THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 10

Case No. 5240 — Case No. 5805

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GAREY—GREVE

Case No. 5,240—Case No. 5,805

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FEDERAL CASES.

BOOK 10.

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

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

Case No. 5,240.

GAREY v. JOHNSON.

[2 Cranch, C. C. 107.] [1]

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

BEATING SLAVE—TRESPASS VI ET ARMIS BY MASTER.

Trespass vi et armis, will lie for the master against one who beats his slave, although there should be no loss of service.

Trespass vi et armis for beating the plaintiff's slave.

THE COURT instructed the jury that the plaintiff might recover if the defendant unnecessarily, and without sufficient provocation, beat the plaintiff's slave, although the plaintiff did not prove any damage by loss of service.

Case No. 5,241.

GAREY v. UNION BANK.

[3 Cranch, C. C. 91.] [1]

Circuit Court, District of Columbia. Dec. Term, 1826.

DEPOSITIONS TAKEN BY COUNTY COMMISSIONER.

A "county commissioner," in the state of Illinois, is not authorized to take depositions under the judiciary act of September 24, 1789, § 30 [1 Stat. 73], to be used in the courts of the United States.

In equity.

Mr. Taylor, for defendants [the Union Bank of Georgetown], objected to a deposition, purporting to be taken de bene esse under the thirtieth section of the judiciary act of 1789, which authorizes such depositions to be taken "before any justice or judge of any of the courts of the United States; or before any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city; or judge of a county court, or court of common pleas of any of the United States." The deposition was taken before a county commissioner of the state of Illinois, who is a judge of the county commissioners' court, which is a court of record composed of three judges, called county commissioners, who are elected by the people and hold their offices for the term of two years. They hold four sessions a year, and their jurisdiction extends to all matter concerning the county revenue, and the county tax. They grant licenses for ferries and taverns, and other licenses. They have jurisdiction in all cases of roads, canals, toll-bridges, and many other cases appertaining to county government and police; and have power to issue all kinds of writs and processes necessary to the execution of their jurisdiction. 3 Griff. Law Reg. 412.

THE COURT (nem. con.) rejected the deposition, being of opinion that the county commissioners' court was not one of the courts described in Act Cong. Sept. 24, 1789, § 30 (1 Stat. 73).

Case No. 5,241a.

GAREY v. UNION BANK.

[3 Cranch, C. C. 233.] [1]

Circuit Court, District of Columbia. Dec. Term, 1827.[2]

BILLS AND NOTES — AGREEMENT WITH INDORSER TO PROCEED AGAINST MAKER.

1. If the defendant, indorser of a promissory note, believing that he has a good defence at

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

[2] [Affirmed in 5 Pet. (30 U. S.) 99.]

law, is induced to confess judgment, by the assurance of the plaintiff's attorney-at-law, that, if he did so, the plaintiff would immediately proceed to levy, by execution, the amount thereof from the maker, who, he assured the defendant, had sufficient property in the county to satisfy the same; and if the plaintiff afterwards refuses so to proceed against the maker, although requested so to do, and the maker becomes insolvent, a court of equity will decree a perpetual injunction.

[See note at end of case.]

2. Quaere? Whether the answer of a corporation aggregate, under its seal, not excepted to, and responsive to the allegations of the bill, is such evidence for the defendant that the court cannot decree against it, unless contradicted by one witness corroborated by others, or by the circumstances of the case.

Bill in equity [by Garey's executrix] for a perpetual injunction, to stay proceedings at law upon a judgment confessed by the defendant at law, the present complainant.

The bill, filed December 2, 1819, states that the complainant's testator was indorser of Merrill's note, discounted by the Union Bank of Georgetown. That, after the testator's death, the complainant was requested, by the attorney-at-law of the bank, to confess judgment on the note, and was assured by him that, "if she did so, and did not dispute her liability on the note, the bank would immediately proceed to levy, by execution, the amount thereof from Merrill, who, he assured her, had sufficient property in the county to satisfy the same," and advised her "that she would thus be saved from her liability for said debt," and "prevailed upon her to make no defence to the suit at law, but voluntarily to confess judgment." That she then had "a valid defence against the said suit, the plaintiff not having made the due and legal demand, and given the due and legal notice, so as to bind the indorser thereon;" "that the said attorney of the bank well knew the same," and made the said propositions to her, to prevent her from contesting the suit. That Merrill had then, and for some time afterwards, in Georgetown, sufficient property to pay the judgment, and that it might have been recovered by execution, which she repeatedly urged the bank to issue, according to the agreement upon which she confessed the judgment. But the bank continued to indulge the said Merrill for a long time, and permitted him to leave the district, and take away with him all his property, and have taken no effective measures to recover the money from him, and he is now insolvent. That the bank threatens to issue execution against the complainant, &c. The prayer of the bill is, "that the said judgment may be opened, and the complainant be permitted to make her defence against the same, or such other order may be taken therein as the court shall direct," and for subpoena and injunction against further proceedings at law, on the judgment against the complainant; and for general relief, "according to law and equity."

The answer of the bank, under its corporate seal, avers that the money was loaned entirely upon the credit of the complainant's testator, Everard Garey. That the judgment was obtained against the complainant at December term, 1817. It denies that the attorney of the bank persuaded the complainant to confess the judgment, and promised if she would do so, that the bank would immediately proceed to levy, by execution, the amount from Merrill. It denies that the bank ever directed or authorized its attorney to hold out any inducements to the complainant to confess the judgment, or to make any such persuasions and promises as are set forth in the bill. It denies that the complainant had any valid legal defence, and avers due and legal demand and notice. It denies that Merrill had, at any time, after the judgment, unincumbered property whereon execution could have been levied, and out of which the judgment could have been satisfied. It denies negligence in recovering the money from Merrill, and indulgence to him without the knowledge and concurrence of the complainant. It avers that the bank offered to assign to her the judgment against Merrill, before he left the district, which she refused to accept.

The evidence consists of the answer of the bank, and the depositions of Daniel Renner, David English, James A. Magruder, G. Cloud, and E. Riggs, all taken on the part of the complainant.

Daniel Renner testifies, that before Merrill left the district, he, at several times, at the complainant's request, applied to the board of directors, of whom he was one, to issue execution against Merrill. That no answer was given by the board, or, if any, it was to this effect, that they were not bound to press Merrill; that the complainant, if she pleased, could pay the judgment, and could then adopt such course as she pleased.

James A. Magruder testifies, that, according to the best of his knowledge and belief, Mr. Wiley was the attorney of the bank at the time of the confession of judgment, and that it was then known to the bank, that many suits against indorsers for trial at that term, were in jeopardy in consequence of the then late decision of the court, as to the insufficiency of the demand and notice on the 4th instead of the 3d day of grace. That he understood from Mr. Wiley that he was requested by the bank, or some of its officers, to adjust all such cases, and get judgments confessed by the parties, so as to avoid such defences being made by the indorsers. That he, Magruder, was requested by Mr. Wiley, to call on several of the indorsers, and among others, on the complainant, with a view to make such adjustment; and did advise her to see Mr. Wiley, who was friendly to her, and would not advise her to do any thing that was against her interest. That there was much apprehension among the banks, at that time, that defendants who were indorsers, would become acquainted with that deci-

sion of this court, and dispute their cases on that ground.

David English, cashier of the defendants' bank, testifies that the suit was in Mr Wiley's hands. He does not know whether the decision was before or after the judgment against the complainant, but that it alarmed the bank as to their cases against indorsers. He knew nothing of the supposed agreement

E. Riggs deposes, that he was one of the directors of the bank. That application was made, in behalf of the complainant, to the board, to call on Merrill for the debt, and to press him for payment. The reply of the board was, that Merrill was not then able to pay, but was about to remove where he would probably make money, and would be more able to pay; but that the complainant might, if she chose, pay the money to the bank, and have the judgment assigned to her; but the majority of the board did not feel themselves compelled to distress Merrill by complying with her request. One or two of the directors thought it ought to be done, but there was no division at the board. He did not know any thing of the supposed agreement, nor does he recollect that there was any defect in the manner or time of demand and notice as to this note.

G. Cloud deposes, in answer to leading interrogatories, that he recollects a conversation between the complainant and Mr. Wiley, on the subject of her confessing the judgment, and that he understood, from the conversation of both of them, that if she would agree and confess judgment, she was to be cleared, and the money to be made out of Merrill's property, as he (Mr. Wiley) said that he had ascertained that Merrill had property sufficient to satisfy the debt, that was clear of incumbrance, and that it was expressly on those conditions that she confessed judgment. That he heard the complainant tell Mr. Wiley, that he had promised her that if she would confess judgment on the note, it would be better for her, as he would have the execution levied on Merrill's property, and it would clear her from paying the debt, as Merrill had sufficient property that was clear of incumbrance. He (Wiley) admitted that he had told her so, and that the fault was not in him, but in the directors of the bank. He (Mr. Wiley) further said, that he did not think she was in danger of paying the debt, for he thought they would get it out of Merrill. He knows that Merrill had considerable property in possession, which he moved with him from Georgetown; but as to the title, he knows nothing further than that he heard Mr. Wiley say, that it was clear of incumbrance, and that he had sufficient to satisfy the judgment. He heard the complainant tell Mr. Wiley, she never would have confessed judgment if he had not told her that he would clear her, by instantly levying on Merrill's property, and that she verily believed that it was in his power to have execution issued at his will, which he admitted. That the reason assigned by Mr. Wiley for not carrying the agreement into effect, was, that the directors of the bank would not suffer the execution to issue, as they knew their debt to be safe, and did not wish to break up Merrill. That the complainant frequently applied to the directors of the bank, as well as to Mr. Wiley, to have execution issued before Merrill left Georgetown with his property. He (G. Cloud) frequently went to the bank, and to Mr. Wiley, upon this business for the complainant, but they would not suffer the execution to issue.

Mr. Coxe and Mr. Jones, for complainant.
Mr Swann, for defendants.

THE COURT (CRANCH, Chief Judge, contra) decreed a perpetual injunction.

CRANCH, Chief Judge. The agreement (to levy execution upon the property of Merrill, immediately after the judgment), is averred in the bill, denied in the answer, and averred by G. Cloud in his deposition, to have been confessed by Mr. Wiley, the attorney-at-law of the defendant, since deceased. In general, if the material averment of the bill be positively denied by the answer, and be proved by one witness only, the court cannot decree against the answer. It is said to be only oath against oath, and there must be something to turn the scale. But slight circumstances of corroboration have been considered sufficient for that purpose.

The circumstances which are supposed to be sufficient to turn the scale in the present case are, 1st. That the answer of the bank is not on oath, but the bill is. 2d. That the complainant repeatedly urged the bank to issue the execution against Merrill. 3d. That Mr. Wiley was the attorney of the bank. 4th. That the bank knew that many suits against indorsers were, at that term, in jeopardy, in consequence of the then late decision of the court respecting what were since called the 4th day protests. 5th. That Mr. Wiley informed Mr. Magruder, that he was instructed by the bank to adjust all such cases, and get judgments confessed, so as to prevent such defences being made; and that Mr. Magruder was requested by Mr. Wiley, to call on several of the indorsers, and among others, the complainant, with a view to make such adjustment; and that he advised her to see Mr. Wiley, who, he assured her, was friendly to her, and would not advise her to do any thing against her interest. 6th. That there was much apprehension among the banks, at that time, that defendants who were indorsers, would become acquainted with the decision of the court, and dispute their cases on that ground.

1. I do not know that it has ever been decided that the affidavit of a complainant to an injunction-bill, gives any weight to his cause upon the final hearing. It is required only as the ground of injunction, and, I be-

lieve, is never considered as evidence at the hearing, although the answer may not be upon oath. The reason why an answer in chancery, is evidence, is, I apprehend, not merely because it is upon oath, but because the complainant has required the defendant to answer, and has thereby made him a witness, and is bound to receive his answer as true as to those facts which he has called upon him to answer, unless the complainant can prove it to be false. If a defendant's answer be not on oath, the plaintiff, if he wishes to avail himself of that circumstance, must except to the answer on that ground. If he does not except, but files a general replication, I apprehend the answer, so far as it is responsive to the allegations of the bill, is as valid evidence for the defendant, as if it had been upon oath. If he calls upon a corporation aggregate to answer, he must receive the answer in the only way in which such a corporation can answer, namely, by its common seal. In a moral view, perhaps, such an answer would not afford as strong a presumption of truth, as an answer upon oath, because it has not the same legal and religious sanction; but as it regards the complainant, it is to be taken as true, until disproved, because it is his own evidence, called for and produced by himself; and as such it must be regarded by the court. The answer, therefore, having denied the agreement alleged in the bill, it is incumbent upon the complainant in the present case, to prove it by at least one witness corroborated by other evidence.

2. The first circumstance supposed to corroborate the testimony of G. Cloud, is, that the complainant frequently urged the bank to issue the execution against Merrill. The witnesses who testify to that fact, do not say that she urged it on the ground of an agreement, or that she ever informed the bank of the agreement. Mr. English, the cashier, and Mr. Riggs, one of the directors, deny that they knew any thing of such an agreement. Mr. Renner, another of the directors, through whom the application of the complainant was made to the board, says nothing of the agreement, in his deposition taken by the complainant. Mr. Riggs says that the refusal to comply with the complainant's request, was by a majority of the board; that one or two of the directors were in favor of it. If that was the case, and there had been such an agreement, it is natural to suppose that it would have been urged as a reason, to induce the board to issue the execution against Merrill. If it was not urged, there is strong ground to infer that it did not exist. Mr. Renner, who made the application to the board, must have known it, if it existed; at least, it is strange if he did not. If there had been no such agreement, still it would have been natural and probable that the complainant would urge the bank to issue the execution against Merrill, as he was the principal debtor. Her doing so, therefore, without any allusion whatever to such an agreement, does not necessarily raise an inference, that such an agreement existed; nor can it be considered, as a corroboration of G. Cloud's testimony, on that point; on the contrary, the inference is clearly the other way, and instead of corroborating his testimony, tends strongly to diminish its weight.

3. The circumstance of Mr. Wiley's being the attorney of the bank, can hardly be considered as corroborating the testimony of Mr. Cloud, because it is a fact not disputed. The fact to be corroborated, is the agreement.

4. It is supposed to be a corroborating circumstance, that at the time of the supposed agreement, the bank knew that many suits against indorsers were at that term, (the term in which the judgment was confessed, namely, December term, 1817,) in jeopardy, in consequence of the then supposed recent decision of the court, that the demand of payment of a note, on the day after the third day of grace, was insufficient to charge the indorser; and that Mr. Wiley was instructed by the bank to adjust such cases, and get confessions of judgment from indorsers, so as to prevent their making such defence; and that Mr. Magruder was requested by Mr. Wiley, to call on several of the indorsers, and among others the complainant, with a view to such adjustment, and that he advised her to see Mr. Wiley.

These facts depend upon the testimony of Mr. Magruder, who does not swear positively; he was sworn only to testify according to the best of his knowledge and belief; and it appears that he must have been mistaken as to dates, because the judgment against Mr. Garey was confessed in December term, 1817, and the decision of the court which caused this alarm to the banks was not until the 11th of June, 1818, in the case of Beeding v. Pic [Case No. 1,227]. All the supposed corroboration, therefore, arising from the alarm of the bank at that decision, fails, and leaves no consideration for such a contract as is supposed to have been made, nor any such motive for Mr. Magruder's calling on the complainant. I do not see, therefore, any evidence corroborating Mr. Cloud's testimony. That testimony being thus unsupported as to the main fact, could not, if it were in itself unexceptionable, prevail against the answer. But his deposition appears to be the testimony of a willing witness, answering to leading questions, without cross-examination, and his character wholly unknown to the court. It consists only of the confessions of Mr. Wiley, the attorney of the bank, in conversations with the complainant, at divers times, after the confession of the judgment. He has not stated any circumstances of time or place, when and where he heard those conversations, except that they were between the years 1814 and 1820. The conversation which he relies on, was evidently after the confession of

judgment, and after December term, 1817, and after the bank had refused to issue execution against Merrill. And he makes Mr. Wiley contradict himself, by admitting that it was in his power to have issued the execution at his will, and yet saying the fault was not in him, but in the directors of the bank; and assigning as a reason for not issuing it, that the directors would not suffer it to be issued. Mr. Wiley died early in 1819. For these reasons, I cannot say that the contract is sufficiently proved to authorize this court to deprive the bank of the benefit of its judgment at law, or that it is unconscientious in the bank to enforce it.

THE COURT, however, as before stated, decreed a perpetual injunction; and the decree was affirmed by the supreme court, 5 Pet. [30 U. S.] 99.[3]

[NOTE. Upon appeal by the Union Bank of Georgetown this decree was affirmed by the supreme court, Mr. Justice Thompson delivering the opinion, in which it was held that the agreement by plaintiffs' attorney to make the amount of the note from the drawer fell within the scope of his general authority, and was binding on the plaintiffs in this suit. The plaintiffs having failed to proceed by execution against the drawer of the note, and having suffered him to remove with his property out of the reach of process of execution, the decree perpetually enjoining proceedings on the judgment confessed by the administratrix was duly affirmed. 5 Pet. (30 U. S.) 99.]

GAREY v. UNION BANK OF GEORGETOWN. See Case No. 5,241a.

GARFIELD (CAIN v.). See Case No. 2,293.

GARITY v. OCEAN TOW BOAT CO. See Case No. 13,175.

Case No. 5,242.

GARLAND v. BOWLING.

[Hempst. 710.] [1]

Circuit Court, D. Arkansas. April, 1835.

RESCISSION OF CONTRACT—PLACING PARTIES IN STATU QUO.

1. Before a contract can be rescinded for any cause whatever, the parties must be placed in statu quo.

2. Where a person had purchased slaves, and given a note therefor, on which judgment was obtained at law, the vendee cannot enjoin the collection of it on the ground that the negroes were unsound, if he still retains the possession of them.

3. A person cannot hold the property of another and refuse to pay him for it.

Bill for injunction, before DANIEL, Circuit Justice. RINGO, District Judge, having been of counsel in the case, did not sit.

The bill was brought to enjoin a judgment at law, rendered in the circuit court on the 25th of April, 1845, in favor of the defendant [William Bowling, as administrator of William J. Bowling, deceased], and against the complainant [Josiah Garland], for 1,626 dollars and 25 cents, on the ground that it was part of the purchase-money of five slaves sold by William J. Bowling, deceased, to complainant, on the 7th of December, 1843, for $1,600, and which slaves were warranted to be sound and healthy in body and mind, and slaves for life; that the said slaves were unsound and diseased, and not worth as much as they were represented; and that the judgment ought to be perpetually enjoined. Prayer for injunction and general relief. The bill did not offer to return the negroes, or place the parties in statu quo; and it clearly appeared from the proof, that the slaves that were living, two having died, remained in the possession of the complainant, and no wish was expressed on his part to surrender them and rescind the contract.

A. Fowler, for complainant.

A. Pike and P. Trapnall, for defendant.

DANIEL, Circuit Justice. The proof taken in the case is not sufficient to show that the slaves were unsound at the time of their purchase as alleged by the complainant in his bill. This is a ground to be made out by him clearly and satisfactorily before he could be entitled to relief in any aspect of the case. And having failed in that respect, he could not in any event succeed. But there is another objection which is fatal to his claim to relief. It is that he still holds the slaves in possession, and does not offer to surrender them, or to place the parties in statu quo. His object appears to be to enjoin the collection of the purchase-money and retain the negroes. Such conduct a court of equity cannot sanction. If he desires to rescind the contract for any cause whatever, and is entitled to do so, he is bound to restore to the adverse party what he received from him. This is demanded by the rules of equity and fair dealing, and is without exception in the forum of conscience. He cannot hold the property of another, and refuse to pay for it; and as it appears by the evidence that he retains the possession and claims the slaves as his own, and does not offer to surrender them, it is not only a complete bar to relief, but very significant evidence that the slaves are not so valueless as the complainant has alleged them to be in his bill.

The injunction granted in this case must be dissolved, the bill dismissed with costs, and the defendant remitted to his judgment at law, and execution to be issued thereon. Decreed accordingly.

GARLAND (DAVIS v.). See Cases Nos. 3,635 and 3,636.

GARLAND v. MORRIS. See Case No. 15,811.

[3] The fact that the judgment was confessed five months before the decision of this court, which was assigned as the motive for making the agreement with the complainant, did not appear in the transcript of the record sent to the supreme court.

[1] [Reported by Samuel H. Hempstead, Esq.]

GARLICK (HALSEY v.). See Case No. 5,965.

GARLINGHOUSE (UNITED STATES v.). See Case No. 15,189.

GARNER (CONTEE v.). See Case No. 3,139.

Case No. 5,243.

Ex parte GARNET.

[7 Leg. Int. 174.]

Circuit Court, D. Maryland. Oct. 18, 1850.

SLAVERY—RECLAMATION OF FUGITIVE UNDER ACT OF SEPT. 18, 1850 — CHARACTER OF PROCEEDING —METHOD OF PROOF—AUTHENTICATION OF WILL —COMPETENCY OF WITNESSES—CONTINUANCES—PRESUMPTIONS.

[1. In a proceeding under the act of September 18, 1850 (9 Stat. 462), a person claiming as executor and legatee of the master, from whom the fugitive is alleged to have escaped, cannot prove title by a will or letters testamentary, not authenticated before any judge or magistrate of the state from which the escape was made, either in the manner prescribed by that act or by the judiciary act of 1790.]

[2. Where the person claiming the fugitive has not taken his title papers and the depositions of his witnesses before a judge or magistrate of his own state, and had them certified in the manner prescribed by the act of 1850, his only alternative is to prove the necessary matters of title, ownership, and escape in the court before which the fugitive is brought, according to the ordinary rules of evidence; and paper title may be dispensed with if possession and escape are shown by witnesses.]

[3. In such case the proceeding is civil, and not criminal, in its nature, and the right of property must be proved according to the rules relating to evidence and witnesses which prevail in other suits to recover property; therefore a party in interest is incompetent as a witness.]

[4. A son of the master from whom it is alleged that the fugitive escaped is not a competent witness, when it appears that such master has since died, and there is no competent evidence before the court as to the disposition of his property; for in such case a son is presumably a party in interest. Nor is it competent to examine the son on his voir dire to show that he has no interest.]

[5. The statute having provided a plain and easy method by which the claimant may perfect his proofs ex parte beforehand, if he fails to do so, and, after causing the fugitive to be arrested and brought before the court, is then unable to establish his title by proper evidence, the court will not grant him a continuance, even until the next day, for the purpose of supplying his previous omissions, but will at once discharge the alleged fugitive from arrest.]

[6. Title in an executor or legatee can be shown by oral evidence only by proof that he had the fugitive notoriously in his own possession as a slave; but where it is in proof that the fugitive escaped from the person under whom the executor or legatee claims, then the title of the latter can only be shown by the will, properly authenticated.]

[7. There is no presumption that a son of one from whom a slave escaped, and who has since died, would, by virtue of the relationship, have title to the slave. The presumption only goes to establish an interest.]

Henry Garnett was before the court on a warrant issued on the affidavit of Thomas Price Jones, of Cecil county, Maryland. The affidavit set forth that the claimant was the executor and residuary legatee of Benedict Jones, deceased; that Henry Garnett belonged to the estate of Benedict Jones; that he was held to labor for a term of years, and that said Henry had run away from his owner, as long ago as the year 1842. The prisoner was brought before his honor, Judge Grier, on the afternoon of the preceding day, when, on motion of William S. Pierce, Esq., one of his counsel, the hearing of the case was continued until the following morning at nine o'clock.

David Paul Brown, Charles Gibbons, Robert P. Kane, and William S. Pierce, for prisoner.

Hugh Tener, for claimant.

Before GRIER, Circuit Justice, and KANE, District Judge.

GRIER, Circuit Justice. We will proceed to hear the case of Henry Garnett, an alleged fugitive. The claimant will proceed to show his right to our certificate, under the act of congress of September 18, 1850.

Mr. Tener.—I submit to your honors, two wills. The first will is the will of Margaret Sanders, which was made upon the 29th of December, 1838. The second is that of Benedict Jones.

Mr. Gibbons.—I call your honors' attention to these two wills. You will find that they are not so certified under the act of congress, as to make them admissible in this case. I believe there is only one mode by which the record of one state can be admitted in evidence in another, and this is provided for by the act of congress of 1790 [1 Stat. 122]. Your honors will find, upon examination of these papers, that they contain simply a certificate of the register of wills. (The sixth section of the fugitive slave act was then read by the counsel.)

Judge GRIER.—We are bound to know the seal of every one of the United States. Are these papers under the seal of any court?

Mr. Tener.—Yes, sir—under the seal of the orphans' court, Cecil county.

Mr. Gibbons.—These are no more than letters testamentary, issued on the 17th of July, 1849, of course not made out in accordance with the recent act, and in fact not authenticated according to the act of 1790. We do not now know whether this person is really the executor of this estate or not, and I think the parties should be allowed no latitude, but should come fully prepared.

Mr. Tener.—I do not offer the will to prove that Mr. Jones is the executor of Benedict Jones, but that he is the residuary legatee.

Judge GRIER.—That renders the objection still stronger. Benedict Jones is dead, and the present claimant must show that he is the owner himself, either as executor or legatee. The party has not pursued the course laid down by the act of congress. It has pointed out a very simple way. He

might have taken his witnesses before a magistrate and established his claim, and submitted the whole proof of ownership; and then nothing would have been left for us but the proof of identity. If he will not go to the expense of employing counsel and taking the proof which the act provided for, but puts himself upon other proof not so taken, he must establish his claim according to the ordinary legal principles of evidence. The party has not pursued the proper course; he should have taken his witnesses before some judge or justice of the peace, and have taken his depositions ex parte with regard to these matters of title, ownership and escape; then there would have been nothing for us to do but to prove the identity. Where a person has not attempted to follow the law laid down for his own advantage, we cannot relax the rules of evidence for him. With regard to the first paper, there may have been a seal on it—there is something like a seal with a horse's head on it. The law has pointed out a plain way, by which, if a person chooses to follow, he can bring all the evidence, both of title and escape, before us, leaving nothing open for us but the question of identity; but here the party has not taken the plain course, and these wills cannot be received.

Mr. Brown.—It is important, this being the first case, that the whole manner of proceeding should be clearly determined.

Judge GRIER.—I will give every man his rights here, with regard to nothing but the law of the land; and I will, if in my power, enforce it against all opposition.

Mr. Tener.—According to this sixth section, the deposition is to be taken by the judge or commissioner before whom the fugitive is brought.

Judge GRIER.—You might have brought your witnesses all from Maryland here and taken the depositions before us, or you might have gone before some officer there, and made all the proof of ownership or escape before him; or you may do the same thing in effect, if you can produce the witnesses before the court here.

Mr. Tener.—We have got these witnesses.

Judge GRIER.—Very well.

Mr. Tener.—I offer the will of Benedict Jones, because the seal of that court is conclusive as to the competency of the proof.

Judge GRIER.—This is a point just decided by the court. This has not been done in pursuance of this act. It would have been so easy for you to have gone to a judge or justice in Maryland and produced this before him, and have had it all certified by him and proved under the seal of the court. This would have been good and sufficient.

Mr. Brown.—It is precisely like the requisition of one governor upon another, leaving only the question of identity.

Judge GRIER.—Yes.

Mr. Tener offered a certificate to prove that the magistrate who signed certain affidavits, was a magistrate of the state of Maryland.

Judge GRIER.—These papers are evidence for all they can prove.

Mr. Tener.—I will offer evidence of parties in court at the present time, who knew this man to be a slave.

Judge GRIER.—If you can show that he was there in the possession of this plaintiff, claiming him there, and known notoriously as his slave, as a horse is known as the property of a man here, very well.

Mr. Tener.—We can show that he belonged to Benedict Jones.

Judge GRIER.—Suppose that is true, you must show that some living man owns him now, to whom he can be awarded. If you can show that he was ever in the possession of this plaintiff, you can dispense with paper title. The title does not necessarily appear upon record, but proof of notorious ownership, will be received.

Mr. Tener.—We will prove that this man was the slave of Benedict Jones, and escaped in 1842; that Benedict Jones has died, and we offer these letters testamentary as prima facie evidence that T. P. Jones is executor of that estate. We have witnesses in court who know the fact of his being the executor.

Judge GRIER.—These papers (certain affidavits before magistrates in Maryland) are received in evidence. (Mr. Tener reads paper.)

Richard Semans sworn. Examination in chief by Mr. Tener.—"I live in Philadelphia; did live in Cecil Co., Md.; I left there last February a year; I knew a negro boy named Henry; it was said he was a slave. He was in the employ of Benedict Jones and Thos. Jones; they claimed him as their slave. I knew him eight years ago, at the time he left. I was born in Kent county and removed to Cecil county. I first became acquainted with Henry in 1838; he was then in Mr. Jones' employ, to the best of my recollection; it was said he belonged to him, and I was under the impression that he did. I can't say how long he continued in Mr. Jones' employ. In 1842 he left the employ of Mr. Jones; he belonged to the estate of Benedict Jones; when he escaped he was in the employ of Benedict Jones, and said to be his slave, and to the best of my knowledge was so. I have seen the man who has been arrested, and he is the same Henry; I have no doubt about it. Benedict Jones died since I have been in the city. It was said this man was a slave for a term of years; I can't say how long. I heard he was to be free in time. Henry was seventeen years old at the time of his escape; he was reputed to be so. At the time he left Mr. Jones his term of service had not expired. He was not set free by Mr. Jones."

Cross-examined by Mr. Brown.—I am twenty years old on the 25th of next January. I first knew this boy twelve years ago; I was

then not eight years old. I lived on the adjoining farm; I never measured the distance. I never knew him in Kent county; I moved into Cecil county in 1837. I am not related or connected with Mr. Jones, the claimant; we were neighbors and friends. I can't say that I knew Henry, prior or subsequent to 1838, as residing with anybody else. I knew him to be a slave of Mr. Jones. I was informed by Mr. Benedict Jones that he was held for a term of years, and not for life. I can't say when Mr. Jones informed me this; as near as I can recollect it was in 1840. I got the information from Mr. Jones when he was speaking to my father, and I had hold of his hand at the time. It was at Benedict Jones' house. I can't say if I ever heard him speak on that subject before or since. He was asked the question if the boy belonged to himself, by my father, and Mr. Jones said he did for a term of years. I have no recollection that anything was said as to the duration of the term; I don't know if my father asked him how long; I can't tell how my father happened to ask if he belonged to him, I didn't inquire.

Question.—How do you fix 1840 as the time of the conversation?

Witness.—Because, as nearly as I can recollect, that was the time. It was after the election of Gen. Harrison; I can't say whether it was before the inauguration or not. I last saw Henry in 1842 at Mr. Benedict Jones'; I was not in company with my father. I was at work on the farm with him. Except the conversation referred to in 1840, in which he was said to be a servant for a term of years, I have had no conversation in particular with anybody on that subject to my recollection; I recollect no conversation definitely but that. That was the ground on which I say he was a slave, and also from hearing it from the family in general, from his sons, and hearing him say it himself, and seeing him in the possession of this man. He was called Mr. Jones' slave, and I was always under the impression from them that he was a slave for a term of years, and at that time. I never heard for how long; since he has left, I have heard. I continued to live in Cecil county till two years ago, next February. B. Jones died since I came to Philadelphia, within the last two years. I have not seen Henry since 1842, till he was brought here yesterday. He bears a mark on his right cheek by which I can identify him. There is none other, except a familiar face; I recognized him as being the man. I remembered the mark on his face since 1842, and spoke of it before I saw him yesterday, and I directed my attention to it the first thing when I entered the room. I was in the company of T. P. Jones, Edward Semans, and another Mr. Jones. There was a doubt on my mind as to its being the person, at the time I entered the room, and I expressed that doubt to Mr. Thomas Price Jones; I said I could not say it was him, till he was brought to the light. I did not say at first that I did not think it was the man. Nobody spoke to me before I examined him with regard to the scar on his face; I spoke about it before I saw him, to Messrs. T. P. and J. W. Jones, Mr. Edward Semans and Mr. J. C. Ferguson. That was before the claim was made. It was night before last, at about 8 o'clock, at the Red Lion Hotel; the negro was not arrested then. I don't live at the Red Lion Hotel, but went there to see my friends, the Messrs. Jones. They had called at my place of business in the afternoon; no papers were exhibited to me there; there was no conversation to me on the part of these gentlemen about marks; I remarked to them that the scar was on his face, and that I should recognize him by it; the scar is on his right cheek, between the cheek bone and the nose; I had no knowledge of the cause of the scar; I carried that impression with me since 1842; there was no other mark; he is not a very dark, nor very light man; I should say he was a medium. Mr. Jones told me they were in pursuit of him; he said he knew where he was, but I didn't ask him where. I can't tell how many colored people were in the employ of Mr. Jones in 1838; I can't tell what marks were on them, except one who had a cut foot, and it left quite a scar; I knew of the accident. I never inquired as to the cause of this mark on Henry; it appears to be a cut, but I can't say what it is; I can't say if it was on him from 1838; I noticed it before 1842, but how long I can't say; I never spoke to him about it; I have not been written to in relation to him since I have been here; I don't recollect having been spoken to in regard to him between '42 and the present time. I have been to Cecil county twice a year since I moved here. I have not, to my recollection, spoken of him particularly then, I have had no direct conversation about him while there.

Re-examination.—I had worked some three years in company with Henry, to and fro, not constantly, so that I had every opportunity of becoming acquainted with his person.

By Mr. Brown.—Benedict Jones had two sons, T. P. Jones and John Ward Jones, and three daughters; the Messrs. Jones present are his sons.

John Ward Jones, sworn. Mr. Brown.—I have an objection to make to the admission of this witness, and that objection must refer to the position of the case as it is thus far ascertained by the court. There are no documents before you that affect the question I am about to propound; as the case stands upon the testimony of the witness just examined, it is alleged that this prisoner was a servant for a term of years to Benedict Jones. It is proved also by him that the witness now in the witness box was a son of that Benedict Jones; I object to the examination of this witness on the score of

incompetency from interest. The death of Benedict Jones is proved, and for aught that appears in the course of the testimony, this man is one of the parties interested.

Mr. Tener.—The party before you has no interest in the matter, and his examination on his voir dire will satisfy the court. I take it that even the claimant here, Thomas Jones, is a competent witness to prove the identity of this person, for this is not like a civil case, where a man brings an action of trover for lost property, but it is in the nature of a criminal proceeding, and the claimant may take hold of his property wherever he may find it, as a man who is the owner of any chattel can come into a court of criminal jurisdiction and swear to the ownership of that chattel and claim it there. But this man is a son of Benedict Jones, but has no interest in his will. The party in interest is T. P. Jones, who is the residuary legatee under the will.

Judge GRIER.—The will is not in evidence.

Mr. Brown.—There are two modes of objecting to a witness. We may for want of any other proof, examine him upon his voir dire, but to examine him upon his voir dire after having established his interest is to make him a witness against the character of the objection.

Judge GRIER.—You need not argue that, Mr. Brown, that is of course a matter of everyday practice; as to the rules of evidence they must be the same as in other cases. I did issue this warrant upon the affidavit of a party in interest, it being in the nature in the first place of a criminal proceeding, but when he is brought before us, and we are to investigate the question of property as well as identity, we have two parties before us with their rights. It is like two persons claiming the same goods; this man is his own goods, if I may be allowed the expression, and stands here upon his rights. The same rules will govern us here, and we will receive the same evidence as we would, if the question were of a cow or a horse instead of a human being. I shall not insist upon pretences of doubts, where there are none in my own mind; but then the same rules of evidence which govern in other property must govern in this. You have thus far shown that Benedict Jones was the owner of a slave for a term of years; he died, and the title to the property has gone somewhere, and prima facie, the children are interested in the estate of the deceased.

Mr. Tener.—I perceive that the chief difficulty hinges upon the certificate to this will, and were that difficulty removed, the will would be competent evidence and would show the whole interest in this matter. I have just been informed by Mr. Jones, that at the time he left Cecil county, it was impossible for him to find the proper officers to make the certificates; they were not there; but if your honor will remand the prisoner until to-morrow morning, I will engage to have the proper certificates here, certifying to this will. I think your honor will accede to this. Your honor knows from the state of feeling on this subject, that the moment it is known, that a claimant is pursuing a fugitive, that moment the fugitive is secreted and escapes and there is no opportunity to get him. I would not ask for further time if we had not produced some evidence before you. I think we have shown that he was the slave of Benedict Jones, and escaped, and that one of these parties is the son of B. Jones, and that he has an interest in this man of some shape or other. To prove what his interest is, we offer evidence which your honors decide is incompetent; and we ask for time to produce the proper certificates. It was probably thought by the counsel in Cecil county, that it was enough.

Judge GRIER.—He might have gone before a judge in Cecil county, and had everything done in form.

Mr. Tener.—I am informed by Mr. Jones, that when he left Cecil county, he went in search of the judge and he was not at home.

Judge GRIER.—There has been eight years' delay in this matter and there was no such hurry that he must come off without seeing the judge. He could have had it all done before a judge or justice of the peace; this might have been certified under seal, and everything could have been regular. The marshal is liable in the sum of one thousand dollars,—no matter how great the force to rescue him, he is liable till he delivers him in. Maryland, for one thousand dollars. I knew the excitement this arrest would cause, and I was determined, that if he made good his case, I would at all expense carry out the requirements of the law.

Mr. Brown.—I understood this application on the part of the learned counsel to be for a postponement of this case. He selected his own time, his own place, made his own preparation, attempted enforcing his own law, and now, after all these opportunities thus afforded, he asks for a delay. I begin by saying to the learned counsel, and to all others in a similar dilemma, "be certain you are ready before you begin;" that is essentially necessary. What have they done? The counsel offers, first, documents that he admits not to have been regularly authenticated; he offers them to you as evidence in this judicial proceeding, having restraint upon liberty. Why is all this? Why offer this document if he knows it is wrong?—The act of congress authorizing your honors to sit on this question does not make you captors of fugitive slaves; does not require you to convert your court room into a prison till the party is ready to make good his claim. It all depends upon the actual establishment of this claim, and the law does not contemplate the continuance of the man in prison till somebody can establish his want of liberty. If the slave himself applied to your honors for continuance, it would be with difficulty

that he would obtain it, yet he is summoned here at their own time without any preparation on his part at all. They have had two or three days, and as many months and years for all I know; they might have come before your honors fully prepared. Why, then, will you give them this extension? Is there any reason for it? Is the right of the respondent to be entirely disregarded? If they can continue it till to-morrow, the same principle would authorize them to continue it a week, and with an acquiescent court they might continue it for a month or a year; and this man is to be held in bondage here, to show that they are entitled to hold him in bondage there. Your honors will do a great good by holding a tight rein over this proceeding; give these men to understand that if they prove their right you will enforce it; give them to understand, however, that they are to prove it, and to come ready, and not like the foolish virgins, with no oil in their lamps, when it is their business to enlighten us. Your honors will not be required to strain a point to give them an extension of time. I remember a case before his honor Judge Kane; when three o'clock had arrived, the claimant suggested that the hour of adjournment had arrived, and the judge said, "I am here to determine this question, and I shall not shut my eyes on the subject; you are bound to come prepared; you are not prepared, and I will not relieve you; settle the question now." They were not prepared and the man was discharged. Your honor has spoken of resistance to the law; I know you know me too well to suppose that I have any refractory disposition; my application now is that the law may be enforced, but their application is to modify it; I will not say that they may steal a victory, but that they may get it in an irregular way. You have done the poor man whom we represent a great wrong, if you suppose he would resist the law. His liberty is not to be effected by an insurrection, and not only has he been wronged, but the gentlemen who have thought proper to help him have been wronged, if it is supposed they would connive to a rescue.

Judge GRIER.—I said that I had reason to believe there were emissaries abroad attempting to get persons to resist the law.

Mr. Brown.—It will be found that, let men contrive as they will, there is a supervising power who will shape our ends, rough-hew them as we will. I conceive it to be a great blessing that this matter was brought before one of the first tribunals of the country, and, I ask, will you give these persons time? The result would be an application on our part for time, and so the matter would go on. There are two sides to this question. Your honor has spoken of rebellion against the capture of fugitive slaves, but there is a rebellion to capture those who are not slaves. Will your honor give them time? If you do, it will be a precedent which shall last for all time to come, and it is a precedent that will pass into the hands of every subordinate individual occupying your places, and they will build their indulgence on what you now do. I ask you, therefore, upon this ground, that, being the highest court known to the law, you can decide the case, and give the influence of example to affect all other tribunals, to which a similar application may be made.

Mr. Tener.—This claimant has rights here as well as this respondent. The respondent's rights were listened to upon yesterday, when he applied through the gentlemen who then represented him for an extension of time till this morning. That was granted to him by your honor. The gentleman says that the principle which would justify extending the time till to-morrow, would justify extending it a week or a month, but I only ask an extension till to-morrow, and then if the evidence is not full and conclusive before you, in addition to what has been presented, (for I think that from the evidence presented we have made out a case strong enough to warrant the marshal in holding this person till the time we ask for has expired.) The law contemplates the marshal's holding the person in charge.

Judge GRIER.—There is a difference here between the plaintiff and defendant. The one has had his own time, and could have had his proof all ready, while the other is brought here without any preparation whatever.

Judge KANE.—A difficulty occurs to my mind in the claimant's own reason for the grant of a postponement. More than the time which he now asks, and within which he tells us the proof can be perfected, has elapsed since the capture of this prisoner. You have had the time, and you could just as well have perfected the proofs within that time as you can now if a continuance is granted.

Judge GRIER.—He has had the choosing of his own time, and he has had eight years to do it in; and since this act was passed he had plenty of time to have it done in order. The law has pointed out a plain road, and the party was warned yesterday, as far as I had a right to warn him, to be prepared.

John Edward Ferguson sworn. Examined in chief by Mr. Tener.—I live in Cecil county, Md., about six miles from Mr. T. P. Jones' residence. I suppose I have lived there about 22 years. I knew Benedict Jones, the father of T. P. Jones. I think he died in June, '49.

Mr. Tener.—Who acted and does still act as executor and administrator of his estate? (Question objected to by counsel for prisoner.)

Judge GRIER.—The farthest I will go is this—If the man, as executor, had this man notoriously as a slave, it will be received in evidence. But you have got him away, and the man who owned him is dead, and you cannot do this now.

Mr. Tener.—If we show that this man is

notoriously the executor of Benedict Jones, and claims all of his property, then he can claim this part of his property.

Judge GRIER.—If you want to show a title, without the evidence of possession as executor, it cannot be done but through the will, and that properly proved.

Mr. Tener.—He would have a title as the relative.

Judge GRIER.—No! he would have an interest, but there is a difference between interest and title.

Examination of witness continued:—I can say that I knew this boy Henry. I know nothing about him.

Edward Semans sworn. Examination in chief.—I live in Philadelphia. Have lived in Cecil county, Maryland. I left there about five years ago, in January, '46. I moved there in the winter of '37.

Judge GRIER.—I would suggest to the counsel, if it is worth while to take up time, till you have filled up this hiatus. If you can only prove that he was the slave of a man who died in '49, and cannot fill up this hiatus, there is no use to take up the time with it.

Mr. Tener.—Will your honor refuse our application for time till to-morrow morning?

Judge GRIER.—I am compelled to do it. You have had your own time; the law has made your course very easy. He might have made out his case ex parte, but has failed to do that. He has had this man arrested, and yesterday morning at nine o'clock he was warned so far as the judge had a right to speak on this subject, and I told him to employ proper counsel. This man is in the possession of the marshal here, at a risk of one thousand dollars every minute. If I put it off for him last night, it was because he was brought here without any preparation; he must have some rights, and it was no very great relaxation to put it off to court hours. My only difficulty was the risk of the marshal, as the laws of Pennsylvania deny us the privilege of holding this man in custody.

Mr. Gibbons explained the way in which the law referred to came to be passed.

Judge GRIER.—We have only to say now, that the party has failed to make the necessary proof, and that the prisoner has a right to be discharged, and is discharged.

Case No. 5,244.

The GARNET.

[3 Sawy. 350.] [1]

District Court, D. California. June 8, 1875.

RIGHT OF MASTER TO DISCHARGE SEAMAN FOR MISCONDUCT.

Where the first mate of a ship, before leaving the home port, became so intoxicated as to be disobedient, insolent to the master, and negligent in his duty: *Held*, that the master was justified in discharging him, while in the home port, for that one offense.

Libel to recover damages for an unlawful discharge.

D. T. Sullivan and James Crittenden, for libellant.

Andros & Page, for claimants.

HILLYER, District Judge. The libellant shipped on board the Garnet on Friday, April 2, as chief officer, at fifty dollars per month. On Saturday the Garnet, then lying at her wharf, was hauled off into the stream. On that day, before the beginning of the voyage, the incidents which led to the libellant's discharge happened, and the first question is, whether the conduct of the first mate was such as justified his discharge, he having been discharged by the master on Monday, the fifth of April; for if the discharge was right the libellant has no case, and the consideration of the other questions is needless.

Making due allowance for the quality of some of the evidence given by the seamen on behalf of the claimant—the contradictions in their statements, being mostly on points not essential—enough appears by a very decided preponderance of evidence to show that the libellant, on Saturday, was so much under the influence of liquor that he was stupid and unfit for duty.

Before the conclusion of the argument this was admitted by libellant's counsel. When the ship hauled off, the master, owing to the mate's condition, was obliged to do much of his duty. When left that afternoon in charge of the ship he omitted many things which it was his duty to do, and in the evening when ordered by the master to go down and stow the provisions out of the water, which was leaking from a water cask, he refused to go, saying the provisions were all right. He was also guilty of using foul and disrespectful language to the master.

Admitting the mate's drunkenness, counsel for libellant argue that the neglect of duty, disobedience and disrespect were caused by the mate's taking too much liquor, and that for this single offense the master may not lawfully discharge him.

Curtis says that the spirit of the English and American tribunals has been not to assign specific offenses for which a mariner, under all circumstances may be discharged; but it is laid down, generally, that the master may discharge for a legal cause, not for slight or nominal causes, and certainly not for a single offense, unless of a very aggravated character, thus leaving the master's justification to depend upon the degree and nature of the mariner's misconduct, under all the circumstances of the case. The station of the party and the nature of his duty are always to be kept in view. Merch. Seam. 149, 150.

Thus the dismission of a cook or steward, when found incapable from drunkenness,

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

may be ratified with more latitude than that of mariners. Black v. The Louisiana [Case No. 1,461].

In deciding upon the legality of this discharge, then, the fact that the libellant was chief officer must be kept in view; also that he was discharged before the beginning of the voyage and in a home port. That there is an important distinction between a discharge in the home port before the voyage has commenced, and one afterward in a foreign port, before the termination of the voyage, is, I think, perfectly plain to every mind. Clearly, when it appeared that a mariner, after weeks or months of faithful service, had been discharged and his wages claimed to be forfeited, the courts would require proof of more aggravated misconduct than when the seaman had been discharged in his home port before the voyage had begun. But in this case the misconduct happened on the day after the libellant shipped, before the voyage had begun, and before two days' wages had been earned. True, the contract had been made and the master was bound to fulfill it, unless the misconduct of the mate was such, as under the circumstances, justified the master in discharging him.

The office of first mate is the second in importance on board a ship. During the absence of the captain or his inability from sickness, his duties devolve on his mate, and the importance of having a sober, faithful and competent man in this place can hardly be exaggerated. The lives and property on board may all be dependent upon his skill and competency. What is said in the cases tending to establish the doctrine that a seaman ought not to be discharged for one act of drunkenness, disobedience or neglect of duty, it seems to me is not applicable to the case at bar. In those cases the seaman had been discharged in a foreign port after long and generally faithful service, and the language of the courts should be read in the light of the facts of the case in which it was used. The present is very different from such cases.

On Saturday, the master left the ship in charge of the libellant, and was absent about three hours. On his return he finds the libellant stupid through liquor, the ship in disorder and the provisions uncared for. His remonstrances, his inquiries and his censure are met by insolence and foul language and his orders with disobedience. No court, I think, can say that under these circumstances the master was bound to go to sea with a chief officer who made such a beginning as this, and wait for another act of drunkenness or disobedience; or to try any experiments with a man who at the outset displayed the character this man did, while he would at the same time be risking the safety of the ship, its cargo and crew. On the contrary, he would have failed in his duty to the owners and to all the interests intrusted to him had he allowed the libellant to remain as chief officer, and commenced the voyage with him. Courts of admiralty, says Judge Lowell, are not very severe with seamen who happen to get drunk once or twice, especially if they are off duty. But the first officer has a much higher responsibility than the crew and must be proportionately careful in his conduct; and if he fails when left in command the master is justified in visiting such an offense with a severe punishment. The Eldorado [Case No. 4,327]. In that case the mate's discharge in Liverpool, a foreign port, was justified because he got drunk when left in charge of the ship.

I consider the master of the ship Garnet legally justifiable for the discharge of the libellant.

The libel, therefore, is dismissed with costs.

GARNETT, Ex parte. See Case No. 13,494.

GARNETT (LISBERGER v.). See Case No. 8,383.

Case No. 5,245.

GARNETT v. MACON et al.

[2 Brock. 185;[1] 6 Call, 308.]

Circuit Court, E. D. Virginia. Nov. Term, 1825.

EXECUTORS AND ADMINISTRATORS — SUBJECTING LAND TO PAYMENT OF DEBTS—COVENANT PLEADED AS A RELEASE—JOINT DECREE—SETTLEMENT OF MOIETY BY ONE — TRUSTEES — SALE TO EXCLUDE DEBTS—SPECIFIC PERFORMANCE — INADEQUACY OF PRICE.

1. To sustain the vendee's allegation that the contract was abandoned by implication, the conduct of the vendor ought to be such, as to justify a reasonable man in believing that he acquiesced.

2. In equity, whether the lands be charged by the will, or the bond, of the ancestor, creditors must exhaust the personal estate before they can resort to the lands.

3. And, in such case, a decree against the executor is not conclusive, but prima facie evidence only, against the heir or devisee.

[Cited in McLaughlin v. Bank of Potomac, 7 How. (48 U. S.) 229.]

4. To avoid circuity of action, a covenant may be pleaded as a release; but it must be a covenant between those parties only; and if it contains no words of release, it will not be construed such, unless it gives the covenantee a right of action which will precisely countervail that to which he is liable; and unless, too, it was the intention of the parties that the last instrument should defeat the first.

[Cited in Durrell v. Wendell, 8 N. H. 372; Berry v. Gillis, 17 N. H. 13; Robinson v. Godfrey, 2 Mich. 414; Morgan v. Butterfield, 3 Mich. 618.]

5. Parol substitution of a third person for one of several obligors, does not release the rest.

6. If there be a joint decree against the executors of two persons, and a creditor receives a moiety of the debt from the representatives of one of them, and covenants not to levy the residue of the decree upon the estate of that one, it does not discharge the representatives of the other.

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

7. What release to one will discharge the rest of several obligors; and e contra.

8. It is the course of a court of equity to decree, in the first instance, against the party who is ultimately responsible; but this is done only where the parties are before the court at the time of the decree, and their several liabilities are clearly ascertained.

9. The court of chancery has established it as a rule, that where the charge is general, the purchaser is not bound to see to the application of the purchase-money.

10. But if the trustee sells with the avowed purpose of excluding the debts of him who created the trust, the purchaser voluntarily assisting him in it, would not be secure.

11. And if he have notice of a debt before he pays the money, he may be affected if he proceeds with the purchase.

12. If the executor sells a chattel, specifically devised, to a nerson who knows there are no debts, the purchaser takes the property subject to the bequest.

13. Both on principle and authority, a specific performance will not be decreed at the instance of the vendor, unless his ability to make a title be unquestionable.

[Cited in Brown v. Cannon, 5 Gilman, 182.]

14. For, if no incumbrance be communicated to the purchaser, or known to him to exist, he must suppose himself to purchase an unincumbered estate:

15. And, therefore, his objections to taking it need not be confined to cases of doubtful title, but may be extended to incumbrances of every description, which may embarrass him in the full enjoyment of his purchase.

[Cited in Irvin v. Bleakley, 67 Pa. St. 26.]

16. The English court of chancery has never laid down the broad principle, that time was never important: on the contrary, the present doctrine there is, that where time is really material to the parties, the right to a specific performance may depend upon it; and the same doctrine prevails in the courts of the United States.

17. Although mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance, yet if an unreasonable contract be not performed according to its letter, equity will not interfere.

18. And there is no difference between a contract, unreasonable when made, and one which becomes so afterwards, if the applicant be in fault.

19. The principle is, that a very great change in the value of the article is a serious objection to a decree for a specific performance, where the vendor is in fault, as it may affect the arrangements of the vendee for a compliance with the contract.

[Cited in Tufts v. Tufts, Case No. 14,233.]

William Garnett, as executor of Richard Brooke, exhibited his bill in the superior court of chancery, for the Richmond district of Virginia, against William H. Macon, John Campbell, an absent defendant, and others, setting forth, that the said Richard Brooke, devisee of George Brooke, empowered his executors to sell his real estate; and that the plaintiff, as executor, had, on the 10th of June, 1818, sold a tract of land, called Mantapike, to the defendant, Macon, who paid part of the purchase-money, but had since refused to fulfil the contract, alleging that the land is subject to the payment of a debt which Carter Braxton owed to Robert Campbell, and for which George Brooke, whose will charged his lands with the payment of his debts, was security. That there was no just cause of apprehension, as a detail of the circumstances would show. That Braxton's debt was the balance due upon some bills of exchange drawn by him, in July, 1768, and secured by a mortgage upon thirty slaves, and two tracts of land called Broadneck and Foster's, both which tracts Robert Campbell afterwards released; and subsequently thereto, to wit, in 1775, William Aylett and George Brooke, without any knowledge of the release, executed an obligation to Robert Campbell, binding themselves to stand securities for whatever sum Braxton owed him; but that obligation being afterwards lost, they, on the 15th of December, 1775, entered into another, under seal, which, reciting the loss of the former, bound them to pay the debt then due. That, in August, 1777, Robert Page, by indorsement on the obligation, substituted himself in the room of Aylett, with the assent of Robert Campbell, but without the knowledge of Brooke. That Braxton, in 1779, made a deed of trust to indemnify Page and Brooke, and a mortgage in 1792, but Page released part of the subject. That George Brooke died in 1781 or 1782, and Robert Campbell in 1791. That, in 1794, the defendant, John Campbell, as assignee and representative of Robert Campbell, brought suit, in the high court of chancery, against Carter Braxton, Robert Page, and Robert Price, the executors of George Brooke, to have the mortgages and trust deeds carried into effect; but the heirs and legatees of George Brooke were not made parties to the cause. That Page died, in 1794 or 1795, subsequent to the commencement of the suit, which was revived against his representatives. That the defence made by Braxton, Page, and Price, was usury, and the act of limitations: both which points were decided against them by the chancellor, who decreed the executors of Page and Brooke to pay so much of the debt as the mortgaged subjects should prove insufficient to satisfy: which decree was affirmed by the court of appeals, and the cause sent back to the court of chancery for further proceedings. That the defendant, Campbell, has ever since been pursuing the representatives of Page only, without taking any steps against Price. That George Brooke's estate is not liable, as well because the obligation of Brooke and Aylett does not bind their heirs, as because the debt was not the proper debt of George Brooke, whose responsibility for it ceased by Robert Campbell's release of the lands; by the acceptance of Page in the room of Aylett; by the defendant, Campbell's, failure to pursue Price; and by the release of part of the indemnity subject by Page, whose estate ought, consequently, to bear the whole burden. That the plaintiff was therefore able to make a good

title; and that the contract ought to be performed by Macon.

The answer of Macon admits the contract of the 10th of June, 1818, and says that he paid $4000 of the purchase-money in anticipation, and bought wheat from Bagby for the purpose of seeding the land: during all which time he knew nothing of the claim of Campbell, or of George Brooke's will, but supposed Mantapike to be free from incumbrances, except a mortgage to Young, which was represented of no great amount, and was to have been paid off by the complainant before he made a deed for the land, although it is still unsatisfied. That the first information which the defendant had of Campbell's claim, was in the latter end of 1818, from Govan the agent, and that he immediately applied to counsel to investigate the title, who discovered the charge in Brooke's will. Upon which the defendant, finding himself involved unexpectedly in a lawsuit of interminable length, with numerous parties, abandoned the contract, and gave notice of it to the plaintiff by letter of the 16th of December, 1818. That the plaintiff neither returned an answer, nor apprized the defendant that he should insist upon the contract, until the institution of this suit, several months afterwards, but, on the contrary, kept possession of the land, paid Bagby for the wheat, and never tendered a conveyance:—all which, the answer insists, released the defendant from the contract. In his amended answer, he said that, after the purchase, he advertised a plantation for sale, to assist in paying for it; but gave over the idea upon discovering Campbell's claim; since which Mantapike had fallen greatly in value, and it would be ruinous now to complete the contract. The original subpoena, which issued on the 26th day of December, 1818, was not executed: the bill was filed in June, 1819, and the writ was served upon Macon in January, 1820. On the 18th of June, 1821, the chancellor, taking the bill for confessed against Campbell, who knew nothing of the suit, and declaring his opinion to be, that the substitution of Page for Aylett released Brooke from his obligation, and that the heirs and legatees of the latter had still a right to contest the debt, as they were not parties to the suit in the court of appeals, decreed a specific performance of the contract, and directed an account of the profits of the land from the 1st of January, 1819. But it being afterwards discovered that Keith, another British subject, represented him as the assignee of Robert Campbell, the plaintiff revived the suit against him, who filed a bill in the circuit court of the United States, against the plaintiff and others, to subject the Mantapike land to payment of Campbell's debt, and, by petition under the act of congress, removed this cause, of Garnett &c. v. Macon and others, into the same court, where he appeared and put in his answer, which was received, and, of course, set aside the interlocutory decree of the chancellor. While the cause remained in the court of chancery, the agent of Campbell, upon receiving a moiety of the debt from Page's representatives, gave them a discharge, with a reservation of Campbell's rights against the heirs and representatives of Brooke, as to the other moiety. The answer of Keith relies on the decree of the court of appeals: insists upon the obligation of Brooke and Aylett, which it contends was not impaired, either by Robert Campbell's release of the lands, as the obligation was given to procure it, and the release was of record when the obligation was made; or by the substitution of Page for Aylett, which was collateral nudum pactum, and gave no time; or by any of the other transactions referred to in the bill and proceedings; asserts that proper steps had been taken to obtain payment of the decree of the court of appeals, but the same had proved abortive, as none of the mortgaged property could be found: denies that the plaintiff can make a good title until Campbell's debt is paid, but claims satisfaction out of the proceeds, if performance of Macon's contract is decreed.

The exhibits consist of—1. A copy of the record in the suit of Campbell against Braxton, Page, and Price, which contains Braxton's mortgage to Robert Campbell; the obligation of Brooke and Aylett; and the substitution of Page, which is without a seal, and expresses no consideration. 2. The releases by Robert Campbell, in May and September, 1773, of the mortgaged lands. 3. The agreement of the 10th of June, 1818, between the plaintiff and Macon, which stipulates that the plaintiff should sow the land that year with wheat, for the defendant, the latter furnishing the seed; and that part of the purchase-money should be paid on the 1st of January, 1819, at which time Macon was to receive possession, and give a mortgage on the land for the other two instalments. 4. Macon's notice to the plaintiffs that he had abandoned the contract. 5. Richard Brooke's two mortgages to Young and Gaines, that is to say, one to indemnify them as sureties for his administration of William Brooke's estate, and the other to save them harmless as his sureties upon an injunction to a judgment obtained against him by Price as executor of George Brooke. 6. Sundry releases from the representatives of Young and Gaines, procured since the institution of the suit, and most of them of very late date. 7. A copy of the settlement of Richard Brooke's administration of William Brooke's estate, made in the latter part of the year 1824, showing a balance due to the estate. 8. A copy of George Brooke's will, which contains this clause, "after my just debts are paid, &c." Subsequent to which it devises Mantapike to Richard Brooke. 9. A copy of Richard Brooke's will, which empowers his executors to sell his lands and distribute the proceeds among his own legatees. 10. A copy of Ma-

con's advertisement in the newspapers (soon after his contract with Garnett), offering an estate in Hanover for sale, in consequence of the purchase of Mantapike, which he discontinued upon abandoning the contract. Smith, who wrote the contract, proved that Garnett, on receiving payment of the first instalment, was to make "a full and complete title" to the land, to Macon, who was to give a mortgage on it for the other two instalments. That Macon was ignorant of Campbell's claim; and, when he afterwards mentioned the information he had received from Govan to Garnett, the latter admitted that he knew of Campbell's suit at the time of the sale, but had not told Macon of it, because he supposed it was abandoned, as no process had been served upon him. The other witnesses proved that Garnett admitted, since the contract, that he was to make a perfect title, and obtain a release of Young's mortgage. That the seed wheat had been purchased by Macon of Bagby; but that Garnett had paid for it, used it, and kept possession of the land, which had fallen very much in value since the date of the contract.

Mr. Stanard, for plaintiff.

The case involves three questions: 1. Whether the vendor can make a good title? 2. Whether he has abandoned the contract, or forfeited his right to a specific execution of it? 3. Whether the fall in the value of the property bars the plaintiff's claim to relief?

The only objection urged against the first, is Campbell's debt. But that claim, whether due or not, has no influence. For, if it be not due, then there is no pretext for resistance on the part of the defendant: and, if it be due, but the charge left ineffectual through the supineness of the creditor, it will not obstruct a specific performance.

The last proposition will be first examined. In all cases of general charge, a sale, before any suit by the creditors, defeats the charge: for it makes the proceeds personalty in the hands of the executor, and exonerates the land in those of the purchaser, who may insist on a conveyance, without regard to the creditors. 1. Because he is entitled to the property from the moment of the contract; for that creates such an interest in the land, that the law gives an action for non-conveyance, and equity a bill for specific performance. He has, therefore, law and equity both on his side; and that constitutes perfect right. 7 Ves. 274; 11 Ves. 554. Whereas general creditors, who neglect to put the subject into the custody of the court, have no interest in the land itself, but an equitable claim only, depending upon the solvency of the personal estate, and which can never be rendered effectual until that is discussed. 2. Because, in consequence of this doctrine, it has become a settled rule, that, if there be no suit depending, the sale can never be overreached by the charge, unless the purchaser be bound to see to the application of the purchase-money; which is the only test with respect to the validity of the sale. But the purchaser is never so bound, unless there be a lien; the objects specified; or the property impounded by a suit. Sugd. Vend. 367, 373; 6 Ves. 654; 1 Madd. 352. Such are the rules, even where the will directs, in terms, that the land shall be sold; and the argument is a fortiori, where the charge is a mere creature of equity raised out of indefinite words, of no effect at law, and only commensurate to an end, which may be served as well by turning the creditors upon the proceeds. Macon's right to the estate, then, cannot be disturbed, as the charge was general, and no steps had been taken by Campbell to enforce it. For the suit in the court of appeals had no effect, because the decree was against the executor only, and the bill did not seek to charge the land. But, if all this were less clear, the claim of Campbell would be no impediment to relief. 1. Because, if the release of Broadneck and Foster's was before the making of the obligation, Brooke was deceived, as he was not apprized of it; and if it was afterwards, as it probably was, that alone was a discharge in equity. 2. Because Page was substituted in the room of Aylett, without the consent of Brooke, who was consequently absolved, as a different associate was imposed upon him. 3. Because Campbell's agent released Page's representatives, which discharged the whole obligation, especially as Page had given up part of the indemnity property, without consulting Brooke, whose security was thereby lessened. 4. Because Campbell did not pursue Price, but suffered the personal estate to be wasted.

The result is, that the plaintiff can make a good title. Which leads to the inquiry, whether he has abandoned the contract, or done any thing to forfeit it? Neither has happened. He has not abandoned it. Because the suit was commenced immediately after the defendant's offer to relinquish, and has been constantly pursued ever since. He has not forfeited it. Because the plaintiff proceeded, without delay, to get up the incumbrances, and has the legal estate now at command.

The third question is clearly with the complainant—1. Because the estate belonged to Macon from the time of the contract, and the vendor had nothing to do with future contingencies. 2. Because it is like the annuitant's dying before he receives any thing, or an exorbitant price given for property; neither of which, unless there be fraud or surprise, will bar specific performances. 1 Brown, Ch. 156; 3 Brown, Ch. 605; 1 Cox, Ch. 428; 3 Ves. & B. 187. It follows, that as the plaintiff can convey a good title, there is nothing to prevent a specific execution of the contract. Gibson v. Patterson, 1 Atk. 12.

Mr. Call, for defendant.

The validity of Campbell's debt is established, both by the decree of the court of ap-

peals, and the evidence. By the decree: 1. Because the executor represents the personal estate, and is the proper party to sue and be sued respecting it. Co. Litt. 209a; 2 Saund. 137b; Id. 72o. 2. Because, in collateral charges, judgment against the principal is conclusive, unless fraud be shown, as the debtor (who is the executor in the present case) is the proper person to contest them. 3 Term R. 374, 377; 1 Wash. [Va.] 33; Skin. 586; 1 Eq. Cas. Abr. 315, pl. 2; Finch, Prec. 198. 3. Because there is privity between the heir and executor; for the case of Mason v. Peter, 1 Munf. 437, proceeded upon an erroneous principle. Co. Litt. 232a; 10 Coke, 93b; 1 Mod. 225; 1 Maule & S. 364; Plowd. 439. 4. Because it is substantially a judgment in rem; for whenever the sentence is against the proper person to prosecute or defend, the right is ascertained, and cannot be drawn into question again. 4 Brown, Parl. Cas. 718; Cro. Car. 167. By the evidence: 1. Because the obligation has not been weakened by any of the events insisted on by the plaintiff's counsel: Not by the substitution of Page, for that was not only nudum pactum, but collateral in terms, and disturbed nothing. 8 Term R. 168. Not by the release to Page's representatives. 1. Because there was an express reservation of the right to pursue Brooke's estate. 2. Because the release of part of the indemnity property, by Page, did not injure Brooke; for his rights were not affected by it. 3. Because neither Aylett nor Page, as between them and Brooke, was bound to pay more than half of the debt; and, consequently, when the representatives of Page paid a moiety, the discharge given to them was of no prejudice to those of Brooke. 6 Ves. 805; 1 Marsh. 603. Not by the failure to pursue the personal estate of Brooke. 1. Because Price could not be proceeded against until the mortgaged subject had been discussed; and he died before the pursuit was over. 2. Because, delay in pressing the personal estate does not discharge the heirs. 1 Anstr. 112. That the obligation does not bind the heirs is unimportant, because the will subjects the land to payment of the testator's debts, and that in question was the debt of Aylett and Brooke. For the correspondence shows, that their undertaking was to be the price of Campbell's release of the mortgaged lands. The consequence is, that Macon was not bound to complete his purchase. For such contracts are always upon the implied condition, that the vendor has a good title (2 W. Bl. 1078); and Smith's deposition, which may be used to rebut the plaintiff's equity (1 Cox, Ch. 406; 1 Ves. & B. 527). proves that a clear title was part of the actual bargain in this case. But the plaintiff cannot make a title. 1. Because the contract was not carried into effect before Macon received notice, followed by a suit, that Campbell claimed satisfaction out of the land, and it is not material, if no conveyance has been made, whether the notice and suit be before or after the contract: for, in either case, any further proceeding with the purchase, amounts to collusion between the executor and the purchaser. 2 Vern. 116; 1 Eq. Cas. 358, pl. 4; 3 Brown, Parl. Cas. 5; 9 Mod. 418; 5 Ves. 722. 2. Because Garnett did not act under the charge in George Brooke's will, but professed to proceed under that of Richard, which was fraudulent as to the creditors of George, and, therefore, the plaintiff could neither convey, nor the defendant obtain, a sure title under him. 3. Because all the necessary releases have not been procured, for the creditors of William Brooke are interested in the mortgage to Young and Gaines, as Richard Brooke died indebted to that estate, and Price's judgment still binds the Mantapike land. 4. Because, if it be true, as insisted, that Keith's suit can never be tried, from the impossibility of convening the parties, that circumstance is an additional argument for the defendant, as it keeps the title in perpetual suspense. But it is not true, for whenever the personalty cannot be conveniently discussed, the court will proceed forthwith against the real estate. D'Aranda v. Whittingham, Mos. 84. If, however, the title could now be rendered valid, Macon would, nevertheless, be released. 1. Because there was an improper concealment: for the plaintiff did not inform the vendee of Campbell's suit and Brooke's will, although Smith's deposition proves that he had notice of the first, and his connexion with the estate must have apprized him of the second. Coop. 308; 18 Ves. 10. 2. Because there was not only actual inability, at the time, to convey the legal estate, but just cause to believe that the title would be disputed, and a purchaser is never bound to take a litigated title, because it is a species of maintenance, and may involve him in controversies with third persons, who ought not to be unnecessarily drawn into litigation. Sugd. Vend. 158; 2 Schoales & L. 553, 560; 2 Ves. & B. 148; 16 Ves. 274; 1 Jac. & W. 547; 5 Ves. 187, 647; 14 Ves. 547. 3. Because it comes too late, for the purchaser is not bound to wait an unreasonable time. 10 Ves. 606; 4 Ves. 689; 5 Ves. 730; 1 East, 627; 2 Mer. 140. And the cases which speak of ability to convey at the moment of the decree as sufficient, must have been cases of formal obstruction only, for whenever danger of eviction is to be apprehended, the purchaser is not bound to complete, especially in this country, where expensive improvements will necessarily be contemplated, and where the opinion seems to be, that the vendee, upon eviction, can only recover his purchase-money and interest, without regard to expenditures. [Hepburn v. Auld] 5 Cranch [9 U. S.] 276, 279. 4. Because the conduct of the plaintiff amounted to abandonment, for he did not insist upon performance, but paid Bagby for the wheat, kept possession of the estate, delayed to file his bill, and was unusually negligent with regard to the service of his writ.

All this afforded a presumption that the abandonment was acquiesced in, and justified Macon in turning his attention to other objects. 4 Brown, Ch. 331, 471, 497. But, in no event ought the defendant to pay interest, for the profits go against it, as Garnett was in possession without being able to make a good title. 2 Taunt. 146.

Mr. Hay, on the same side.

The contract must be considered as abandoned by both parties; for Macon expressly relinquished, by letter, which ought to have been promptly answered, and some decisive step taken, by the plaintiff, to show that he insisted on a fulfilment of the agreement. But nothing of that sort happened; for no deed was tendered, nor any demand made of that part of the purchase-money which became payable in January; and although a subpoena was taken out at an early period, the bill was not filed for several months afterwards, nor the writ served for more than twelve; although Garnett, in the mean time, had sown and reaped a crop of wheat upon the land. Under these circumstances, Macon had a right to presume that his abandonment of the contract was accepted, and to give himself no further concern about it. 4 Brown, Ch. 469; 5 Ves. 818. It is incumbent on the vendor to make a clear title, and to be able to do so when he contracts; for the purchaser cannot be compelled to take a doubtful one, or to wait an unreasonable period for adjustment of difficulties respecting it. 2 P. Wms. 201; 5 Ves. 189; 16 Ves. 273; 2 Ves. & B. 149. Under this view of the subject, Campbell's claim justified Macon's refusal to perform. For it was a well-founded claim: 1. Because the decree of the court of appeals had established it; for the case of Mason v. Peter, 1 Munf. 437, is not law, as it turned upon the notion of a want of privity, which is completely refuted by the authorities already cited; and, in the case of Mayo v. Bentley [4 Call, 528], the court of appeals decided that a judgment, confessed by the administrator, was conclusive against every body. 2. Because the release of Broadneck and Foster's was purchased by Aylett and Brooke, with the obligation given by them; and, therefore, it does not lie in the mouths of their representatives to say, that it was not the debt of the obligors, against their own covenant founded on a full consideration. Nor is that obligation in any manner impaired. Surely not by the substitution of Page, for that was collateral, and could, at most, operate as an additional security; but, as it had neither seal nor consideration, it possibly had no operation at all. Nor did the release to Page's representatives affect the obligation; for the right to pursue those of Brooke was reserved; and the case Ex parte Gifford, 6 Ves. 805, decides that an express release to one, upon payment of his proportion of the debt, does not discharge the rest of the obligors. The debt, then, is not only still due, but has been shown to be the debt of Brooke and Aylett; and, therefore, it is expressly within the charge created by the will upon the land. But if Campbell's claim had not been so well-founded, Macon would still have been at liberty to resist the contract. 1. Because it had been decided, by the court of appeals, that the claim was just; and he could not have delivered himself from embarrassment by paying the money either to the plaintiff, or to Campbell; for, as he had received notice that the debt would be asserted against the land, he would have proceeded at his peril to pay to the former (Sudg. Vend. 530); and, if he had paid to the latter, he would have run the risk of having to pay it over again, if the contract should be preferred to Campbell's claim, or that claim should not be established. 2. Because the primary liability of the personal estate threatened to protract the contest to an immeasurable length, so as to keep him in perpetual suspense, and put it out of his power either to go to market with the property, or to dispose of it among his family: a difficulty to which he ought not to have been exposed; and, as specific performance is discretionary with the court, the jurisdiction should not be exercised against an innocent purchaser, brought into the dilemma through the fault of the vendor; especially as Mantapike has greatly depreciated, and Macon, who was diverted from his efforts to sell the plantation in Hanover, which has since fallen in value, must make great sacrifices to raise the purchase-money. However, it is useless to insist any farther upon these points, as the mortgages given by Richard Brooke have not been completely released, and Price's judgment still binds the land. For those incumbrances put it out of the power of the plaintiff to make a good title, and therefore he is not entitled to relief.

Mr. Leigh, for plaintiff, said, that, in the reply, he should insist, 1. That as the obligation of Aylett and Brooke did not bind their heirs, Campbell's claim, if it were the debt of Brooke, would be no objection to a specific performance, because the charge in the will was indefinite, and the contract made before notice of the debt. 2. That the release of Broadneck and Foster's by Campbell, was subsequent to the obligation, and therefore destroyed it, as Aylett and Brooke were not consulted. 3. That the substitution of Page for Aylett released the whole obligation, because a court of equity would have compelled a general release to Aylett, and that would have operated as a release to Brooke also. Co. Litt. 232; Wats. Partn. 226; 5 Bac. Abr. 167. 4. That as Price's answer to the suit in the court of appeals does not deny assets, it admitted them, and therefore the failure to pursue him was culpable negligence. 5. That the release to Page's representatives was a complete discharge to those of Brooke.

Mr. Wickham, for defendant.

The decree of the court of appeals is conclusive; for if it had been in favour of Price, the heirs and devisees of George Brooke would have been discharged; and the rule must be reciprocal. The case of Mason v. Peter, 1 Munf. 437, does not resemble this; for that was a judgment by default; this a full defence upon the merits by the executor. But independent of the decree, the cause is in favour of Campbell. For it is of no consequence whether the covenant binds the heirs or not; because the will charges the land with the payment of all the testator's debts, and not those only where the heir and executor are both bound. But as the covenant proves that Brooke owed the debt, the case is necessarily embraced within the terms of the devise. The substitution of Page for Aylett, did not release Brooke, as the case cited from 8 Term R. 168, shows; for it was a mere collateral undertaking, which did no injury to Brooke, as his situation was not altered by it; and he might, if Aylett had failed, have even derived benefit from it, as Page, in that case, must have assisted to pay the debt. This is an answer to all that has been said relative to the release to Page's representatives; for that was beneficial to those of Brooke, as it relieved them from all responsibility for Aylett's moiety, to which extent only was Page bound, even at law, and, therefore, it was but a new acknowledgment of their having fulfilled his engagement, which, in effect, was no more than to pay one half of the debt, and his representatives having done so, they were discharged, whether an actual release was given or not; for, to use Mr. Leigh's own argument, a court of equity, as they were no farther liable, would have decreed one to be executed. It is therefore not like Co. Litt. 232, and the other authorities cited by him, because it was not a release of the original obligation, but of Page's own undertaking, and Aylett was left bound as he was before. But the other view which has been taken of this part of the case by the defendant's counsel, is equally clear, for the release expressly reserves the right to proceed against Brooke's representatives, who, consequently, continue liable, according to the cases cited from 6 Ves. 805; 1 Marsh. 603. There was no delay in pursuing Price; but if there had. it would not have been material. as the responsibility of the devisees arose from the charge in the will, and the creditor was not bound to prosecute for their indemnity. Croughton v. Duval, 3 Call, 69. Besides, Campbell was out of the country, and his course was impeded by the death of parties, and other obstructions. It is of no consequence that the personal estate is first liable, for it does not appear that it can be ascertained whether there be any which can be made effectual, and a purchaser is not to be kept in suspense forever. Macon could not have paid the purchase-money with safety, for, after the notice, he was bound to see to the application of it. Besides, Garnett's suit created a lis pendens, which was followed by those of Campbell and Keith; and the whole together rendered performance, to the last degree, perilous. Campbell's equity is both prior in point of time, and derived from the highest source; for Garnett's trust is for the representatives of Richard Brooke, and not for the creditors of George Brooke, to whom the land belonged, and who created the charge, that his own debts might be paid before his devisees took anything. But this upright intention would be defeated by the doctrines contended for by the plaintiff's counsel. For if Garnett had received the money, and paid it over to the legatees of Richard Brooke, he would not have been liable for it, because he would have acted in discharge of the trust committed to him, and there was no confidence between him and George Brooke. Another view of the subject makes the case clear. Richard Brooke mortgaged the land, and that put it out of the power of Garnett to convey the legal estate, as he had only the equity of redemption. But Campbell's prior claim gave him the first right to redeem. This refutes the notion that Macon had the best right to call for the legal estate. For if Garnett were now to obtain complete releases from all the mortgagees, and to convey to Macon, the prior right of Campbell would overreach him.

The argument that Macon may pay the money into court, and leave Garnett and the creditors of George Brooke to contest the right to it, is unsound:—1. Because the price will not pay Campbell's debt, and, therefore, if the land should rise in value, Keith will have a right to insist upon a re-sale, in order to obtain the benefit of the rise. 2. Because payment into court would only bind the parties to this suit, and not the other creditors of George Brooke who may join in Keith's suit, and claim to have the land sold again. Surrounded with such difficulties, none of which were known to him at the time of his purchase, Macon has a right to say, "non haec in faedera veni." —"My contract was for a clear title, not for one embarrassed with endless disputes." If there be a well-grounded apprehension that the litigation will be protracted, and the property locked up for a long time, the court will not compel execution of the contract, because the vendee will not be able to improve with safety, or go to market with the estate. Courts, in order to prevent controversies and loss, will sometimes enjoin trustees from proceeding to sell where other incumbrances exist. The present contract, therefore, will hardly be enforced, if performance would only lead to new litigation. The circumstances, in the case of Gibson v. Patterson, 1 Atk. 12, do not appear; but it is certain that the rule of courts of equity, upon questions of this

sort, has undergone a considerable change, and that the old cases differ widely from the modern, in respect of the period of performance. The foundation of this kind of bills for specific execution, where other persons than the contracting parties are made defendants, is simple. It is to remove formal obstructions, when the title is otherwise clear, in order that the purchaser may hold the estate without danger of interruption. But that is not the case here, for the same embarrassments will continue after the decree as before, the obstructions not being formal only, but such as the court itself cannot remove. The vendor should be able to show both that his conduct has been fair, and that he has been guilty of no laches. But Garnett is not in that situation, for he has sold an estate subject to incumbrances, without apprizing the purchaser of them; and if it was in his power to remove them, he has not used due diligence to effect it: not even in the prosecution of this suit, although professedly brought to clear the title. Compare the conduct of the parties. Garnett was bound to offer a complete title, or to disclose the defects; but he did neither, for he was not able to convey a good title, nor did he apprize the purchaser that it was defective; even Young's mortgage was represented as small, and, with respect to the rest of the incumbrances, formidable as they are, nothing was said. Macon's conduct, on the other hand, has been unexceptionable. Confiding in Garnett's representation that it was a clear title, he paid $4000 of the purchase-money before it was demandable, and was preparing to fulfil the contract in all other respects, until he received notice from Govan, that he would proceed at his peril, upon which he abandoned the agreement, and gave notice to the defendant, who was not injured by it, as he was thereby enabled to clear the title if he could, and go to market again with a sure estate. If, however, performance should be decreed, interest ought not to be allowed, as the title was in controversy, and the plaintiff had possession of the estate.

Mr. Leigh, in reply.

Four objections are made to a specific performance:—1. That the contract was abandoned by the plaintiff. 2. That there was laches in prosecuting the suit and removing incumbrances. 3. That there has been a change of circumstances, in consequence of a fall in the value of the property. 4. That there are existing incumbrances now upon the estate.

There is not a shadow of reason in support of the first, for the suit was brought immediately on the receipt of the defendant's notice; and if no deed was tendered in January, it was because he had refused to proceed, and it was his duty to have prepared one. Sugd. Vend. 182.

The second objection is equally as untenable, for the suit was constantly going on, and there was no delay in getting up the incumbrances; but, if there had, it would not have been material, for time is not of the essence of the contract in any case, unless expressly stipulated (Sugd. Vend. 282, 289, 293; [Hepburn v. Auld] 5 Cranch [9 U. S.] 262; [Hepburn v. Dunlop] 1 Wheat. [14 U. S.] 179; 14 Ves. 205), and much less in this, for a clearing of the title within the limit of the instalments was all that was looked for upon a fair construction of the agreement, compared with Smith's deposition. Besides, ability to convey at the time of the decree is all that is ever required, and more ought not to be insisted on here, as the incumbrances were not, in fact, known to the plaintiff at the time of the contract (Sugd. Vend. 229); and, if there was any room for constructive notice, the purchaser was as much bound to search for it as the vendor (Sugd. Vend. 336).

With respect to the change of circumstances, and fall in the value of the property, nothing favourable to the defence can be drawn from that source, for it has long been settled, that objections of that kind have no weight, any more than the premature death of the annuitant, or the inadequacy in the price of the property in the cases cited by Mr. Stanard, from 1 Brown, Ch. 156; 3 Brown, Ch. 605; 1 Cox, Ch. 428; 3 Ves. & B. 187. Indeed, inadequacy of price would appear to be the stronger objection, because it might, with some plausibility, be urged as a fault in the bargain itself; but the subsequent fall in value is unconnected with the agreement, and ought not to affect a bona fide transaction.

The fourth objection is of a three-fold character: the mortgages, Price's judgment, and Campbell's claim; but none of them are sufficient to repel a specific execution of the contract, for the mortgages have all been released; or if any thing still remains to be done, it may now be decreed, as all necessary parties are before the court, which has always been considered as sufficient, because the title is assured by the decree, and that is the same as if the plaintiff possessed it. 16 Ves. 380. Price's judgment is as little to be regarded, for the prior mortgage of Young prevents it from fastening on the legal estate, and it cannot affect the equity of redemption as a specific lien. Pow. Mortg. 339, 340, 615, 620; 3 Brown, Ch. 480; 1 Ves. Jr. 431; 1 Cox, Ch. 160. Campbell's claim, therefore, is the only pretext left; but that has no influence, for it was not a specific lien, but a mere charge which might or might not become operative; and therefore, if the purchase-money had been paid, and a conveyance taken before notice, it is admitted that the vendor could not have been disturbed. But the notice in pais makes no difference, for in cases of general charge without a lien, any other notice than a lis pendens, is immaterial, because the proceeds of the sale are assets, and the price of the land is all that

the creditors are entitled to. 1 Eq. Cas. Abr. 358, pl. 2; 1 Anstr. 109; Amb. 676. The force of this is not weakened by the argument that the contract is still executory, for the equity looks upon things agreed to be done as actually performed, and when an agreement is entered into for the sale of an estate, it considers the purchaser as the true owner from the date of the bargain; consequently the sale in the present case is good against the charge, as the purchaser was not bound to see to the application of the purchase-money, and was complete owner of the land at the moment of closing the contract, as there was no lis pendens at the time. Sugd. Vend. 130; 2 P. Wms. 277; 1 Brown, Ch. 186; 3 Brown, Ch. 96; 16 Ves. 151; Sugd. Vend. 372. Nor is it material that Garnett was not a trustee appointed by the will of George Brooke, for he had authority to sell, and the proceeds of the sale will be as available for the creditors as the land itself would have been.

The cases cited by the defendant's counsel, to prove that a purchaser is not bound to take a doubtful title, do not conflict with our right to a specific execution, for that of Rose v. Calland, 5 Ves. 187, was a case where there was a perpetual impropriation of hay not disclosed in the contract, but which, according to a doctrine settled in the court of exchequer, was attached to the estate. That of Stapylton v. Scott, 16 Ves. 272, was a case where the executor sold the whole property, when the devise was that he should sell the testator's own moiety, and his interest only in the rest. Sloper v. Fish, 2 Ves. & B. 145, was a doubtful question whether the deed was absolute, or had been delivered as an escrow only. Jervoise v. Duke of Northumberland, 1 Jac. & W. 540, was a case of uncertainty as to the nature of the estate. Lowes v. Lush, 14 Ves. 547, was a question of great doubt, whether the sale had not been anticipated by an act of bankruptcy. Cooper v. Denne, 4 Brown, Ch. 80, was a case where it was uncertain whether the leases had been confirmed, without which they were clearly void. Hapland v. Smith, 1 Brown, Ch. 75, was a case where there was a doubt whether there was a good tenant to the praecipe, and the chancellor was of opinion there was not. Walker v. Smalwood, Amb. 676, was the case of a lis pendens, and therefore has nothing to do with this case. Green v. Lowes, 3 Brown, Ch. 217, was an injunction upon motion before answer, without any decision upon the merits; and Sugd. Vend. 243, is his own inference only, and therefore is of no importance. The decree of the court of appeals does not conclude the plaintiff. Mason v. Peter, 1 Munf. 437, is expressly otherwise; and the authority of that case is not lessened by Mr. Wickham's argument, that as the heir may avail himself of a judgment in favour of the executor, he is bound by one against him; because that turns upon the principle, that the claim is entirely destroyed by the judgment. The release of Broadneck and Foster's discharged Aylett and Brooke; for Braxton's letter proves that it was subsequent to the obligation. But, if that were not so, the substitution of Page had that effect as to Brooke clearly; for equity would have decreed a release to Aylett, which would have discharged Brooke, as Page would have been left bound instead of Aylett, with whom he was associated in the obligation. If, however, that were doubtful, the release to Page's representatives discharged those of Brooke, upon a known principle of the common law. Co. Litt. 232, note 1, which is not impugned by the case Ex parte Gifford, 6 Ves. 805, and Hutton v. Eyre, 1 Marsh. 603; for they were cases of composition with insolvents and partners, and therefore not like this. Campbell's representative has lost all pretensions against the real estate of Brooke, by the failure to pursue the personal effects in the hands of Price; for as the latter did not deny assets in the suit in the court of appeals, he admitted them, and therefore, it was the duty of Campbell to have made that fund effectual. But, in any view of the case, the personal estate must be first discussed (Sugd. Vend. 378); and, if, through the supineness of his predecessor, Keith should meet with any difficulty in the pursuit of it, he must resort to the securities upon the administration bond. Interest is always decreed upon the purchase-money, and the purchaser is only entitled to credit for the profits actually received.

MARSHALL, Circuit Justice. Richard Brooke, by his last will, empowered his executors to sell his whole estate, and William Garnett, the plaintiff, alone proved the will, and took the executorship upon himself. On the 10th of June, 1818, William Garnett sold the estate called Mantapike, to William H. Macon, the defendant, "for the sum of twenty-two dollars per acre, $6000 of which are to be paid on the 1st day of January next, when possession will be given, and the balance in two equal annual payments from that date, which said two last payments are to be secured by mortgage on the said land. The said William Garnett farther agrees to put the present cornfield land in wheat, the said William H. Macon furnishing the seed. And it is farther agreed, that the said William H. Macon is to have power to make this agreement valid in one month from the date hereof, or to make the same null and of no effect, by giving due notice to the said William Garnett to that purport, within the time aforesaid."

On the 22d of August, William H. Macon paid William Garnett, $4000 in part of the first payment; but having received notice afterwards, that George Brooke, who devised Mantapike to Richard, had by his last will, charged his whole estate with the payment of his debts; and had in his lifetime, become

surety for Carter Braxton in a large sum, to Robert Campbell, for which a decree had been pronounced in the court of chancery against Carter Braxton, Robert Price, executor of George Brooke, and against the representatives of Robert Page, who was also surety for Carter Braxton, which decree was affirmed in the court of appeals in October, 1799, and remains unsatisfied; and being advised by counsel, that he, having notice thereof, the estate called Mantapike, would be charged with the said debt in his hands, he, on the 16th of December, addressed the following letter to the plaintiff: "Sir—I am informed that Colonel George Brooke, the former owner of the Mantapike tract of land, became Carter Braxton's security for a large debt to Robert Campbell, and by his will, charged his lands with the payment of his debts; that the debt to Campbell is still due, and that the Mantapike lands are liable to be sold for the payment thereof. I, therefore, think proper to inform you, that I consider the contract which I made with you for the purchase of the said tract of land, as void, and request you to return me the $4-000 which I paid you, in part of the purchase-money, with interest. I am, sir, very respectfully, W. H. Macon." On the 26th of the same month, William Garnett instituted his suit in the court of chancery of the state, against William H. Macon, and against the representatives of Robert Campbell, praying for a specific performance of the contract, and insists in his bill, that the estate called Mantapike, would not be chargeable with the debts of George Brooke, in the hands of a purchaser; and insists, also, for several reasons which are detailed at length, that George Brooke was not liable for the debts to Campbell, and that his devisees were not bound by the decree against his executor, or estopped from contesting the claim. The chancellor was of opinion, that Brooke had been released by the conduct of Campbell, and that a specific performance of the contract ought to be decreed, and directed an account of the rents and profits of the estate received by the plaintiff since the sale; but information was received of Campbell's death, on which the suit abated as to him, and was revived against William Keith, his representative, who appeared and petitioned that the cause should be removed into this court, which was ordered accordingly. Keith, as the representative of Campbell, has also filed a bill against the representatives, heirs, and devisees of George Brooke, praying that his debt may be paid; and to this bill William H. Macon is made a defendant: but this suit is not ready for trial. In May, 1820, William H. Macon filed his answer, in which, he insists that he ought to stand discharged from his contract, on account of the lands being incumbered with Campbell's debt, of which he had no notice, and that he purchased, "supposing the said Mantapike tract of land was free from incumbrances and charges of all kinds, except a mortgage by Richard Brooke to General Young, which was represented as of no great amount, and which the complainant was to pay off before he made a deed for the land to this defendant, but has failed to do so, as this defendant understands." He says, that on examining the records, which he did, in consequence of receiving notice of Campbell's debt, he found the question to be so perplexed and intricate, that the controversy would probably not be determined during his life, in consequence of which he resolved to abandon the contract, and addressed a letter to the plaintiff giving notice of his resolution. That in consequence thereof, as he presumes, the complainant kept possession of the tract of land; failed to tender a deed to the defendant for it, or to demand the instalment in January, 1819, and paid for the seed-wheat, which Macon had purchased to seed the cornfield, according to the written contract; thus exhibiting every mark of a reciprocal abandonment of the contract on his part, and he gave no indication to the contrary till the institution of this suit, several months afterwards.

In argument, the first point which has been made by the defendant Macon is, that the contract was abandoned by both parties. It is not pretended that there has been any express or formal abandonment on the part of the plaintiff. The allegation is, that it is to be implied from his conduct. To sustain this implication, the conduct of the vendor ought to be such as to justify a reasonable man in believing that he acquiesced in the decision of the vendee, to abandon the contract; it ought to be such as might reasonably influence the conduct of the vendee, and induce him to regulate his own affairs on the presumption that it was no longer incumbered by his contract. The attempt of the vendor to re-sell the estate, or the unequivocal exercise of ownership over it, unaccompanied with any explanation showing that he still considered the contract as binding, might be such an act; but there has been no attempt to re-sell the estate, nor any unexplained act of ownership over it. On the contrary, a subpoena was taken out within ten days after the date of the letter of abandonment, and the bill, since filed in consequence of this subpoena, claims a specific performance. Had the bill been immediately filed, and the subpoena executed, this point, it is presumed, would not have been made; but the bill was not filed until June, 1819, and the subpoena was not returned executed until January, 1820. From these circumstances, the counsel for the defendant claim the same advantages to their client, as if the plaintiff had acquiesced silently in his letter of the 16th of December, 1818, until the service of the subpoena informed him that a suit was depending. But I do not think that this claim can be supported.

No laches are imputable to the plaintiff. His determination to insist on the contract,

seems to have been immediate; and the measures taken by him in pursuance of that determination, were sufficiently prompt. A subpoena was issued on the tenth day after the date of Colonel Macon's letter, but there was not time to execute it. New process was directed, and the law makes it the duty of the officers of the court, to attend to that process. I do not think the delay which took place in executing it, can be justly imputed to Colonel Garnett, nor ought any forfeiture of right to be the consequence of that delay, unless some injury to Colonel Macon had resulted from it. No injury is shown or alleged, nor is it probable that any can have arisen. From the vicinity of the two gentlemen to each other, their rank in life, the common conversations which grow out of such controversies, the interest which the parties took in it, and the inquiries they would naturally make, it is not reasonable to suppose, that while the vendor was in fact actively pressing his suit, and continually issuing new process, the vendee could act upon the presumption that he had abandoned his contract. But if these circumstances, which generally accompany transactions of this character, cannot be considered as belonging to this cause, the record, I think, furnishes satisfactory evidence that Colonel Macon was apprized of the determination of Colonel Garnett to insist on the specific performance of the contract. Thomas G. Smith deposes to a conversation with Colonel Macon, in which that gentleman said, that, though the counsel consulted by him had been of opinion that Mantapike was bound for Campbell's debt, the counsel consulted by William Garnett had advised otherwise, and that William Garnett said, he did not think himself at liberty, as a representative, to cancel the bargain. The deposition of James M. Garnett, too, though less explicit, bears on the same point. The very fact, that the vendee did not repeat his demand for repayment of the $4000 he had advanced, shows that he did not suppose the vendor had relinquished the contract. Since, then, the vendor did never in fact relinquish the contract, but took early measures to enforce its specific performance; since the delay which took place in the service of process did not proceed from him, and did not produce any real mischief to the vendee, I cannot think that the right to enforce a specific performance is in any degree affected by that delay.

It has been also argued, that the vendor ought to have done all that was required from him by the contract. He ought to have tendered possession and a conveyance, on the 1st of January, 1819. He certainly might have done so. But when it is recollected that previous to the 1st of January, 1819, he had received a letter from the vendee, announcing his determination not to receive possession or a conveyance, and had himself resorted to the laws for that remedy, which they afforded for a broken contract, I cannot think that the omission, if it may be so termed, ought to vary that remedy, so far as respects a specific performance, whatever might be its influence on other questions which would arise in the cause, should the contract be carried into execution.

I come now to consider the validity of the objections made by the vendee to a specific performance of the contract, supposing it not to be abandoned. He complains, that the title is incumbered and embarrassed with liens, of which he had no knowledge when the contract was made, and which would certainly have deterred him from making it, had they been communicated to him. A court of equity compels the specific performance of contracts, because it is the intention of the parties that they shall be performed. But the person who demands it, must be in a capacity to do, substantially, all that he has promised, before he can entitle himself to the aid of this court. At what time this capacity must exist, whether it must be at the date of the contract, at the time it is to be executed, or at the time of the decree, depends, I think, upon circumstances, which may vary with every case. There is no subject which more requires the exercise of a sound discretion. The inquiry in every case of the kind must be, whether the vendor could at the time have conveyed such a title as the vendee had a right to command? If he could not then, whether he can now? And if he can, whether there has been such a change of circumstances, that a court of equity ought not to compel the vendee to receive it? The first and great objection to the title, is the lien supposed to be imposed on the Mantapike estate, by the will of George Brooke, for the payment of his debts. In the year 1781, George Brooke made his last will in writing, in which he devised as follows: "After my just debts are paid, I give and dispose of the remainder of my estate in the manner following, &c." The testator was then seised and possessed of Mantapike, which he devised to his son Richard. Richard Brooke entered upon the property devised to him, and remained in possession of it until his death, which happened in the year 1816. By his last will, he empowered his executors, or such of them as might act, to sell his land. William Garnett, the plaintiff, alone qualified as executor to the will, and sold the land to the defendant, William H. Macon, without any intimation of the existence of Campbell's claim, or that George Brooke had charged his land with the payment of his debts. He now contends that this claim constitutes no obstacle to a specific performance of the contract, because: —First. It was not one of George Brooke's just debts, at the date of his will or at the time of his death. Second. If it was a just debt, it does not charge the estate in the hands of William H. Macon.

First. Is the claim now made by Keith, on the part of Campbell, for a debt legally due

from the estate of George Brooke, deceased? As a suit for that claim is now pending, and is not yet ready for hearing, any positive decision respecting it would, perhaps, be premature. It is, however, in the power of the court to form opinions on some points of that case, subject, indeed, to future revision; because the facts on which those points most certainly depend, are in the record; and it may be proper to do so, because, if the claim be obviously unfounded, the course of the court would be different from what it ought to be, if any strong presumptions exist in its favour. The defendants insist that the decree against the personal representatives of George Brooke is conclusive evidence against his devisee of the existence of the debt. The cases cited by counsel, in support of this proposition, do not decide the very point. Not one of them brings directly into question the conclusiveness of a judgment against the executor, in a suit against the heir or devisee. They undoubtedly show that the executor completely represents the testator, as the legal owner of his personal property, for the payment of his debts in the first instance, and is, consequently, the proper person to contest the claims of his creditors. Yet there are strong reasons for denying the conclusiveness of a judgment against an executor in an action against the heir. He is not a party to the suit,—cannot controvert the testimony,—adduce evidence in opposition to the claim,—or appeal from the judgment. In case of a deficiency of assets, the executor may feel no interest in defending the suit, and may not choose to incur the trouble or expense attendant on a laborious investigation of the claim. It would seem unreasonable that the heir, who does not claim under the executor, should be estopped by a judgment against him.

In the case against Munford's heirs, in this court (Alston v. Munford [Case No. 267]), the question was decided against the conclusiveness of such a judgment, and I am not satisfied that the decision was erroneous. This case, however, varies from that, in a material circumstance. In that case, the heir was bound by the obligation of his ancestor, and was liable to the creditor directly. In this case the creditor is bound to proceed against the executor, and to exhaust the personal estate before the lands become liable to his claim. The heir or devisee may, indeed, in a court of chancery, be united with the executor in the same action, but the decree against him would be dependent on the insufficiency of the personal estate. Since, then, the proceeding against the executor is, in substance, the foundation of the proceeding against the heir or devisee, the argument for considering it as prima facie evidence may be irresistible, but I cannot consider it as an estoppel. The judgment not being against a person representing the land, ought, I think, on the general principle, which applies to giving records in evidence, to be re-examinable when brought to bear upon the proprietor of the land.

It was said, but not pressed, by the counsel for the plaintiff, that the decree of the court of chancery was not even prima facie evidence against the representatives of George Brooke. I do not concur with him in this proposition; but if I did, it would not, I think, materially affect this case. The decree was against Braxton, as well as against the representatives of Brooke and Page, and is admitted to be conclusive against Braxton and his representatives. They could never be permitted to deny that Braxton owed Campbell the money specified in that decree. The undertaking on which the decree was pronounced against Brooke's executor, is dated in 1775, and promises, under seal, to stand security for Braxton to Campbell, for the sum then due. This sum is fixed by the decree against Braxton, and the defence now set up for Brooke does not controvert that decree as to Braxton, but insists on several circumstances which, as they contend, discharge Brooke from the liability incurred by his undertaking, as Braxton's surety. The first of these is, the release of Broadneck, which had been mortgaged for the debt, in 1769, when the bills drawn by Braxton and sold to Campbell came back protested. William Aylett and George Brooke became sureties to Campbell for this debt. On the 21st day of May, in the year 1773, Campbell joined Braxton in a conveyance of the mortgaged premises to John Shermer, which is recorded in September, of the same year. On the 15th of December, 1775, Aylett and Brooke transmit to Campbell an instrument in writing, under seal, which, after reciting a former undertaking as sureties for Braxton, contains these words: "We, therefore, in consideration of our former agreement, do promise and oblige ourselves to stand security for the said Braxton to the said Campbell, his heirs, executors, administrators, and assigns, for the sum of money now due from the said Braxton to the said Campbell."

It is contended for the plaintiff, that this suretyship was probably undertaken in the confidence that the mortgaged property was amply sufficient to discharge the debt, and that Campbell, by releasing this property without the consent of the sureties, discharged them. There would be great force in this objection, had the release of the mortgaged premises been dated subsequent to the engagement made by Aylett and Brooke. But that engagement was dated in December, 1775, and the deed of conveyance by Braxton and Campbell to Shermer, was recorded in September, 1773. No evidence exists that either the mortgage or its release was communicated to Aylett or Brooke, other than the presumption arising from the notoriety of such transactions, and from the fact that both deeds were recorded. These circumstances are precisely as strong to

prove a knowledge of the deed to Shermer, as of the deed to Campbell, were it even proved that the first bond of Aylett and Brooke anteceded the deed to Shermer. The undertaking made in December, 1775, cannot be presumed to have been induced by a deed of mortgage which had been released more than two years, and although it is expressed to be made in consideration of the prior undertaking, yet that prior undertaking would not have been renewed under circumstances, which, in the opinion of the parties themselves, absolved them from it, both in law and conscience. The fair inference from this renewal is, that the parties, being mutual friends, the conveyance to Shermer was with the knowledge and assent of all.

The second objection arises from a fact which is considered as an implied release of Aylett from his joint obligation with Brooke. On that instrument is this endorsement:—"Aug. 6th, 1777, I do oblige myself to perform every engagement that Colonel William Aylett was bound by the within to perform, and to be considered as one of the securities of Mr. Braxton, in the room of Colonel Aylett. Witness my hand, this 6th day of Aug. 1777. Robert Page." It is contended, that this endorsement must be considered as made with the consent of Campbell, who, from its terms, and from suing the representatives of Brooke and not of Aylett, must be considered as having agreed to discharge Aylett. The inference is, I think, a fair one. The instrument always remained in possession of Campbell, who must be presumed to have been privy and assenting to the endorsement, and who has avowed it by his suit. It is insisted, that the legal effect of this agreement is to discharge Brooke as well as Aylett, because the release of one joint obligor releases the other. It is obvious that the release of Brooke was not contemplated by the parties. If such be the effect of the instrument, an operation is given to the words, which they do not naturally import, and which the parties could never have foreseen or intended. If a positive rule of law require such a construction, the court must make it; but the construction can be justified only by a positive and well-settled rule. The common rule of law, and it seems also to be the rule of reason, is, that words shall subserve the intent; but when the reverse of this rule is to be adopted, and both the words and the intent of an agreement are to yield to a technical principle, that principle ought to be sustained by decisions of unquestionable authority, the application of which cannot be doubted. The principle is, that a covenant never to put a bond in suit, is a release, and it is also settled, that a release to one of several obligors, is a release to his co-obligors. Both these points have been frequently decided, and the plaintiff is certainly entitled to the benefit of those decisions, as far as they apply to his case. The principle will be found in any abridgement,[2] or general treatise on the subject, with a reference to the cases which establish it. In no one of them does the obligation contain any other party than him with whom the covenant is made. In all of them, the covenant, if broken, gives a right of action to the parties bound in the obligation, and the measure of their damages is given by the recovery of the obligee in his suit against them. If A. is bound to B. in an obligation, and they enter into a covenant, stipulating that it shall never be put in suit, notwithstanding which, B. puts it in suit, this breach of covenant gives A. an action against B., in which he must recover in damages, precisely the sum to which the judgment obtained by B. may amount. To avoid circuity of action, this covenant may be pleaded as a release. Thus far the cases go, and if there be one which goes farther, I have not found it. To bring himself within their letter, Brooke ought to show a covenant, in which Campbell stipulates with Aylett and himself, never to put their bond in suit. To bring himself within their spirit, he ought to show some agreement giving him an action against Campbell, in which his right would be commensurate with any judgment Campbell might obtain against him. In such a case, and in such a case only, would the principle of the decisions relied on apply; because, in such a case only, the sole effect of leaving the instrument to operate according to its language, would be to produce circuity of action. In such a case, too, the parties can have no other intention than to defeat the obligation. It is the sole object and effect of their covenant. To construe such an instrument, then, as a release, is to give it the effect intended by the parties. I think the proposition may be stated, without fear of its being disproved by the books, that a covenant containing no words of release, has never been construed as a release, unless it gave to the party claiming that construction, a right of action, which would precisely countervail that to which he was liable; and unless, also, it was the intention of the parties that the last instrument should defeat the first.

This general view of the precedents on which the plaintiff relies, would be sufficient to satisfy my mind that they do not apply to the case under consideration, had not the contrary opinion been urged at bar, with all the earnestness of conviction, and been supported by an authority, given on the case itself, which is entitled to the utmost respect. I shall, therefore, look farther into the question, and examine some cases and principles, which are adverse to the construction claimed by the plaintiff's counsel. Lacy v. Kynaston, 2 Salk. 575, 12 Mod. 551, and 1 Ld. Raym. 688, was in substance, this:—Articles were entered into by the members of a company of comedians, binding them-

[2] See 5 Bac. Abr. tit. "Release," A 2, p. 683, Ed. Gwil.

selves to pay £100 to the representative of the plaintiff's intestate, who was a member of the company, within three months after his death, should he continue to act during his life. The action was brought against Kynaston, who was also a member of the company, and the declaration avers, that plaintiff's intestate did continue to act during his life. The defendant pleads in bar, articles subsequently entered into by the same parties, including the plaintiff's intestate, stipulating jointly and severally, that if the defendant Kynaston, should give notice of his intent to give over acting in said companies, he should be free and discharged of and from all debts, &c., entered into by him, on account of the company, and that the plaintiff's intestate, and the rest should save harmless and indemnify the defendant from all such debts, &c., or any matter or thing relating to the company. To this plea the plaintiff demurred, and the only question was, whether the articles amounted in law to a defeasance or release, or were to be construed only as a covenant. The court was of opinion that it was only a covenant, for several reasons, which are assigned in the opinion. In discussing the question, the principle, that a perpetual covenant amounts to a release, was particularly considered, and the reason given for construing such a covenant as a release, is to avoid circuity of action—"Because," says the court, "there, one should precisely recover the same damages that he had suffered by the others suing the bond. A. is bound to B., and B. covenants never to put the bond in suit against A.; if, after, B. will sue A. upon the bond, he may plead the covenant, by way of release. But if A. and B. be jointly and severally bound to C. in a sum certain, and C. covenants with A. not to sue him, that shall not be a release, but a covenant only; because he covenants only not to sue A., but does not covenant not to sue B., for the covenant is not a release in its nature, but only by construction, to avoid circuity of action; for when he covenants not to sue one, he still has a remedy, and then it shall be construed as a covenant, and no more." The same point was determined in Dean v. Newhall, 8 Term R. 168, in which the authorities were reviewed at length, and a distinction of great importance taken, between an actual and a constructive release.

It has been insisted by the plaintiff's counsel, that these cases do not apply, because they relate to obligations which were joint and several, whereas the obligation of Aylett and Brooke was joint. This objection merits consideration. It is admitted to be law, that a release to one of several obligors, whether they be bound jointly, or jointly and severally, discharges the others, and may be pleaded in bar by all. 2 Saund. 48, note; 2 Salk. 574; 12 Mod. 550. That the obligation is joint, or joint and several, then, can make no difference, if there be an actual release. The difference, if there be any, consists in the construction of the instrument. The same words, it may be contended, would amount to a release of a joint obligation, which would not release one which was joint and several. Has this ever been so determined? I can only say, if it has, I have not found the case. In the absence of authority, the proposition must rest upon its reasonableness, and on analogy. The reason assigned by the plaintiff in support of this distinction, is that which is given by the court in Lacy v. Kynaston. In case of an obligation which is several as well as joint, the plaintiff may still sue the obligor, to whom the covenant does not apply, without violating his engagement, or subjecting himself to a suit; whereas, if the obligation be joint only, both obligors must be joined in the action. There is certainly much in this argument which deserves consideration. Without admitting its conclusiveness, which I am far from doing, it is necessary, as an indispensable preliminary to its application to the cause at bar, to show that the endorsement on the bond of Aylett and Brooke, amounts to an agreement on the part of Campbell not to sue Aylett, on which agreement Aylett might recover damages equivalent to those he had sustained by the suit. I do not think this is shown. Aylett is no party to the endorsement, and it is only upon the intention that Campbell can be considered as coming under any stipulation to him. What, then, was his intention? Certainly not to discharge the obligation. The endorsement supposes the obligation to remain in full force, and is received in the confidence that it does remain in force. It may well be doubted, whether a destruction of the obligation would not also destroy the endorsement; for Page agrees only to stand in the place of Aylett in the obligation, and if that be annulled, it is by no means clear that Page is bound to any thing. Were this even otherwise, it is very certain that Page would be placed in a situation entirely different from what he intended. If the endorsement is to be considered as a substantive agreement, referring to the obligation, for the sole purpose of ascertaining the sum for which he was bound, and remaining in force after the destruction of that obligation, then Page would be liable to Campbell for the whole debt, without retaining that recourse against Brooke for a moiety of it, which Aylett certainly possessed. He would not then stand in the room of Colonel Aylett, as the endorsement imports, but in the room of both Aylett and Brooke, which the endorsement does not import. To construe Campbell's assent to this endorsement, then, as an agreement not to sue Aylett, if the effect of that agreement would be to destroy the obligation, would be to defeat the plain intention of the parties, and effect an object they designed to guard against. This is not to be tolerated, if the act can be otherwise con-

strued. I can perceive no difficulty in doing so. The intention of the endorsement being, to secure Colonel Aylett against the claim of William Campbell, and to transfer his liability to Mr. Page, leaving Mr. Brooke still bound, the endorsement must be so construed as to give full effect to the whole of this intention, so far as its words will justify. Now, if by supposing an agreement on the part of Campbell not to sue Aylett, we plainly defeat the intention of the parties, and probably annul the instrument itself, we ought not to suppose such an agreement, but some other more congenial to their views. Their object would be effected by joining Aylett in the suit on the obligation, and either not proceeding to judgment against him, or not using the judgment when obtained. If it were true, that the suit could never be brought against Brooke without joining Aylett in the writ, it would be much more rational to suppose that an agreement for his security, omitting to describe the mode by which it was to be effected, was to be carried into execution by means consistent with other objects plainly intended by the parties, than by means which must defeat those objects.

The respect which the law in all such cases pays to the intention with which an instrument is executed, may receive some illustration from the difference between the construction of a perpetual and of a temporary covenant, not to put a bond in suit; precisely the same words which, in a perpetual covenant, are a bar to an action, cannot, if used in a temporary covenant, be pleaded to an action brought during the suspension. Why is this? If the perpetual covenant can bar the action forever, why may not the temporary covenant be pleaded to an action brought while the suspension exists? The reason of the distinction is found in the principle, that a personal action once suspended, is gone forever; although, therefore, it is the intention of the parties to suspend the action, and although this intention is expressed by their words, yet, as the consequence of giving effect to this intention would be to destroy another more important object, the validity of an instrument not designed to be destroyed, such a covenant is not allowed to constitute even a temporary bar, but the party injured by its breach, must take his remedy by a cross action upon it. On general principles, then, I should, in the absence of express authority, be led to the conclusion that a covenant with one of several joint obligors not to sue him, could not be pleaded as a release; but the very case has, I think, been decided. In Hutton v. Eyre, 1 Marsh. 608, 6 Taunt. 289, 1 E. C. L. 385, which was cited by Mr. Call, the action was brought for money paid to the use of the defendant. The plaintiff and defendant being partners, entered into a deed on the 26th of August, 1809, to dissolve their partnership on the 1st of January, 1810, and agreed that neither would in the mean time contract any debt on the credit of the firm. On the 27th of October, 1810, the defendant executed an assignment of all his property to trustees, for the benefit of his creditors, in consideration of which the creditors covenanted and agreed with the defendant not to sue him on account of any debt due to them from him; and that in case they did sue him, the deed of assignment should be a sufficient release and discharge for him. The trustees sold the property assigned to them, and paid five shillings in the pound to the creditors, after which the plaintiff paid the residue of certain debts contracted by the defendant between the date of the agreement and the time of dissolution, on the credit of the firm, for which this suit was brought. It was contended for the defendant that the covenant not to sue him being perpetual, was a release not only to him, but to his partner also, and that the payment being voluntary, gave no cause of action. It is observable that this case is stronger than that under consideration would be, did the endorsement made by Page, on the bond of Aylett and Brooke, even contain a stipulation that no suit should be brought against Aylett, because the instrument provides expressly, that in case suit should be brought, the deed of assignment should be a sufficient release and discharge. In delivering the opinion of the court, Lord Chief Justice Gibbs noticed the cases of Lacy v. Kynaston and Dean v. Newhall [supra]; but observing the circumstance that those cases were on joint and several obligations, and were, therefore, not direct authority for the case before the court, he added: "We must look at the principle on which the rule has been applied, that a covenant not to sue shall operate as a release. Now, where there is only A. on one side, and B. on the other, the intention of the covenant by A. not to sue B., must be taken to mean a release to B., who is accordingly absolutely discharged from the debt which A. undertakes never to put in suit against him. The application, therefore, of the principle in that case, not only acts in prevention of the circuity of action, but falls in with the clear intention of the parties; but, in a case like the present, it is impossible to contend that, by a covenant not to sue the defendant, it was the intention of the covenantors to release the plaintiff who was able to pay what his partner might be deficient in. It would have been an easier and a shorter method to have given a release than to make this covenant. The only reason, therefore, for their adopting this course, was, that they did not choose to execute a release to the defendant, because that would also have operated as a release to the plaintiff, whereas they considered that a bare covenant not to sue the defendant, would not extend to his partner; as, therefore, the terms of the covenant do not re-

quire such a construction, and as such construction would be manifestly against the intention of the parties, we are decidedly of opinion that it ought not to be permitted so to operate." I can add nothing to the language of Chief Justice Gibbs, to show farther the direct application of this case to that under, the consideration of the court. That this was not a joint obligation, but a joint assumpsit, constitutes, I think, no difference in the cases.

In considering a principle of construction, which rests entirely on a technical and positive rule, as defeating a plain intention, it may not be altogether improper to consider the action of other technical principles on the case. It is clear that if this endorsement be construed as an agreement between Campbell and Page, who is a stranger to the bond, it cannot release Brooke the obligor. This is expressly stated by the court in the case of Lacy v. Kynaston; but if it be considered as an agreement between Campbell and Aylett, still it is an agreement by parol only, and an agreement by parol cannot release an instrument of writing under seal. This subject is discussed in Fowell v. Forrest, 2 Saund. 47n, in a note of Mr. Williams. Brooke does not allege satisfaction of the contract, but a discharge from it; he does not allege performance, but that he is not bound to perform. The instrument which will sustain such a defence, must be of equal dignity with that which it professes to dissolve. According to the best view I can take of the question, I cannot consider the endorsement made by Page on the bond of Aylett and Brooke, as implying any agreement on the part of Campbell, which could be used by Brooke, in law or equity, as a release.

The next objection to Campbell's claim is, that the estate of Robert Page, ought to be exhausted, before recourse is had to Brooke; because, in June, 1792, Braxton mortgaged sundry slaves to Page and White, to indemnify Page, on account of this suretyship, and White, for suretyships entered into by him. Braxton was afterwards taken in execution at the suit of Richard Adams, upon which Page and White agreed that a sufficient portion of the mortgaged property, should be sold to discharge the execution. It is contended on the part of Brooke, that he has an equal interest with Page in this mortgage, that it was the duty of Page to see to its application to the discharge of the debt, for which they were both bound, and that he is liable, first, for his negligence in allowing the property to be wasted; and secondly, for having allowed a part of it to be applied to a different object. As Campbell was not party or privy to this transaction, it can give Brooke no claim on Campbell, were it even admitted to give him an equity against Page. It is undoubtedly the course of the court, to decree in the first instance against the party who is ultimately responsible; but this is only done, where the parties are before the court at the time of the decree, and their several liabilities, are clearly ascertained. It would be alike unprecedented and unreasonable, to anticipate, in this action, the liability of Page to Brooke, for a transaction not before the court, and to compel Campbell to resort to that liability, and to forego his direct claim on his immediate debtor, and that without any proof of the competency of Page's estate, to satisfy the unascertained equity of Brooke. The unreasonableness of such a pretension seems so obvious, that I presume it is brought forward only on account of its connexion with a subsequent transaction between Page and Campbell. On the 6th of June, 1821, articles of agreement were entered into between the representatives of Page, and the attorney in fact, of Campbell, in which Campbell agrees in consideration of one moiety of the whole debt paid by Page's representatives, not to proceed against them for satisfaction of any part of the decree which might be obtained against the representatives of Page and Brooke; but this agreement is to be without prejudice to his right to pursue the other defendants till the other moiety of the debt should be satisfied: "and the said Campbell farther covenants, that the representatives of Page, shall never be made to contribute anything to the estate of George Brooke, on account of any payment the said Brooke's estate may be decreed to make to the said Campbell." This agreement, not to levy the decree, which might be obtained against the representatives of Brooke and Page, upon the estate of Page, which had already paid one moiety of the whole debt, is in terms, which exclude the idea of being technically a release of the action, for that is to proceed, as if the agreement had not been made. The representatives of Brooke, can avail themselves of it so far only, as it raises an equity in their favour, against Campbell. What is this equity? It cannot be contended, that receiving one moiety of the debt from Page, is an injury to Brooke. Ex parte Gifford, 6 Ves. 805. Nor can he be injured by the agreement not to levy Brooke's moiety, in any possible state of things, on Page. The liability of Brooke cannot be increased, nor his burden augmented by this transaction. It may be diminished, because his possible liability for more than a moiety of the debt, is removed. Can the covenant, that the representatives of Page shall never be made to contribute anything to the estate of George Brooke, on account of any payment the said Brooke's estate may be decreed to make to the said Campbell, give Brooke an equity against Campbell? To sustain this, it will be necessary to prove, that the estate of Brooke has an equity against that of Page, and that it is deprived of that equity by this agreement. The amount of this injury is, the precise extent of Brooke's claim on Campbell. Brooke's equity against Page, is founded on the agreement that a part of the property mortgaged to White and

Page, might be applied in payment of the debt due from Braxton to Adams, and on the failure of Page to apply the mortgaged property to Campbell's debt. This mortgage was obtained for the benefit of Page and White, in proportion to their respective responsibilities, and it will not, I presume, be denied, that they are to be completely exonerated, before any equitable claim on the fund can accrue to Brooke. How far Mr. White may have been relieved does not appear, nor is it shown that one cent arising from this property has ever been applied to the use of Mr. Page. Admitting him to be responsible for the sum paid to Adams, his responsibility can be only for the excess of that sum over the debts the mortgage was intended to secure, and Brooke ought to show that excess. Its existence is not and cannot be pretended.

As little foundation is there for the claim growing out of the alleged negligence of Page. It will scarcely be pretended, that one of two sureties who obtains an indemnity for himself, becomes thereby responsible to the other for that other's moiety of the debt, however insufficient the thing given as an indemnity may be, even to secure himself. If this cannot be pretended, it will certainly be required from the person who claims the residue, to show that there was a residue, and that it has been lost to him by the fault of the party whose responsibility he alleges. His difficulties would not, even then, be overcome. The inquiry would still be, why did he not himself proceed to assert his equity, by calling on the mortgagee and mortgagor to apply the fund to its proper object, and thereby relieve him to the extent of his right. But I enter not into this inquiry, because the subject is not, and probably never will be, before the court. It is enough to say, that this equity cannot be assumed in this suit to the discharge of Brooke's debt to Campbell. I will barely add, to prevent my being understood as deciding anything which might affect a point, not strictly before the court, that I do not mean to indicate any opinion whether the contract between Campbell and Page could or could not influence any claim of Brooke on Page, growing out of the conduct of Page respecting the mortgage of 1792. In deciding on the right of the plaintiff to demand a specific performance of his contract with Macon, that question must be considered as remaining open.

An additional objection to Campbell's claim on the Mantapike estate, is derived from the length of time which has elapsed since the decree by which his debt was established. The decree of affirmance was entered on the 3d of March, 1800, in the court of chancery; and on the 29th of September, in the same year, all attempts to find the mortgaged property having failed, executions were directed by the court to issue against the estate of Brooke and Page respectively, in the hands of their respective representatives, who, on the 18th of March, 1801, were ordered to settle their several accounts of administration before a commissioner of the court. From that time till the 27th of October, 1820, when the supplemental bill was filed, no step whatever has been taken against Brooke's estate. By this gross negligence, the plaintiff alleges, that his testator has been greatly injured, if Campbell be now permitted to charge his debt upon Mantapike. There is undoubtedly great weight in this objection; but the extent of its influence on Campbell's claim, depends on circumstances, the testimony concerning which, is not to be found in the record before the court. It will form a very material part of the case, in which Keith is plaintiff. That case being not ripe for a hearing, the claim of Campbell upon Mantapike, even while it remained in the hands of the devisee, must, for the present, be considered as uncertain. Previous to any discussion of the effect of such a claim on this contract, the court will proceed to the second point made by the plaintiff in the argument, which is, that

Second. If Campbell's is one of George Brooke's just debts, and is chargeable on his lands, still it cannot charge Mantapike, in the hands of William H. Macon. In considering this point, I shall assume for the present two propositions: 1. Had Keith's suit, praying a sale of Mantapike for Campbell's debt been instituted before the contract between Garnett and Macon was entered into, the subsequent sale, made by the executor, without the assent of the court or creditor, could not have relieved the land from the charge created by George Brooke's will. 2. Had the conveyance been made, and the purchase-money been paid, before notice of the claim, the purchaser would not have been affected by it. It is unquestionably true that, whatever doubts may exist respecting the liability of a purchaser, for the application of the purchase-money, to schedule debts, with which lands are charged, he is exempt from all liability for its application to debts generally. Had the contract, then, been fully executed before this claim was asserted, Mantapike would have been clearly exonerated from it. These propositions are stated, for the purpose of clearing the way, to the very case before the court; the case of a contract for the purchase of land, equitably charged with the payment of debts, and notice of a debt given to the purchaser between the date of the contract, and the time when it is to be executed.

In considering this case, the question immediately occurs, whether there is any distinction between a charge on lands, which descend to the heir, or pass to a devisee, subject to the charge; and a devise to executors or other trustees, for the payment of debts. In Anon. Mos. 96, and in Nels. 36, this question was answered in the affirmative by the court; and it was determined, that where lands were charged with debts generally, they

remained liable to creditors in the hands of a purchaser. This distinction was, however, overruled in the case of Elliot v. Merryman, Barnard. Ch. 78, 81, 82, in which the master of the rolls determined, that in such a case the purchaser was not liable for the application of the purchase-money, and said that, "otherwise, whenever lands are charged with the payment of debts generally, they could never be discharged without a suit in chancery, which would be extremely inconvenient." There were many circumstances in the case of Elliot v. Merryman, showing, that the creditors acquiesced in the sales, and looked to the vendor for their money, which might have had great influence on the mind of the judge; and, if that case stood alone, the question might not be considered as settled. But it does not stand alone. The principle laid down by the master of the rolls, appears to have been followed ever since; and in Walker v. Smalwood, Amb. 676, which was a charge on land for debts generally, the chancellor said, "the court has established it as a rule, that where the charge is general, the purchaser is not bound to see to the application of the purchase-money." This rule has been pursued invariably in the English courts for near a century, and may, therefore, be considered as well settled. Although the charge creates no legal estate, it manifests a clear intent that the person in whose favour it is made, shall receive so much out of the land, which a court of equity considers as a trust, and converts the owner of the legal estate into a trustee. The heir or devisee, being once considered as a trustee, and the charge considered as a trust, public convenience and uniformity of decision would lead to an assimilation of these charges, or implied trusts, to those which are express; and, in general, where no other question arises than what relates to the construction of the trust, and the respective duties it imposes on a vendor and vendee, in a case attended with no peculiar circumstances, a court of equity perceives no ground of distinction between them. But, if it be admitted as a principle, that in a case of direct and culpable, or of negligent and constructive collusion between the vendor and vendee, by which the trust may be defeated, the purchaser may become responsible for the application of the purchase-money; or, in other words, the land may remain charged in his hands; it is possible that there may be a difference in the testimony required to establish this constructive collusion, in the one case, and in the other. If lands be devised to trustees or executors, to be sold for the payment of debts, the devisee possesses a legal, but not a beneficial estate in the premises. He can sell for the purposes of the trust only, and the vendee can consider him as acting no otherwise than in the execution of a trust, for which he has been selected by the owner of the property. This confidence being placed in him by the person who had the sole right to dispose of the property at his will, no other can question the correctness of his proceeding, or can be justifiable in suspecting any intention to violate the trust. The payment of the purchase-money, therefore, to the trustee, is an act which is the regular consequence of the contract, and if that be made fairly, the purchaser has no right to inquire in what manner the residue of the trust will be executed. He has no right to suspect that the person who has been selected by the testator for its execution, will violate the trust reposed in him, and no collusion between him and the trustee ought to be implied from equivocal acts. The existence of a debt is the very circumstance which justifies a sale, and notice of its existence can never excuse the purchaser for withholding the payment of the purchase-money. But where lands descend to the heir, or pass to the devisee, he does not necessarily sell, in execution of the trust, but for his own purposes. The trust is, in a great measure, the creature of a court of equity, and the heir, or devisee, is made a trustee by the court. When he sells, he is not executing a power confided to him for the purpose of paying debts, but is parting with an interest vested in himself, for his own use, which interest is charged with debts. The purchaser does not consider the seller as executing a trust, nor does he so consider himself; but each considers him as acting for his own benefit. If, in such a case, the charge still remains unsatisfied, the purchaser who has notice of it, may be considered as aiding in, and conniving at, a violation of the trust, under circumstances which would not justify the same conclusion, if the trustee professed to act in the execution of his trust.

It becomes, therefore, material to inquire, what degree of connivance on the part of the purchaser, in acts which may defeat the trust, will leave him responsible to the creditor. It is scarcely necessary to say, that positive fraud or direct collusion, for the purpose of defeating the trust, will charge the purchaser. It is unnecessary to urge this proposition, because the principle is, I believe conceded by all, and because too, the transaction before the court, has no taint of that description; its moral fairness is not questioned, and the sole inquiry is, whether the purchaser by proceeding with the contract and paying the purchase-money, would have exposed himself to the hazard of such a constructive collusion, as to leave him subject to the claim of the creditor. In pursuing this inquiry, it is proper to recollect, that Mantapike was devised by George Brooke, to his son Richard, charged with the payment of his debts. This devise gave Richard an absolute estate at law, subject to an equity, which could be asserted only in a court of chancery. Richard Brooke would be considered, in this court, as a trustee for the creditors of his father, and had they applied to a court of equity, a sale of the property would,

if necessary, have been decreed. Richard survived his father upwards of thirty years, during which time no claim was asserted on Mantapike, and in his last will, devised his estate to be sold, and the money divided among his children. One clause is supposed to charge his real as well as personal estate with his debts. Although a court of equity will consider the trust with which Mantapike was chargeable in the hands of Richard, as passing with his land to his devisee, yet the devisee might naturally consider himself as acting under the express trust contained in the will of his immediate testator. The purpose of his sale would be, to comply with the will of Richard, and any presumption, that he might possibly hold himself bound to pay the debts of George, is prevented, so far as respects Campbell's claim, by the fact, that he denied all liability for that claim. If the purchaser should, after receiving notice of that claim, proceed to pay the purchase-money to the seller, who contested its validity, and did not hold himself responsible for it, the question arises, whether payment under such circumstances might not be considered, in a court of equity, as so far implicating the purchaser in an act tending to defeat the trust, as to charge him in the event of a failure on the part of the trustee, with the amount of the debt, so far as the purchase-money was liable for it. With full notice of the claim, he pays the money to a person who receives it, not for the avowed purpose of applying it to the objects of the trust, but of applying it to distinct trusts created by the will of which he is executor. This state of things presents a case entitled to very serious consideration.

It is an old rule, that all persons acquiring property bound by a trust with notice, shall be considered as trustees. The ancient cases on this point are collected in Equity Cases Abridged, under the title "Notice," and the modern decisions maintain the principle; the purchaser is subject to all the consequences of notice, if he receives it before payment of the purchase-money. In one case, Wigg v. Wigg, 1 Atk. 382, 384, this rule has been carried so far as to affect the purchaser who had paid his purchase-money, but had not received his conveyance. Whatever may be thought of the rule as applying generally to cases of this description, it has, I believe, never been doubted, that notice after the contract and before the payment of the purchase-money, made the purchaser a trustee. That the charge created by the clause in George Brooke's will, which subjects his lands to the payment of his debts, is a trust in the view of a court of equity, is admitted, and the purchaser with notice must take the land clothed with that trust, unless he can bring himself within the principle that he is not bound to see to the application of the purchase-money. I have certainly no disposition to contract this principle within narrower limits than have been heretofore assigned to it. On the contrary, I am strongly inclined to the opinion that, if the instrument by which the trust is created, contains no provision contradicting the presumption that the person who is to make the sale is also to execute the trust throughout, it will be found difficult to maintain the dicta which are scattered thick through the books, declaring the purchaser bound to see to the application of the purchase-money, in cases of scheduled debts, or legacies. The principle, however, which supports this opinion must be examined, to determine how far it will carry us. The person creating the trust has confided its execution to the trustee, where he has named one, and it is a part of his duty to sell the trust property, and generally to receive the purchase-money, and dispose of it for the purposes of the trust. The trust could not be executed without a sale, and sales would be very much embarrassed, if the purchaser, by the mere act of purchase, became a trustee. In all cases, therefore, where the objects are not so defined as to be brought at once to the view of the purchaser, it is settled, that he is not affected by them, and has only to pay the purchase-money. The same rule is established in the case of a charge, where the lands descend, or are devised, liable to the payment of debts. In such case, a court of equity considers the heir, or devisee, as a trustee, and exercises the same control over him as over a trustee named by a testator. In either case, if there be nothing to show that the trustee is acting in violation of his trust, the purchaser must consider him as acting in pursuance of it; and as the sale may be a necessary part of it, the purchaser has done every thing incumbent on him when he pays the purchase-money, and is, consequently, relieved from the necessity of inquiring into the conduct of the trustee.

But trusts, whether express or implied, are the peculiar objects of care to courts of equity, and are guarded from abuse with great vigilance. In the exercise of this vigilance, they extend their control, not only over the trustees themselves, but over all those who have transactions with the trustees. Their endeavours to secure the faithful execution of trusts would often be defeated, if their regulations could not comprehend and bind those who contract for the trust property. To prevent the abuse of trust by the trustee, it is necessary to annul his acts, so far as they constitute an abuse; or in other words, to consider the property in the hands of a purchaser who has aided in the abuse, as still charged with the trust. In affirmance of this principle, the master of the rolls said, in a late case (Balfour v. Welland, 16 Ves. 156): "Where the act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act tending to defeat the trust, of which they have notice." Plain as this principle is, and strictly conformable as it is to the general doc-

trines of a court of equity, there is some difficulty in applying it to particular cases. It is not easy to mark the precise act which constitutes such a breach of duty in the trustee as will affect the purchaser. If William Garnett be considered, in this court, as a trustee for the execution of George Brooke's will by the sale of Mantapike, it would defeat the trust to sell that estate for the uses described in Richard Brooke's will, unless the debts of George Brooke are to be considered as the debts of Richard Brooke, provided for by that clause in his will which respects his own debts:—And if William Garnett sold, with the avowed purpose of excluding the debts of George Brooke, or if he should proceed to distribute the money according to the will of Richard Brooke, disregarding the claims of George Brooke's creditors, if there be any, the trust, so far as respected those claims, would be defeated, and a purchaser intending to aid in thus defeating the trust, could not be perfectly secure. But if William Garnett sold, with the intention of paying George Brooke's creditors first, and then of distributing the residue of the money according to the will of Richard Brooke, the act of sale would be no breach of trust, since a sale would be necessary for its performance. A purchaser, therefore, of the Mantapike estate might be placed in some peril. After receiving notice from a creditor of George Brooke, he might be considered, if he proceeded with the contract, as taking upon himself a responsibility for the subsequent transactions of William Garnett, which was no part of his engagement, and which he did not mean to take. I very readily admit, that if a trustee sells for the payment of debts generally, he is at liberty to contest any particular debt, and no notice to the purchaser can involve him in the contest. But, in such case, the trustee is in the fair execution of his trust, and regular performance of his duty; and the purchaser, having no right to intrude himself into the trust, cannot be made responsible for its execution. But if the trustee, not professing to sell under the trust, holds himself absolved from it, and this is made known to the purchaser, the question, whether by completing the purchase, he assists in defeating the trust, and will be held responsible in a court of equity, becomes a much more serious inquiry. In pursuing it, all the circumstances must be considered, in order to determine whether they prove satisfactorily that the trustee is not acting in pursuance of the trust, but under the opinion that it does not bind him.

In this case, William Garnett is the immediate trustee of Richard Brooke, charged with the execution of his will, which directs the sale of Mantapike for the benefit of his children, and probably for the payment of his own debts. Although a court of equity will consider the land as charged with any debt due from George Brooke, and treat the devisee of Richard Brooke as the trustee for such creditor, yet the devisee would assume a very great responsibility, were he to undertake to pay this debt without the direction of a court. If the existence of the debt might be presumed, of which great doubts have been suggested at the bar, the extent of his testator's liability for it is far from being certain. The personal estate of George Brooke ought to have been exhausted before his real estate became chargeable, and the proportion of the debt with which Mantapike ought, under all circumstances, to be charged, could not safely be settled by the executor. No counsel could have advised William Garnett to incur this responsibility. No court could censure him for not incurring it. William H. Macon, then, who purchased without suspicion that any creditor of George Brooke remained unsatisfied, had great reason for the apprehension that Mr. Garnett, not considering himself as a trustee for the benefit of such creditor, would apply the money to the uses prescribed in the will of Richard Brooke. This apprehension could not be removed by any inquiry. The bill filed by William Garnett to enforce a specific performance, alleges expressly that Campbell's debt was not due from George Brooke, and that if it was, Mantapike is not charged with it. Whether any direct communication took place beween the parties on the subject is unknown; but as none is stated, none can be presumed. The fact, however, is sufficiently obvious, that any inquiry respecting it must have been answered by the assurance, that the justice of the claim was denied. Whether going on to complete the contract, by paying the purchase-money, under these circumstances, would be considered by a court of equity as such a concurrence in "an act tending to defeat the trust" as would affect the purchaser, is a question of real difficulty. Some light may be thrown upon it by analogies drawn from the liability of the purchaser of leasehold estates. It is well settled, that the purchaser of a chattel from an executor is not liable for the application of the purchase-money, although such chattel be given in trust for a special purpose, or be itself a specific legacy. Elliott v. Merryman, Barnard. Ch. 78, 81; 2 Atk. 42; Ewer v. Corbet, 2 P. Wms. 148; Burting v. Stonard, Id. 150. The reason is, that no man can exempt his personal estate from the payment of his debts, or make any disposition of it which shall prevent its passing to his executors, to be sold by them if his debts require it. Consequently, whenever an executor sells in execution of his trust, the purchaser takes the property, freed from any charge with which the testator may have burdened it by his will. But if the sale be a breach of trust, and the purchaser have notice of the fact, he is affected by it. If the executor sells to a person who knows that there are no debts, or that all the debts are paid, and that the sale is not a fair execution

of the trust, the purchaser may take the property subject to the trust. 2 P. Wms. 148, 150. So, too, if the executor sells at such under value as to indicate fraud, or for payment of his own debt. Crane v. Drake, 2 Vern. 616; Scott v. Tyler, 2 Brown, Ch. 433, 477; Andrew v. Wrigley, 4 Brown, Ch. 125, 130; Hill v. Simpson, 7 Ves. 152, 167; Lowther v. Lord Lowther, 13 Ves. 95; M'Leod v. Drummond, 17 Ves. 169. These cases proceed upon the principle, that the executor does not sell in pursuance of his trust, but in violation of it, and that the purchaser, knowing this fact, aids him in its execution by making the contract. The purchaser is not bound to make any inquiry. The general power of the executor to sell protects him in buying; but if he buys with notice that the sale is a breach of trust, the property remains charged with it. I feel much difficulty in resisting the application of this principle to freehold estates charged with the payment of debts. It would seem to me as if the inquiry must always be into the fact. The question must always be—Is the sale, taking its object into view, a breach of trust? And are the circumstances such as to charge a purchaser, having express notice, with a participation in the breach? The purchaser of a chattel from an executor, with notice that no debts are due, or in payment of his own debt, seems to me to present the same question.

Two cases have been cited by the counsel for the plaintiff, as bearing very strongly on that under consideration of the court. The first is Walker v. Smalwood, Amb. 676. John Smalwood devised his estate to his son Thomas, charged with the payment of debts, and Thomas afterwards mortgaged the estate, and then devsed it to his wife, charged with the payment of his debts. The bill was brought by bond creditors of John and Thomas Smalwood, against the wife and mortgagee. Pending the suit, they joined in selling the land to Yeomans, against whom a supplemental bill was filed, to set aside the sale; it was set aside upon the principle, that the execution of the trust had been taken out of the hands of the trustee, and transferred to the court. The chancellor said: "Though a general charge does not make a purchaser before the suit see to the application of the money, yet after a suit commenced, I should hold him bound to it; and I hold it as a general rule, that an alienation pending a suit is void." He also states, that actual notice was admitted. The propositions stated by Lord Camden in this case, have not, I believe, been questioned, but those propositions do not reach the point now in controversy. A part of the purchase-money was applied to the mortgage made by Thomas Smalwood, and the case does not inform us, that any objection was made on this account; but the case does not inform us either, whether this mortgage was made in satisfaction of a private debt due from Thomas, or for money generally, which might have been applied to the debts of the father, or for a debt actually due by the father. Notice was admitted; but of what? Probably of the application of the money, and of the pendency of the suit; but these facts do not imply a breach of trust, since it is not shown that the mortgage itself, which is an alienation pro tanto, was made under circumstances which could involve the mortgagee in the application of the money. This case, then, has no positive application to that at bar.

The other case is, Hardwick v. Mynd, 1 Anstr. 109. William Mynd devised considerable estate to his son William Mynd, charged with certain legacies to his daughters. He also devised other estates to George Mynd and John Roberts, in trust for payment of debts, and appointed them his executors. George Mynd and John Roberts renounced the executorship, and conveyed their interest in the freehold estates to William the son, subject to the trusts of the will. William mortgaged great part of the estate for his own debts, and, about eleven years after the death of his father, became a bankrupt. The creditors of the father then filed this bill for the satisfaction of their demands, and it was admitted, that the most considerable of the mortgagees took, with notice of the situation of the property. Eyre, C. B., said (and it is to be presumed the court concurred with him): "If the trustees had made these mortgages, they would not have been disturbed; in fact they are made by them, for they have assigned their whole interest to William Mynd, to act for them in the trust." If the case stopped with this opinion, it would be, perhaps, conclusive, certainly very strong in favour of the plaintiff. The mortgagees took with notice of the misapplication of the purchase-money, and were yet not held responsible for that misapplication. This decision would certainly go far in showing that a purchaser, knowing that the sale was made, not for the purpose of the trust, but of the trustee, would yet hold the land discharged from the trust; but other points were determined which deduct considerably from the application of this opinion to the case at bar, if they do not entirely destroy it. The court held the trustees liable to make good the whole deficiency arising from the misapplication of the fund. This case, then, considering the two points which were decided in connexion with each other, amounts to nothing more than this: Where there has been a collusion between the trustee and purchaser, which results in an abuse of the trust, the trustee shall be chargeable in the first instance; but the case does not decide on the ultimate responsibility of the purchaser, should the trustee prove insolvent. Applying it to the case at bar, it would prove, that had William H. Macon proceeded, after notice, to complete the contract and to pay

the purchase-money, and a suit been brought by the creditors of George Brooke, William Garnett would have been liable in the first instance; but does not, I think, prove that William H. Macon would not have been liable in the event of the trustee's insolvency. The court professed to found its opinion on the case of Burt v. Dennet, 2 Brown, Ch. 225. Dennet was trustee in a mortgage-deed from Godfrey to Burtenshaw, by which an annuity of £30 per annum was secured to the plaintiff. Dennet, having transactions with Burtenshaw, assigned the mortgage to him without the privity of the plaintiff, and afterwards assigned his property to trustees for payment of his debts. Burtenshaw paid the annuity to the year 1784, after which he stopped the payments, upon which the plaintiff filed her bill against Dennet. The chancellor said: "The plaintiff ought to have made Burtenshaw and the assignees of Dennet's estate parties, by which she might have gotten the mortgage-deeds; he then should have decreed Burtenshaw to have paid the annuity, and Dennet to stand as a security for having broken the trust." This case is not supposed to be applicable to that at bar, for the assignee of the mortgage was undoubtedly responsible for the annuity. It is cited solely because it was referred to by the court, as an authority for the opinion given in Hardwick v. Mynd, and may, therefore, tend to explain that opinion. It would countenance the idea, that in the case in which it was cited, the court did not suppose that the liability of the original trustee discharged the assignee.

Taking together the two parts of the opinion given in Hardwick v. Mynd, I cannot consider them as showing what would have been the decision of the court with respect to the mortgagees, had the trustees been insolvent. The report is very unsatisfactory, inasmuch as it assigns no reason for the decision, nor does it give the principle on which it stands. If the bill was dismissed as to the mortgagees, because the receipts of the trustees or of their agent, even under the circumstances of the case, amounted to an absolute discharge, it would be an express authority for the plaintiff in the case at bar. If the bill was dismised, because the trustees were liable in consequence of their breach of trust, and were able to make up all deficiencies, it does not affect this case. If the court meant to say, that if the trustees had made these mortgages to secure a debt due from themselves, the mortgagees would yet have held the property discharged from the trust, the decision would appear to me to be in direct opposition to the principle settled in the sales of chattels by an executor, and to the general principle, that where the act is a breach of duty in the trustee, those who deal with him, knowing the fact, are affected by it. To mortgage the property to secure their own debt, would seem to me to be a direct and palpable breach of duty in the trustees, in which the mortgagee must have fully participated; and I cannot conceive that the court meant to say that such a transaction could be innocent. I must therefore suppose, that the decision turned upon the fact, that the trustee himself, who was before the court, was, of himself, unquestionably competent to pay the money, and ought to pay it. It is true, that if the court proceeded on this idea the land ought to have been held still responsible; but the report is too defective and unsatisfactory to warrant any confidence in its being full as to this point.

These cases then, though they have a strong apparent bearing on that under consideration, are too loosely and too carelessly reported, to satisfy the court that they were decided on principles which they are cited to support. I cannot consider them as proving that land sold for other objects, in exclusion of a debt charged upon it, is relieved by the sale from that charge, if the purchaser pays with notice of the intended misapplication of the purchase-money. I repeat, then, that it is a question of fact. Did the circumstances, under which Mantapike was sold, prove that the purchase-money was to be diverted from the payment of George Brooke's debts to other objects, with such reasonable certainty as to leave it probable, that a purchaser with notice would be liable for the application of the purchase-money? or, in other words, that the land would, in the event of misapplication and the insolvency of the trustee, remain charged in his hands?

These circumstances have already been stated. The most prominent are, that William Garnett was the immediate trustee under Richard Brooke's will, though considered in a court of equity as being also a trustee for George Brooke's creditors, whose claim was prior to that of Richard Brooke's creditors or legatees, but whose claim the vendor not only did not, but could not, safely mean to satisfy, unless directed by a court of equity so to do. The purchaser had certainly reason to believe, that the sale was not made with a view to satisfy the charge created by George Brooke's will, and that the purchase-money, if paid before the institution of a suit by Campbell's representative, would be applied to the purposes of Richard Brooke's will. If a suit should be instituted before the purchase-money became due under the contract, or before it was paid, the whole affair would then be transferred to the court of chancery, and he would no longer be master of his own conduct. In the one event, he would take upon himself the hazard of paying, with full notice of the charge, money which he had reason to believe was to be diverted to different objects; in the other, he would be involved in a chancery suit, the course and duration of which he could not anticipate. Do these difficulties constitute a valid objection to a

decree for a specific performance? It cannot be doubted that these difficulties, if presented to the mind of a prudent man, contemplating the purchase of an estate, and desirous of performing his contract according to its terms, might have a serious influence on his conduct, and might deter him from making the purchase. If informed of them, after making the contract, but before its execution by the paying of the purchase-money and receiving a conveyance, he would have such strong motives for stopping entirely, or at least for pausing until the impediments could be removed, as would, I think, justify him for so doing, in the opinion of any reasonable man. Had this suit come to a hearing as between the vendor and vendee only, on the day on which it was instituted, could a court of equity have pronounced the objections to the title so frivolous, as to decree that Macon should take it, without having those objections removed? Is the exoneration of the land from Campbell's debt, by a sale to a purchaser, with notice of all the circumstances which had come to the knowledge of Colonel Macon, so perfectly clear, that a court of equity ought to decree him to take the land and pay the purchase-money, without any security against the future demand of Campbell's representative?

Both on principle and authority, I think it very clear, that a specific performance will not be decreed on the application of the vendor, unless his ability to make such a title as he has agreed to make be unquestionable. Marlow v. Smith, 2 P. Wms. 201; Rose v. Calland, 5 Ves. 186, 189; Roake v. Kidd, Id. 647; Stapylton v. Scott, 16 Ves. 272; Sloper v. Fish, 2 Ves. & B. 149. And it is equally clear that a purchaser under such a contract as that between Garnett and Macon, had a right to expect that an unincumbered estate in fee simple would be conveyed to him. Omerod v. Hardman, 5 Ves. 722, 734; Flureau v. Thornhill, 2 W. Bl. 1078. In a contract for the purchase of a fee simple estate, if no incumbrance be communicated to the purchaser, or be known to him to exist, he must suppose himself to purchase an unincumbered estate, and a court of equity will not interpose its extraordinary power of compelling a specific execution of the contract, unless the person demanding it can himself do all that it is incumbent on him to do. It has been said at the bar, that the declarations of the chancellor to this effect, have been made in cases where the title itself was doubtful, not where there was a money charge upon the estate which would not materially affect the purchaser, and which might be paid off by him without any material change in his contract, and without inconvenience. This allegation is not, I think, entirely correct. The objection is not entirely confined to cases of doubtful title. It applies to incumbrances of every description, which may, in any manner, embarrass the purchaser in the full and quiet enjoyment of his purchase. In Rose v. Calland, 5 Ves. 189, the property was stated to be free of hay tithe, and there was much reason to believe that the statement was correct. But the point being doubtful, the bill of the vendor, praying a specific performance, was dismissed. There is certainly a difference between a defined and admitted charge, to which the purchase-money may, by consent, be applied when it becomes due, and a contested charge, which will involve the purchaser in an intricate and tedious lawsuit of uncertain duration. There can, I think, be no doubt that Campbell's claim, controverted as it necessarily was by Brooke's representative, is of this character, and that the continuance of the charge on the land in the hands of a purchaser, with full notice of that claim, and of all the circumstances under which the sale was made, was too questionable to be disregarded as entirely frivolous, if alleged in a suit between Garnett and Macon only, for a specific performance. If it could not be entirely disregarded by a court, Macon was certainly justifiable in refusing to proceed while this cloud hung over the estate. He was certainly justifiable in referring the case to a court. He was justifiable in refusing to take the title which could have been made in January, 1819. But although it was not in the power of Garnett to make a perfectly secure title, previous to a decree which would dispose of Campbell's lien, it is undoubtedly now in his power. All the parties are now before this court, and if a specific performance should be decreed, the title which can be made to Macon will undoubtedly stand clear of Campbell's lien. The question, therefore, is, whether the contract ought now to be enforced?

It has been repeatedly declared, both in the courts of England and of this country, that time is not of the essence of a contract; and that a specific performance ought to be decreed, if a good title can be made at the time of the decree. This principle is sustained by many decisions, and by the practice of the court of chancery in England, to refer it to a master, to report whether the title be good at the time. But I do not think that the English court of chancery has ever laid down the broad principle, that time was never important, and that an ability to make a clear title at the time of the decree, arrested all inquiry into the previous state of things. On the contrary, if a person sell an estate to which he has no title, he cannot, though he should afterwards acquire it, enforce the contract. There is an implied averment in every sale made without explanation, that the vendor is able to do what he contracts to do. If he is not, and the vendee sustains an injury in consequence of this inability, it would seem unreasonable that the contract should be enforced; it would be the more unreasonable, if the amount of the injury should not be the subject of exact calculation. It is a general rule, that he who

asks the aid of a court of equity must take care that his own conduct has been exactly correct. It would be strange if this general rule should be totally inapplicable to time, in the execution of a contract. If the day be carelessly or accidentally passed over without making a conveyance, and no serious inconvenience result from the omission, the objection would be captious, and would very properly be discountenanced; but if the vendor was unable to clear up the title, until such an alteration had taken place in the state of things, as materially to affect the parties, time, I think, cannot, in reason, be deemed unimportant. It is settled that mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance, unless the difference between the sum to be given and the value of the land, be so enormous, as to countenance the idea of fraud or imposition. Yet, if an unreasonable contract be not performed according to its letter, equity will not interfere. Sugd. Vend. (2d Am. Ed.) 190. Between a contract which is unreasonable when made, and one which has become so before it can be executed, if the application be made by the person in fault, for the aid of the court against the party who has suffered by his inability, no clear distinction is perceived.

In the case of Gibson v. Patterson, 1 Atk. 12, Lord Hardwicke, is reported to have paid no regard to the negligence of the vendor in producing his title-deeds. But this case is said, by subsequent judges who have inspected the record, to be misreported; and if it were not, it does not appear that there was any incumbrance on the estate, or that the condition of the parties had been affected by the delay. In Morgan v. Shaw, 2 Mer. 140, the chancellor said: "The inclination of my opinion is against the old doctrine, that time is in no case of the essence of the contract;" and in Fordyce v. Ford, 4 Brown, Ch. 498, the master of the rolls said: "I hope it will not be gathered from hence that a man is to enter into a contract, and think that he is to have his own time to make out his title." In Harrington v. Wheeler, 4 Ves. 686, and Lloyd v. Collett, 4 Brown, Ch. 469, time was held material. I think that the present doctrine of the court of chancery of England, is clearly in favour of the opinion, that where time is really material to the parties, the right to a specific performance may depend upon it; and I think that the same doctrine prevails in the courts of the United States. Hepburn v. Auld, 5 Cranch [9 U. S.] 262, was a suit for a specific performance, which was objected to by the vendee, because six thousand acres of land, sold by Hepburn and Dundas, was not held by a title in severalty, but was an undivided interest in a much larger tract, and that the time of executing the contract was, in that case material. On that point the court says (page 276): "It is not to be denied that circumstances may render the time material; and the court does not decide that this case is not of that description. But the majority of the court is of opinion, that the estate is to be considered as an estate held in severalty." It was also said, in Pratt v. Law, 9 Cranch [13 U. S.] 456, 494, that time is made material to the specific performance of a contract, whenever, from the change of circumstances, a specific performance, such as would answer the ends of justice between the parties, has become impossible.

In Brashier v. Gratz, 6 Wheat. [19 U. S.] 528, the case was this:—Michael Gratz, residing in Philadelphia, sold, in March, 1807, to Walter Brashier, residing in Kentucky, a tract of land lying in Kentucky, which Gratz had purchased, and for the title to which, a suit was then depending. Brashier gave his notes for the purchase-money, and agreed to attend to the prosecution of the suit, for which service an allowance was made him in the price of the land. The land was sold at twenty-two dollars fifty cents by the acre, and it was agreed that if any part of the land should be lost by the decision of the court, Gratz should repay eleven dollars twenty-five cents for each acre that might be so lost. The suits were not pressed to a decision, and in 1811, the fees were demanded from Gratz and were paid by him. In 1811, Brashier came to Philadelphia, and his notes being protested for non-payment, Gratz required that they should be paid, or that the contract should be rescinded. Brashier was unwilling to do either, and the question, whether Gratz was still bound by it, was left to arbiters, who decided that he was. Brashier became insolvent, and Gratz took the management of the suits into his own hands, which were decided in his favour in 1813. About this time the lands rose suddenly in value, on which Brashier tendered payment of his notes, and demanded a conveyance of the land. Gratz refused, and the bill was brought for a specific performance. It was dismissed in the circuit court, and the plaintiff appealed to the supreme court, where the decree was affirmed.

It will be readily admitted, that the case of Brashier and Gratz was a strong one against the plaintiff, much stronger than that now before this court; but the principles laid down in its decision, apply to all cases where the party demanding the aid of the court, has failed to perform his part of the contract, and a change in circumstances, unfavourable to the party resisting the demand has taken place. The court says (pages 533, 534): "The rule, that time is not of the essence of a contract, has certainly been recognised in courts of equity; and there can be no doubt that a failure on the part of a purchaser or vendor, to perform his contract on the stipulated day, does not, of itself deprive him of his right to demand a specific performance at a subsequent day, when he shall be able to comply with his part of the engagement. It may be in the power of the court to direct compen-

sation for the breach of contract in point of time, and, in such case, the object of the parties is effectuated by carrying it into execution; but the rule is not universal. Circumstances may be so changed, that the object of the party can be no longer accomplished; that he who is injured by the failure of the other contracting party, cannot be placed in the situation in which he would have stood, had the contract been performed. Under such circumstances, it would be iniquitous to decree a specific performance, and a court of equity will leave the parties to their remedy at law." "If, then, a bill for specific performance be brought by a party who is himself in fault, the court will consider all the circumstances of the case, and decree according to those circumstances." In reviewing the circumstances of the case, the court says (pages 539, 540): "Another circumstance which ought to have great weight, is the change in the value of land; it was purchased at twenty-two dollars fifty cents per acre. Mr. Brashier failed to comply, and was unable to comply with his engagements. More than five years after the last payment had become due, the land suddenly rises to the price of eighty dollars per acre; then he tenders the purchase-money, and demands a specific performance. Had the land fallen in value, he could not have paid the purchase-money. This total want of reciprocity, gives increased influence to the objections to a specific performance, which are furnished by this great alteration in the value of the article." The change in the value of the article in the case which has been cited, between the time when the money ought to have been paid, and the time when the money was tendered, was certainly enormously great, much greater than can take place in ordinary times; but the principle does not depend entirely on the excessiveness of that change. The principle undoubtedly is, that a very great change in the value of the article constitutes a serious objection to a decree for a specific performance, when claimed by the party whose fault it is, that the contract has not been executed.

In the case under consideration, a considerable change has taken place in the value of the article, and that change has been produced by a general declension in the price of lands. It must, therefore, materially affect the arrangements to be made by the purchaser for a compliance with his contract; the same property which, if sold in time, would probably have enabled him to pay for Mantapike, would not, on any reasonable estimate, now enable him to do so. If, then, William Garnett was unable to convey a perfectly safe title in January, 1819, Mr. Macon has sustained an injury by the suspension of his proceedings, the amount of which admits of no certain calculation, and which is probably equivalent to the difference in the value of Mantapike at that time and at this. Although I am entirely satisfied that there is no moral taint in this transaction, that the omission to give notice of Campbell's debt was not concealment, to which blame, in a moral point of view, can be attached; yet a court of equity considers the vendor as responsible for the title he sells, and as bound to inform himself of its defects. The purchaser, in making a contract, may be excused for relying on the assurance of the vendor, implied in the transaction itself, that he can perform his agreement. As I think Campbell's claim was a cloud lowering over the title Garnett could convey to a purchaser with notice, which justified Macon in refusing to go on with the contract, which cloud cannot be dissipated but by the decree of a court of chancery, and as before such a decree was attainable, the value of the article has greatly changed, that circumstance creates a strong objection to a specific performance. At the same time, it must be perceived that the vendor, who has committed no moral wrong, and who is now able to perform his contract, will sustain all the loss arising from the depreciation of the property, which he might have sold to another, had not Macon purchased. I felt some hesitation between a decree dismissing the bill, and a decree for carrying the contract into execution, considering the vendor, who has retained possession of the property, as entitled to the profits, and the vendee, who was justifiable for not proceeding with his contract, as exempt from the payment of interest. But, on reflection, I have come to the opinion, that as there is no fault in the purchaser, and as there was some remissness in the seller in not communicating Campbell's claim, that the whole disadvantage ought to fall on the vendor, and that his bill ought to be dismissed.

The point which has weighed heaviest on my mind, and about which I have felt the greatest difficulty, concerning which I have indeed at different times inclined to different opinions, is whether the sale under the will of Richard Brooke is, under all the circumstances of the case, to be considered as such a breach of trust, as respects the creditors of George Brooke, as will involve a purchaser, having notice before the contract of sale is carried into execution, in the consequences. I am rather disposed to the opinion that it is such a breach of trust. At all events, I am satisfied that it wears such a serious aspect, as to justify a purchaser in refusing to proceed.

Decree. Bill dismissed,—each party to bear his own costs.

Case No. 5,245a.

GARNETT v. MAYO et al.[1]

[4 Hughes, 377.]

District Court, E. D. Virginia. April 30, 1878.

LIABILITY OF SURETY—SIGNATURE TO BOND—MISREPRESENTATIONS—EVIDENCE.

[A surety on a bond resisted its enforcement on the ground that he only signed it on the representation that one W. would join as surety. It appeared that defendant had previously refused to sign without W.'s signature, but that he afterwards did sign when the bond was in a complete state, without W.'s name in any part of it, and without any additional scroll of seal for another signature, or room on the paper for such. The obligee was not present at the time, and no attempt was made to deceive defendant into the belief that W.'s name was on the bond. *Held*, that on these facts a verdict for defendant should be set aside and a new trial granted.]

[This was an action at law by Garnett, as assignee in bankruptcy of D. C. Mayo, against said Mayo, as principal, and W. K. Watts and Lawrence Lottier, as sureties, upon a bond given under the circumstances stated below. The case was heard on motion of plaintiff to set aside a verdict for defendants.]

A valuable part of the assets of Mayo, the bankrupt, consisted of the expensive machinery and implements constituting the outfit of a very large factory for the extensive manufacture of tobacco in the city of Richmond. Its value could only be approximately realized by selling it as an entirety in the factory building in which it was, at the time of the bankruptcy of Mayo. The bankrupt, by the aid of capitalists, proposed to go on with his business as a large tobacco manufacturer, after his bankruptcy; and proposed to do so in the same building in which he had operated before; and hence it was obvious that he could afford to give more for his former outfit and fixtures than could be obtained for them by sale. At all events, so it was, that the court, on due consideration, ordered, in the bankruptcy proceedings, among other things, as follows, viz.: That when D. C. Mayo has paid into the Planters' National Bank to the credit of this cause, subject to the order of this court, the sum of $1,000 in cash, and deposited in the same place, to the same credit, his note for the sum of $1,700, payable, etc., and endorsed, etc., and when he and two responsible sureties satisfactory to the assignee have made, executed and delivered to said assignee their bond in the penalty of $12,000, to have all the personalty enumerated (the said outfit and fixtures) in a schedule filed with his petition, forthcoming, whenever the court shall require him to pay the balance due by him for said personalty and conditioned to pay said purchase money in obedience to any order of court requiring him so to do, or else to surrender the personal property aforesaid for sale by the assignee, and in the event it sells for less than the said balance due, to make good the deficiency; and conditioned also to keep said property insured, to pay all taxes due and to accrue, and not to remove it from its present location, and also to pay interests on said balance of $12,000, then the court will accept him as the purchaser of said personalty, and look to him and his sureties as responsible for the same. Mayo complied with these terms, paid the cash, gave the note, which was duly met at maturity, and gave the bond for $12,000 for the balance of the purchase money, W. K. Watts and Lawrence Lottier being his sureties. After the lapse of time the court did fix the amount due by Mayo for the purchase at $12,550, which he was ordered to pay. On his failure to do so, the court ordered a sale of the tobacco fixtures and outfit, which sale produced the sum of $6,347, and left a balance due of $6,359, for which Mayo and his sureties were held liable. In due course, this balance not being paid by Mayo, this action was instituted for it by the assignee against Mayo and his two sureties, Watts and Lottier. It seems that the bond on which the suit was brought was not the first sketch of one that was presented for signature to W. K Watts. When the form of bond first drawn was presented to Watts by the assignee, he refused to sign it with Lottier alone, but said he would sign it if one Joseph P. Winston went upon it. Afterwards, and upon some explanations, the bond now sued upon, drawn wholly in manuscript and containing in the opening clause only the names of Mayo, Watts and Lottier, and having only three scrolls of seals at the end and without room at the end for more than three names, was presented to him. Watts signed it without Winston's name being upon it. The defense of Watts was, that he was informed at the time the bond was presented to him that it was not a bond for money, but merely for the forthcoming and safe keeping of property; and that he had signed on the condition that Winston also was to be on the bond. There were one or two mistrials of the case, by the juries failing to agree upon a verdict. There was finally a trial at which the jury found for the defendants. Plaintiff now moves the court to set the verdict aside, and grant a new trial.

HUGHES, District Judge. The motion is to set aside the verdict as contrary to the law and evidence, and as defective in form; and for a new trial. It is unnecessary to consider the technical ground relied upon in part by the plaintiff. My action will rest upon a reason of substance, to wit, that the verdict was contrary to the law and the evidence of the case. It was proved that Watts, the defendant, had had previous conversations about the bond, and had declared more than once that he would not

[1] [Published from certified copy furnished by the clerk of the court.]

sign the bond with only Lottier upon it as co-surety, but would sign it if Winston would go upon it as a co-surety. This he said in his testimony, that he had told Mayo, the principal in the bond, and had also told Alderdice, the obligee. Nevertheless, after these positive declarations of intention, the bond, which is the subject of this suit, was presented to him just as it now is, and he signed it. He signed it although he had recently told Alderdice that he would not sign without Winston's name upon it. He stated to the jury before the case was submitted to the jury, in words which I took down myself: "Alderdice was not present, as I recollect, when I signed the bond." Further on in his evidence he said again as I took him down: "I know that Mr. Lottier's signature was on the bond when I signed it. I don't recollect whether Alderdice was present when I signed the bond or not." If Alderdice, the obligee, was not present to misrepresent or deceive the defendant Watts when he signed the bond, it is difficult to conceive how in law Watts is not liable. There was no evidence that Alderdice, in his interview with Watts previously to Watts' execution of the bond, made any other representations than that the effect of the bond would be only to guarantee that the fixtures would not be removed from the factory. If, when the bond was brought to Watts for his signature, it had words to give it effect beyond that, and Watts signed it, Watts is bound, and it is not competent to prove previous conversations to vary its terms. No one but Mayo is shown by the evidence to have given Watts assurances that Winston would join him on the bond. If Watts after, as he says, "peremptorily and positively" declaring to Mayo that he would not go on the bond without Winston, afterwards nevertheless went on the bond, it is difficult to imagine that he had not changed his mind; and it is more difficult to perceive how Mayo's representations or promises to him or to Winston could in law release him from his obligation under hand and seal to the obligee of the bond. The evidence is clear and uncontradicted, that Watts signed the bond just as it is; in the day time; in his own store; while in the full possession of his faculties; after his mind had been fully drawn to the consideration whether he would sign without Winston or not; while free from all extraneous influence over his free will and action; when it was obvious that Winston's name was not on the bond, and when no attempt was made to deceive him into the belief that Winston's name was on it. That the jury had great doubt of the truth of the pretension that Watts had signed on an understanding with Mayo that he was to get Winston's name upon the bond, was shown by their asking to re-examine Watts after they had been for some time in retirement. This pretension is negatived also by the fact, that the bond in the shape in which it was when Watts signed it was not drawn up for Winston's signature. For these and other reasons I am so strongly inclined to the opinion that the verdict was contrary to both the law and the facts of the case, that I will set aside the verdict.

[For subsequent proceedings, see Cases Nos. 9,353 and 9,353a.]

GARNETT (ROSENBAUM v.). See Case No. 12,053.

Case No. 5,246.

The GARONNE.

[Blatchf. Pr. Cas. 132.] [1]

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

PRIZE—VIOLATION OF BLOCKADE.

Vessel and cargo condemned as enemy property, and for a violation of the blockade.

In admiralty.

BETTS, District Judge. This vessel, as in the last case, being of small value, and unfit, from her size and capacity, to be sent to a Northern port for adjudication, was, on her capture off the port of Galveston, Texas, December 11, 1861, by the United States frigate Santee, Captain Eagle commanding, ordered to be appraised by naval surveyors, and to be broken up and appropriated to the use and service of the United States, and her cargo to be forwarded to this port by the United States steamship Supply, and her master and crew by the United States steamship Connecticut. The vessel and cargo were owned by a citizen and resident of New Orleans. The cargo was consigned to a resident in Brownsville, Texas. The master knew that New Orleans was under blockade, and that the coast of Texas was also, but he had no personal warning of the fact.

No claimant interposes to make claim to, or defend the vessel or cargo in this suit. The evidence, on the ship's papers and the preparatory proofs, leaves no ground to doubt that the vessel and cargo were both enemy property at the time of capture, and also had, on that voyage, intentionally evaded the blockade of the port of New Orleans, with intent to enter and violate the blockade of the port of Brownsville, in Texas. Both are accordingly condemned as prize of war. The proceeds of the vessel are to be decreed to be paid into the registry of the court for distribution pursuant to law; and execution is to be awarded to make sale of the cargo arrested, and, on return of the proceeds thereof into court, they will be distributed, with those of the vessel, among the captors.

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

Case No. 5,247.

GARRATT v. DAVIDSON et al.

[3 App. Com'r Pat. 21.]

Circuit Court, District of Columbia. March 10, 1857.

PATENTS—INTERFERENCE—APPEAL—EVIDENCE OF INVENTION.

[1. Conversations and declarations of a party stating that he has made an invention, describing its details and explaining its operations, are properly to be deemed an assertion of his right at that time, as an inventor, to the extent only of the facts and details which he then makes known.]

[2. On appeal from the commissioner's decision in an interference case, the burden is on appellant to prove that he is the prior inventor.]

Appeal [by Alfred C. Garratt] from the decision of the commissioner of patents refusing to grant to him letters patent for an improvement in surgical pump syringes, and awarding priority of invention to Charles H. Davidson and H. E. Davidson.

The specification of the appellant states very particularly the construction and nature of his invention, and then says: "I am aware that elastic bags and tubes, and that valves, also, have been in use for syringe purposes. Therefore, neither of these devices do I claim separately. I claim, as new and my invention, combining the globular valve, as adjusted at E, with the reservoir suction sack C, and the valve A, as arranged at the extremity of the tube B, or their equivalents, so as to constitute a new and improved surgical syringe." This amended specification appears to have been filed June 25, 1856. The original specification was filed May 9, 1856. The specification of the Davidsons states the nature of their invention thus: "The nature of our invention consists in the combination of a hollow elastic bulb of a prolate spheroidal shape with flexible tubes, and metallic valve boxes containing valves arranged for the purpose of eduction and ejection. When the elastic tubes and metallic valve boxes are all attached to such an elastic bulb or sac in or nearly in its greatest axial line, the prolate spheroidal form of sac is the one best adapted to produce the greatest effect from the grasp of the hand by which the instrument is operated by so combining it with the tubes and valve boxes that they shall be in or nearly in the greatest axial line of the sac and the fluid is passed through the instrument in the most direct manner, with the least loss of effect possible by friction." They state their claim thus: "The combination of the prolate spheroidal shaped elastic sac with flexible tubes terminating in valve boxes containing valves arranged for the purpose of eduction and ejection when the sac tubes and valve boxes are in or nearly in the same axial line, the whole operating together substantially in the manner and for the purposes set forth." An interference having been declared, each of the parties was allowed to take their testimony. Upon the hearing thereof, and the arguments, the commissioner, on November 4, 1856, finally decided, awarding priority of invention to the said Charles H. and Herman E. Davidson; from which decision the said Alfred C. Garratt hath appealed, and filed his reasons of appeal: "First. That the commissioner has erred, as matter of fact, that said Garratt had not, prior to any date, proved by the Davidsons, perfected his invention or improvement in syringes substantially as he now seeks to patent it, to wit, the arrangement of a bag in the course of a tube for the purpose of exhausting one part of the tube and expelling the injection fluid through the other by compressing and releasing the bag. Second. As matter of law, in deciding that the production of such an article as was shown by said Garratt to the witness Putman, and so explained by the former to the latter, was not such a completed invention as under the statutes entitled said Garratt to letters patent. Third. As matter of law, in deciding that it was necessary to show, on the part of Garratt, that he had used diligence in putting his invention into use, so long as it did not appear that the same had resulted in experiment simply, and so been abandoned."

The commissioner's reasons for his decision are that "the patentable feature at issue in the cases interfering is the combination of an elastic sack with two flexible tubes terminating in proper valves to constitute a syringe to be operated by the squeezing of the sack, and having its forcing tube distinct from its suction tube. The evidence shows that Alfred C. Garratt did not, previous to his application for letters patent, —that is, previous to March 29, 1856,—produce the whole of the above combination. Any parts thereof, whatever his plans might have been for their practical adaptation to a syringe, would not have been a syringe as here claimed, until sack, tubes, and valves were effectually so combined as to constitute a syringe to be worked by the squeezing and relaxing of the bag both for suction and forcing of the liquid. Elastic sacks, flexible tubes, and valves of all kinds being separately of common application in syringes and pumps, nothing short of the whole combination indicated above can be considered here as the point at issue, and the evidence in this respect for Garratt does not go back prior to his application, while that in favor of Charles H. and Herman E. Davidson goes as far back as February, 1853. Priority of invention is therefore awarded to Charles H. and Herman E. Davidson."

At the time and place appointed for the hearing of this cause, the commissioner laid before me all the original papers in the case, with the evidence, and his written report, and the reasons of appeal, and the said case was submitted with the written argument on behalf of the respective parties. I think, from reading the specifications of the parties, that

the inventions are substantially the same, and that the invention, to be patentable, being claimed as an improvement, must be shown by the appellant to have been made and discovered by him in the combination as stated in the specification, without which there would be a want of novelty. The real and only issue in the case is, as stated by the commissioner, which of the parties is the first and original inventor of said instrument with its improved combination? And the proof to show it is on the appellant. It seems to be unquestionably established that the appellee has shown that his invention was discovered as early as February, 1853.

I proceed to consider the testimony on the part of Mr. Garratt. The witness Silas S. Putman says that in the fall of 1851 he called at the house of Mr. Garratt in the evening; that Dr. Garratt showed the witness a depletor first. After showing him the operation of this, he took from a little box an india rubber bag; two tubes of india rubber connected with it on opposite sides. The doctor worked it in his hands by squeezing the bag, and said, "I can make (or I have got) a complete syringe,"—one or the other; witness could not tell distinctly which he said. He said, "I mean to put it through when I get able (or have time)"; witness does not know which he said. Witness believes that is all. That they had some further conversation about it. What was said he does not recollect distinctly. He is asked by the appellant's counsel: "Look at the article now shown you, marked, 'Alfred C. Garratt, W. A. P.,' and state how that article compares with what was shown you on the aforesaid occasion by Dr. Garratt." To which he answers: "The bag that I saw was not so finished as this, I should think. It was not so long. It was more of a circular shape; more like an india rubber ball with tubes on opposite sides. I should think the tubes were of equal lengths. I don't recollect seeing any ivory tube, neither did I see this wooden ball at the end of the other tube. That is all I recollect about it." In answer to the question, on cross-examination, "Did Dr. Garratt then describe to you the mode in which he could make a syringe from that bag?" Answer, "No, sir." He also said the tubes were of india rubber, but he did not recollect seeing anything at either end of the tube. To a question, "Could you look into the ends of the tubes?" Answer, "I did not look to see." He further said he did not see any valves about the instrument. The amount of the evidence, then, is, that the witness did not know that the instrument shown to him by Dr. Garratt, from its appearance, had any valves; nor did he recollect seeing anything at either end of the tube. He did not look to see, nor did Dr. Garratt describe to him, the mode in which he could make the syringe a complete syringe, as he said he had done or could do; gave no description of the particular contrivance or device of which the instrument shown to him was constructed; as to the comparison, he thought the external appearance differed in some respects, and corresponded in others with the one which had been shown to him. Inasmuch, therefore, as the witness could not testify to a knowledge, either from his own observation or from a detailed statement at the time by Dr. Garratt of the patentable features of the invention, or of any sufficient evidence of identity between the instrument shown to him originally in 1851 and that subsequently exhibited to him, I think he has failed to prove that he was the first and original inventor of that invention which is in issue in this case. The rule of law applicable to this point I take to be that it is necessary to be proven; that the conversations and declarations of the party stating that he had made an invention and describing its details and explaining its operations are properly to be deemed an assertion of his right at that time as an inventor, to the extent of the facts and details which he then makes known. My conclusion, therefore, is that the decision of the commissioner is correct.

Before MORSELL, Circuit Judge.

Patent for a new and useful improvement in surgical pump syringes, and for awarding priority of invention to Charles H. Davidson and H. E. Davidson.

I, JAMES S. MORSELL, assistant judge of the circuit court of the District of Columbia, certify to the commissioner of patents that in the appeal of the above-named Alfred C. Garratt from the decision of the commissioner, as above stated, due notice having been first given to the parties of the hearing of said cause, and they having submitted the same upon written arguments, upon full consideration of said case, I do hereby decide and adjudge that the said decision of the commissioner is correct, and the same is hereby affirmed.

GARRATT (SIEBERT v.). See Case No. 12,845.

Case No. 5,248.

GARRETSON v. CLARK et al.

[15 Blatchf. 70; 3 Ban. & A. 352; 14 O. G. 485.] [1]

Circuit Court, N. D. New York. July 15, 1878.[2]

PATENTS—ACCOUNTING FOR PROFITS—APPORTIONMENT BETWEEN PATENTED AND UNPATENTED FEATURES—COSTS.

1. In a suit in equity on two letters patent, each for an "improved mop-head," an interlocutory decree for profits and damages was made. The plaintiff, before the master, put in

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 352; and here republished by permission.]

[2] [Affirmed in 111 U. S. 120, 4 Sup. Ct. 291.]

no evidence, except evidence to show the damages to the plaintiff and the profits to the defendant, in the manufacture of the infringing mop as a whole. At the close of the plaintiff's evidence, the defendant moved to dismiss the proceedings, on the ground that no basis had been laid before the master to compute or estimate the plaintiff's damages, and that he was entitled to only nominal damages. The point was reserved and the defendant put in evidence on the basis assumed by the plaintiff. The master reported, that, as no evidence had been given before him of damages resulting to the plaintiff, or of profits accruing to the defendant, from making and selling the patented improvements as distinguished from the whole mop, he found for the plaintiff nominal damages only: *Held*, that the master's report was correct.

[Cited in Schillinger v. Gunther, Case No. 12,457; Star Salt Caster Co., Id. 13,320.]

2. The patentee must, in every case, give evidence tending to separate or apportion the defendant's profits and the patentee's damages, between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.

[Cited in Calkins v. Bertrand, 8 Fed. 759; Zane v. Peck, 13 Fed. 476; Maier v. Brown, 17 Fed. 737; Atlantic Milling Co. v. Rowland, 27 Fed. 25.]

[See note at end of case.]

3. Exceptions by the plaintiff to the master's report, founded on the admission of testimony objected to, *held* to be immaterial, because, the plaintiff having failed to give adequate evidence as to profits and damages, the defendants were not put on their defence in that respect, and it was unimportant whether they gave competent evidence or no evidence.

4. Certain exceptions overruled, as too general.

5. The plaintiff not allowed to give further evidence, there being no claim of a failure, through inadvertence, to give other or further evidence, or that there was any which could be given.

6. Costs awarded to the plaintiff, except the costs of the reference, and report, and exceptions, and the hearing thereon.

[Cited in Everest v. Buffalo Lubricating Oil Co., 31 Fed. 743.]

[This was a bill in equity by Oliver S. Garretson against Charles B. Clark and others for the alleged infringement of certain patents.]

James A. Allen, for plaintiff.

Francis A. Macomber, for defendants.

BLATCHFORD, Circuit Judge. The bill in this case is founded on two patents. One of them [No. 54,860] was granted to Charles B. Clark and Oliver S. Garretson, May 22d, 1866, for an "improved mop-head." The specification states that the invention consists (1) "in the combination of a collar provided with wings, or their equivalent, which carry the movable jaw, and an adjusting nut with which it is connected by means of a flange and lugs, with a threaded shank and fixed cross-head;" and (2) "in the manner of connecting the wire-frame, which constitutes the movable jaw, with the arms of the collar." The patent has two claims: "(1) Connecting the nut with the collar which carries the movable jaw, by means of the lugs, or their equivalents, in combination with the threaded shank of the fixed jaw, arranged and operating substantially as set forth. (2) Connecting the movable jaw with the collar by means of the bows, constructed and operating substantially in the manner and for the purposes specified." The other patent [No. 67,643] was granted to Oliver S. Garretson, August 13th, 1867, for an "improved mop-head." The specification states that the invention consists "in constructing that part of the loose jaw that forms the collar in two parts or halves, with the inner surfaces properly grooved to receive and retain the flange or wings of the nut, and to allow it to have a free rotary motion, by which means the parts, with the recesses and rivet-holes, may be cast complete, requiring no drilling or reaming in putting together." The claim is: "Making the collar of the loose jaw in two parts, so that the nut may be placed between them, and, when connected together, the collar surrounds the nut and retains it in position, for the purpose above set forth."

In April, 1875, on final hearing on pleadings and proofs, an interlocutory decree was entered, finding that the defendants had infringed the first claim of the patent of 1866, and the whole claim of the patent of 1867, and decreeing that the plaintiff "recover of the defendants the profits made and received by the defendants, and the damages, if any, over and beyond the amount of such gains and profits, suffered by the complainant, by reason of the infringement and violation of the rights of the complainant, which it is adjudged have been so committed by the defendants," and referring it to a master, George J. Sicard, Esquire, to take proofs of, and to compute the amount of, the said profits and damages, and report the same to the court, and awarding a perpetual injunction against the defendants. The master has filed his report, by which he finds that the plaintiff has not offered before him evidence of the damage suffered by the plaintiff, or of profits realized by the defendants, by reason of the infringement and violation by the defendants of the rights of the plaintiff in the inventions and improvements referred to in the decree, and that the plaintiff is entitled, under said decree, to nominal damages only against the defendants. The master has stated at length his reasons for his finding. He proceeds upon the view that it is settled law, that, when a patent is for an improvement of a machine, the plaintiff can recover only such damages as are occasioned by the use of the improvement, and the inquiry is as to what profit the defendant acquired by the use of the improvement alone, and not by the manufacture of the whole machine. The master states, and the record shows, that all the evidence offered by the plaintiff, has been

with the view of showing the damages to him and the profits to the defendants, in the manufacture of the infringing mop as a whole. At the close of the evidence given before the master on the part of the plaintiff, the defendants moved to dismiss the proceedings, on the ground that no basis had been laid for the master to compute or estimate the plaintiff's damages, and that consequently the plaintiff was entitled to only nominal damages. The point was reserved, and the defendants put in evidence on the basis assumed by the plaintiff. The master says: "There has been no evidence before me that would warrant a finding that the whole success of the mops in question, either of the defendants' or of the complainant's manufacture, was due to the peculiar construction described in the claims of the patents above referred to. Nor could I find, from the evidence, that that peculiar construction constituted the sole feature that made the mops a success in the market. Such finding would be required to sustain the complainant's theory of damages. The evidence showed that Garretson had invented and patented an improvement in mops; that the mops made by him and embodying the improvement were successfully introduced into the market; that, after the manufacture and introduction by the defendants of the infringing article, the trade of the complainant had decreased; and there was much documentary and other evidence produced to show the amount of the cost and of the sales by both parties. All this testimony was given on the theory, which is the complainant's position in this case, as I understand it, that the claims infringed are indispensable to the success of the mop and form the only and vital part and principle of its operation. In other words, it is claimed that this mode of construction, connection and operation of the collar and loose jaw, is all there is, practically speaking, of the mop. By the patents themselves, and the claims thereof, it is clear that the complainant's invention is not of a machine, but of an improvement. He has taken the mop, an instrument in use from time immemorial, and claims that, by the introduction of a new mode of constructing and operating it in one of its parts, he has added to it all that is valuable in it. The complainant has given before me no evidence aimed at the separation of the damages, or the apportionment of a certain proportion of the defendants' profits in manufacturing mops as belonging to the peculiar features which are the complainant's invention, and which the defendants have wrongfully adopted and incorporated into the instrument made and sold by them. He rests all his evidence on the proposition, that his invention covers the whole ground and lends to the article manufactured by the defendants all its value. I cannot agree to that view, upon the evidence submitted. The complainant's invention has peculiar and distinctive features in the form of construction and operation referred to, but these features alone do not constitute a mop, and there were many valuable mops in the market before these features were at all introduced. The evidence shows many such mops as made in the past, and even as made in the present, for the defendants appear to be now selling with success a mop not claimed to infringe the complainant's invention. The complainant has given no testimony before me to satisfy my mind that the sole salability of the mops in question arose from their possessing the features I have referred to as embodied in the complainant's invention. These features are the form of the construction of the collar in two pieces, the mode of connecting the collar and the nut, the presence of flanges on the latter, and its enclosure within the circuit of the former. The nut, the collar, the wire-binder, the cross-head fixed and riveted to the handle, the grooving of such cross-head, the notching of its ends to steady and guide the wire-binder, the threaded shank, the connection and securing of the wire-binder to the collar—all these are independent of the plaintiff's improvement, and most of them are old in the history of the invention. Yet, they contribute to the successful operation of the mop, and are found in the mops of the complainant as well as those made by the defendants. Combinations of these various elements of invention, in different forms, are found in most, if not all, of the exhibits in the case. Some of these elements are common to all the successful mops spoken of by the witnesses, and may be considered as quite indispensable to the construction and practical operation and salability of the instrument. I cannot believe that none of them contributes any value to the mops in question. As these elements and combination exist in the mop made and sold by the defendants, and adjudged to be an infringement, the finding of more than nominal damages for the complainant would, on the complainant's theory, involve the proposition that there is not, among all of these elements or combinations, any one that involves a principle of sufficient practical use to add to the salability or actual value of the machine. I believe, on the contrary, that all of these elements have combined to make the mops in question successful, and it is too much to say that no proportion of the trade diverted from the complainant by the defendants, or of the profits they realized from the sale of their mop, was due to the presence of some one or more of them. At least, while so many elements of success are present in the instrument, I would not be warranted in finding that its entire success was due to its embodiment of the complainant's invention, unless direct evidence on that subject were furnished. As no evidence has been given before me of damages resulting to the complainant, or of profits accruing to the defendants, from the manufacture and sale of the improvement of the complainant, as distin-

guished from the machine itself, I find for the complainant nominal damages only." The plaintiff has excepted to the master's report. The exceptions insist that the actual damages to the plaintiff, for the mops made and sold by the defendants in infringement, which the plaintiff would have made and sold but for the infringing manufacture and sale by the defendants, are the difference between what the manufacture and sale of such mops would have cost the plaintiff, and the amount for which the plaintiff would have sold such mops; and that the amount of the profits made and received by the defendants, by reason of the infringement adjudged, is the difference between what the manufacture and sale of the infringing mops made and sold by the defendants cost the defendants, and the amount for which the defendants sold said infringing mops.

There is, thus, a pointed antagonism between the views of the master and those contended for by the plaintiff. I have cited, thus, fully, the text of the master's views, because it would be difficult to express, in more apt words, the considerations properly applicable to the determination of the questions involved in this case. They may be amplified and illustrated, but the master has expressed, with clearness and force, the true principles which, on the evidence before him, apply to this case.

The argument on the part of the plaintiff is, that, at the time the defendants began to infringe, the plaintiff's mop and the mop of one Taylor held a monopoly of the market, and were not competed with seriously by other mops, or to an extent which interfered with an arrangement which had been made between the proprietors of the patents covering the plaintiff's mop and the proprietors of the patent covering the Taylor mop, whereby the price of those two mops was maintained at $2 a dozen, affording a profit of at least $1 a dozen; that the defendants sold the infringing mop at $1.75 a dozen; that the plaintiff had an establishment at which he could have made mops enough to fill all ordinary orders for mops; that his mop was known and his trade was established; that the effect of the infringement was to cause a large falling off in the plaintiff's sales; that it was the taking, without right, of the plaintiff's patented improvements, which enabled the defendants to enter the mop market, because the plaintiff's mop and the Taylor mop had substantially driven out of the market all other mops, by making it impossible to sell such other mops at a profit; that, while it is generally true that the patentee of an improvement in an article is not entitled to the profits on the sale of the whole article, the rule is otherwise when, as a matter of fact, the improvement so dominates and controls the article in the market held as an exclusive monopoly by the patentee, that the only way in which the article can be sold at all at a profit, is through the sale of it with the patented improvement; that the advantage which the defendants gained was a market for mops at a large profit, when there was no other form of mop open to the public by which they could have obtained any considerable sale at a profit; and that the only way to reach a result consonant with the substantial justice of this case, is to regard the mop as an article of commerce, under the operation of laws whereby an improved article will supersede and displace an unimproved one, destroying the possibility of producing it at a profit, and thus driving it out of existence, so that the superior article, by virtue of its superiority, dominates in the market until it in turn gives way in the progress of new improvements in its kind.

It is a weak point in the argument for the plaintiff, that it assumes, without sufficient evidence, that the market for the plaintiff's mop was made solely by the fact that the mop contained the improvements patented by the plaintiff's patents. This would not follow, even from the fact that the mop, with such improvements, had driven other mops out of the market. Energy, diligence, business tact, superior facilities and skill, and fortuitous circumstances, contribute largely to the success in the market of even an article which has all the superiority, in its line, that is claimed for the plaintiff's mop. In the present case, there was an especial element, entirely outside of the plaintiff's patents, which made the manufacture and sale of the plaintiff's mop profitable, and that was the combination with the owners of the Taylor patent, under which the price of both mops was fixed at $2 a dozen.

The argument on the part of the plaintiff leads to the conclusion, that, when an article or a machine, with a given patented improvement embodied in it, has a controlling preference in the market, over the article or machine which does not embody such improvement, it must be conclusively inferred that such preference is due to the improvement; and that the patentee, in case of infringement, is entitled to the profits made by the infringer from the manufacture and sale of the whole article or machine, and is entitled, as damages, to the profits he would have made on the manufacture and sale of an equal number of entire articles or machines made and sold by the infringer. This would often cause a small improvement on a costly machine to draw to itself very large profits, entirely out of proportion to the relation existing between the improvement and the rest of the machine, and, in cases where the unpatented parts of the machine were quite as indispensable to the machine as the patented improvements, and even more indispensable. The profit on the entire machine would virtually become the license fee for the use of the patented improvement. In the case of a machine em-

bodying several patented improvements, in infringement of several patents belonging to several different persons, each patentee would claim that it was his particular patented improvement which caused the machine to dominate the market, and each would claim the profits of the manufacture and sale of the entire machine, and damages based on the same principle. The patentee must, in every case, give evidence tending to separate or apportion the defendant's profits and the patentee's damages, between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature. In the present case, the master reports that the patentee has failed to give such evidence, and I concur with the master in his conclusion.

The plaintiff's exceptions to the master's report are all of them overruled. Those which relate to the admission of testimony objected to by the plaintiff, (conceding that such objections can be availed of by exceptions to the master's report,) become immaterial, in view of the fact, that, because the plaintiff failed to give adequate evidence as to profits and damages, the defendants were not put upon their defence in that respect, and it is unimportant whether they gave competent evidence or no evidence. If the evidence objected to is all stricken out, the defendants are protected by the plaintiff's failure. They are not called upon to rebut until the plaintiff has made out a case. Black v. Munson [Case No. 1,463]. The 18th exception, that the master excluded material evidence offered by the plaintiff, and sustained the defendants' objections thereto, is too general. The 19th exception, that the master received in evidence testimony offered by the defendants, and overruled the plaintiff's several objections thereto, is too general.

The exceptions being overruled, the plaintiff asks that the case be referred back to the master, with instructions setting forth the principles on which the proper assessment of damages and profits should be made, and directing the master to receive such further evidence pertinent thereto as the parties may offer. This application is not made on any showing that the plaintiff failed, through inadvertence, to give other or further evidence, or that there exists any other or further evidence which he can give. The idea of inadvertence is negatived by the entry on the record, before referred to, at the close of the plaintiff's testimony, when the defendants moved to dismiss the proceedings on the ground assigned. No proper foundation is laid for granting the application.

There must be a decree in accordance with the master's report, and awarding to the plaintiff the costs of the suit, except the costs of the reference before the master, and of his report, and of the exceptions, and of the hearing thereon, and awarding to the defendants the costs of such reference, and report, and exceptions, and hearing.

[NOTE. For other cases involving these patents, see Garretson v. Clark, Case No. 5,250; Id., 111 U. S. 120, 4 Sup. Ct. 291; Taylor v. Garretson, Case No. 13,792.]

[On appeal by Oliver S. Garretson, this case was presented to the supreme court for adjudication. Mr. Justice Field, in delivering the opinion, quoted the following from the opinion of Blatchford, Circuit Judge, given above: "The patentee must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature,"—and held that the plaintiff had complied with neither part of this rule, having produced no evidence to apportion the profits or damages between the improvement constituting the patented feature or the other features of the mop. His evidence went only to show the cost of the whole mop and the price at which it was sold; and, concluding, the learned justice remarked that "of course it could not be pretended that the entire value of the mop head was attributable to the feature patented. So the whole case ended, the rule was not followed, and the decree is therefore affirmed." 111 U. S. 120, 4 Sup. Ct. 291.]

Case No. 5,249.

GARRETSON v. CLARK et al.

[17 Blatchf. 256.] [1]

Circuit Court, N. D. New York. Oct. 30, 1879.

PRACTICE IN EQUITY — COSTS — SOLICITOR'S FEE FOR OVERRULED EXCEPTION TO MASTER'S REPORT.

An allowance is not proper, in a bill of costs, in this court, of a solicitor's fee for an overruled exception to a master's report, because, under rule 84, in equity, no standing rule has ever been made by this court on the subject, and because no allowance for such fee is found in section 824 of the Revised Statutes of the United States.

[This was a bill in equity by Oliver S. Garretson against Charles B. Clark and others for the alleged infringement of certain patents. See Cases Nos. 5,248 and 5,250.]

James A. Allen, for plaintiff.

F. A. Macomber, for defendants.

BLATCHFORD, Circuit Judge. In this case the court overruled all the exceptions taken by the plaintiff to the master's report, and awarded costs to the defendants for all proceedings upon the reference to the master

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

and subsequent thereto. [Case No. 5,248.] In the bill of costs presented by the defendants to the clerk for taxation, there was a charge of $25 for each of the exceptions overruled. The clerk declined to tax such charge. The defendants now move for an order directing the clerk to allow and tax, as a part of the defendants' costs, the sum of $25 for each of said exceptions, or such other sum therefor as shall seem reasonable and just.

In March, 1842, the supreme court promulgated rule 84 of the rules of practice for the courts of equity of the United States, in the following words: "And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs, the costs to be fixed in each case by the court, by a standing rule of the circuit court." No standing rule of this court has ever been made on this subject. There is no authority for this court to impose any costs in this case, under rule 84, except in pursuance of a standing rule, previously made. Moreover, under section 823 of the Revised Statutes of the United States, which is a reenactment of a provision in section 1 of the act of February 26, 1853 (10 Stat. 161), no other compensation to attorneys and solicitors in the United States courts can be taxed and allowed against a party to a cause than that prescribed by statute. No specific allowance of a solicitor's fee in respect of exceptions overruled is prescribed by statute, and, therefore, none can be allowed. The only fees or compensation which can be taxed in this case in favor of the defendants are what are found specifically set forth in section 824 of the Revised Statutes or some other statutory provision. The motion is, therefore, denied.

Case No. 5,250.

GARRETSON v. CLARK et al.

[4 Ban. & A. 536;[1] 16 O. G. 806.]

Circuit Court, N. D. New York. Sept. 3, 1879.

PATENTS — APPORTIONMENT OF PROFITS — EVIDENCE—PROVINCE OF MASTER—COSTS.

1. Where, upon an accounting, the plaintiff had given evidence before the master, showing the profits made by the plaintiff by the sale of articles containing his patented features, and showing also the profits made by the sale of similar articles not containing the patented features: *Held*, that such evidence would be proper only in a case where the entire value of the whole machine, as a marketable article, is properly and legally attributable to such patented features.

[Cited in Kirby v. Armstrong, 5 Fed. 803.]

2. It is not the province of the master, or the court, rejecting a plaintiff's proofs as to profits, to suggest what is the proper line of proof to adopt—the burden of laying a proper basis by evidence for ascertaining the profits is on the plaintiff. The case of Herring v. Gage [Case No. 6,422] cited.

3. The question of costs on a reference to a master, considered.

[This was a bill in equity by Oliver S. Garretson against Charles B. Clark and others for the alleged infringement of two patents for "improved mop-heads." The first (No. 54,860) was granted to Charles B. Clark and Oliver S. Garretson, May 22, 1866; the other (No. 67,643) was granted to Oliver S. Garretson, August 13, 1867.]

James A. Allen, for complainant.

F. A. Macomber, for defendants.

BLATCHFORD, Circuit Judge. The rule laid down in the decision rendered in this case July 5th, 1878 [Case No. 5,248], was this: "The patentee must, in every case, give evidence tending to separate or apportion the defendants' profits and the patentees' damages, between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature." I understand this rule to be the result of the authorities. The plaintiff does not controvert the rule, but insists that he has complied with it. The conclusion of the court was this: "In the present case, the master reports that the plaintiff has failed to give such evidence, and I concur with the master in his conclusion."

The plaintiff contends that the evidence before the master furnished a substantial compliance, according to the nature of the subject-matter, with the rule that the profits or damages deducible from the use of the patented features must be separated from the profits or damages upon the article as a gross product. He contends that such evidence made the separation referred to, because it showed, on the one hand, the profits which the plaintiff made in making and selling mops containing his patented features, and, on the other hand, the profits realized from the manufacture and sale of forms of mops on actual sale which did not embody the plaintiff's patented features. This is the same proposition which was considered and rejected by the master and the court; but the evidence referred to would be the proper evidence only in a case where the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented features. In such a case as that, the profits and damages are to be calculated on the whole machine. This is not such a case. The master says: "There has been no evidence before me that would warrant a finding that the whole success of the mops in question, either of the defendants' or of the complainant's manufacture,

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

was due to the peculiar construction described in the claims of the patents above referred to. Nor could I find, from the evidence, that that peculiar construction constituted the sole feature that made the mops a success in the market. Such finding would be required to sustain the complainant's theory of damages." The master was clearly correct in thus holding. The plaintiff complains that the master's report contains only negations, and omits to affirm what specific line of proof on the part of the plaintiff should have been adopted properly to establish his damages. It was not the province of the master, nor is it the province of the court, to suggest any specific line of proof, either as proper or necessary. The burden is on the plaintiff to lay a basis, by evidence, for ascertaining the proper profits or damages. If he produces certain evidence, and lays a certain basis, all that the master and the court are to do is to say whether he has made out his case or not. If he has not made out his case, that is all there is to be said. It cannot be said that there may not be many forms of evidence which would be satisfactory to show that a plaintiff is entitled to the profits on the whole machine. Their sufficiency is to be passed upon when they are presented.

It is also contended that the court did not pass on the first five exceptions taken by the plaintiff; but I think it quite apparent, that, in passing on the sixth and seventh exceptions, the court passed on the first five. The first claims that there was evidence of damages and profits; the second, that it was error to award only nominal damages; the third, that there was evidence of actual damages; the fourth, that there should have been a report of an amount of actual damages; the fifth, that there should have been a report of an amount of actual profits. I do not perceive that any of the considerations now presented on the part of the plaintiff were overlooked by the court in its former decision.

In the case of Herring v. Gage [Case No. 6,422], in this court, decided by Judge Wallace, the master reported that the defendants, in milling, saved, by using the patented device, one barrel of flour in every six hundred made, saving thus so many barrels, worth so much a barrel. He reported such saving as profits, and reported it as a saving made over and beyond the saving which the defendants could have made by the use of any other device. The plaintiff did not except, and the defendants did except that such finding was not supported by the proof. The proof given by both sides was as to the additional saving made by the use of the patented device, over what might have been made by the use of other devices for cooling and drying meal, as a substitute for the patented device. Judge Wallace remarked that it appeared that the defendants had saved, by the use of the patented device, flour which, until they used that device, had been lost; and, in commenting on the rule laid down in Mowry v. Whitney, 14 Wall. [81 U. S.] 651, he said that that was a case where the entire profit of the manufacture had been given by the master, when such profit was largely due, not to the patented invention, but to other processes actually used by the defendant, and that the rule so laid down did not apply where the profit had been made directly by the use of the patented device. This case is like Mowry v. Whitney, and is not like Herring v. Gage. There is nothing in the decision in the latter case that is inconsistent with the rulings in the former decision in the present case. A plaintiff is required to separate between the patented part of what the defendant makes and sells and the unpatented parts, and not between such patented part and something which the defendant does not embody in his machine. The distinction is a plain one.

In its former decision [Case No. 5,248] this court directed that the plaintiff have the costs of the suit, except the costs of the reference before the master, and of his report, and of the exceptions, and of the hearing thereon; and that the defendants have the costs of such reference, and report, and exceptions, and hearing. The plaintiff alleges that the interlocutory decree provided that the plaintiff recover of the defendants "the costs of the complainant in this cause to be adjusted;" but it further provides that the question of the amount of such costs be reserved until the coming in of the master's report, and that a final decree be had for the same, together with the profits and damages which shall be finally adjudged to be payable to the plaintiff. It also awards a perpetual injunction to the plaintiff. In view of the award to the plaintiff of nothing but nominal damages and of no profits, it is not proper that the plaintiff should have any costs, except those to and including the interlocutory decree, and that the defendants should have the costs of the subsequent proceedings. There is nothing in this that is inconsistent with the interlocutory decree.

The prayer of the petition for a rehearing is denied, with costs.

[For subsequent proceedings, see Case No. 5,249.]

GARRETSON (JENKS v.). See Case No. 7,278.

Case No. 5,251.

GARRETSON v. LINGAN.

[2 Cranch, C. C. 236.] [1]

Circuit Court, District of Columbia. April Term, 1821.

SLAVERY—REMOVAL—LAPSE OF TIME.

Length of time does not raise a presumption against a slave, that his owner took the oath required by law.

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

Petition for freedom. The petitioner [Jack Garretson, a negro] was carried, by his owner, from Maryland to Virginia, in the year 1784, and kept there several years, and then brought back to Maryland. By the law of Virginia of 17th of December, 1792 (page 186), the slave was entitled to his freedom, unless the owner took a certain oath within sixty days after his removal to Virginia.

Mr. Key and Mr. Caldwell, for defendant, moved the court to instruct the jury, that after such a lapse of time they have a right to presume that the oath was duly taken agreeably to law. The law did not require that there should be any record of the taking of the oath. It is a fact which may be proved by parol. Judge White in Virginia has decided in favor of the presumption.

Mr. Taney and Mr. Jones, contra, stated that there is a contrary decision in 5 Munf. 542, and that Judge Dade had decided in the same way. The presumption could arise only from the acquiescence of the petitioner; but that presumption is rebutted by the state of slavery in which he has been held, which disabled him from asserting his rights.

THE COURT (CRANCH, Chief Judge, doubting) refused to give the instruction.

GARRETSON (TAYLOR v.). See Case No. 13,792.

Case No. 5,252.

In re GARRETT.

[2 Hughes, 235; 11 N. B. R. 493.] [1]

District Court, E. D. Virginia. Feb., 1875.

BANKRUPTCY—ALIMONY AS A LIEN ON BANKRUPT'S LAND—EXEMPTIONS—DISCHARGE—RELEASE FROM PAYMENT OF ALIMONY.

1. The bankruptcy court has no jurisdiction of alimony operating as a lien upon land belonging to a bankrupt's estate.

2. Where a state court has decreed a divorce, and provided alimony, the bankruptcy court will not increase or diminish the alimony, though chargeable upon the estate administered in bankruptcy.

3. In granting an exemption to the bankrupt, the bankruptcy court will order that it shall not affect or prejudice the wife's rights to alimony chargeable upon real estate claimed as homestead.

4. A discharge in bankruptcy does not release a husband from the obligation to pay alimony, though—

5. Quaere. Whether instalments of alimony due before the bankruptcy are released by a discharge in bankruptcy, as a personal liability of the bankrupt?

Prior to the Civil War, Edward and Phillis Garrett intermarried, and a number of children were born to them. In June, 1870, Phillis, by next friend, brought suit on the chancery side of the circuit court of Alexandria county, against Edward, for a divorce a vinculo matrimonii, setting forth, as the grounds, adultery, neglect, etc., and praying alimony and the custody of the children, all of whom were under age. The case was removed by consent to the corporation court of Alexandria city, where, in January, 1872, after hearing, the court entered a decree divorcing the parties a vinculo matrimonii, forbidding Edward to marry again, giving the custody of the children to Phillis, and directing Edward to pay to Phillis, during her natural life, for the maintenance of herself and children, the sum of nine dollars per month. The decree operated as a lien from the date it was docketed upon Edward Garrett's estate. The husband had neglected to pay the monthly instalments decreed, which were due since 1872. [In the county of Fairfax, Virginia (adjoining Alexandria), Edward owned a tract of land; and on the lien docket of that county this decree for alimony was entered, and, according to the law of the state, became a lien as early as 1872.] [2] The husband filed his petition in bankruptcy on the 7th March, 1874, and was adjudicated a bankrupt on the 16th March. In January, 1875, at his instance, a rule issued calling upon his creditors to show cause why certain of his real estate bound by the lien of the decree for alimony, should not be set aside to him as a homestead according to the constitution and laws of Virginia, and discharged from the claims of the wife. To this rule Phillis Garrett answered the facts as stated, and maintained that the marriage having occurred prior to the adoption of the constitution containing the homestead provision, the obligation to pay the alimony decreed could not thus be annulled, and that to allow the husband thus to avoid this obligation would be practically to use the law to defeat the very purpose which the convention had in view when the measure was adopted, viz.: the support of the family. Vide Code Va. 1873, c. 183, § 9, and Anthony v. Wade, 1 Bush, 110.

HUGHES, District Judge. The state court which rendered the decree mentioned was a court having full jurisdiction of questions of divorce and alimony, which this, the bankruptcy court has not. That court was competent to render such decree, and the bankruptcy court has no jurisdiction, directly or indirectly, to review or modify or affect that decree. The lien of the decree directing the payment of alimony in monthly instalments is a continuing lien, similar in some respects to a ground-rent charge upon ground in which a homestead should be claimed. In this case it is superior to the claim of homestead; for, though the decree of alimony was itself subsequent in date to the adoption of the state constitution, which makes the homestead superior to judgments upon contracts made after its adoption, yet the marriage and birth of children, and therefore the contract

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

[2] [From 11 N. B. R. 493.]

on which the decree was rendered, occurred long before the adoption of the state constitution, and have priority over the right of homestead.

As to the monthly payments which fell due before the proceedings in bankruptcy, it might be a question whether, as a personal charge, the discharge in bankruptcy does not release from them. That is a question which can only be decided in a suit in personam for these instalments, on a plea of discharge in bankruptcy. Certainly, however, does the lien of the decree bind the lands for these instalments.

As to the payments accruing monthly after the petition in bankruptcy, they are due by natural obligation which continues; they are in the nature of fiduciary obligations, which the bankruptcy law does not affect, and which a bankruptcy court will not interfere with, the proper state court having exclusive jurisdiction of the subject—to enforce, remit, diminish, or increase the alimony as it may see fit.

I will allow the land claimed as a homestead to be set aside to the bankrupt as such, but shall take care to recite in the order that the homestead shall be held subject to the right of the wife to alimony, as has been or may be decreed to the wife by the state court.

GARRETT (ANDREWS v.). See Case No. 375.

GARRETT (ROBERTSON v.). See Case No. 11,924.

Case No. 5,253.

GARRETT v. WOODWARD et al.

GRAHAM v. SAME.

[2 Cranch, C. C. 190.] [1]

Circuit Court, District of Columbia. Dec. Term, 1819.

DEPOSITIONS — CERTIFICATE OF MAGISTRATE—EVIDENCE OF CONTENTS OF PAPER IN DEFENDANT'S POSSESSION—PARTNERSHIP.

1. The magistrate who takes a deposition under the 30th section of the judiciary act of 1789 [1 Stat. 88] must certify that the deponent was "carefully examined, and cautioned, and sworn or affirmed, to testify the whole truth." It is not sufficient that he certify that previous to the taking of the deposition the deponent was by him carefully examined, cautioned, and affirmed, to testify the whole truth concerning all the matters touching which he should be questioned, although one of the interrogatories should be: "If you know any thing further, material to plaintiff or defendant in the cause, mention it and conceal nothing."

2. If the defendant will not, upon notice, produce at the trial a material paper, in his possession, the plaintiff may give parol evidence of its contents.

[See Bas v. Steele, Case No. 1,088.]

3. In an action brought to charge the defendant Y. as a secret partner with the other defendant W. after having given competent evidence to prove the partnership, the declarations of W. the ostensible partner may be given in evidence to show that the debt due to the plaintiff was a debt due by the partnership.

These suits were brought to charge the defendant Yerby, as a secret partner with the defendant Woodward.

The deposition of Anthony Elton, taken by the mayor of Philadelphia, under the 30th section of the judiciary act of 1789 (1 Stat. 88), was offered in evidence on the part of the plaintiff.

Mr. Jones, for defendant, objected to it, because the mayor had not certified that the deponent was "carefully examined, and cautioned, and sworn or affirmed to testify the whole truth." The mayor had certified that the deposition was taken upon the interrogatories thereunto annexed, the last of which was in these words: "If you know any thing further, material to plaintiff or defendant in the cause, mention it, and conceal nothing." He further certified that the deposition was reduced to writing by the witness and subscribed by him in his own handwriting, in his (the mayor's) presence; and that previous to the taking thereof the deponent was, by him, carefully examined, cautioned, and affirmed to testify the truth concerning all the matters touching which he should be questioned.

THE COURT (nem. con.) sustained the objection, and rejected the deposition.

The plaintiffs having given notice to both of the defendants to produce at the trial a paper purporting to be articles of copartnership between the defendants, and to be signed by both of them, and witnessed by a Mr. Lang, and having proved such a paper to have been in the possession of Woodward, one of the defendants, and the same not being produced, the plaintiffs offered to prove the contents by parol evidence.

Mr. Jones and Mr. Key, for defendant Yerby, objected that Yerby was charged as a dormant partner. That the defendant Woodward was interested and combined with the plaintiffs in the endeavor to establish the partnership; and that Yerby cannot be charged by the confessions or the acts of the other defendant until a partnership shall have been first proved.

THE COURT, however (CRANCH, Chief Judge, not concurring), permitted parol evidence to be given of the contents of the paper; and the defendant Yerby took a bill of exceptions.

The plaintiffs having given evidence of a partnership in the name and firm of Thomas Woodward, the confessions of the defendant Woodward were permitted by THE COURT to be given in evidence, to show that the debt due to the plaintiffs was a debt due from the partnership.

[See Case No. 13,129.]

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

Case No. 5,254.

In re GARRISON.

[5 Ben. 430;[1] 7 N. B. R. 287.]

District Court, S. D. New York. Jan., 1872.

TRADESMAN—BOOKS OF ACCOUNT.

A bankrupt's occupation had been that of a stair-builder. He bought lumber, nails and other materials, and, by the labor of workmen employed by him, wrought the materials into stairs, for persons who gave him orders to build the stairs, and paid him a gross sum therefor. He kept no books except a memorandum book of men's time: *Held*, that he was a merchant or tradesman, and had not kept proper books of account, and that he was, therefore, not entitled to a discharge in bankruptcy.

[Cited in Re Archenbrown, Case No. 505.]

[Cited in Re Howard, 59 Vt. 595, 10 Atl. 716; Re Good, 78 Cal. 399, 20 Pac. 861.]

[In bankruptcy. In the matter of Edward Garrison.]

Salter & Cowing, for bankrupt.

Stephen A. Walker, for creditors.

BLATCHFORD, District Judge. In this case I must refuse a discharge, on the third specification filed by the creditors Smith & Williams, without reference to any other specifications. That specification is, that the bankrupt, being a merchant or tradesman, has not, subsequently to the passage of the act [of 1867 (14 Stat. 517)], kept proper books of account.

He was a merchant or tradesman. His occupation was that of a stair-builder. He bought lumber, nails and other necessary materials, and, by the labor of workmen employed and paid by him for the purpose, wrought such materials into stairs, for persons who gave him orders to construct such stairs, and received as compensation, from such persons, a gross price for the stairs delivered and completed. He was none the less a tradesman because he was, also, a manufacturer of the stairs, or because he did not re-sell the lumber and other materials in the same state in which he bought them, or because he did not buy and sell completed stairs.

He kept no cash book. Such books as he kept furnish no intelligible account of his transactions. A large part of the outstanding debts against him, set forth in his schedules, are debts for lumber bought on credit, and used in his business. He testifies that he kept no books except a memorandum book of men's time; that he has no means of testifying respecting his business for the two years prior to the filing of his petition, except his memory, and, possibly, some paid bills and accounts rendered, and some of such memorandum books. His petition was filed on the 30th of December, 1868. He testifies that he cannot tell what amount of debts was owing to him, or by whom, on the 1st of January, 1868, or what amount of debts he owed on that day, or to whom. His schedules show debts to the amount of over $7,000, nearly all of the amount contracted during the year 1868, and nearly all of it for lumber for his business. Persons who buy on credit and sell again, in such wise as to be merchants or tradesmen, must see to it, in order to be in a position, when misfortune overtakes them, to obtain the benefits of the bankruptcy act, that they keep such books in relation to their business, as will furnish an intelligible account to their creditors of the state and course of their business transactions, not leaving such account to be made up from memory or from sources other than such books.

A discharge is refused.

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

Case No. 5,255.

GARRISON v. CHICAGO et al.

[7 Biss. 480; 9 Chi. Leg. News, 362; 6 Am. Law Rec. 25; 4 Law & Eq. Rep. 166.][1]

Circuit Court, N. D. Illinois. July, 1877.

CONTRACTS WITH MUNICIPAL CORPORATIONS—AUTHORITY OF MUNICIPAL OFFICERS TO MAKE TIME CONTRACTS.

1. The city of Chicago has not the right to contract for lighting the streets and public buildings for a term of years.

[Cited in Citizens' Gas & Min. Co. v. Town of Elwood, 114 Ind. 334, 16 N. E. 625; Putnam v. Grand Rapids, 58 Mich. 423, 25 N. W. 333.]

2. If the other contracting party has gone to great expense in pursuance of such a contract, a strong equity may arise in his favor.

3. The officers of a municipal corporation should be held to a rigid accountability in the discharge of their duty in regard to contracts of such corporation; and in all cases of contracts to run for years, the authority to make them should be clear, because they involve pecuniary liability which will be a tax upon future property owners of the city.

[Cited in City of Indianapolis v. Indianapolis Gaslight & Coke Co., 66 Ind. 404.]

In equity. This was an application for a preliminary injunction made by Cornelius K. Garrison, a citizen of the state of New York, as a stockholder of the People's Gas Light and Coke Company, an Illinois corporation, to restrain the city of Chicago from interference with the rights of the gas company, under and by virtue of a certain contract entered into by the city of Chicago with said gas light and coke company, on the 3rd of October, 1869, for the supply of gas to the city for the period of ten years, for a sum not exceeding $3.00 per 1,000 cubic feet. The bill, after setting forth the contract, and averring the expenditure of $300,000 in the construction of gas works, and $40,000 for the purpose of supplying the west division of said city with gas as required by said contract, charged, among other things,

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 6 Am. Law Rec. 25, and 4 Law & Eq. Rep. 166, contain only partial reports.]

the repudiation of the contract on the part of the city, its refusal further to receive the gas as agreed from the company, and that the said "city will, unless restrained by an injunction, enter into a contract for lighting the west division of said city and the public buildings with oil, and discontinuing lighting the west division of said city by gas, and that the said city now threatens to and will, unless restrained by injunction, enter upon and take possession of all the lamp posts erected by the People's Gas Light and Coke Company, taking therefrom the service pipe, or a portion thereof, and wholly prevent said company from using said lamp posts and service pipes connected therewith for the purpose for which they were erected." The bill prays for a temporary injunction, and "that the court may declare said contract to be in full force and effect, and that the damages of said company may be ascertained, by reason of the wrongful acts of said city." The application was made upon bill, answer and affidavit.

For the complainant it was contended that there was a manifest and undeniable violation on the part of the city of the written contract in this case, and that heavy expenditures had been incurred by the company on the faith of the contract, that irreparable injury would be sustained by the company and its stockholders if the defendant was not restrained by injunction, as prayed for in the bill. The principal ground of defense relied on was the alleged invalidity of the contract set forth in the bill.

T. G. Frost, in opposition to the application, contended, that the bill could not be sustained, nor the application for injunction could not be granted for the following reasons:

I. There was a complete remedy at law, if the contract on which the complainant's rights depend is valid, and where there is an adequate remedy at law, the injured party cannot maintain a bill in equity, or be entitled to the benefit of the extraordinary writ of injunction. Dows v. Chicago, 11 Wall. [78 U. S.] 108–112; Ewing v. St. Louis, 5 Wall. [72 U. S.] 413–419; Hannewinkle v. Georgetown, 15 Wall. [82 U. S.] 548.

II. A municipal corporation cannot be enjoined from the exercise of its legitimate or chartered powers where its action does not transcend said powers. If it has violated its contract, the injured party must be remitted to his action at law. He cannot, though there has been a palpable violation of the contract on the part of the corporation, on that ground alone, arrest the machinery of the city government, or impede it in the legitimate exercise of its functions. Public policy forbids that a municipal corporation should be enjoined from the exercise of its clear, chartered powers conferred for important public purposes. Wiggin v. New York, 9 Paige, 21–23; Mississippi v. Johnson, 4 Wall. [71 U. S.] 475–500; People v. Bissell, 19 Ill. 231; U. S. v. Guthrie, 17 How. [58 U. S.] 305; Dows v. Chicago, 11 Wall. [78 U. S.] 108–112; Dill. Mun. Corp. §§ 58, 476, 727–729, 738, 740, and notes; People v. New York, 2 Hill, 9, 10; In re Fay, 15 Pick. 252; People v. Supervisors of Queens, 1 Hill, 196; Brooklyn v. Meserole, 26 Wend. 140, 141; People v. Galesbury, 48 Ill. 485; Dickey v. Reed, 78 Ill. 261.

III. The contract set forth in the bill and relied upon as the foundation of the rights of the gas company, and of the complainant, as a stockholder thereof, was void, and was, therefore, incapable of enforcement, either in law or equity, upon the following grounds: First. Because such a contract was not authorized by any provision of the charter, and was in conflict with its general purpose and policy, and illegally suspended the operation of the legislative and other powers of the common council for the period of ten years, and was contrary to public policy. 12 Abb. Pr. 364, 378; Presbyterian Church v. New York, 5 Cow. 538; Coates v. New York, 7 Cow. 585; Milhau v. Sharp, 17 Barb. 435; in court of appeals, 27 N. Y. 611; State v. Cincinnati Gas Light & Coke Co., 18 Ohio St. 262, 294; Dill. Mun. Corp. §§ 371, 372; Gale v. Kalamazoo, 23 Mich. 344; Britton v. Mayor of New York, 21 How. Pr. 251; City of Jackson v. Bowman, 39 Miss. 671; Gosler v. Georgetown, 6 Wheat. [19 U. S.] 593; East Hartford v. Hartford Bridge Co., 10 How. [51 U. S.] 535; Davis v. New York, 14 N. Y. 506, 532; Richmond Co. Gas-Light Co. v. Middletown, 59 N. W. 228, 232; 1 Dill. Mun. Corp. §§ 253, 254, 256, 257, 259, 296; Thompson v. Schermerhorn, 6 N. Y. 92; State v. Cincinnati Gas Light & Coke Co., 18 Ohio St. 290; Illinois & St. L. R. & C. Co. v. St. Louis [Case No. 7,007]. Second. Said contract was prohibited by the following provision of the charter, found on page 428 of Laws and Ordinances of Chicago, being section 43 of the act of February 13, 1863, viz.: "No contract shall be hereafter made by the common council, or any committee or member thereof, and no expense shall be incurred by any of the officers or departments of said city government, whether the object of the expenditure shall have been ordered by the common council or not, unless an appropriation shall have been previously made concerning such expense." No such appropriation was or could have been made prior to the execution of this contract. Appropriations are made annually, and cannot be made without special authority, to cover expenses for ten successive years at one time. Pullman v. New York, 49 Barb. 57; Bladen v. Philadelphia, 60 Pa. St. 464; Philadelphia v. Flanigen, 47 Pa. St. 22; Jonas v. Cincinnati, 18 Ohio, 318; McSpedon v. New York, 7 Bosw. 601. Third. The contract in question made by the mayor and comptroller, on behalf of the city, with the gas company, was not warranted by the authority conferred by the resolution of the common council, recited

in the contract, and under which it was executed, because, contrary to the proviso in said resolution, viz.: "that the price to be paid for the gas shall not exceed three dollars per thousand cubic feet," whereas the price fixed by the contract did exceed said price authorized by the resolution by the amount of the government tax on the gas in addition. Nor was it within the power of the city council to authorize the mayor and comptroller to make the contract in question, and leave the terms of the contract open to the discretion of these officers.

IV. The complainant, as a stockholder of the People's Gas Light and Coke Company, had no right to maintain this suit. Because he could only maintain such a suit where the corporation, of which he is a member, exceeded its powers, or allowed its franchises to be violated to the irrreparable injury of the stockholder. Such a suit cannot be maintained merely because of the refusal of the corporation to commence a suit to enforce its rights even in a proper case. Dodge v. Woolsey, 18 How. [59 U. S.] 341; Memphis v. Dean, 8 Wall. [75 U. S.] 64, 76; Samuel v. Holliday [Case No. 12,288].

Corydon Beckwith, William C. Goudy, and B. F. Ayer, for complainant.

T. G. Frost, Leonard Swett, and Elliott Anthony, for defendants.

DRUMMOND, Circuit Judge. In May, 1859, the city of Chicago entered into a contract with the Chicago Gas Light and Coke Company to furnish the city with gas for ten years, viz., till May, 1869.

In February, 1855, the People's Gas Light and Coke Company was incorporated, and was authorized to manufacture and sell gas to the city of Chicago, and to erect all necessary works for that purpose.

In April, 1862, with the consent of the city, the Chicago Gas Light and Coke Company assigned all its interest in the contract of 1859, as to the west division of the city, to the People's Gas Light and Coke Company, and from that time the latter company, until May, 1869, when the contract of 1859 expired, performed the obligations of the Chicago Gas Light and Coke Company under that contract. In 1869, then, the People's Company had the means of manufacturing gas, and was selling it to the city as the assignee of the Chicago Company.

By an amendment made in 1865 to the charter of 1855, the People's Company was authorized, with the consent of the city, to lay down all necessary gas pipes along the streets and public squares. This power seems to have been exercised by the company from 1869 to 1876, and until the controversy which has given rise to this litigation.

By its charter the city had authority to light the public streets—and, it is to be inferred, the public buildings and offices—and to levy and collect a tax for that purpose. The power to provide the necessary means for lighting the streets, buildings and offices, either by the construction of a gas manufactory or by contract, would seem to follow as of course. But it can hardly be presumed, in the absence of any restrictive legislation on the subject, that it was intended to confine the city of Chicago, as its source of supply for gas, or for light, to the People's Company or to the Chicago Company. These means were furnished, but they were not exclusive.

In 1869 the charter of the city contained a provision that no contract should be made by the city involving any expense, unless an appropriation was previously made concerning such expense. And the comptroller was required in May of each year to submit an estimate of the amount necessary to defray the expenses of the city for the current fiscal year.

This provision of the charter does not seem to have been construed as a prohibition to the execution of contracts extending over one year, even where the appropriation did not meet fully the expense of the contracts, and it would be difficult to maintain that this construction is unsound. The language must obviously be applied to the subject matter of the contract, as understood by the legislature, viz.: to those matters where the terms of the contract and the time of its execution were practically within the reach of an appropriation once made.

The construction of tunnels, of water works, of public buildings, including gas works, of deepening summit levels, and many other matters within the general scope of the powers of the city, may require more than a year to complete, and must necessarily involve more than one appropriation. And yet, in view of the manifest intention of the legislature, it may be doubted whether the city would be authorized to execute any of these general powers within an estimate first made of the expense to be incurred.

But if it be admitted that this is the true meaning of the prohibition, it is clear that the purpose of the legislature was to limit the city council to the actual necessities of the particular case, and the question to be determined is whether there was a reasonable necessity on the part of the city council to extend the contract in controversy here, and which will now be mentioned, for ten years from its date, there being no appropriation made commensurate with the obligations of the contract.

We will waive the question connected with the right of the plaintiff, a stockholder of the People's Gas Light and Coke Company, to come into this court for equitable relief, and also the other question, whether there is not a complete remedy at law for a breach of the contract, if valid, against the city, questions not free from difficulty, and come to what is the principal controversy between the parties—the contract between the city and the People's Company.

On the 5th of October, 1869, in pursuance of authority given to that effect by the city council, the mayor and comptroller entered into a contract with the People's Gas Light and Coke Company, by which the gas company agreed to supply the streets and public buildings and offices of the west division with gas for $3 for 1,000 cubic feet, and the city agreed to take and use the same for the streets, buildings, and offices, and pay the price named. The contract was to continue in force till the 1st of April, 1879.

The contract contains other stipulations not material to this controversy. But it must be stated that the contract assumes that the gas company had the means of complying with its obligations. It is not the case of a contract made by the city with the company, by which the company as a consideration for making the contract with the city, was to construct and maintain gas works where there were none before. On the contrary, it is to be fairly inferred that the company had, as authorized by its charter of 1855, and its amendment of 1865, constructed gas works before October, 1869, and had the necessary appliances to execute the contract on its part. It is true, the bill alleges, and we may presume that, in consequence of the making of the contract, the company enlarged its works and made considerable expenditures; but it nowhere appears that this was a condition precedent to the execution of the contract, as that the city declared, if this shall be done, the contract shall be executed, or that the company said, if not done, then it would not be a party to the contract. This, then, being the condition of the parties as to the subject-matter of the contract, had the city the capacity to make it? I think it had not.

It is not necessary to refer to the numerous cases cited in the argument. In my judgment, they establish by a preponderance of authority, that a municipal corporation, under the powers conferred on the city of Chicago by the legislature, and under the circumstances existing here, had no right to make a contract with the People's Gas Light and Coke Company to pay for the use of gas for so long a time. And I think on principle the same conclusion must be reached.

The officers of the city—the members of the council—are trustees of the public. They are clothed with authority to legislate upon public interests. There can be do doubt that the right to regulate the lighting of the streets and to furnish means for the same by taxation, is in its nature legislative power. It concerns the whole public of the city. The effect of the contract in question by the city authorities in October, 1869, if valid, was to bind their successors for ten years as to those matters of legislation. If it be conceded that the power existed, as claimed, then it practically follows that at the end of the term in 1879, a contract may be made by their successors without limit, and which may bind the public indefinitely. I am unwilling to sanction a principle which, in a case like this, would lead to such results. The safer rule is to hold the officers of a municipality to a rigid accountability in the discharge of their trust. In all cases of contracts to run for years, the authority to make them should be clear; because they involve pecuniary liability, and it is a tax upon future property owners of the city.

To sustain the contract between the city and gas company in this case would encourage the making of such contracts in the future. It would place it in the power of companies, whose interests were to be affected by them, to multiply them, and to continue them when the public interest demanded they should cease. To condemn it is to prevent, so far as it may tend to produce that result, the use of influences which look to private rather than to public profit. It is better that all parties should understand there is a limit to the power of municipal bodies in such cases. I hold, therefore, as matter of strict legal right, that the contract of October 5th, 1869, was unauthorized, and the motion for an injunction against the city to prevent interferences with lamp posts, service pipes, etc., will be denied.

But the opinion of the court, even on this application, would be incomplete without considering the case in another aspect.

It must be admitted that the claims of the gas company against the city seem, in some respects, to be founded in a strong equity. The city assumed to treat with the company on the basis of right to make the contract. The latter may, therefore, be pardoned for recognizing the authority claimed. For several years the city conceded the validity of the contract by paying for the gas the stipulated price. It is only within the last few years, and after the cost of producing gas had been reduced, that any active efforts were made by the city to deny the obligations of the contract. If the cost of its production had been increased, we should probably never have been troubled with this litigation.

The company has made large expenditures for additional works. Many miles of mains and many service pipes have been put down. These have been much extended in parts of the city where there has been, up to the present time, no adequate return, owing to the sparseness of population there. It is alleged this has been done by the company at the request of the city, and that in consequence the company has been subjected to great loss caused by condensation and leakage of gas from the pipes not in use and not required for use when they were put down.

The contract, by its own limitation, expires in less than two years from the present time. In view of these circumstances it was suggested at the hearing of the motion for an injunction, that some satisfactory arrangement should be made between the parties, or by reference to others. The gas company has the means of supplying gas. The city needs it.

It would seem as though they could deal with each other better than with any one else. If the purpose of the city was to do nothing until the validity of the contract was ascertained, that is now accomplished so far as the opinion of this court can determine it. And, therefore, as we are now only deciding a preliminary motion in the case, it does not seem improper to renew the suggestion that was made on the hearing of the motion;—for the equity of the plaintiff appears so strong, the acquiescence of the city in the contract so long continued, that, if I could hold it binding on the city because of this acquiescence, I should feel inclined to do so, but the fact that the rights of the public cannot in any way be affected, prevents this, and nothing remains to be done in the present stage of the case but to express the wish that the suggestion of the court may be adopted by the parties.

Case No. 5,256.

GARRISON v. MARKLEY.

[7 N. B. R. 246.] [1]

Circuit Court, E. D. Michigan. May 6, 1872.

EQUITY JURISDICTION—DISCOVERY—REMEDY AT LAW.

1. Where the complainant knows what the goods, transferred in fraud of the bankrupt act [14 Stat. 517], consisted of, he cannot claim equity jurisdiction, on the ground of discovery, because he is ignorant of their precise amounts, for he can compel the examination of the preferred creditor and obtain a full disclosure.

2. Where the remedy at law is plain, adequate, and complete, without any reasonable doubt, equity will decline the jurisdiction, provided the objection is taken by demurrer, or is claimed in the answer.

[Distinguished in Sill v. Solberg, 6 Fed. 471.]

3. Bill dismissed, without cost to either party.

Demurrer to bill. The bill in this cause is filed by the complainant [Charles M. Garrison] as assignee in bankruptcy, and its object is to recover the value of a certain stock of goods alleged to have been transferred by the bankrupts to the defendant [John J. Markley], a creditor, within four months, etc., with a view to give him a preference, the bankrupts then being insolvent, and, the defendant having reasonable cause to believe, etc., in fraud of the bankrupt act. It is also alleged that complainant is ignorant of the particular description of the goods so transferred, and a discovery in that regard is prayed. A demurrer has been interposed, alleging as grounds of demurrer numerous informalities in the bill, and in its execution, signing and verification, and especially to the discovery prayed, and to the equity of the bill.

Mr. Dickinson and Mr. Pond, for complainant.

Mr. Griffin, for defendant.

[1] [Reprinted by permission.]

LONGYEAR, District Judge. Passing over the formal objections to the bill, I will proceed at once to the consideration of the last two grounds of demurrer, viz.: to the discovery and to the equity of the bill.

First, as to discovery. On the argument the ground upon which the claim of equity jurisdiction is based was, that, not knowing the particular description of the goods, the plaintiff could not declare in a suit at law, and it was therefore necessary for him to come into equity for a discovery of the same; and that equity having jurisdiction for that purpose, it will retain it for relief. This claim cannot be maintained, for several reasons; the complainant knew that the goods so transferred was "a stock of merchandise, consisting of groceries, drygoods, fancy goods, hardware, boots and shoes, ready-made clothing, and other articles of merchandise" as appears in these express words on the face of the bill; these constitute data amply sufficient to enable a competent pleader to frame a declaration at law, with all the particularity necessary in such a case. It would, no doubt, be convenient to know the exact items and quantities and numbers of each kind, but this is not necessary; because the pleader may, as is done almost every day, cover the whole range of items of each kind, and may state the numbers, quantities and values broad enough to cover any possible proofs that may be made. (2) Complainant has at hand, in the bankruptcy court of which he is an officer, a ready means of obtaining all the information he could possibly obtain by an answer to a bill in equity. Under section twenty-six of the bankrupt act he can compel the examination of the preferred creditor, as well as the bankrupts themselves, and obtain a full disclosure. (3) Since the law has been changed so as to allow parties to be called and examined as witnesses in trials at law, discovery bills in aid of trials at law, or to enforce purely legal rights, have become entirely unnecessary—have, in fact, fallen into disuse, and may be considered practically obsolete. See 1 Story, Eq. Jur. § 74. (4) Even if it were otherwise, it could not be maintained, because it is not alleged that the facts cannot be proven by any other witness; and, furthermore, such allegation could not, from the nature of the case, be truthfully made; because the bankrupts of course know all that the defendant can know in regard to the matters alleged, and they are competent witnesses. [Brown v. Swann] 10 Pet. [35 U. S.] 497, 501; Har. [Mich.] 203; 1 Story, Eq. Jur. §§ 71, 74c, 74d.

Second, as to the equity of the bill. Jurisdiction is claimed on the ground in addition to the ground of discovery, that the question of fraud is involved, of which equity always takes cognizance, concurrent with the courts of law—that the jurisdiction being concurrent, equity having obtained jurisdiction first, will retain it. These posi-

tions are no doubt correct as a general rule. There are, however, well defined exceptions recognized, by which the rule is confined to somewhat narrower limits than as above stated.

Judge Story (Story, Eq. Jur. §§ 76, 74e), in view of the exceptions alluded to, states the rule as follows: "It may, therefore, be said that the concurrent jurisdiction of equity extends to all cases of legal rights, where, under the circumstances, there is not a plain, adequate, and complete remedy at law." He is here speaking particularly of concurrent jurisdiction in cases involving fraud. It is not alone because there is a remedy at law, that equity will decline the jurisdiction, but it is because the remedy at law is plain, adequate, and complete. If, however, the fraudulent transaction in question, was attended by, or has given rise to, circumstances on account of which a judgment at law will fall short of doing full and complete justice between the parties, or on account of which there is difficulty in reaching the full merits of the case under the rules of law, or where there is even a reasonable doubt as to the remedy at law being plain, adequate, and complete, equity will always take and retain jurisdiction; but in all other cases equity will decline to take cognizance of the case and leave the parties to their action at law, provided the objection is taken by demurrer or is claimed in the answer. Not because equity has not jurisdiction, but because it is more proper that such cases should be tried at law, it being optional with the equity court, in all such cases, to retain the jurisdiction or decline it, as circumstances seem to indicate. 1 Story, Eq. Jur. §§ 73, 74e.

The supreme court of Michigan state the rule thus: "The true rule upon this subject would seem to be, that where the subject of the suit is embraced under any of the appropriate heads of equitable jurisdiction, the court will take cognizance of it, notwithstanding there may be a remedy at law, or other circumstances exist which would induce the court to refuse to entertain jurisdiction in the particular case, unless the defendant raises the objection by demurrer, or claims the benefit of it in his answers." Williams v. Mayor, etc., 2 Mich. 560, 585. In the case of Stockton v. Williams, 1 Doug. (Mich.) 545, 565, cited by counsel for complainant, there was a former suit at law pending, but it was not taken advantage of by plea or otherwise, and the question was first raised at the hearing. While the court doubtingly expressed the opinion that the objection might have been good if made in time, yet defendant, having submitted to the jurisdiction, it was now too late to make the objection.

In the present case, there is not a shadow of doubt that the remedy at law is plain, adequate, and complete. A judgment at law cannot fail, on account of anything inherent in the case itself, to reach its full merits, and there is not a circumstance in the case seeming to require equitable interference for any purpose whatever. Defendant has taken the objection by demurrer, thereby in effect demanding the right to have the case tried in a court of law and by a jury. There are no circumstances in the case indicating, or in any manner requiring, that he should be deprived of that right. Therefore, under the rules above laid down, the court decline the jurisdiction. The bill must be dismissed, but without costs to either party.

GARRISON, The W. F. See Case No. 17,475.

Case No. 5,257.

GARROW et al. v. DAVIS et al.

[10 N. Y. Leg. Obs. 225.]

Circuit Court, D. Maine. Sept. Term, 1851.[1]

PRINCIPAL AND AGENT.

1. An agent, when contracting for his principal, cannot stipulate for any private collateral benefit for himself. If he does, he will be deemed to take and hold it in trust for his principal. The rule applies to all persons standing in a fiduciary relation to those for whom they are acting.

[See note at end of case.]

2. Fraud may be inferred from facts and circumstances without direct proof. But when the circumstances admit of a natural and probable explanation, consistently with the innocence and good faith of the party charged with the fraud, the presumption is in favor of innocence.

[See note at end of case.]

3. A simple hope, expectation, or possibility of benefit is a sufficient consideration to support the contract of sale.

[This was a bill in equity by John Garrow, Thomas Y. How, Jr., James Seymour, and George Miller against Amos Davis, George M. Pickering, William McCrillis, and Ephraim Paulk.]

WARE, District Judge. In February, 1835, John Black, as the agent of the devisees of William Bingham, entered into two contracts with one Ramsdell to sell to him a township of land, No. 14, in the county of Hancock, with a strip adjoining it, amounting in the whole to 28,804 acres, at three dollars per acre, the whole amount of the purchase being $86,412, to be paid in five equal installments, the first in sixty days, and the others in one, two, three, and four years, with interest, for which notes were given. The contract contained a proviso that if the notes were not paid according to their tenor, at the election of the vendor the contracts might be declared void, and the money paid should be forfeited. On the 1st of April, 1835, Ramsdell assigned

[1] [Affirmed in 15 How. (56 U. S.) 272.]

all his interest in both contracts to Nathaniel Norton and Junius Keith, and by several mesne assignments, two-thirds of the interest in the contracts came to the plaintiffs by purchase at different times between 1837 and 1841. The first notes for one-fifth of the purchase money were paid at maturity or within a few days after, and Black received at different times afterwards from the different assignees, on account of the contracts, including the first payment, $34,005.24. He also received for timber taken from the land, $6,066.46, amounting, with the cash payments, to $40,071.70, leaving $46,341.30 due on the contracts, inclusive of interest. In 1839, there was some negotiations with Black for an arrangement by some of the parties interested in the bonds by which they might obtain the means of paying for the land by a sale of the timber, but the negotiation failed, and nothing further was done till 1844, when Black, July 22, wrote to Miller, one of the plaintiffs, saying that he had heard nothing for several years from the parties, and informing him that he had applications for the purchase of the land, and inquiring what the holders of the bonds intended to do in regard to their interests in them. The plaintiffs wishing to save something for themselves, and not being in a condition, or not desirous of purchasing the land, employed Paulk, one of the defendants, to sell their rights and interest in the contract. All their legal rights had become forfeited, or were liable at the election of the vendor to be forfeited, under the proviso, by the non-payment of the purchase money, but as Black had given them no notice of his intention to insist on the forfeiture, it was supposed that their rights in equity were not entirely foreclosed. These were a right to complete the purchase by paying what was due on the notes. But since the original contract, the market value of timber lands had so fallen that this tract, which was bargained for in 1835 at three dollars an acre, was now considered to be worth but about one, and the balance remaining due on the contract, inclusive of the accumulation of interest, was more than the present market value of the land. All that Paulk had for sale was, therefore, the good will of the contract; that is, the hope or expectation that the vendor would be willing to sell to them, as the assignees of Ramsdell, in consideration of what they had already paid, at a lower price than he would demand of strangers. It appears from the deposition of Black that though he held the bonds to be entirely forfeited and of no value, he was unwilling to sell to others until the bonds were surrendered and canceled, and it was evidently considered by others as well as the plaintiffs, that the possession of the contract was worth something in making a bargain with him. Miller first applied to Paulk by letters, on the 11th and 13th of September, requesting him to make inquiries and ascertain whether anything could be saved to the parties interested in the contracts by a sale of them, and expressing a faint hope that the land might be worth something more than the balance remaining due. Paulk in his answer communicated the information that he had obtained, and expressed his opinion that the land was not worth in the market more than one dollar per acre, which was considerably less than the balance due on the note without interest, and that there was little prospect of the holders of the bonds saving anything, unless Black could be induced to make in their favor a considerable abatement of the price. In the last of October, Paulk was regularly authorized by Miller and Norton, two of the plaintiffs, to transfer their interest, and furnished with the original contract to be surrendered to Black. Under this authority he sold the interest of Miller and Norton to Davis, one of the defendants, for $1,050, November 16th. There was a stipulation in the contract of sale that the purchaser should have the benefit of the vendor's communication with Black in regard to the price of the land, and that Paulk should continue the negotiation with him for Davis' benefit. Davis soon after sold portions of his purchase to the other defendants. It is also alleged in the bill that it was understood that Paulk should act on the behalf of all the parties interested in the bonds, although he was formally authorized only by two of them. The plaintiffs complain and charge in their bill that Paulk entered into a corrupt and fraudulent agreement with the other defendants, to procure for their common advantage an assignment of these contracts from the plaintiffs for an inadequate and trifling consideration, and then to continue to negotiate in their names with Black, so that he might be made to believe that whatever abatement he might make in the price would enure to the benefit of the plaintiffs; and it alleged that it was well known that Black, from considerations of equity and favor, was willing to sell to them, and did actually sell under the belief that it was for their benefit, for a much less sum than he could have obtained from other persons. The prayer of the bill is that the defendants may be held as trustees and decreed to assign to the plaintiffs all the right and interest they obtained by virtue of the sale by Black on the payment of such sum as they have paid, and to account for whatever they have received from the sale of timber or otherwise from the land.

Such in substance is the case presented by the plaintiffs' bill. It is not pretended that they were desirous of becoming purchasers of the land at the time when Paulk made his contract with Davis, and all that they can equitably demand is to have the benefit of any abatement of the price which from any consideration he might be willing to make, and did actually make, from what he would have demanded and might have ob-

tained from strangers, or whatever other value the bonds might have. There is a variety of matter introduced into the bill in giving a history of the transaction relative to the land from the first contract with Ramsdell to the final sale to Davis, sharing the hardships and losses to which the plaintiffs have been subjected, constituting a strong appeal to the sympathy and favor of Black, if from his position of an agent, and not an owner, he could be supposed to be accessible to any consideration of this kind, and there are various charges against Paulk with regard to his management of the business, which have an application more or less direct and stringent on the question of his good faith in the conduct of his negotiations; but the gravamen of the bill is that which I have stated.

A material question arises, then, whether Black was willing to sell, and actually did sell, under a belief that he was doing a favor to the holders of the bonds, for a less sum than he would have demanded of other persons. The answers of Col. Black to this point are perfectly conclusive. He says that he did not consider them as having any legal or equitable claim against him or his principals arising out of the original contract, and that he never intended to make them any allowance or consideration for any such supposed claim further than an offer of a renewal of the bonds or right of pre-emption; that he had, as agent of the trustees of the estate, always given bonds in the same form as those given to Ramsdell, that many had been forfeited by neglect to make the payments, and that he had considered such bonds as worthless; that it was his wish to have them returned before giving new ones, but that he had often given new bonds without the surrendering of the old, but that his custom was to notify the holders and give them, as a matter of comity and not of right, a privilege of pre-emption, provided they would give as much as others, and that in this case, as in others, he considered it as his duty to sell for the best price he could get. It is therefore certain that the supposition on which the suit seems to have been originally commenced was a mistake, and when these bonds were offered for sale all the value they had was that they gave a simple right or privilege of pre-emption, and furnished no basis of a claim for a reduction of the price below the market value of the land. But this right is admitted to have been worth something, and the question of interest to the plaintiffs is whether Paulk in good faith endeavored to obtain, and did obtain, the best price he could. Immediately after receiving the first letters, he made inquiries for the purpose of finding a purchaser. He had an offer of $1,000 from Dwinal, which he did not think proper to accept, and attempted to make arrangements with Vickering, but, failing of success, he finally sold to Davis, who had before been in negotiation with Black for the purchase of the land, for $1,050. No evidence is offered tending to prove that a higher price could have been obtained, and none that shows that the right of pre-emption was worth a greater sum. So far as the evidence goes, it shows that Davis, after paying the bond holders for the bonds, paid Black the fair market value of the land. Such is the direct testimony of Dwinal, and such seems evidently to be the opinion of Roberts,—two of the plaintiff's witnesses, both well acquainted with the value of timber lands. I have not been able to find in the record any evidence of a want of diligence and fidelity in Paulk in his endeavors to find a purchaser, or any proof that the sale was actually below the value of the bonds; nor any evidence of collusion with Davis or others in the negotiation for the sale.

Some discrepancies urged at the argument between Paulk's answer and the proofs do not appear to me to be of sufficient importance to warrant the imputation of bad faith. They principally are this, that Paulk urged haste in closing the contract; and it is argued that he wished to prevent Miller from visiting Bangor for the purpose of negotiating himself. But it is to be borne in mind that the sale was not concluded until the near approach of the lumbering season, and if it were delayed, the opportunity for a sale that season would be lost, and with it possibly the chance of obtaining anything for the bonds. The contract of sale was completed, and the papers executed, November 16, but as Davis was not prepared to pay the money, they were deposited in a bank. Miller was informed of the contract, was dissatisfied, and wrote to Paulk to delay the sale until he could go to Bangor, and Miller had delayed the delivery of the papers to the 25th of November to allow Miller time for that purpose, and that he might ratify or disaffirm the contract, but he not arriving, the papers were delivered on the 26th. Complaint was also made that the suggestion of Dwinal was not adopted, and the bond sold at auction. In this case the offer would of course be withdrawn, and it is possible that at an auction sale the bonds would have brought less than the offer, and there was no considerable probability that an advance would be obtained. It was a proposition on which the agent ought to exercise a sound discretion, and his not adopting it seems to me but a slight foundation for an imputation of bad faith. Though there may be something in the conduct of Paulk which may, to a suspicious mind, appear equivocal, there is nothing that appears to me to warrant the charge of collusion with Davis to pass into his hands the bonds at an under price. And it is certain that Davis, so far from thinking that Paulk had any disposition to favor him in the bargain, complained of his want of frankness in the negotiation.

It was earnestly contended by the counsel for the plaintiffs that the contract of Paulk with Davis was absolutely void in itself. In that contract, Paulk, speaking for his principals, says: "We also agree that the

said Davis may have the benefit of all our communications with Col. Black, as regards the price of the land, and may continue the negotiations with Col. Black through our authorized agent for the said Davis' benefit, said Davis paying said agent for what he may do hereafter, and ourselves not being in any way liable for his acts while negotiating for said Davis." It is contended that this term of the contract per se rendered it void—First, because by this clause he became in the same transaction the agent of the buyer as well as the seller; and, secondly, because he has introduced into the contract a condition for his own private and personal benefit. It is certain that an agent to sell cannot make himself an agent for the buyer. If he presumes to act as such, it is admitted that the contract of sale will be void, at the election of the vendor. But it is not precisely true that Paulk, by virtue of this condition, was the agent of the buyer at the time when the contract was made. He became so by virtue of the contract, but not until it was completed, and then his agency for the seller terminated. The objection, therefore, does not apply in technical strictness. If the contract may be declared void on the ground of this condition, or if the condition show to the plaintiffs a way for any other equitable relief, it must be for the second reason urged by the counsel,—that it is a stipulation for the private benefit of the agent.

It is a general rule of law that an agent shall not be allowed, when contracting for his principal, to provide for himself any emolument in pecuniary advantage from the contract, beyond the compensation which he receives from his employer. An agent to sell cannot be a buyer, or be in any way interested in the purchase of what he sells. Nor can he, when contracting for his principal, stipulate for any individual or collateral advantage to himself. If he does, he is deemed to take and hold it as a trustee for his principal. It is a rule which applies to all persons standing in a fiduciary relation to the parties for whom they are acting, founded in a wise public policy, and which courts of equity are in the habit of enforcing with wholesome rigor. The most entire good faith is a legal obligation. If it were otherwise, an agent would be under the temptation of sacrificing the interest of his principal for some collateral benefit to himself, and the law therefore wisely closes the door against the temptation, and holds that all such benefits of a pecuniary value which the agent may make in his own interest shall enure for the benefit of his principal. 1 Story, Eq. Jur. pp. 308, 315, 320; 4 Kent. Comm. 432, and notes; Story, Ag. p. 211. Of the general rule there is no question. If a servant or an agent, availing himself of the advantage of his relation to his employer, gains by a bargain a profit to himself beyond the proper remuneration belonging to his office or employment, he must account for it. Thus, if a factor, employed to purchase for his principal, instead of taking his commission or a factorage, charges a mercantile profit, such as he would in the sale of his own goods, or in fact executes his commission by a sale of his own goods for such an advance on the price, he will be held to refund to his principal all beyond his proper commission. East India Co. v. Henchman, 1 Ves. Jr. 289; Massey v. Davis, 2 Ves. Jr. 319; Lonsdale v. Church, 3 Brown, Ch. 41. The only question of difficulty is whether the facts bring the present case within the rule. If this term of the contract had been introduced by Paulk in his own interest, and for the purpose of giving him the profit of a second agency, it would seem to fall within the reason of the rule. It would at least have the appearance of being part of the consideration of the transfer of the bonds. But the owners are entitled to the whole of this consideration, in whatever form may be given to it, and this stipulation might render the contract void or entitle the plaintiff to an account of the profits he made in his agency. Story, Ag. p. 207. It becomes, then, important to inquire what was the true reason for the insertion of this condition in the contract of the sale of the bonds. It is charged in the bill that Black was willing to sell to the plaintiffs for a much less sum than he would have demanded, and could have obtained, from others, and that Paulk entered into a fraudulent agreement with the other defendants to sell the bonds for a trifling and nominal price, and then to continue the negotiation, ostensibly for the plaintiffs, and then obtain the benefit of this reduction of the price for the defendants, and that for this he was to receive a large interest in the land, or a large sum of money; and the argument is that this sum of $1,500 was paid to him for the betrayal of his trust.

It is seen by the testimony of Black that the expectation that he would make any abatement of the price in favor of the assignees of the bonds was a delusion. But this notion appears to have been entertained by others as well as the plaintiffs; at least by Davis. It cannot, I think, be fairly denied that one reason for introducing this condition into the contract was that Davis might obtain the benefit of any favor in the terms of the sale that Black would be willing to allow the plaintiffs in consideration of the losses they had sustained in their former contract. This was a chance or hope that they might fairly sell, for it had cost them a large sum. An expectation or a hope, if it has an appreciable value, is a sufficient consideration to support the contract of sale. Poth. Vente, No. 6; Spei emptio est, Dig. 17, 1–8. Did, then, Paulk, in the sale of the bonds to Davis obtain in the price the value or the benefit of this hope or expectation? In his answer to this charge of the bill, he says that this was

the stipulation of Davis, that the offer of $1,050 was on this express condition; a condition which he says that he considered that he had a right to agree to. Davis, also, in his answer, says that he made this a condition in his offer, that he might have the advantage of all those considerations of equity or favor which the vendor could be induced to extend to the previous holders of the bonds. These answers, being responsive to the bill, must be taken as true unless overcome by other evidence. But there is no direct evidence in the case to control the effect of the answers; nor is there anything in the circumstances connected with the transaction that impairs their credibility beyond the stipulation, on the face of the contract, and the sum ultimately paid to Paulk for his services. But a contract of sale by an agent containing a condition apparently for his private benefit will naturally be scrutinized with jealousy, especially when, as pointedly urged by the counsel, he indirectly obtains for himself more than he does for his principal. Whatever fair pretexts may be thrown over the transaction, it will be the duty of the court to look into it with great care, and be satisfied that they are not mere pretexts to cover a secret and fraudulent collusion between the agent and the other party. If this fact stood alone and unexplained, it would give strong color to the charge of collusion. But it is to be observed that the contract of sale provided only that the purchaser should have the advantage of Paulk's previous negotiations with Black, and should continue them at the expense of Davis, without determining the amount of the compensation. That was to be fixed by Vickering, who at this time certainly had no interest in the bargain. Now if there was foundation for the opinion that Black would make an abatement from the price in favor of the plaintiffs, that advantage, it was supposed, could only be obtained by continuing the negotiation nominally for them. The compensation of $1,500 was awarded by Vickering, not merely for his personal services and time in negotiating the bargain, but included his compensation for endorsing Davis' notes. These amounted to $30,000, and even if the whole was considered as commission it would not be a very extravagant commission, considering the length of time the notes had to run, and that Davis was a man of doubtful credit. But then it is said that Paulk himself was insolvent, and that if his endorsement was of slight value to the holders of the notes, his liability was of nearly as little consequence to himself; and that it is not reasonable to suppose that if $1,500 would be paid for the endorsement of an insolvent person. But in answer it may be said that Black absolutely insisted on an endorser; that it was his invariable practice in all sales of lands; that he was willing to take Paulk; and that Davis could obtain no other. The other parties who were then negotiating for an interest, and eventually became interested in the purchase, refused, on any consideration, to endorse the notes, and preferred to pay the sum fixed by Vickering rather than take this responsibility on themselves.

These circumstances appear to me sufficiently to account for the introduction of this condition into the contract without supposing that Paulk sacrificed the interest of his employer for a collateral benefit to himself. Fraud is never presumed, nor ought it to be imputed on mere suspicion. It must be shown by clear proof. "Dolum in indiciis perspicuum probari convenit." Code, 2, 21, 6. It may be inferred from facts and circumstances. Domat. liv. 1, tit. 18, § 3, No. 4. But when these facts are susceptible of a natural and probable explanation consistently with the good faith and honesty of the parties, it is sufficient to say that they do not prove fraud, and the legal conclusion then is in favor of innocence. I am the better satisfied with this conclusion, as I think it appears from the testimony that Paulk obtained by the sale of the bonds all that the possession of them at the time of the sale was believed to be worth. My opinion on the whole is that the bill ought to be dismissed, with costs.

[NOTE. On complainants' appeal this decree was affirmed by the supreme court. Mr. Justice Curtis, in delivering the opinion, reviewed the evidence in detail, and held that it did not show that the complainants' agent disposed of what he was employed to sell for less than its value and that he did it fraudulently. In respect to the two defendants McCrillis and Pickering, it was noted that there was no evidence tending to show they were guilty of any fraud. Upon the charges of fraud in respect to the other defendants, and the answers denying those charges, and the proofs, the court was of the opinion that the complainants failed to make out a fraudulent combination between Paulk and Davis, and hence the decree of the circuit court dismissing the bill was duly affirmed. 15 How. (56 U. S.) 272.]

Case No. 5,258.

Ex parte GARWOOD.

Ex parte POTTS.

[Crabbe, 516.] [1]

District Court, E. D. Pennsylvania. Oct. 7, 1843.

ACT OF BANKRUPTCY — PAYMENT BY INSOLVENT — SATISFACTION OF JUDGMENT — DISCHARGE.

1. A payment made by an insolvent aware of his insolvency is not necessarily an act of bankruptcy; to make it so it must be with the intention of giving a preference.

2. Payment or satisfaction of a judgment obtained bona fide and without collusion, and on which execution may at once be issued, cannot be considered a voluntary payment in fraud of the bankrupt law, if by such payment the debtor is enabled to continue his business.

3. Pending a proceeding by creditors to have Potts and Garwood declared bankrupt, they

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

instructed a foreign agent of theirs to remit funds to a particular creditor, to secure him from loss; the creditors' petition was dismissed —this fact not appearing—and subsequently the respondents thereto commenced voluntary proceedings to have themselves declared bankrupts, both individually and as members of the partnership; the court decided that the instructions to the foreign agent, though not obeyed by him, were in violation of the bankrupt law [5 Stat. 440], and therefore refused to discharge the petitioners, but a jury being demanded, the petitioners were decided by it to be entitled to their discharge, and were discharged accordingly.

These were petitions by George M. Garwood and by Percival M. Potts for certificates and discharges, both individually and as members of the firm of Potts and Garwood, they having voluntarily petitioned to be declared bankrupts. It appeared that while the proceedings were pending to declare the firm of Potts and Garwood bankrupts, and also subsequently to the dismissal of that petition [Case No. 11,344], these petitioners had satisfied several judgments on which they were liable to execution, and had taken up their notes which were endorsed by Richard D. Garwood. It also appeared that, on the 27th of May, 1842, a few days after the petition against the partnership had been filed, Garwood wrote, in the name of the firm, to one Kechmli, their agent at Rio Janeiro directing him to consign to the extent of $10,000 to Richard D. Garwood, as he had endorsed for the firm, and, under the bankrupt law, that was the only way to protect him. Kechmli did not obey these instructions, as he had nothing to consign. The letter was not copied into the letter-book of the firm, and was written without the knowledge or assent of Potts, but some days after it was sent its contents were communicated to him by Garwood, and it was often the subject of subsequent conversation between them.

Mr. McIlvaine, for opposing creditors.

The object of these petitioners throughout the whole of this business has been to protect Richard D. Garwood in the first instance, and to postpone the claims of all other creditors to his. They transferred to him the possession of the coffee belonging to them in New York, which transfer was the basis of the petition of Harley and Son heretofore dismissed by this court; they instructed their agent in South America, on the 27th of May, 1842, to take means to secure this preferred creditor; and, with a full knowledge of their insolvency and bankruptcy, they have purchased or taken up the notes on which he was endorser. The transfer of the bill of lading for the coffee was fully argued upon when these parties were last before this court, and it was then decided that such an intention for that transfer was not shown as would render it an act of bankruptcy. We think that other acts of these petitioners—now made apparent—show what the intention of that transfer really was. The letter to Kechmli of the 27th May, 1842, was, beyond a doubt, a flagrant fraud, and an act of bankruptcy, and its expressed intention was to give a fraudulent preference. Whether Potts knew of that letter or not he had the means of knowing and was bound to know of it; Garwood swears that he did know of it; at least subsequently to its being sent; and on general principles, even if he did not know of it, one partner is civilly answerable for the acts of another done within the scope of his authority. That the purchases of the notes endorsed by Richard D. Garwood were made under a full knowledge of their insolvency, cannot be denied by the petitioners; their books show it, and their correspondence, even to the letter of 27th May, is full of it. We think, therefore, that these acts constitute such fraud in the petitioners as should prevent their discharge.

Mr. Macaulay, for Garwood.

To render a payment fraudulent under the second section of the bankrupt law it must have been in contemplation of bankruptcy, while all the payments here complained of were made under pressure and to gain an advantage. They paid the judgments to prevent execution and enable them to go on. As to the letter of 27th May, it contemplates not a breaking up of business but a continuance of it, and it is admitted nothing was sent to Richard D. Garwood in consequence of it.

W. B. Reed, for Potts.

There is nothing in evidence now which would have varied the decision of this court in the former case in July, 1842, at least so far as concerns Potts. That case decided that the transfer of coffee to Richard D. Garwood was not an act of bankruptcy, and that the transfers of bills of lading and policies of insurance to D. Smith, Jr. were legal. The only new facts of importance are the letter of 27th May, and the purchase of notes endorsed by Richard D. Garwood. As to the last, the debt was a bonâ fide one, and the transaction cannot be described as fraudulent; while for the letter Potts is wholly irresponsible, as he did not know of it till too late, and as one partner may commit an act of bankruptcy without compromising the other. Cary, Partn. 196, 197, 254 (5 Law Library).

J. Randall, for Garwood.

By the fourth section of the bankrupt law, every creditor who surrenders all his property is entitled to a discharge, except he fall within the prohibition of that and the second section, by making a fraudulent payment in contemplation of bankruptcy. But what a person's contemplation or intention is can never be shown by positive evidence, and is only to be presumed from circumstances and actions, and the burden of proof of such improper intention is in this case on the opposing creditors.

Mr. Randall then entered into a lengthy review of the evidence in the case, and then urged that, as the letter of 27th of May had never been carried into effect, even if it had

a fraudulent intention—which he denied—such intention alone, unaccompanied as it was by any effect or result, could not be such an act of fraud as to prevent a discharge.

Mr. Dallas, for opposing creditors, in reply.

This application is entitled to no favor; it is voluntarily made by debtors after they have disposed of all their property. Under the state laws there is no doubt but that these petitioners had a full right to prefer certain favored creditors as they have done, and, had they thought proper to do so, they might have contented themselves under those laws, but coming here to claim the privileges of the bankrupt law, they must satisfy its requirements. We, on the other hand, do not charge any criminal or moral fraud, but simply such actions as constitute a fraud under the bankrupt law, and there we think we have a right to stop, and to repudiate any obligation on us to show the intention of the acts we prove; from those acts but one design can be presumed, and that design a fraudulent one. Acts of fraud like these cannot be explained away. Insolvency is an inability to pay and meet engagements as they become due, and that was the condition of these petitioners when they called the meeting of their creditors in April, 1842; from that time they were fully aware of their position, and must have had the idea of failure and bankruptcy constantly before them. This fact should be borne in mind as we examine their various actions subsequent to that time. The letter of the 27th May, 1842, needs no reference to collateral facts to bring out its fraudulent character. It bears the brand on its face; it avows the intention to secure one creditor to the prejudice of others; and it throws great light on other and less manifestly fraudulent actions. But, it is said, we have no right to visit the consequences of this letter on Potts, as he did not know of it until it was too late; it is in evidence, however, that he knew of it very shortly after, that he never countermanded it, communicated it to the creditors, or in any way expressed his dissent or disapproval of it, and we also have it proved, that he positively assented to the purchase of the notes which Richard D. Garwood endorsed,—a transaction which was only another part of the general design to protect that favorite creditor. We think, therefore, that Potts has no right to throw off his responsibility for this letter; he, at least, subsequently ratified it; and such a subsequent ratification is equivalent to an original assent. Again, it is said that this letter was not carried into effect; but that does not render it any the less a fraud. It is undoubtedly a preference, undoubtedly made in contemplation of bankruptcy, and such transfers are declared frauds by the bankrupt law: not because they are valid and effective, for under that law they are expressly made void and of no effect. It is, therefore, no answer to the charge of fraud against this letter to say that it produced no effect; it produced as much effect as it possibly could when the bankrupt law declared it should have no effect at all. As to the purchase of the notes endorsed by Richard D. Garwood, it was a preference made, as we have seen, under full knowledge of insolvency and necessary contemplation of bankruptcy; it was therefore a fraudulent act of bankruptcy.

RANDALL, District Judge. I do not agree with the counsel for the opposing creditors that any payment made by a person who is insolvent, and aware of his insolvency, is to be considered as an act of bankruptcy, or as the giving a preference prohibited by the bankrupt law. Many persons, knowing they are insolvent and unable to meet their engagements, continue business in the expectation and hope that they will be able eventually to extricate themselves from debt, and in this they frequently succeed:—to hold that payments, made by a person under such circumstances, are fraudulent, would be to put an end to the exertions of an honest and enterprising debtor, who, finding himself suddenly overtaken by losses and disasters, is determined to devote his time and talents to a business which, he is confident, will, with industry, enable him to meet all the demands against him. To make such payments fraudulent they must be with the intention of giving a preference to the particular creditor, whether the debtor intends making application for the benefit of the bankrupt law or not. Neither do I agree that the payment or satisfaction of a judgment on which execution may be at once issued, can be considered as a voluntary payment, in fraud of the bankrupt law, if the judgment was obtained bona fide, and without collusion, if by such payment the debtor is enabled to continue his business. These views would seem to dispose of most of the exceptions urged against the discharge of the petitioners, if I have correctly viewed the evidence; but I have not examined it with as much care as I should have deemed it my duty to do had these been the only objections urged.

The petitioners were extensively engaged in commercial pursuits, and apparently in prosperous business, when, in the early part of 1842, they found themselves involved in the general prostration which then came over our business community. On the 27th of April of that year, being unable to meet their engagements, they called a meeting of their creditors, from whom they asked an extension of nine, twelve and fifteen months, which was generally agreed to; on the 14th of May, however, Harley and Son filed a petition in the district court, praying to have them declared bankrupts, and alleging, as an act of bankruptcy, a fraudulent conveyance and assignment of their goods and chattels, viz.: a certain quantity of coffee, to Richard D. Garwood, the father of one of these petitioners, and an endorser of their

notes, with a view to give him a preference over the other creditors. This application was subsequently dismissed. On the 13th of December, 1842, these petitioners made a voluntary assignment of all their property, for the benefit of their creditors, without preference; on the 21st, Garwood, and on the 23d, Potts, presented a petition for the benefit of the bankrupt law. During the pendency of Harley's petition, Garwood, in the name of the firm, wrote to Kechmli, their consignee in Rio, under date of the 27th May, 1842,—"The object of this letter is to request you to ship $10,000 under cover to Richard D. Garwood, as he is our endorser, and, under the bankrupt law, this is the only way we can secure him." It is admitted, and indeed could not be denied, that if this instruction had been carried into effect, it would have been fatal to the application of the petitioners. Does the failure make any difference?

The second section of the bankrupt law enacts, "that all future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any creditor, endorser, surety, or other person any preference or priority over the general creditors of such bankrupt, and all other payments, securities, conveyances, or transfers of property, or agreements made or given by such bankrupt, in contemplation of bankruptcy, to any person or persons whatever, not being a bona fide creditor or purchaser for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act; and the assignee under the bankruptcy shall be entitled to claim, sue for, recover, and receive the same as part of the assets of the bankrupt; and the person making such unlawful preferences and payments shall receive no discharge under the provisions of this act." The only question then is whether this transfer was made in contemplation of bankruptcy, and for the purpose of giving a preference to an endorser, surety, or other person, over the general creditors. To determine that it was so it is only necessary to refer to the letter itself. The act of congress does not contemplate that the instrument giving the preference shall be valid and effective: on the contrary, it declares it shall be void, that the assignee in bankruptcy shall be entitled to the property so attempted to be transferred, and the assignor be denied a discharge. What difference then can it make whether the transfer is inoperative by act of law, or by the omission of the consignee to carry it into effect? The object of the law was to insure equality among all the creditors, and to punish any one who attempted to destroy that equality; not only by declaring his attempt to be void, but also by refusing him a certificate and discharge for making such an attempt. It is true that this letter was written by Garwood in the name of the firm, without the knowledge or consent of Potts, and was not entered in the letter book of the firm. If the evidence rested here I should hesitate to charge the consequences of it on Potts, but Garwood swears that, in a few days after it was sent, he communicated the contents of it to Potts, and that it was the subject of frequent conversations between them, and it is also in evidence that the notes on which Richard D. Garwood was endorser, have since been purchased with the funds of the firm, some of them certainly with the knowledge and, if not with the assent, without the disapprobation or dissent of Potts, while other creditors remained wholly unpaid. Although the acts complained of were perfectly legal and justifiable under the laws of Pennsylvania, yet, as the petitioners ask a benefit under the bankrupt law of the United States, and believing as I do their acts to be prohibited by that law, I cannot grant their discharge unless directed to do so by the verdict of a jury, or a decree of the circuit court, to either of which they, or either of them, may appeal.

Subsequently both the petitioners demanded a jury, and were by it decided to be entitled to their discharges.

GARWOOD (NEWLIN v.). See Case No. 10,172.

Case No. 5,259.

The GARY v. The SHERMAN.

[Chase, 468.] [1]

Circuit Court, D. South Carolina. June Term, 1869.

SALVAGE AND TOWAGE—FRAUDULENT PURPOSE ON PART OF TOW TO AVOID TOWAGE.

The Sherman was lying helpless in a dangerous locality, with her engine broken and useless, and in answer to her signals of distress, the Gary came to her relief, and contracted with her captain to tow her into Norfolk for fifteen thousand dollars. On their way thither it was determined between them to go to Charleston instead, and while going there, a false alarm was given that they were in shoal water. At this point of time, the hawser connecting the vessels parted, and there was some reason to believe the Sherman cut it, and the wind being favorable, the Sherman pursued her way by using her sails. There was sufficient evidence of a fraudulent purpose on the part of the Sherman to avoid the towage, to justify the Gary in not pursuing her and renewing her offers of assistance. Another steamer towed the Sherman into port. *Held*;—the Gary is not entitled to recover the contract price, but she is entitled to salvage, although the second vessel be also entitled to it; and the second vessel is entitled to it.

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

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[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

A. G. Magrath, for libellant.

Porter & Conner, for defendants.

The claim for compensation must rest upon salvage service rendered, or upon the contract made. As to salvage service: A salvage compensation can be awarded only to persons by whose agency the vessel was saved. Unless the property be saved in fact by those who claim as salvors, salvage will not be allowed. Montgomery v. The T. P. Leathers [Case No. 9,736]; The Pandora [Id. 4,442]. The indispensable ingredient of a salvage service is that of having contributed immediately to the preservation or rescue of the property in peril at sea. The John Wurts [Id. 7,434], Betts, J. The foundation of the claim for salvage is the rescue of the property from peril, and the placing it in safety—and unless the salvor does place the property in safety, he is not entitled to salvage compensation. "It is an undisputed principle upon which a claim for salvage at all times rests, that unless the property be in part saved by those who claim the compensation, it can not be allowed, be their intentions however benevolent, and their conduct however heroic." Clarke v. The Dodge Healy [Id. 2,849]. "The property must be effectually saved. It must be brought into some port of safety; and it must be then in a state capable of being restored to the owner before the service can be deemed complete." The Henry Eubank [Id. 6,376]. If there is, from any cause, an absolute voluntary abandonment of the property on the high seas by the salvors, they are not entitled to salvage. Id. The right to contribution or compensation as co-salvor or joint salvor, applies only where the efforts of second salvors are in connection with and continuation of the efforts of the first salvors—where it is one and the same enterprise, and not to cases where the first salvors have abandoned their effort, sine animo revertendi, and sought their port of destination. The India, 1 W. Rob. Adm. 409; The Jonge Bastiaan, 5 C. Rob. Adm. 322; The Samuel, 4 Eng. Law & Eq. 581; The Henry Eubank [supra]; The John Wurts [supra]. When first set of salvors voluntarily and entirely abandon their enterprise, and a second salvor comes in and effects the salving, it is an entirely new enterprise. The second salvor is entitled to the entire compensation, and the first salvor has no right to claim compensation for efforts which he abandoned before placing the property in safety. The India, 1 W. Rob. Adm. 406; The Henry Eubank [supra]; The John Wurts [supra]. If first salvor is able to save property, there can not be co-salvors, without the assent of the first salvor, and if the second salvor were not on a new undertaking, but is to be regarded as a continuance of the original enterprise, then the Gary must be regarded on the principle of admiralty law as the meritorious salvor of whatever is preserved, and is entitled to the possession of it, and the possession of the Maryland, the second salvor, was tortious, notwithstanding that the Gary had abandoned the Sherman, and was in port at Wilmington when the Maryland met the Sherman on the high seas. See The John Gilpin [Case No. 7,345], and cases cited; The Blenden-Hall, 1 Dod. 414. That if abandonment was from a mistake of judgment, it relieves the party from moral blame, but not from legal consequences of his acts. As to the contract: The contract was for towage to a port of safety. The port of safety was of the essence of the contract. To entitle libellant to the benefit of contract, he must prove performance. "In general, if the agreement be that one party shall do an act, and for the doing thereof the other shall pay a sum of money, the doing of the act is a condition precedent to the payment, and the party who is to pay shall not be compelled to part with his money until the thing be performed." Chit. Pl. 1, 322; The Hector, 3 Hagg. Adm. 94. Admiralty guards the rights and enforces the duties arising or to be performed on the sea. It has been called the humane providence that watches over those who go down to the sea in ships and do their business on the great deep.

The case is stated so fully in the opinion of the court that no addition can be made to it.

CHASE, Circuit Justice. It is not likely that I shall arrive at any other conclusion in this case than that to which the evidence has already brought me. It is a case of salvage. The libellant makes no claim on the ground of contract. Admiralty guards the rights and enforces the duties arising or to be performed on the sea. It has been called the humane providence that watches over those who go down to the sea in ships and do their business on the great waters. Its rules of proceeding are not those of the common law. They are not technical. They aim at substantial justice, according to the principles of equity, applicable in each case.

What is the substantial justice in this case? The steamship Sherman on her voyage southward was disabled by the breaking of her shaft near Cape Lookout, and was lying inshore in a position where a change of weather might drive her aground, and cause a total loss. Her engine was useless. She had sails, but the evidence shows that the ship could not be navigated safely without the aid of steam. Where she was, her sails seem to have been of no use to her. In this condition of distress, she made the ordinary signals for assistance from other vessels which might be in the vicinity.

Hearing the signals the Gary came to her relief, and negotiations took place which show the estimate put by the respective parties on the assistance needed and its value. It was agreed between them that the Gary

would tow the Sherman into Norfolk, for fifteen thousand dollars. Under the circumstances of this case, the contract can not be the measure of damages, but it is proper to take it into consideration as showing the views of the parties at the time. The fact that the contract was made can not deprive the Gary, as salvor, of her right of compensation, if, though not performing the contract, she rendered salvage service, and did not forfeit her claim to compensation by her subsequent conduct.

Under the contract of towage, the vessels proceeded some time in the direction of Norfolk, when an unfavorable change of weather took place. The captain of the Gary, satisfied that it would take a great deal of time to get into Norfolk, proposed to change the port of destination, and go to Charleston. The proposition was assented to by the captain of the Sherman, and the courses of the steamers changed accordingly. They proceeded safely and easily in the new direction until they reached Frying Pan shoals, where the difficulties which give rise to this action occurred.

I can not resist the impression made by the testimony for the libellants, that both vessels were quite safe at that moment. Undoubtedly there was an alarm on board of the steamer, and there was no reason for it, for the leadsman reported four and a half fathoms water and shoaling. The evidence satisfies me that this report was an error. The captain of the Sherman, however, necessarily became anxious about the situation of his ship, and changed her course notwithstanding the captain of the Gary, to whom he called, assured him that there was no danger. From this unnecessary change of course all the subsequent mischief arose. The Gary endeavored to accommodate herself to the movements of the Sherman, and in consequence of the maneuvers of the two vessels, the hawser by which the Sherman was towed parted, and the two vessels separated. In this state of things it was the duty of the Sherman to lay to and wait assistance from the Gary, which was obliged to take in the hawser before the vessel could be safely navigated. Instead of doing this, the Sherman proceeded under sail, the wind being favorable, towards Charleston. On the other side, it was the duty of the Gary, as soon as possible, to render the stipulated assistance.

There is much conflict in the testimony upon the point whether the Sherman made any signals after the vessels separated. The weight of the evidence is that she did not. On the other hand, the evidence shows that when the hawser was brought on board the Gary, there was evidence that it had been cut on the Sherman. The captain of the Gary concluded naturally enough, that the separation of the vessels was designed. The Sherman had gone off, as he thought, with the intent to get rid of the towage. Under these circumstances he thought it useless to go in pursuit.

I do not think that the evidence that the hawser was cut is conclusive, though it is certainly strong. I think that the appearances, regarded by witnesses as evidence that it was cut, may be well enough accounted for by the peculiar circumstances under which the hawser parted. The captain of the Gary, however, certainly had reason for the conclusion he came to. He knew the vessels were safe at the time the disturbance arose upon the Sherman. The steamer had gone off without apparent reason; there was what seemed to him strong evidence of a fraudulent intent to evade the contract on her part.

Although this conclusion does not seem warranted by the evidence before me, there was in the circumstances of the case, in my opinion, a sufficient excuse to the captain of the Gary for not proceeding in search of the Sherman. He is not entitled to payment under the contract, as he would have been if he had followed the Sherman and offered to continue in the performance of it, and that offer had been refused; but I think he was entitled to salvage. Through the aid of the Gary, the Sherman had been rescued from danger, and brought safely a great part of the way to Charleston. Favorable winds enabled her to proceed still further without that aid, and then she found another vessel which towed her into port. Under these circumstances, I am inclined to regard this as a case of salvage, in which two vessels performed successfully the salvage services. None of the cases which have been cited in argument are exactly similar, but the principles upon which some of them were decided sustain, as I think, this view.

This leaves only the question of compensation to be determined. Undoubtedly, if the Gary had pursued the Sherman and offered continued assistance, her case would have been better; perhaps, had she done so, and her further assistance had been declined, she might have been entitled to the full amount stipulated in the contract. As it was, I think she was entitled to such an amount as would be a fair compensation for the services actually rendered by her. She rescued the Sherman from a certain degree of peril; by deviating from her course to render that assistance, she forfeited her insurance; a considerable time was devoted to the service, and a certain amount of expenditure was incurred. It is difficult to say what is a fair reward for the services thus rendered.

Under the circumstances, it seems proper to refer to the testimony concerning the attempt to compromise the difference between the owners of the two vessels. It appears that the owners of the Gary were willing to take four thousand dollars, and that the Sherman offered three thousand dollars. This evidence, to be sure, is by no means conclusive as to the actual value of the services,

but before I heard it I inclined to the opinion that three thousand five hundred dollars might be fairly decreed, and this evidence confirmed that opinion. Upon the whole, therefore, I will pronounce for the libellant, and decree three thousand five hundred dollars as salvage.

GARZA (NEILSON v.). See Case No. 10,091.

GAS CONSUMERS' ASS'N (HERRING v.). See Case No. 6,423.

Case No. 5,260.

GASS v. STINSON.

[2 Sumn. 453.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1836.

PRINCIPAL AND SURETY—CHANGE OF CONTRACT—RELEASE—NEW BOND.

1. The defendant Stinson, being warden of the state prison of New Hampshire, appointed James as his agent for the sale of granite for the said prison, with power to sell the granite, and collect the moneys arising from the sales. Gass was the surety of James, for the faithful performance of the agency. *Held*, that a change in the relation between Stinson and James from that of mere agency in the sale of granite to third persons, to that of a conditional purchase, or sale and return, would amount to a discharge of the surety, Gass, pro tanto, or rather that the transaction would fall without the condition of the bond.

2. It was agreed between Stinson, the obligee in the bond, and Gass, a surety, that if Gass should be dissatisfied with continuing his suretyship in the premises, he should "have a right on ten days notice being given to the warden of the prison in writing, to discontinue his liability as surety, provided the accounts of the agent are then all settled up, the balance paid, and the property of the state prison delivered over to the warden or his agent." *Held*, that this proviso in this agreement was not a condition precedent to the right of Gass to liberate himself from future suretyship, and that Gass, on giving ten days notice was entitled to be discharged from his liability for the future conduct of James, continuing, however, liable for the balance then due to Stinson, and for the delivery over of the other property then in his hands.

3. *Held*, that Gass was discharged from all liability on account of the transactions subsequent to notice of his wish to discontinue his suretyship, and that the necessity of notice in writing according to the foregoing agreement was waived, under the circumstances of the present case.

4. *Held*, that James was a competent witness for Gass under a bill in equity, brought by the latter to be relieved of his suretyship.

5. A new bond was executed, and sent to the obligee, to take up and supply the place of the old bond. *Held*, that it was the duty of the obligee to return the new bond forthwith, and to give notice thereof to the parties interested, and that omission to do so, under the circumstances of the present case, afforded a presumption, that it was accepted.

6. Semble, that at law the obligation of a surety, on a bond for the fidelity of a party for an indefinite period, cannot be determined at the will of the surety by notice. Quaere, if the same rule prevails in equity.

7. Matters may be inquired into under a bill in equity, notwithstanding they are open at law, where the bill is brought for other purposes, as for a discovery, an injunction to stay proceedings at law, and for other general relief upon the merits, which a court of law is incompetent to administer.

[Cited in Pierpont v. Fowle, Case No. 11,152; Plummer v. Connecticut Mut. Life Ins. Co., Id. 11,232.]

Bill in equity brought by Joseph Gass to be relieved from a bond given by him as surety for one Noah James, to the defendant, Abner P. Stinson; and for an injunction to stay proceedings in a suit at law, brought on the bond against James and the plaintiff. The defendant Stinson, being the warden of the state prison of New Hampshire, on the 22d of January, 1831, appointed one Noah James, of Boston (Mass.) his agent for the sale of granite for the said prison, with power to sell the granite, and collect the moneys arising from the sales, and to sell at such prices, as should from time to time be given to him, with a power reserved to discontinue the agency at the pleasure of the warden or his successor in office. On the 27th of January, 1831, James, together with the plaintiff, Gass, as his surety, executed a bond to the defendant, in his official capacity, payable to him and his successor in office, in the penal sum of of ten thousand dollars, with a condition that James, so appointed agent, should well and truly account to the defendant or his successors, for all stone or granite belonging to the said state prison, which should come to his possession or be consigned to him, and should promptly pay over the proceeds of all sales by him made, and should, from time to time, exhibit a statement of his doings as agent, and all accounts of sales when called for by the defendant or his successor; and upon the discontinuance of his agency, that he should deliver to the defendant or his successor, free of expense and in good order, any granite in his hands, belonging to the prison. The bond was executed in Boston, through the instrumentality of one Thompson (the deputy warden under the defendant,) and he, Thompson, afterwards on the same day, signed a written instrument, by which it was agreed, that if Gass should be dissatisfied with continuing his suretyship in the premises, he should "have a right, on ten days notice being given to the warden of the prison in writing, to discontinue his liability as surety; provided the accounts of the agent are then all settled up, the balance paid, and the property of the state prison delivered over to the warden or his agent." The agency of James was revoked on the 4th of October, 1833; and about this time, James became insolvent. Stinson was removed from his office as warden, in September, 1834. Suit was brought in the circuit court of Massachusetts, at the May term, 1834, against James and Gass, on the original bond. By consent, a verdict on the issue joined between the parties, was entered for the plaintiff (Stinson,) which was

[1] [Reported by Charles Sumner, Esq.]

to be altered or amended according to the report of Simon Greenleaf, Esq. an auditor appointed for the purpose; and the opinion of the court thereon. At the May term of the court, 1836, the auditor made his report, stating the facts on which it was founded, finding that there was a balance due by James to the warden at the termination of the agency of $6,033.39. But the report expressly reserved, for the opinon of the court, the question of Gass's liability as surety. No exceptions were filed to the report; and the same still stands open for the final action of the court; Gass preferring the course of filing a bill in equity. The cause came on for a hearing at this term, upon the bill, answer and evidence.

B. Rand, for plaintiff.
W. C. Aylwin, for defendant.

STORY, Circuit Justice. The present bill is brought by Gass to be relieved from his suretyship and liability under the bond given to Stinson, upon several grounds. In the first place, he insists, that the nature and character of the suretyship were essentially changed after the execution of the bond, without his consent, by a contract (commonly called a contract of sale and return), by which in effect James, instead of a mere agent, became a conditional purchaser of the granite, liable, if he sold it for certain stipulated prices, and for all the bad debts contracted under his own sales, however faithful might be his conduct, in the course of his agency. In the next place he insists, that he did give notice of his dissatisfaction at remaining surety to Stinson, who waived any formal notice; and he was thereupon entitled to be discharged from all liability for the future agency of James. In the third place he insists, that a bond with new sureties was accepted from James with the avowed understanding of its being a substitute for that originally given by Gass. In the fourth place, he insists that a certain contract, called the New Orleans contract, by which James and another engaged to furnish granite for building a bank at New Orleans, which was made known to and acted upon by Stinson, and for which the granite, charged in the account against James, was furnished by Stinson, is in no sense a contract or proceeding appertaining to the agency, for which Gass is liable under his bond. All these various matters are insisted upon in some form or other in the charges in the bill, and in the argument at the bar on behalf of Gass, and they are all denied in the answer and in the argument on the other side.

Before proceeding to a consideration of these matters, thus put directly in contestation by the parties, it is necessary to dispose of one or two preliminary points, which grow out of the collateral agreement stated in the case, as to the obligation and construction of that paper. It is contended by Stinson that he never gave any authority to the deputy warden to sign any such paper; and, that it was not a part of the original contract with Gass at the time of executing it, but was a subsequent unauthorized proceeding. And it is further contended, that the true interpretation of the agreement, if valid, is, that the settling of the accounts of the agency, paying the balance, and delivering over the property of the prison in the hands of James, constitute a condition precedent to the right of Gass to avail himself of the written notice. It appears to me, that the true and reasonable interpretation of the instrument is, that Gass upon giving the ten days notice was entitled to be discharged from his liability, or, as the instrument phrases it, "to discontinue his liability" for the future proceedings of James, remaining, however, liable for the balance then due to Stinson, and for the delivering over of the other property then in his hands. Upon any other construction, Stinson and James, by any arrangement between themselves, as to continuing the agency, or as to not settling the accounts, or not requiring such balance or property to be paid or delivered, would have it in their power to defeat the whole intent of the instrument, and to hold Gass to an indefinite responsibility as surety. It seems to me, therefore, that the natural interpretation of the terms of the agreement is, that the proviso is not a condition precedent to the right of Gass to liberate himself from future suretyship, but is a qualification of the effect of the notice, as to his discharge from liability for antecedent proceedings under the agency.

The other point involves considerations of a very different nature; and in one aspect would be decisive of the case against Stinson. If, as Stinson in his answer, solemnly affirms, he gave no authority to the deputy warden to enter into this collateral agreement with Gass, and it was a stipulation on the part of Gass at the time of executing the bond, that it should be entered into, thus forming the substratum of his suretyship, it is very clear, that the bond and agreement must, as to Gass, be treated as nullities; for neither instrument in such a case could operate unless both did, the one being the motive for the other. But I am abundantly satisfied, that the collateral agreement, though executed after the bond, on the same day, was understood by all parties to be a part of the res gestae, and the very condition of Gass's assuming the suretyship. And I am also as well satisfied, that as Stinson accepted and acted upon the bond with a full knowledge of the nature and effect of the collateral agreement without objection; and, indeed, as some of the evidence shows, with a positive adoption of the latter; it must be taken to be a final ratification of the whole transaction on his part, and binding upon him. In the whole course of the subsequent

negotiations and proceedings there is not a tittle of evidence establishing his disapproval of it.

We may now proceed to the examination of the other questions in the case. In respect to the first, viz. the change of the relation between Stinson and James, from that of a mere agency in the sale of granite to third persons, to that of a conditional purchase, or sale and return, I entirely agree with the argument at the bar, that, if made out in point of fact, it is so total a departure from the true nature of the original agency, and involves so much more responsibility and risk, that it will amount to a discharge of Gass; or rather, the transactions will fall without the condition of the bond. The difficulty is in coming to the conclusion, that the fact is precisely made out. Stinson explicitly denies it in his answer. James as explicitly affirms it in his deposition. His competency as a witness in this case has been objected to; but I cannot perceive, what interest he has in the present suit, to which he is not a party, and by the event of which he can neither gain nor lose. If the plaintiff succeeds in the suit, James is not discharged from his liability; if he fails, the costs must be exclusively borne by the plaintiff. The case of Riddle v. Moss, 7 Cranch [11 U. S.] 206, is distinguishable. There the surety was sued at law on the bond; and his principal, who was offered as a witness, had made over his property to the surety to indemnify him for the event of that very suit. The court on this account, as well as that his liability would be increased to the extent of the costs of the suit, if the judgment was for the plaintiff, held the principal an incompetent witness. It appears to me, however, as the result of the subsequent correspondence and acts of the parties, that the proposal contained in the letter of the 12th of February, 1831, by which Stinson proposed to change the former agreement, under which James was to receive a commission of five per cent. upon his sales of granite, and to substitute a low price of the granite, so as to give James the full benefit of the extra price of the sales, was never definitely acted upon by either party. No account is shown, in which it was ever adopted as the basis of any settlement; and there is a subsequent letter of James (8th of April, 1831,) in which he says "I must have pay for trucking and commissions on all I sell; unless, I cannot live." So that it appears to me, that the denials of the answer ought under all the circumstances to prevail over the positive assertions of James on this point.

But this leads me to the consideration of the New Orleans contract, and whether it can be treated as a transaction within the scope of the agency. The nature of this transaction was as follows: On the 15th of August, 1831, a special contract was entered into between James and one Hastings (then his partner in business,) on the one part, and Reynolds and Zacharie of New Orleans of the other part, by which the former agreed to furnish the latter with all the stone for a bank building at New Orleans of certain specified dimensions and sizes, to be shipped at specified periods, for the gross amount of ten thousand dollars, under a penalty or rent (as it was termed) of five hundred dollars per month, for every month, which should elapse after the stated periods of shipment at Boston. After the making of this contract, which was made known to Stinson, James wrote from time to time to Stinson for such stone as he wanted for the undertaking; all of which was furnished to him by Stinson, and charged to him in account. It does not appear, that Stinson had any other participation in the New Orleans contract, than by supplying the stone from time to time for the same. James in his bill insists, that Stinson agreed to furnish the stone at the periods stipulated in the contracts, and claims damages for losses sustained by him from his inability strictly to perform the same, in consequence of the default of Stinson. The answer of Stinson explicitly denies any participation in the contract, and any agreement to comply with its stipulations. Now, upon this posture of the case, the question arises, whether the stone, supplied to James under the then New Orleans contract, can properly, as against Gass, be deemed a part of the business of the agency, for which he is responsible. I think it cannot. So far as the supplies went to James avowedly to fulfil this contract, they must be treated as absolute sales to James or to James and Hastings, and not deliveries to James to be afterwards sold by him under the agency. It is impossible, that he could be at once agent and vendee; that he could negotiate as agent to sell to himself as purchaser. Reynolds and Zacharie never contracted at all with Stinson, directly or indirectly; but with James and Hastings only. Stinson, in making the supplies of stone to James treated him as the absolute debtor for the stone, as soon as received by him, and charged him therefor as purchaser. A purchase is in no just sense an agency; a contract to sell to an agent is in no just sense a contract by an agent to sell for his principal. Not knowing the exact state of the accounts, between the parties, independent of this transaction, I am unable to say, what will be the effect of this view of the matter as to Gass's responsibility.

I proceed, therefore, in the next place to the consideration of the question as to notice by Gass to Stinson of his dissatisfaction with continuing his suretyship; and of the waiver of any formal notice by Stinson, and his assent to discharge Gass. It appears from the evidence, that at the time, when the bond was given, Gass was a stone-cutter in Boston in the employ of James, then a wharfinger in Boston, and concerned in the sale of stone.

In September, or October, 1831, Gass left the regular employment of James, and set up business for himself, which was a cause of dissatisfaction to James; and it is in a very high degree probable, that about this period, Gass intimated his wish to James to be absolved from his suretyship in future. On the 20th of September, 1831, James wrote a letter to Stinson stating, that Gass was going into the granite business soon; that he was daily interfering in contracts, that happened under his immediate observation; that he, James, felt well persuaded, that he had been a great injury to the sale of many stone on his wharf; and he then added: "Entertaining the above views respecting his universal interference in my concerns, I have come to the conclusion to ask the favor of you to fill up a new bail-bond, and forward it enclosed in a letter by mail as early as possible, and immediately on my receiving it I will have it signed by a man, that will be satisfactory to you and all concerned, and remit it to you for your inspection. If the person is satisfactory to you, after you have made investigation, on the reference I shall offer respecting it, you will oblige by sending me the old bond, signed by Gass &c." On the 20th of the same month the deputy warden replied: "If it will be of as much benefit, as you say it will, we have no objection to your changing your surety; all we want is to have things about right; and if Mr. Gass does not answer your purpose, you can get a better one. As soon as we can possibly get time we will send you a copy of the obligation, and you may see, what you can do with it." On the 29th of September, 1831, the deputy warden wrote a letter to James, in which he said: "We have sent you a copy of the bond varying only, where it says, 'for what may have been done since the 27th January.' This variation will make it the same, as though it was signed at the time the other was written, and will agree with the commission you have, appointing you agent dated 27th January. You can get, who you please on the bond, one or two, as you like, and forward it; and if acceptable, we will exchange with you." On the 4th of October, 1831, James enclosed the same bond with certain persons proposed in pencil as sureties. On the 9th of the same month, Stinson acknowledged the receipt of the bond, and added: "I can only say, the names of the sureties are strangers; presume they are good; but wish to have it to say to the executive, I know them to be good. Mr. T. or myself will be down in all this month, and will then adjust the business satisfactorily." This bond does not appear ever to have been executed or accepted. On the 13th of October, James wrote to Stinson: "If it would not discommode you, you would confer on me a favor, a great favor, to give up the old bond, as Mr. Gass considers me as beholden to him on that account, and takes the advantage of it, having lately commenced the granite business near my wharf, and still expects me to employ his men at any price, he may choose to charge." On the 16th of October, the deputy warden, in the absence of the warden, wrote to James, saying, that he could not say, what would be his (the warden's) course respecting the bonds. "He does not know Mr. Sanborn, nor Mr. Hastings (the proposed sureties). All he wants is to be able to say to the directors, that the bond is perfectly good. If he can be satisfied, that they are good, he will willingly exchange with you. I shall be in Boston the last of this month, and then we can arrange it, I think." On the 8th of November, 1831, the deputy warden wrote to James, saying: "We sent you the copy of the bond sometime since; have not heard any thing of it yet." What bond this refers to, does not distinctly appear. On the 10th of November, James & Co. by their clerk, wrote to Stinson, saying: "We have received the bond; but have been so very busy with shipping stone, that I have not had time to attend to it; but will soon." The bond here alluded to probably was the copy referred to in the letter of the 8th, and probably also was that, which was soon afterwards executed by one Amos C. Sanborn, and one Joseph Hastings, as sureties, and was received by Stinson, and never afterwards returned to James. Stinson, however, in his answer, denies, that it was satisfactory to him or ever accepted by him; and says, that he retained it sometime in order to redeliver it to James, when he should come to Concord, (N. H.). But he does not pretend, that he ever returned this bond; and he says "he does not know what became thereof." It is proved by Hastings and Sanborn, that the bond was never returned to them, and by James, that it was never returned to him; and that no notice was ever given to either, that it was not accepted by Stinson. On the contrary, James expressly asserts, that no dissatisfaction was ever expressed by Stinson, respecting the sureties, and that on one occasion he expressed himself satisfied with the bond. Be this, as it may, it is very clear, that the bond was never returned to James, or the sureties; and I cannot but express myself under some difficulty in avoiding the conclusion, that its being retained affords some, if not cogent evidence, that it was satisfactory, and was in fact accepted. It was the duty of Stinson to return it forthwith, if he did not mean to accept it, and to give notice thereof to the parties interested in that bond. His omission to do so, under all the circumstances of the present case, cannot but afford a presumption, that it was accepted. I am aware, that the language of the letter of Stinson to James, of the 19th of April, 1832, leads to a different conclusion; and, indeed, it is the principal source of my doubts on the subject.

But I should be sorry to place the decision of this part of the case upon the mere fact of an acceptance of the new bond, even if the presumption were stronger than it is, as I am of opinion, that the whole subsequent conduct of Stinson demonstrates, that he afterwards had full notice of the dissatisfaction of Gass in remaining a surety; that he waived any formal notice in writing of his (Gass's) wishes to discontinue his suretyship; that he intentionally lulled Gass into the belief, that he required no other notice; that he had no claims on him under the old bond; and that he did not mean to insist upon any settlement according to the terms of the proviso. Under such circumstances, if clearly made out, there can be no doubt, that Gass is entirely discharged from his suretyship in regard to all transactions subsequent to that notice and waiver. The written correspondence of James & Stinson, in September, October, and November, 1831, does, as I think, furnish a good deal of internal evidence of a knowledge on the part of Stinson, that Gass, as well as James, was then desirous of his being relieved from the suretyship; and, taken in connexion with the deposition of James and of the other witnesses for the plaintiff, there does arise a strong presumption of the fact, notwithstanding the rebutting evidence on the other side. Indeed, if the plaintiff's depositions are to be believed, there is the most conclusive evidence, that Stinson repeatedly admitted, that he was willing to give up the old bond; and that he had no claim under it upon Gass; and that he excused himself from his repeated promises to deliver it up by subterfuges and evasive pretences, which varied at different times, but which all admitted, by implication, that Gass was entitled to be discharged. And, although the answer strenuously denies these allegations, I am not satisfied, that, in this respect, as well as in some other respects, it stands sufficiently supported to give it entire credence.

But, what I rely on, is, that the answer itself admits, that in the spring of 1832 (though not before) an application was made by Gass to Stinson, in Boston, to deliver up the old bond; and that he, Stinson, then stated to Gass, that he could not, consistently with his duty as a public officer, give up the original bond without receiving another with a satisfactory surety; that James had proposed substitutes, but none were satisfactory; and he, Stinson, was ready to receive a sufficient substitute. The answer also admits, that the brother of Gass did twice or thrice in Concord converse with him on the same subject, and for the same purpose. But it denies, that he, Stinson, ever promised to give up the bond, unless all the accounts were settled by James, the balance paid, and the remaining property of the prison delivered over to him. Now, without stopping, at present, to consider, whether the answer is, under all the circumstances, satisfactory on this head, it is material to state, that here notice is actually brought home to Stinson, in the spring of 1832, of Gass's dissatisfaction, and of his desire to discontinue his suretyship, and to have the old bond given up. No objection whatsoever was made as to the form or manner of the notice; and the objection to the delivering up of the old bond (which was a very different matter from the termination of the suretyship,) was put upon a distinct ground, not touched in the collateral agreement, and not required by it, viz. the giving of a new bond with new sureties. Stinson had no right to insist, that the new bond should be given before the discontinuance of Gass's suretyship, whatever he might insist on before a delivering up of the old bond. I think, therefore, that Stinson must be taken to have dispensed with any formal notice in writing by Gass of his intention not to be held to any suretyship for the future conduct of James in his agency.

There is a letter of the 19th of April, 1832, from Stinson to James, which shows, how earnestly Gass was at this time pressing his claim to deliver up the bond. It begins thus: "Mr. Gass is pressing us hard to give up the bond. We know not what to do. Has sent to his brother J. P. Gass, two or three times, to come and see us; says he shall come up this week himself, if the bond is not sent. Had you not better see him, and say to him to remain easy. I know of no cause of his requesting this. I suspect he is not satisfied, because you do not employ him to cut stone. So far as I am interested personally, I should feel easy with your own paper. But you know the duty we owe the state. I hope you may get some good man; and let Mr. Gass off, as he is so anxious, &c. I think, however, if you say to Gass, you shall settle up in June or July, and then will get some one else, if we require it, he will be satisfied—I think he ought." It is apparent from this letter, that Stinson had not, at that time, any intention to revoke James' agency, or to close his accounts, or to insist upon the delivery up of the granite remaining in his hands. On the contrary, his object was to continue the agency, and to lull Gass into security. On the 4th of June, Stinson wrote a letter to Gass, in which he says: "On my return home, I looked to the bond, and also to the certificate given you by Mr. Thompson (the deputy warden), which specifies the bond to be given up on ten days notice, provided the accounts be all settled, &c. By referring to the certificate you have of Thompson's, you will see it, as above stated. You know what I said to you, as to the propriety of our holding the bond, when I saw you the other day, and you yourself must be satisfied of the propriety of it. I am at a loss to know your anxiety to get it up, other than Mr. James' not employing you to prepare stone. Mr. Thompson, or myself, will be in Boston soon, and shall then settle with Mr. James, and relieve you of an unnecessary anxiety." On the same day Stinson wrote to

James, and said: "After I saw you, Mr. Gass pressed me hard for the bond, and demanded it as a matter of right. I told him, why and wherefore I wished it, and the reasons I stated to you, &c. I tried to make him quiet; but he said, if I did not send the bond, he should come up this week. Would it not be well for you to see him, and say to him, that so soon as the New Orleans job was done, you should settle with us and discharge him. Of this course you will judge." On the same day Thompson also wrote to James, and said: "Major Stinson wrote to-day to you about Gass; he also wrote to Gass. I think you need not be any worried about him, as he will be still, we think." Now, it seems to me clear, from these letters, that Stinson was trying to lull Gass into security; that he was seeking to evade the just rights of Gass to a termination of his suretyship; and that he was postponing a final settlement of the accounts with James, in order to answer his own particular purposes. There is a total silence in all these letters as to any existing claim against Gass, under his suretyship.

If we pass from this documentary evidence to the testimonial evidence of the plaintiff, it is most manifest, if that evidence is believed, that Stinson had the fullest notice, that Gass wished to discontinue his suretyship; that Stinson either had written notice thereof, or waived it; that he admitted Gass had fully entitled himself to the exercise of this right; that he lulled Gass into the belief, that he required no further notice; that he had no claim against Gass under the band; and that he would surrender the bond to him. There is some portion of the testimony of the defendant's witnesses, which is in conflict with the testimony of the plaintiff's witnesses on these points. But after making every deduction, I am constrained to come to the conclusion, that the weight of the evidence, as well as of the corroborative circumstances, is decidedly in favor of the plaintiff. It appears to me, that the latest period, to which the notice can be referred, and to which Gass's liability can be prolonged, is the close of the month of April, 1832. The subsequent retainer of Gass's bond was a violation of the reiterated promises, made to him, to deliver it up; and it was for purposes, and under pretences wholly beside any avowed intention to hold Gass responsible for any balance then due, or supposed to be due, from James. In short, the reasons assigned by Stinson for retaining the bond, according to the plaintiff's witnesses (to which I on the whole give credit,) were of a nature wholly personal to Stinson, and excluded any notion of continuing liability on the part of Gass.

In cases of this sort, where a bond is given for the fidelity of a party for an indefinite period, I am aware, that it has been supposed, that at law the obligation created by the bond cannot be determined at the will of the surety by notice. That was intimated by Mr. Justice Bayley in Calvert v. Gordon, 7 Barn. & C. 809, and afterwards confirmed by the whole court, in the same case, in 3 Man. & R. 124. That doctrine may well be maintainable at law. I am aware, that the same doctrine seems to prevail in equity; for in the case of Gordon v. Calvert, before the vice chancellor (2 Sim. 253), and again in the same case, before the lord chancellor (4 Russ. R. 581), it seems to have been held, that notice would not terminate the liability; and that it was no more a defence in equity, than at law. I confess, that I should yield with more reluctance to this latter doctrine, though I am by no means prepared to say, that it is not maintainable. The case of Shepherd v. Beecher, 2 P. Wms. 288, is distinguishable in several respects. In the first place, the father gave no notice, that he would not be liable on the bond for the future delinquencies of his son; but only requested, that the master would not trust him with any cash, at least, that he would do it sparingly. In the next place, the bond was for the fidelity of the son during the specified term of his apprenticeship of seven years. But it is wholly unnecessary, in this case, to decide, what would be the effect of notice generally in equity in the case of a bond for an indefinite period; because, here, it is matter of express contract. And my judgment is, that, taking all the circumstances together, all the parties understood, that the liability of Gass as surety was terminated by a notice, sufficient for that purpose, at farthest at the close of the month of April, 1832; and that he ought not to be held responsible for any subsequent transactions under the agency of James.

It was suggested by the counsel for the defendant, in opening the argument, that the question as to the effect of the supposed change of the contract from a mere agency to a conditional purchase, or sale and return, was a defence open at law; and, therefore, not properly matter for equitable relief. That is true, if it constituted the whole matter of the bill. But the jurisdiction of a court of equity is invoked in this case for other purposes and other relief, for a discovery, for an injunction to the proceedings at law, and for other general relief upon all the merits, which a court of law is incompetent to administer. What I propose to do is, to refer it to a master, to ascertain the state of the accounts between Stinson and James upon the principles above stated, unless the parties agree to the statement annexed to the auditor's report in the suit at law. If nothing shall appear to be now due to Stinson from James, as a balance of accounts for any debts of the agency, contracted before the end of April, 1832, then Gass is entitled to be discharged altogether. If any balance is due, then he ought to be held liable therefor. Considering the suit at law as having been placed under the power of the court, for the purpose of administering substantial jus-

tice between the parties, it appears to me, that that will be perfectly attained by accepting the auditor's report in that suit, and entering a joint judgment thereon against both James and Gass; and then to require Stinson to stipulate on record, not to execute any execution issuing on the said joint judgment against Gass, except for such sum as the court shall direct to be levied by its own order indorsed on the execution.

[For further proceedings, see Cases Nos. 5,261 and 5,262.]

Case No. 5,261.

GASS v. STINSON.

[2 Sumn. 605.] [1]

Circuit Court, D. Massachusetts. May Term, 1837.

PRACTICE IN EQUITY — TESTING COMPETENCY OF WITNESSES BEFORE MASTER—APPLICATION BY PETITION—CREDIBILITY.

1. If a cause by an interlocutory decree, has been referred to the master, and either party desires to take the testimony of witnesses, in order to establish the incompetency of a witness, who has already been examined in the cause, and whose deposition was before the court, when the decretal order was passed, the application to the master must be by petition in writing, verified by affidavit.

2. If the application be founded on a suggestion, which is incorrect, in point of fact, the order to take the testimony, which was made thereon, will be superseded.

3. A party will not be allowed to give oral testimony to the contents or purport of an indictment, verdict or judgment; as the best evidence is the original paper or a certified copy.

4. If a party would object to the competency or credibility of a witness in courts of equity, he must make a special application by petition to the court for liberty to exhibit articles, stating the facts and objections to the witness, and praying leave to examine other witnesses to establish the allegations in the articles by suitable proofs; and upon this petition, leave is ordinarily granted by the court.

5. Semble, that the application may be made by motion, upon the foundation of ignorance at the time of the examination.

6. An objection to the competency of a witness cannot be made after publication, if the incompetency was known before the commission to take his deposition issued.

7. An objection to the credibility of a witness may be ordinarily made after publication and before hearing; but the interrogatories must be so shaped, as to prevent the party, under color of an examination to credit, from procuring testimony to overcome that already taken and published in the cause.

[Approved in Re Thomas, 35 Fed. 340.]

8. In the United States the usual questions asked, in order to discredit a witness, are: What is the witness's general reputation for truth? Is it good or bad?

[Cited in Teese v. Huntingdon, 23 How. (64 U. S.) 12.]

[Cited in Eason v. Chapman, 21 Ill. 38; Fletcher v. State, 49 Ind. 132.]

9. After the hearing and an interlocutory decree, a party cannot object before the master to the credibility of a witness, whose testimony was read at the hearing without objection.

10. Quaere, if a party, who cross-examines a witness, knowing his interest, does not thereby waive all right of objection.

11. A witness, who has given his deposition, which has been read at the hearing, cannot be examined anew before the master, without a special order of the court.

[This was a bill in equity by Joseph Gass against Abner P. Stinson.]

This cause being before the master, under the decretal order already passed [Case No. 5,260] an application was made to the master orally, by the defendant's counsel, to take the testimony of certain witnesses, the object of which was to establish the incompetency of one Noah James as a witness, who had been examined in the cause, and whose deposition was before the court, when the decretal order was passed. The ground of the application was, that James had been convicted of larceny; that the defendant's counsel knew it before the hearing of the cause; but he then supposed, that the witness, James, had been pardoned; and that he had since ascertained, that James had not received a full pardon, so as to restore his competency as a witness. The master certified the foregoing facts to Story, J., at chambers, and also that under these circumstances he was of opinion, that the purposes of justice required, that the proposed testimony should be taken, de bene esse, saving all the rights of the plaintiff to object to the same. An order was accordingly made by Story, J., at chambers, to take the depositions of the witnesses under a commission, de bene esse, saving the rights of the plaintiff, after due notice to the plaintiff. The depositions had not as yet been taken under the commission, and a motion on petition was now made in open court by the plaintiff to supersede the order thus made.

B. Rand, for plaintiff.

W. C. Aylwin, for defendant.

STORY, Circuit Justice. As the original application to the master was made orally, the precise grounds on which it was made do not appear, except from the master's certificate. This was a great irregularity; and the application should have been by petition in writing, verified (if not ordinarily, at least in a case of this sort,) by affidavit. See Troup v. Sherwood, 3 Johns. Ch. 558, 566. The irregularity, however, was not then brought to my notice. The interrogatories, proposed to be put to the witnesses, were, however, filed in writing before the master; and an exception has now been taken to their purport and character. I shall presently have occasion to comment on them. The application to supersede the order relies upon various grounds. The first one is, that the application was founded upon a suggestion, which is wholly incorrect, to wit, that James had not received a plen-

[1] [Reported by Charles Sumner, Esq.]

ary pardon; whereas in fact he had received such a pardon, as appears by a copy of the instrument of pardon. This removes at once the whole of the original ground of the application, and undoubtedly entitles the plaintiff to have the order for taking the depositions superseded, since the witness was clearly competent.

But an attempt has been made to sustain the order upon the ground, that the facts to be stated by the witnesses would go to affect the credibility of James. Upon looking into the interrogatories filed, it is impossible that they can be sustained for this or any other purpose, applicable to the cause. The first three interrogatories are merely introductory, and point solely to the identification of James; and in other respects, are immaterial and irrelevant. All the other interrogatories seek to establish by the parol evidence of witnesses, that there was an indictment, trial, conviction, and sentence of James for larceny; facts, which should be proved by a production of the record itself, and which are not, in their character, proper to be established by the mere oral statements of witnesses. There is no ground, upon which a party can be permitted to testify orally to the contents or purport of an indictment, or verdict, or judgment; for the best evidence is the original paper, or a certified copy. So that if the interrogatories had been originally examined, they must have been suppressed, whether they applied to competency or to credibility.

But it is proper to say a few words, as to the time and manner of presenting objections to the competency or credibility of witnesses in courts of equity. The general course of practice is, that, after publication has passed of the depositions (though it may be before), if either party would object to the competency or credibility of the witnesses, whose depositions are introduced on the other side, he must make a special application by petition to the court for liberty to exhibit articles, stating the facts and objections to the witnesses, and praying leave to examine other witnesses to establish the truth of the allegations in the articles by suitable proofs. 1 Har. Ch. Pr., by Newland, pp. 282, 283; Hind, Pr. 374, 375; 1 Newl. Ch. Pr. 289, 290; Gilb. Forum Rom. 147, 148. Without such special order, no such examination can take place; and this has been the settled rule, ever since Lord Bacon promulgated it in his Ordinances. Ord. 72; Beames' Orders Ch. pp. 32, 187; Mill v. Mill, 12 Ves. 406. Upon such a petition to file articles, leave is ordinarily granted by the court, as of course, unless there are special circumstances to prevent it. There is a difference, however, between objections taken to the competency, and those taken to the credibility of witnesses. Where the objection is to competency, the court will not grant the application after publication of the testimony, if the incompetency of the witness was known before the commission to take his deposition was issued; for an interrogatory might then have been put to him, directly on the point. But, if the objection was not then known, the court will grant the application. 1 Har. Ch. Pr., by Newland, pp. 282, 283; 1 Newl. Ch. Pr. 289–291; Hind, Pr. 374, 375; Purcell v. M'Namara, 8 Ves. 324; Vaughan v. Worrall, 2 Madd. Ch. Pr. 322, 2 Swanst. 400. This was the doctrine asserted by Lord Hardwicke in Callaghan v. Rochfort, 3 Atk. 643, and it has been constantly adhered to ever since. See Purcell v. M'Namara, 8 Ves. 324; Vaughan v. Worrall, 2 Madd. Ch. Pr. 322. The proper mode, indeed, of making the application in such case seems to have been thought by the same great judge to be, not by exhibiting articles; but by motion for leave to examine the matter, upon the foundation of ignorance at the time of the examination. Id. But upon principle there does not seem to be any objection to either course; though the exhibition of articles would seem to be more formal, and, perhaps, after all, more convenient and certain in its results. But where the objection is to credibility, articles will ordinarily be allowed to be filed by the court upon petition, without affidavit, after publication. Watmore v. Dickinson, 2 Ves. & B. 267. The reason for the difference, is said by Lord Hardwicke, in Callaghan v. Rochfort, 3 Atk. 643, to be, because the matters examined to in such cases are not material to the merits of the cause, but only relative to the character of the witnesses. And, indeed, until after publication has passed, it cannot be known what matters the witnesses have testified to; and, therefore, whether there was any necessity of examining any witnesses to their credit. Russel v. Atkinson, 2 Dickens, 532. This latter is the stronger ground; and it is confirmed by what fell from the court in Purcell v. M'Namara, 8 Ves. 324.

When the examination is allowed to credibility only, the interrogatories are confined to general interrogatories as to credit, or to such particular facts only, as are not material to what is already in issue in the cause. The qualification in the latter case, (which case seems allowed only to impugn the witness's statements, as to collateral facts,) is to prevent the party under color of an examination to credit, from procuring testimony to overcome the testimony already taken in the cause, and published, in violation of the fundamental principle of the court, which does not allow any new evidence of the facts in issue after publication. The rule and the reasons of it are fully expounded in Purcell v. M'Namara, 8 Ves. 324, 326; Wood v. Hammerton, 9 Ves. 145; Carlos v. Brook, 10 Ves. 49, 50; and White v. Fussell, 1 Ves. & B. 151.[2] It was recognized

[2] The very form of the order is given in a note g to Watmore v. Dickinson, 2 Ves. & B. 268. See, also, 1 Madd. Ch. Pr. 320–325; Piggott v. Croxhall, 1 Sim. & S. 467.

and enforced by Mr. Chancellor Kent, in Troup v. Sherwood, 3 Johns. Ch. 558, 562-565. When the examination is to general credit, the course, in England is, to ask the question of the witnesses, whether they would believe the party sought to be discredited upon his oath. See Purcell v. M'Namara, 8 Ves. 324; Carlos v. Brook, 10 Ves. 49, 50; Anon., 3 Ves. & B. 93; Watmore v. Dickinson, 2 Ves. & B. 267. But see Gill v. Watson, 3 Atk. 522. With us the more usual course is to discredit the party by an inquiry, what his general reputation for truth is, whether it is good or whether it is bad. But examinations to the credit of witnesses are required to be made before the hearing; and it is quite too late to make the application after the hearing, and a fortiori after an interlocutory decree has passed upon the hearing, upon the footing of the evidence in the cause. So the doctrine was laid down by Lord Eldon in White v. Fussell, 1 Ves. & B. 151. The case of Piggott v. Croxhall, 1 Sim. & S. 467, manifestly implies the same doctrine; though the application was there made before the hearing. It seems to me, therefore, that upon this ground alone, the defendant is not now at liberty to examine witnesses before the master, to the credit of a person, whose testimony was read at the hearing without objection, the objection to his competency or credibility being then fully known. The defendant, by his conduct upon that occasion, waived the objection, and he cannot, in any subsequent stage of the cause, renew it.

But it is said, that, upon a rehearing, or an appeal from the decree at the rolls to the chancellor, new evidence is admissible to be read, which was not read at the original hearing. That may be true under particular circumstances, as where it is evidence originally in the cause, but not read; or where it is evidence newly discovered, since the hearing. On this subject, however, I do not dwell, because it was recently considered in this court in a case, which underwent a good deal of consideration. I allude to the case of Wood v. Mann [Case No. 17,953]. The case of Needham v. Smith, 2 Vern. 463, has also been relied on to shew, that a confession of a witness, which has come to the knowledge of the other party since the hearing, and which goes to his competency or credibility, is admissible on an appeal from the rolls. On that occasion it was also said, that if, after the hearing, a witness is convicted of perjury, the objection may be taken advantage of upon a rehearing. But, giving the fullest effect to this doctrine, it only applies to a case strictly of a rehearing (for an appeal from the rolls is only a rehearing. East India Co. v. Boddam, 13 Ves. 421; Buckmaster v. Harrop, Id. 456) where the whole cause is opened anew; and where the evidence is already in the cause, or has been brought out since the former hearing. The present is not such a case.

It has been suggested by the counsel for the plaintiff, that, if a defendant cross examines a witness, knowing his interest, it is a waiver of the objection. The case of Corporation of Sutton Coldfield v. Wilson, 1 Vern. 254, certainly supports this proposition. It has been thought to go farther, and to decide that a mere cross examination upon the merits is a waiver of any objection to his competency. But this has, as a matter of general practice and doctrine, been overturned by the more recent decision in Moorhouse v. De Passou, 19 Ves. 433, Coop. 300, in which it was held, that in equity the cross examination of a witness, in utter ignorance of his having given an answer to an interrogatory, showing that he has an interest in the cause, cannot amount to a waiver of the objection to his competency. In our practice, at least, where the objection is actually known, and may be taken at the time of the cross examination, it might deserve consideration, whether the case in Vernon ought not to be adhered to. But I do not, as it is unnecessary, give any opinion on this point.[3]

It is suggested, in the argument of the defendants' counsel, that James is to be examined anew before the master, without any special order of the court. If this is so, certainly it is an irregularity, and his examination upon a proper motion may be suppressed. The case of Rowley v. Adams, 1 Mylne & K. 543, is directly in point. But, if his former deposition, only is to be read in the hearing before the master, that is all proper for the evidence already in the cause is for the consideration of the master.

Upon the whole, my opinion, in every view of the matter, is, that the order ought to be superseded; and it is accordingly superseded.

[For a hearing upon exceptions to the master's report, see Case No. 5,262.]

Case No. 5,262.

GASS v. STINSON.

[3 Sumn. 98.][1]

Circuit Court, D Massachusetts. Oct. Term, 1837.

EVIDENCE—EXAMINATION BY BOTH PARTIES—TESTIMONY AS TO CONTENTS OF BOOKS — PARTNERSHIP—PAYMENT OF INDIVIDUAL INDEBTEDNESS—RUNNING ACCOUNTS—SET-OFF.

1. The general rule at law is, that no evidence shall be admitted, but what is or might be under the examination of both parties.

[Cited in The Jacob Brandon, 33 Fed. 169.]

2. Semble, a deposition may be admitted in equity, where the direct interrogatories have been fully answered, and death or some inevitable accident occurs, which, without any

[3] But see on this point Harrison v. Courtweld, 1 Russ. & M. 428, and Pigott v. Croxall, Id. 428, note.

[1] [Reported by Charles Sumner, Esq.]

fault on either side, prevents a cross-examination.

[Cited in Re Cary, 9 Fed. 756; Celluloid Manuf'g Co. v. Arlington Manuf'g Co., 47 Fed. 5.]

3. Quaere, how this would be at law?

4. The direct examination of a witness was taken by a commissioner, with the consent of both parties. No cross-interrogatories were ever filed; and the witness lived several months after the direct examination was begun; there was no proof, that, if the cross-interrogatories had been filed, they might not have been answered. *Held*, that the omission to file the cross-interrogatories was at the peril of the party, and that the deposition is admissible.

[Cited in Lewis v. Eagle Ins. Co., 10 Gray, 510.]

5. A witness, whose books are out of his reach, so that he cannot have access to them, may testify to their contents.

6. Quaere, if the payments and credits made by one partner after a dissolution of the partnership, and joint agency, and after a new individual agency in him, can be applied to the extinguishment of a debt of the partnership, unless circumstances justify the presumption, that the partnership debt has been adopted as his individual debt.

[Cited in Smith v. United States, 2 Wall. (69 U. S.) 236.]

7. The natural presumption is that a partner paying a sum of money to his private creditor, who is also a creditor of the partnership, means to pay it on his private account, unless circumstances vary this presumption.

[Cited in Perot v. Cooper, 17 Colo. 80, 28 Pac. 394.]

8. The doctrines of the common law as to the appropriations of indefinite payments generally, have been borrowed from the Roman law.

9. Semble, that the creditor cannot elect to what debt to apply an indefinite payment, except where it is utterly indifferent to the debtor to which it is applied.

[Cited in Whetmore v. Murdock, Case No. 17,510.]

10. In the case of running accounts between parties, with various items of debit and credit on both sides, occurring at different times, each item of payment or credit, is to be applied, in the absence of any special appropriation, in extinguishment of the earliest items of the debt, then actually due, and constituting debitum in praesenti.

[Cited in the Antarctic, Case No. 479.]

11. In cases of mutual running accounts, every item, whether for pay, services, or otherwise, ending in a debt, is to be deemed a credit in favor of the party pro tanto.

12. *Held*, that the master was right in allowing a sum for labor, wharfage, &c., as a credit in an account.

13. Courts of equity, in cases of set-off, follow the law.

[Cited in McKenzie v. Nevins, 22 Me. 141; Caldwell v. Wentworth, 14 N. H. 439; Inhabitants of Farmington v. Stanley, 60 Me. 474. Disapproved in Gaston v. Barney, 11 Ohio St. 512.]

[This was a bill in equity by Joseph Gass against Abner P. Stinson, for an injunction to stay proceedings, and for other relief. See Cases Nos. 5,260 and 5,261.]

At this term the master made his report, as follows: "The state of accounts between the defendant as warden of the state prison in New Hampshire, and Noah James, as his agent, constituted January 27, 1831, for the sale of stone consigned to him, as they existed April 30, 1832, appears in a schedule marked 'A,' which accompanies this report, and is signed by the master. (This is omitted here.) In this account said James is charged with all the stone belonging to the prison, and in his hands, on the 27th January, 1831, and with all the stone consigned to him as agent, down to April 30, 1832; and with a lot of hoops for the same; rejecting all stone received for the 'New Orleans contract,' so called. He is credited with the value or amount of stone remaining in his hands, unsold, on the 30th day of April, 1832, being parcel of what had been previously debited to him as above. He is also credited with all moneys by him paid to the warden of the prison, or on his account, not specially appropriated to any other than general account. Also, with his commissions on sales of the stone consigned to him; and for his wharfage and extra services in regard to other stone sent to him for shipment to other agents or places; all which appear in the account herewith. The plaintiff Gass being desirous of the testimony of said Noah James, who was then dangerously ill, a commissioner was agreed on by the parties, on November 22, 1836, to take his answers to interrogatories; and his answers were accordingly taken to the interrogatories filed by the plaintiff, no objection being made to the commissioner's proceeding immediately, upon those interrogatories alone, till others could be filed, saving to the defendant all other benefit of exception. The witness lived several months afterwards, during which the commissioner proceeded with the examination, as the witness was able to bear it; but before the filing of any cross-interrogatories, and after answering, under oath, to all the direct interrogatories, the witness died. The defendant objected to the admission of these answers, for the want of cross-examination; but I admitted the testimony. A further objection was made to the answers of James, so far as he testified to matters contained in his books of account, to which books he said he could not have access, they being in some place in the state of New York, not precisely known to him. The defendant insisted that it was the plaintiff's duty to produce these books, they having been produced in court, upon notice, at the trial of the action of Stinson v. James [unreported], and no leave of the court having been given to take them away. It was answered by the plaintiff's counsel, and not denied by the other side, that the books of both parties were taken away, by mutual tacit consent, and for their private and necessary occasions; and that he had used every means in his power to obtain these books, but without success. I therefore overruled

this objection. Testimony was offered by the defendant, to the point that some kinds of the stone ought to be charged at higher prices than were allowed by the auditor, in his report in the above-mentioned action at law. To this the plaintiff objected, contending that said report was conclusive, between these parties, both as to debits and credits. I received the evidence, but taking all the testimony together, I have allowed only the prices stated in the auditor's former report. The defendant produced a paper purporting to be a statement of accounts between him as warden of the New Hampshire state prison, and Stone and James, his former agents, showing a large balance due to the prison; and insisted that the general payments made by James should first be applied to the balance of this old account; in proof of which he offered the prison books, and the deposition of G. C. Thompson. But taking into consideration the fact that a quantity of stone alleged to form part of this balance had already been receipted for by said James under his last agency; that no such claim was set up at the hearings before me as auditor in the former suit; that the correspondence of the parties exhibited to me, subsequent to the termination of the agency of Stone and James discloses no such claim; and that said James positively swears that nothing was due to the prison; I was not satisfied of the validity of that demand; and therefore did not perceive any necessity for deciding the question of such application of the payments. The defendant's counsel also objected to the allowance, in this account, of any wharfage, or any personal services of said James, rendered after April 30, 1832. But I thought otherwise; and have credited said James for all such services and wharfage, down to the close of his agency in 1833; but distinguishing the amount accruing prior to the 30th April, 1832, from that which subsequently accrued. Charging said James with the stone aforesaid, and allowing him against such debits all payments made on general account, and all labor and services rendered, there was nothing due from him to the state prison of New Hampshire, as its agent for the sale of stone, on the 30th day of April, 1832; but a balance was in his favor of a thousand and forty-four dollars and eighteen cents. The further payments made by said James on the same general account, down to October 4, 1833, being added to the balance aforesaid, amount to three thousand three hundred and forty-two dollars and seventy-four cents. Whether against this sum the said James should be charged with any thing received on general account subsequent to April 30, 1832, or should be recharged with the sum of seventeen hundred and fifty dollars, being the amount credited to him April 30, 1832, for stone then on hand, which, it was proved to me, he sold afterwards, and before October 4, 1833, I have not determined. Which is respectfully submitted. Simon Greenleaf, Master in Chancery."

"November 22, 1837. At the request of defendant's counsel, I further certify, that, when a commissioner was agreed on to take the testimony of Mr. James, defendant's counsel called for the production of James' books of accounts, in order to enable him to frame proper cross-interrogatories. The plaintiff's counsel said that the books were as much in defendant's power as in plaintiff's, being the private books of a third person; but that he deemed them important evidence for the plaintiff, and should use all means in his power to obtain intelligence of them, and if he knew the place, he would send specially for them, rather than not have the use of them; but he denied that the plaintiff was bound to produce them. S. Greenleaf, Master in Chancery."

The defendant filed his exceptions to the report, as follows: "1st exception. For that the said Greenleaf, acting as master in chancery, in and by his report, certified, that he, the said master, permitted the deposition of Noah James to be read in evidence before him, which deposition had been taken on the interrogatories of the plaintiff only; whereas the cause should not have been so read, because the said Stinson had no opportunity to cross-examine said James. 2d. Because said deposition was so read in evidence, although said James testified to the contents or matters contained in his books of account, without their being then seen or made a part of his deposition; whereas, the same should have been rejected, because the said books were not then produced; and because the said books which had been produced in the suit of said Stinson against said James and Gass, upon notice, had been withdrawn and taken out of the state of Massachusetts, without the knowledge or consent of said Stinson, and he was thereby deprived of an opportunity of examining the entries therein, and cross-examining said James thereto; notwithstanding it had been agreed that all evidence used in said suit at law, should be used in this case, as appears by an entry on the docket of the court. 3d. Because the said master did not allow or proceed to examine into the state of the balance due from said James on the termination of a former agency, and apply first the subsequent payments in extinguishment thereof, or at least proportionably with the other accounts due; whereas the said Stinson alleged that there was a considerable balance due from said James on such prior account, and sufficient proof to establish the cause was offered and in evidence in the depositions of said cause and otherwise; whereas such allowance should have been had, and subsequent payments first applied to the extinguishment thereof. 4th. Because the said master did not apply or pass credits in the account by him taken to the payment of stone previously delivered for the

New Orleans job by said Stinson, or for stone delivered for said job proportionably with other charges for stone not delivered or shipped for that particular job; whereas, such application should have been made either in whole or in part,—or at most only a portion-rate credited in said account taken by him up to the 30th of April of the year 1832, where there was no direct evidence of a particular application by the parties. 5th. Because said master allowed items for labor, wharfage, and services, &c., of said James, which were never made or received in payment, to be applied to the credit of said James, charged and stated in said account by him taken; whereas, they should not have been so allowed or applied."

Mr. Aylwin, in support of the exceptions.
B. Rand, contra.

STORY, Circuit Justice. The first exception is to the admissibility of the deposition of Noah James in the case, he having died before any cross-interogatories were propounded to or answered by him. The general rule at law seems to be, that no evidence shall be admitted, but what is or might be under the examination of both parties. So the doctrine was laid down by Lord Ellenborough in Cazenove v. Vaughan, 1 Maule & S. 4, 6, and his lordship on that occasion added, "And it is agreeable to common sense, that what is imperfect, and, if I may so say, but half an examination, shall not be used in the same way as if it were complete. The same principle seems recognized in Attorney General v. Davison, 1 McClel. & Y. 160. See, also, 1 Starkie, Ev. (2d Ed.) 265; Id. 270, 271. But neither of these cases called for an explicit declaration as to what would be the effect of a regular, direct examination, where the party had died before any cross-examination. In ——— v. Brown, Hardr. 315, in the case of an ejectment at law, the question occurred, whether the examination of a witness, taken de bene esse to preserve his testimony upon a bill preferred and before answer, upon an order of court, where the witness died before he could be examined again, and he being sick all the meantime, so that he could not go to be examined, was admissible on the trial of the ejectment; and it was ruled, after consultation with all the judges, that it could not be, "because it was taken before issue joined in the cause; and he might have been examined after." From what is said in the same book in Watt's Case, Hardr. 332, it seems to have been held, at that time, that, if witnesses are examined de bene esse before answer upon a contempt, such depositions cannot be made use of in any other court but the court only where they were taken. And the reason assigned is, "because there was no issue joined, so as there could be a legal examination." It may well be doubted, if this doctrine would prevail in our day, at least in courts of equity. See, on this point, 1 Starkie, Ev. (2d Ed.) 271, and note o, note q; Id. 272, notes x and y. Indeed, it seems directly against the decision of the court of king's bench in Cazenove v. Vaughan, 1 Maule & S. 4, 6; for in that case it was ruled, that a deposition taken de bene esse, where the party might have cross-examined, and did not do so, or take any step to obtain a cross-examination, might be read in a trial at law, the witness having gone abroad. On that occasion, the court said; "If the adverse party has had liberty to cross-examine, and has not chosen to exercise it, the case is then the same as if he had cross-examined; otherwise, the admissibility of the evidence would depend upon his pleasure, whether he will cross-examine or not, which would be a most uncertain and unjust rule." But it is the more important to consider how this matter stands in equity; for, although the rules of evidence are, in general, the same in equity as at law, they are far from being universally so.

It seems clear, that, in equity, a deposition is not, of course, inadmissible in evidence, even if there has been no cross-examination, and no waiver of the right. Thus, if a witness, after being examined on the direct interrogatories, should refuse to answer the cross-interrogatories, the party producing the witness will not be deprived of the benefit of his direct testimony; for, upon application to the court, the witness would have been compelled to answer. So it was held in Courtnay v. Hoskins, 2 Russ. 253. But if the witness should secrete himself, to avoid a cross-examination, there the court would, or at least might, suppress the direct examination. Flowerday v. Collet, 1 Dickens, 288. In such a case a cross-examination is still possible; and the very conduct of the witness, in secreting himself, has a just tendency to render his direct examination suspicious. But where the direct interrogatories have been fully answered, and an inevitable accident occurs, which, without any fault on either side, prevents a cross-examination, I do not know that a like rule has been established, or that the deposition has been suppressed. So far as authorities go, they incline the other way. In Arundel v. Arundel, 1 Ch. R. 90, the very case occurred. A witness was examined for the plaintiff, and was to be cross-examined for the defendant; but before he could be cross-examined he died. Yet the court ordered his deposition to stand. Copeland v. Stanton, 1 P. Wms. 414, is not an adverse authority; for, in that case, the direct examination was not completed, and the witness had not signed the deposition, so far as it went; and the examination being postponed to another day, he was the next morning taken suddenly ill, and died. The court denied the motion to allow the deposition, as far as it had been taken. But the court refused, because the examination was imperfect; and, indeed, until the witness had signed the examination, he was at liberty to amend and alter it in any part. In

O'Callaghan v. Murphy, 2 Schoales & L. 158, Lord Redesdale allowed the deposition of a witness, whose examination had been completed, but who died before his cross-examination could be had, to be read at the hearing, deeming it proper evidence, like the case of a witness at nisi prius, who, after his examination, and before his cross-examination, should suddenly die, under which circumstances, he thought, that the party producing him would not lose the benefit of the evidence he had already given. But the want of such cross-examination ought to abate the force of the testimony. However, the point was not positively and finally ruled, as, upon examining the cross-interrogatories, they were not found to apply to any thing, to which the witness had testified in his direct examination, and, therefore, the deposition was held admissible. In Nolan v. Shannon, 1 Moll. 157, the lord chancellor held, that the direct examination of a witness might be read at the hearing, where a cross-examination had been prevented by his illness and death. My own researches, and those of the counsel, have not enabled me to find any other cases, in which the question has been raised; and in the latest book of practice, 1 Smith, Ch. Pr. 294, no other case is alluded to on the subject, than that of Copeland v. Stanton, 1 P. Wms. 414. So that the general doctrine is far from being established in the manner, which the argument for the defendant has supposed, and appears strongly to lead the other way.

But if it were, I should have no doubt, that the special circumstances of this case would well create an exception. The direct examination was taken by consent. No cross-interrogatories were ever filed. The witness lived several months after the original examination was begun; and there is not the slightest proof, that, if the cross-interrogatories had been filed, they might not have been answered. Under such circumstances, I am of opinion, that the omission to file the cross-interrogatories was at the peril of the defendant. I do not say, that he was guilty of laches. But I put it upon this, that, as his own delay was voluntary, and the illness of the witness well known, the other party is not to be prejudiced by his delay. His conduct either amounted to a waiver of any objection of this sort, or to an election to take upon himself the whole hazard of the chances of life. It appears to me, that the case falls completely within the principles laid down in Cazenove v. Vaughan, 1 Maule & S. 4, 6.

The second exception is to the inadmissibility of James' testimony to the contents of his books of account. But those books were not in the witness's possession, and were beyond his reach, and that of the court. They had been formerly in the cause; but had been withdrawn from the custody of the court, by the tacit consent of both parties. Under such circumstances, it seems to me that the master was right in admitting the testimony. The case is not essentially different from what it would be, if the books had been mislaid, or lost; for no access could be had to them by the parties, or by the witness; and, therefore, secondary evidence of their contents was admissible.

The third exception is to the disallowance by the master of the supposed balance of a former old account, asserted to be due from James and one Stone, as agents under the defendant, Stinson, in the state prison business, at a prior period, and his refusal to apply any of the payments and credits of James to the liquidation of that balance. The reasons given by the master for this disallowance and refusal seem to me to be entirely satisfactory. He had been auditor between the same parties in the suit at law (still pending in this court), upon the same matters, in regard to which the present bill is brought, and it was agreed by the parties, that his report, rendered in that case, should be deemed evidence before him, upon the hearing of the present cause. The master now says, that he is not satisfied, that the present claim, for such balance of the old account is well founded; and he has stated very strong reasons for entertaining a presumption against it, which reasons are not in the slightest manner affected by any rebutting proofs before the court. Under such circumstances, the report is entitled to be treated as importing entire verity, as to the matter of fact of the invalidity of the claim. I would add, that I exceedingly doubt, whether, in a case of this sort, the payments and credits made by one partner, after a dissolution of the partnership and joint agency, and after a new individual agency in him, can be rightfully applied to the extinguishment of a debt of the partnership, unless the attendant circumstances justify a presumption, that the debt of the partnership has been adopted as his individual debt, and brought into account as such, or the payments and credits were intended by the parties to be so actually applied. No evidence of this sort exists in this case. The natural presumption is, that a partner, paying a sum of money to his private creditor, who is also a creditor of the partnership, means to pay it on his own private account, unless some circumstances occur, which repel or qualify that presumption. No case has been cited, in which a different doctrine has been asserted and acted on; and certainly my own researches have not enabled me to find any. The case of Baker v. Stackpoole, 9 Cow. 420, 436, so far as it goes, is rather the other way.

But I wish to add a few words upon the subject of the appropriation of payments, because I cannot concur in some of the views, which have been suggested in the argument; and because they will serve more fully to explain the ground of the doctrine of indefinite payments in relation to cases

of running accounts, hereinafter stated. There is no doubt that the doctrine of the common law, as to the appropriation of indefinite payments, has generally been borrowed from the Roman law; and it is deeply to be regretted that there has been any departure in any of the authorities from its true results. The Roman law is equally simple, convenient, and reasonable upon this subject; and, for most cases, will furnish an easy and satisfactory solution. Sir William Grant, in Clayton's Case (Devaynes v. Noble, 1 Mer. 604), has stated the general doctrine of the Roman law in an accurate manner. "The leading rule," says he, "with regard to the option given, in the first place to the debtor, and to the creditor in the second, we have taken literally from thence. But, according to that law, the election was to be made at the time of payment, as well in the case of the creditor, as in that of the debtor, 'In re praesenti, hoc est, statim, atque solutum est:—caeterum, postea non permittitur.' If neither applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the priority in which they were incurred. And, as it was the actual intention of the debtor that would, in the first instance, have governed, so it was his presumable intention that was first resorted to as the rule by which the application was to be determined. In the absence therefore, of any express declaration by either, the inquiry was, what application would be most beneficial to the debtor. The payment was, consequently, applied to the most burdensome debt,—to one that carried interest, rather than to that which carried none,—to one secured by a penalty, rather than to that which rested on a simple stipulation;—and, if the debts were equal, then to that which had been first contracted. 'In his, quae praesenti die debentur, constat, quotiens indistincte, quid solvitur, in graviorem causam videri solutum. Si autem nulla praegravet,—id est, si omnia nomina similia fuerint,—in antiquiorem.'"[2] Pothier, in his edition of the Pandects, has collected together all the texts of the Roman law on this subject (Poth. Pand. lib. 46, tit. 3, art. 1, notes 89–99); and he has summed up the general results in his treatise on Obligations (Poth. Obl. notes 528–536).

Now, the whole of this doctrine of the Roman law turns upon the intention of the debtor, either express, implied, or presumed; express, when he has directed the application of the payment, as in all cases he had a right to do; implied, when he knowingly has allowed the creditor to make a particular application at the time of the payment without objection; presumed, when, in the absence of any such special appropriation, it is most for his benefit to apply it to a particular debt. And, notwithstanding there are contradictory and conflicting authorities on this subject in the English and American courts, I cannot but think, that the doctrine of the Roman law is, or, at least, ought to be held, and may well be held, to be the true doctrine to govern in our courts. There is a great weight of common law authority in its favor; and, in the conflict of judicial opinion, that rule may fairly be adopted, which is most rational, convenient, and consonant to the presumed intention of the parties. If the creditor has a right in any case to elect to what debt to appropriate an indefinite payment, it seems to me, that can be only, when it is utterly indifferent to the debtor, to which it is applied, and then, perhaps, his consent, that the creditor may apply it, as he pleases, may fairly be presumed. Mr. Justice Cowen, in his learned and elaborate opinion, in Pattison v. Hull, 9 Cow. 747; Id. 765–773, has examined and criticised all the leading authorities; and manifestly leans in favor of adopting the doctrines of the Roman law throughout. I confess myself strongly inclined the same way; and shall yield only to authorities which I am bound to follow.

The fourth exception is, as to the mode in which the payments, made by James, have been appropriated by the master. In the case of a running account between parties, where there are various items of debit on one side, and various items of credit on the other, occurring at different times, and no special appropriation of payments, constituting the credits, has been made by either party, the successive payments and credits are to be applied in discharge of the items of debit, antecedently due, in the order of time in which they stand in the account. In other words, each item of payment or credit is applied in extinguishment of the earliest items of debt, until it is exhausted. This was the rule laid down in Clayton's Case, 1 Mer. 572, 604, 608; and it was recognized and acted upon by the supreme court of the United States in U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720, 737, 738; and by this court in U. S. v. Wardwell [Case No. 16,640]. In McDowell v. Blackstone Canal Co. [Id. 8,777], the doctrine was limited to debts antecedently due, and not applied to debts which were not due at the time of the payments or credits. This qualification is indispensable to the good sense of the rule, which is founded upon the apparent intentions of the parties; for it would be almost absurd to suppose that a man, owing to his creditor two debts, one of which was due and the other not, should be presumed to intend to apply payments made to his creditor in discharge of the debt not yet due, rather than to the debt actually due. See the cases in the same point referred to in Pattison v. Hull, 9 Cow. 765, 773, 777, and note. Now, upon the ground of these prin-

[2] The doctrine of the Roman law is still more fully shown and compared with the common law decisions in a very able note to the case of Pattison v. Hull, 9 Cow. 773–777, to which I gladly refer.

ciples, it is plain that unless some moneys were due and unpaid for stone supplied in fulfilment of the New Orleans contract, before the 30th of April, 1832, there is no room for the application of any prior payments to any other than the agency account. In this view of the matter, the master's report would be perfectly unexceptionable. Now, I have been unable to find, in any of the evidence, any positive or clear proofs, that, up to the 30th of April, 1832, there was a single cent due from James, on account of stone supplied under the New Orleans contract—a contract, which it is not unimportant to add, was not a contract originally made by Stinson alone, but by Stinson, and Hastings, his partner. Some deliveries of stone, on account of the New Orleans contract, were made before the 30th of April, 1832; but it does not appear how much. They were continued for a considerable length of time after the 30th of April, 1832, and the job itself was not completed until a subsequent period; and (as it is said) after very injurious delays. Now, it is no where questioned, that Stinson did undertake to supply all the stone, of the proper dimensions, to complete the New Orleans job. And in contracts of this sort, it is a natural presumption, at least in the absence of all rebutting circumstances, that the right to payment depends upon a due fulfilment of the whole contract. If this be so—and there is not a scintilla of evidence to dispel the presumption—then the court is bound to act upon it, and to treat these deliveries for the New Orleans contract as only in fulfilment of an executory contract, upon which no sums were finally due. In the evidence (which, however, under the form of the report, is not properly before the court), which has been alluded to at the argument, it appears, that the first charge in the books of account for the New Orleans contract is debited on the 31st of May, 1832, and the last on the 13th of July, of the same year, making an aggregate to upwards of $5,030. So that upon the face of the accounts, it would seem, that the charges were not understood to be proper debits in account, until the respective times above stated. An explanation, however, is made in the testimony of the defendant's witness (Mr. Wild), who was superintendent of the stone-shop under Stinson, and who stated that his practice was first to enter in his own memorandum-book the number of the stone and the dimensions; and, when the stone was sent off from the shop, he then affixed the date when it was so sent. He added, "It was my uniform practice to charge in the day-book the amount of stone for a particular job or contract, when it was finished and delivered, and not before, unless on the last day of May, when it was necessary to bring up the books, for the warden to make his annual report, when I charged in the day-book what had then been delivered of any unfinished job or contract." It seems to me, that this statement completely establishes what the facts were in regard to the New Orleans contract; that is to say, that payments were not expected to be made, or debits deemed due thereon, until the whole job was finished. If this be true, then the New Orleans job cannot be admitted to form an item of the account, to which the prior payments and credits were to be applied. But it is not necessary in this case to resort to general presumptions. The onus probandi is on the defendant to establish a subsisting debt, due in praesenti, and not in futuro,—and much more, one not contingent,—in order to bring the case within the reach of the principles as to the appropriation of payments and credits. If he fails in his proof, that is sufficient to apply the payments and credits to other known or admitted debts.

The fifth and last exception is, as to the allowance by the master of a sum for labor, wharfage, and services to James, as a credit in the account. The ground of objection to the allowance of this item seems to be, that it is properly matter of set-off, and not of credit in account. But it seems to me, that where there are mutual running accounts between the parties in a case of this sort, there is a necessary understanding between the parties, that every item of account on either side, ending in a debt, is to be deemed a credit in favor of the party pro tanto upon the final adjustment of the accounts. Every service performed by a factor or agent respecting the business of his principal entrusted to his charge, and every expenditure by him about the same constitutes a proper debit on his side, to be deducted from the amount of the debt due by him to his principal. In the present case, this doctrine is the less important to be considered, for the item objected to seems to amount, up to the 30th of April, 1832, to the sum of $125.83 only, whereas the balance then due by Stinson to James is found to be $1,044.18. Whether allowed or not cannot make the slightest difference in the present case. Besides, it seemed to be admitted at the argument, that this constituted a proper item of set-off to an action at law brought to recover the balance due on the account of Stinson against James, under the Massachusetts statutes of set-off. If so, then it is properly allowable in equity; for courts of equity in such cases follow the analogy of the law.

Upon the whole, the exceptions must be overruled, and the report be confirmed, so far as it applies to the accounts up to the 30th of April, 1832.

Case No. 5,263.

GASSAWAY v. JONES.

[2 Cranch, C. C. 334.] [1]

Circuit Court, District of Columbia. Oct. Term, 1822.

EVIDENCE—ADMISSIONS BY DEFENDANT TO STRANGER.

If an indorser, after suit brought against him, tell a stranger, that he is ready and willing to pay the debt, if he knew the amount of the costs, and to whom to pay it; this will not dispense with proof of demand and notice, or of the defendant's knowledge that he was discharged by the want of due demand and notice; nor with proof of the defendant's handwriting on the note, although the note was filed in the clerk's office before the supposed acknowledgment; nor will it be sufficient evidence to sustain any of the money counts.

Assumpsit, against the indorser of a promissory note.

The defendant after the suit was brought, told a stranger (Z. W.) that he was ready and willing to pay the debt if he knew the amount of the costs.

Mr. Key, for plaintiff, contended that the promise to pay, is prima facie evidence of due demand and notice, and of the defendant's indorsement; the note having been filed in the clerk's office before the acknowledgment, although there was no evidence that the defendant had seen the note.

Mr. Lear, contra. The burden of proof is on the plaintiff to prove due demand and notice, or of a promise to pay, made by the defendant with a knowledge of his discharge by the want of demand and notice. Good v. Sprigg [Case No. 5,532] in this court at June term, 1819.

THE COURT (nem. con.) said that the note could not be given in evidence upon that testimony.

But THE COURT (MORSELL, Circuit Judge, contra), at the request of the plaintiff's counsel, told the jury that the acknowledgment was evidence upon the money counts.

The jury thereupon found a verdict for the plaintiff, for $120, (the amount of the note,) upon the count for money had and received.

THE COURT, however, upon further consideration, at the motion of the defendant's counsel, granted a new trial, being of opinion that the last instruction given at the trial was erroneous.

The plaintiff had leave to amend his declaration.

GASSAWAY (UNITED STATES v.). See Case No. 15,190.

Case No. 5,264.

GASSETT et al. v. MORSE et al.

[21 Vt. 627; 3 N. Y. Leg. Obs. 350.]

District Court, D. Vermont. 1843.

ACT OF BANKRUPTCY—FRAUDULENT CONVEYANCE—PREFERENTIAL ASSIGNMENTS—ACT OF 1841.

1. A conveyance, or assignment, which is fraudulent at common law, is within the meaning of the first section of the bankrupt act [5 Stat. 440], defining what shall be considered cause for declaring a person a bankrupt; and so is every conveyance, or assignment, which contravenes the provisions and objects of the bankrupt act, though good at common law.

2. A conveyance, or assignment, by a trader in embarrassed circumstances, of all his effects to a particular creditor, whether voluntary, or under pressure of legal process, or with intention to take the benefit of the bankrupt act, or not, is an act of bankruptcy, within the first section of the bankrupt law.

3. Where a portion of the property of a debtor was under attachment, at the suit of a creditor, and another creditor executed to the attaching creditor his bond, conditioned for the payment of the debt, and thereupon the attachment was released, and then the debtor executed to the second creditor a general assignment of all his property, to secure a debt due to him, and also to secure him for so giving his bond to the attaching creditor, and for the benefit of his other creditors, generally, but creating preferences in favor of some of them, it was *held*, that this was both an act of bankruptcy, within the first section of the bankrupt act, and a giving of an unlawful preference, within the second section.

4. The clause in the bankrupt act in reference to transactions with the bankrupt entered into in good faith more than two months previous to the filing of the petition against him, was only intended to give validity to such transactions, so far as it concerns the party dealing with the bankrupt, and cannot be understood as giving any protection to the bankrupt himself, either on the question of his bankruptcy, or of his right to a discharge.

This was a petition by Henry Gassett and others against Jonathan Morse and James L. Chapman, and was filed August 12th, 1842. The petition, after setting forth an indebtedness to the petitioning creditors in a sum exceeding five hundred dollars, alleged, that Morse and Chapman, being partners in trade, owing more than two thousand dollars, and insolvent, on the twenty eighth day of May 1842, made and executed to one Orange Smith a fraudulent conveyance, assignment and transfer of all their lands and tenements, goods and chattels, and credits and evidences of debt; and prayed, that they might be declared bankrupts. It appeared, that, on the twenty seventh day of May, 1842, Amplius Blake, to whom Morse and Chapman were indebted in the sum of $4000, attached all the goods in their store to secure the debt; that on the day following Orange Smith, who was then holden as surety for Morse and Chapman on a note to the bank of Montpelier for $500, and on a note to Guarantor Hastings for $150, at the request of Morse and Chapman, and in consideration of their making the assignment hereafter mentioned, executed a bond to Blake, guaranteeing the payment of his debt, who thereupon discharged his attachment. On the same day Morse and Chapman accordingly executed to Smith an assignment of all their notes, amounting to $3550, all the demands due them on book, amounting to $3300, and all the goods and effects belonging to them in their store, amounting to $3000; to have and to hold the same for the better security and payment of the following cred-

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

itors, in the following order: First, to the Bank of Montpelier $500, Guarantor Hastings $150, Charles B. Chandler $300, Lucy Carpenter $41, Jeremiah Foster $30, Francis Sturtevant $42, Jenison Jones $67, Paul Royce $35, E. O. Joslin $67, and George W. Barker $34. Second, to pay Amplius Blake six promissory notes, dated May 24, 1840, for $3400, and the interest thereon. Third, to pay all other debts due from Morse and Chapman, if the goods and effects should meet and pay the same, or in proportion as the said property and demands should be to the amount due from them. There was also a farther assignment at the same time, by Morse and Chapman to Smith, of their lease of the store for an unexpired term of three years. Smith took possession of the property under the assignments; and it appeared, that one object of the assignments was, to secure him for his liabilities as surety on the notes to the Bank of Montpelier and Guarantor Hastings, and for his liability on the bond given by him to Blake. It also appeared, that Morse and Chapman estimated their debts at $7,500; but there was no other evidence as to the amount.

PRENTISS, District Judge. At the hearing of this case I had a very strong opinion upon it, and ordinarily should have pronounced an immediate decision; but as the case was one of a good deal of magnitude, and of great interest, especially to one of the individuals concerned in the transaction, I thought it my duty on that account, more than on account of any real difficulty in the case, to examine it fully. I have taken pains to go through all the cases having any bearing upon the subject, have read them attentively and thoroughly, and the result has been a full confirmation of the opinion I at first entertained.

The general question is, whether an act of bankruptcy has been committed. What is an act of bankruptcy is to be ascertained from the first section of the bankrupt law. That section enacts, that any person, being a merchant, &c., may be declared a bankrupt in the following cases: 1. When he shall depart from the state, of which he is an inhabitant, with intent to defraud his creditors. 2. When he shall conceal himself to avoid being arrested. 3. When he shall willingly or fraudulently procure himself to be arrested, or his goods and chattels, lands or tenements, to be attached, distrained, sequestered, or taken in execution. 4. When he shall remove his goods, chattels, and effects, or conceal them, to prevent their being levied upon, or taken in execution, or by other process. 5. When he shall make any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods and chattels, credits, or evidences of debt. For any of the causes thus enumerated and specified, a trader may be proceeded against and decreed a bankrupt. But the last cause mentioned is the only one applicable to this case, because it is the only one assigned or alleged in the petition; and the particular question is, was the assignment, which is relied upon as an act of bankruptcy, a fraudulent assignment, within the intent and meaning of the act? A conveyance, or assignment, which is fraudulent at common law, is undoubtedly within the meaning of the act: and so is every conveyance, or assignment, which contravenes the provisions and objects of the act, though good at common law. The act, for instance, prohibits all preferences, and, with the exception of certain specified priorities, liens and securities, declares, that the property of the bankrupt shall be distributed, pro rata, among his creditors. Any conveyance, or assignment, therefore, which is intended and operates to defeat this provision, though ever so fair as between the parties to it, and entirely unimpeachable on general principles of law, is a fraudulent conveyance, and consequently an act of bankruptcy. The clause, declaring what conveyances shall constitute acts of bankruptcy, is very broad and general in its terms, the language used being, as we have seen, "any fraudulent conveyance, assignment, sale, gift, or other transfer" of property. The provision is substantially the same as the provision on the same subject in the English bankrupt act of 1 Jac. I., now contained in the consolidated act of 6 Geo. IV; and it is evident enough, that in framing and passing the act of congress reference was had to the English statutes and the English decisions upon them, and that it was meant, that the act of congress should be subject to the same construction.

In looking into the English decisions, there is found to be a distinction, running throughout all the cases, between a conveyance by a trader, in debt, of all his effects, and a conveyance of only a part. The former is held to be fraudulent, and ipso facto an act of bankruptcy, in and of itself. The latter is held to be fraudulent, only when made voluntarily, in contemplation of bankruptcy, and for the purpose of giving a preference. A conveyance by a trader of all his effects to one or more creditors, in exclusion of others, is deemed to be an act of bankruptcy, because, in addition to giving a preference, it is, in itself, a breaking or failing in business, rendering him incapable of going on in his trade, which is the original definition and meaning of bankruptcy. Insolvency is not material; for a man may be a bankrupt without being insolvent, or insolvent without being a bankrupt. A man may be actually insolvent, and yet go on in trade many months, or years, without failing, or becoming bankrupt.

The distinction between a conveyance by a trader of all and a part only of his effects, we repeat, pervades all the adjudged cases. It is to be found in the earlier decisions, and remains undisturbed and unquestioned in the more modern reports. It is sanctioned by concurrent opinions of the most eminent English judges for nearly a century, and has

been recently recognized by some of the soundest and most enlightened judges in this country. It was fully adopted by Conkling, J., in Barton v. Tower [Case No. 1085]; by Story, J., in Arnold v. Maynard [Id. 561]; and by Thompson, J., in Wakeman v. Hoyt [Id. 17,051]. The latter said, that a conveyance, or assignment, by a trader in embarrassed circumstances of all his effects to a particular creditor, whether voluntary, or not, or with intention to take the benefit of the bankrupt act, or not, was, per se, a fraud upon the act of congress and an act of bankruptcy. So far has the doctrine been carried in England, and in one instance at least in this country, that a conveyance by a trader of all his effects, or all but a colorable part, in trust for the benefit of all his creditors rateably, has been held to be an act of bankruptcy, because it enables him to appoint his own trustees, and takes the estate out of the operation of the bankrupt law. In Eckhardt v. Wilson, 8 Term R. 140, where partners assigned all their partnership effects in that way, and only a separate creditor dissented, the point was considered so clear and well settled, that it was not even argued. A conveyance by a trader of only a part of his property to a particular creditor stands, as we have already remarked, upon a different footing. To render such a conveyance fraudulent, as against the bankrupt law, it must be voluntary, as well as in contemplation of bankruptcy. It is not unlawful, though made while in failing circumstances, or when actually insolvent, if made under pressure by the creditor, and in the ordinary course of business. The cases cited and relied upon by the opposing counsel are all of this character. They are cases of a transfer or delivery of a part, only, of the effects of the trader, and go to confirm the general proposition, that the substantial distinction, in all the cases, is, between the assignment of all, and a part only.

In the present case, the assignment was of all the partnership property, including goods, notes, and demands on book; and it does not appear, that the respondents had any separate property, except their household furniture. If not actually insolvent, it is abundantly evident, that they were deeply indebted and greatly embarrassed. It is true, the goods at the time were under an attachment, at the suit of a creditor, for a large debt; and Smith, the assignee of the property, for the purpose of removing the attachment, executed his bond, conditioned to pay the debt, and took the assignment to indemnify himself for that and certain other debts, for which he had previously become holden as surety. But this circumstance, though it shows that the security was given under the pressure of legal process, and for a valuable consideration, does not take the case out of the general rule. In Butcher v. Easto, Doug. 295, where a trader, being arrested for a debt by one of his creditors, executed a bill of sale of all his effects to another creditor, to whom he was also indebted, as security for both debts, and the latter, on that condition, became bail for him, and he obtained his discharge, it was determined, that the bill of sale was fraudulent and an act of bankruptcy. So in Newton v. Chantler, 7 East, 138, a bill of sale to a particular creditor of all the effects of a trader was held to be an act of bankruptcy, notwithstanding it was given by the trader, when under arrest at the suit of the particular creditor, for a just debt. Lord Ellenborough said, that the bill of sale being given under the pressure of legal process made no difference, for it was not like the case of a partial conveyance, only, of a trader's property. And Le Blanc, J., after referring to the case of Butcher v. Easto, observed, that the security being given to the particular creditor, at a time when he held the trader under arrest, did not distinguish the case from the general class of cases, where a conveyance of a trader's effects to a particular creditor had been uniformly holden to be an act of bankruptcy.

The present case falls within the principle of the cases just cited; for in this, as in them, though the assignment was made under the pressure of legal process, and the debts secured were bona fide debts, it was an assignment of the effects, exceeding in value the amount of the debt due to the attaching creditor at least six thousand dollars; and though it embraced all the debts owing by the respondents, in its provisions for payment out of the effects, a preference was given to particular creditors and classes of creditors, to the prejudice of other creditors. In addition to the evidence of a preference appearing upon the face of the assignment, Smith testifies, that the respondents would not consent to make the assignment, without providing for the payment of their home creditors first. Here is direct proof, then, that one leading motive was to give a preference; and all the facts and circumstances, collateral as well as others, combine to bring the case, in all particulars, fully and clearly within the principle established by the uniform current of judicial determinations. But in my judgment the case also comes within that provision in the second section of the bankrupt act, which declares "that all future payments, securities, conveyances, or transfers of property, or agreements, made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person, any preference or priority over the general creditors of such bankrupt, and all other payments, securities, conveyances, or transfers of property, or agreements, made or given by any such bankrupt, in contemplation of bankruptcy, to any person or persons whatever, not being a bona fide creditor, or

purchaser for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act." Now, if immediate, absolute bankruptcy were the necessary consequence of the assignment in this case, as we have seen it was, the assignment must be taken to be a transfer of property made in contemplation of bankruptcy, as well as for the purpose of giving a preference, since every man must be supposed to contemplate or intend that which is the necessary consequence of his own act; and such a transfer, when made to a surety, as this was, is expressly declared, by the provision referred to, to be a fraud upon the act.

It is insisted, however, that admitting the assignment to have been an act of bankruptcy, yet having been made more than two months before any proceedings in bankruptcy were instituted, the respondents are protected from the consequences of it by the proviso to the clause of the act just recited. The proviso declares, "that all dealings and transactions by and with any bankrupt, bona fide made and entered into more than two months before the petition filed against him, or by him, shall not be invalidated or affected by this act; provided, that the other party to any such dealings or transactions had no notice of any prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act." It is very manifest, that this saving provision was inserted, not for the sake of the bankrupt, but for the sake of the party dealing with him; and such a construction should be given to it, as will effectuate the legislative intention and object, without at the same time being inconsistent with the apparent sense and meaning. It cannot reasonably be taken to have any other effect, than merely to give validity to a transaction, bona fide entered into more than two months before the filing of the petition, so far as it concerns the party dealing with the bankrupt. It cannot be understood as giving any protection to the bankrupt himself, either on the question of bankruptcy, or on the question of his right to a discharge. If the transaction be fraudulent on his part, why should he not be decreed a bankrupt, or denied a discharge, as the case may be, though the rights of the other party under the transaction, who may be an innocent party, should remain unaffected? That this is the just construction is evident from the consideration, that the validity of the transaction is made to depend upon the condition, that the party dealing with the bankrupt "had no notice of any prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of the act." The object was to protect transactions, on the part of a creditor, or other person, done in the common course of trade and business, without knowledge of any act of bankruptcy, or of any proceeding in bankruptcy being in contemplation. But where the transaction, as in this case, is a general, sweeping disposition of effects, and is, itself, unconnected with other circumstances, a substantive and complete act of bankruptcy, equally within the knowledge of both parties, the case is not within the proviso.

Case No. 5,265.

GASSETT et al. v. PALMER et al.

[3 McLean, 105.] [1]

Circuit Court, D. Michigan. Oct. Term, 1842.

PLEADING AT LAW—CAPTION OF THE DECLARATION—VENUE—OTHER AVERMENTS.

1. It is sufficient to state the title of the court in the caption of the declaration.

2. The venue if substantially laid is sufficient. And so of other averments in the declaration.

At law.

Joy & Porter, for plaintiffs.
Romeyn & Lee, for defendants.

OPINION OF THE COURT. This is an action of assumpsit on a note. To the first count in the declaration the defendants [Palmer & Clarke] demur, and plead non assumpsit to the other counts.

To the first count it is objected that the caption of the declaration is insufficient, as it does not state in what circuit court of the United States it was filed. The declaration commences, "Circuit Court of the United States, District of Michigan;" and then the names in which the parties contracted is stated and their citizenship alleged, which is followed, (speaking of defendants,) citizens of "the state of Michigan, against whom the declaration is filed." This we think is sufficient. The caption names the court in which the suit was commenced, and the declaration filed.

It is also objected that the venue is not sufficiently stated. The venue is laid "at Boston, in the state of Massachusetts, to wit, at Monroe, in the county of Monroe, and district aforesaid, and within the jurisdiction of this court." This is sufficient. The third objection, "that no time nor place is stated in the first count for the promise of the defendants to pay to the order of Henry Gassett & Co.," is without foundation. The promise is laid at Boston, aforesaid, to wit, at Monroe, within the district aforesaid, and within the jurisdiction of the court, and the note is set out.

It is again objected, there is no allegation that Henry Gassett & Co. are the plaintiffs, or that they constituted the firm at the date of the note. The names of the firm are expressly stated, as constituting the firm to whom the note was given. So that it is unnecessary to say, whether it was essential for the plaintiffs to allege their names be-

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

yond the firm, as stated on the face of the note.

The demurrer is overruled.

Case No. 5,266.

GASTREL et al. v. CYPRESS RAFT.

[2 Woods, 213.] [1]

Circuit Court, E. D. Louisiana. April Term, 1876.

ADMIRALTY—TITLE TO LOGS IN NAVIGABLE RIVER.

A court of admiralty has not jurisdiction to try the question of title to certain logs which have been incorporated into a raft and floated down a public navigable river.

[Cited in Muntz v. Raft of Timber, 15 Fed. 557. Distinguished in Seabrook v. Raft of Railroad Cross Ties, 40 Fed. 597.]

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

Wm. Grant, for libellants.

W. W. Howe, for claimants.

WOODS, Circuit Judge. Libellants [Gastrel & Raymond] allege that they are the owners of a certain tract of land in Mississippi; that the claimants wrongfully entered thereon, and without consent of libellants, cut one hundred and forty cypress logs, and caused them to be incorporated into a raft and floated down the Mississippi river and navigated to the city of New Orleans, where they now lie in said raft, and pray that a warrant of arrest may issue against the raft and the one hundred and forty trees or logs of cypress timber incorporated therein, and that the possession and ownership of said logs may be adjudged to libellants according to the course of admiralty.

Objection is raised to the jurisdiction of the court of admiralty over this cause. The suit is not brought upon a maritime contract, or to enforce a maritime lien, or to secure possession of or establish title to the raft. But it is to obtain possession of one hundred and forty logs which libellants aver are their property, having been cut from their land, and incorporated with other logs in the raft and floated down the Mississippi river to New Orleans. Has this court jurisdiction to try the title to the logs claimed by libellants, and incidentally the title to the land from which they were cut, because they have with other logs been formed into a raft and floated down a public navigable river?

The case of Jones v. Coal Barges [Case No. 7,458] was a libel against a barge loaded with coal, to recover damages for a collision. Grier, J., said: "The subject of dispute proposed by the libel is a collision between two coal barges loaded with coal. They are not 'ships' or 'vessels' in the maritime sense of the terms. They do not take out a coasting license. They are generally mere open chests or boxes of small comparative value, which are floated by the stream, and sold for lumber at the end of their voyage. A remedy in rem against such a vessel, either for its contracts or its torts, would not only be worthless, but ridiculous, and the application of the maritime law to the cargo and the hands employed to navigate her would be equally so. * * * Every mode of remedy and doctrine of the maritime law, affecting ships and mariners, may be justly applied to ships and steamboats, but could have no application to rafts and flatboats. A court of admiralty is not needed to try common law actions of trespass, nor to administer common law remedies in any form."

In the case of Tome v. Four Cribs of Lumber [Id. 14,083] it was held by Chief Justice Taney, that "rafts anchored in a stream, although it be a public navigable river, are not the subject matter of admiralty jurisdiction where the right of property or possession is alone concerned. Any assistance rendered to these rafts, even when in danger of being broken up or swept down the river, is not a 'salvage' service in the sense in which that word is used in the courts of admiralty. The district court therefore had not jurisdiction to issue the process by which the marshal was directed to take the property from the possession of the respondent; the controversy was proper for the decision of a court of common law, and the remedy of the owners to regain possession was an action of replevin, and not a libel in the district court; consequently its decree must be reversed and the libel also dismissed."

If these two decisions are law, and barges and rafts cannot be libeled in admiralty for either a collision or salvage, it would seem to follow conclusively that a libel will not lie to try the title to a part of the materials of which a raft is constructed, even though the raft may be found upon a public navigable river. The propriety of this ruling is made evident by the record in this case, for the main question to which nearly all the evidence is directed is the question of title to a tract of land on the Homochitto river, in Mississippi, from which it is alleged the cypress logs were cut; both libellants and claimants asserting title to the land, and essaying to establish title by the production of deeds and the evidence of witnesses as to the boundaries. Is this question proper for trial by a court of admiralty sitting in Louisiana?

In my judgment, the libellants have mistaken their remedy, which should have been a common law action of trespass, quare clausum fregit, or replevin, to recover possession of the logs. The opinion of this court is, therefore, that it is without jurisdiction in this case, and its judgment is that the libel be dismissed.

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

Case No. 5,267.

The GATE CITY.

[5 Biss. 200.] [1]

District Court, N. D. Illinois. Aug., 1872.

CAPTAIN HAS NO LIEN—SERVICES AS CLERK—EFFECT OF SALE OF CLAIM—BOAT USED FOR FERRY—EFFECT OF FERRY FRANCHISE — WAIVER OF MARITIME LIEN.

1. It being a well-established rule in admiralty that the contract of a captain is personal, and that he has no lien for his services, he cannot maintain a libel for additional services as clerk or manager without showing a special contract designating the extra compensation to be paid him as such.

2. The lien of a mariner is strictly personal, and if he reduce it to a common law judgment, which he sells, no libel can be maintained thereupon, either by himself or for the benefit of the assignee.

3. A vessel plying between several points on the Mississippi river, on opposite sides, and within a distance of six miles, is amenable to the admiralty, even though her main business be that of a ferry-boat between points on opposite sides of the river.

[Cited in Murray v. The F. B. Nimick, 2 Fed. 90; The Ella B., 24 Fed. 508; The St. Louis, 48 Fed. 313.]

4. The fact that such boat was owned and run by a company possessing a ferry franchise does not change the character of the service.

5. The width of a stream or length of a voyage is no criterion by which to determine the character of the service, nor the question of admiralty jurisdiction.

6. A mariner's lien will not be considered as waived by anything less than an express contract. Attaching the vessel under a state law, and settling that proceeding on receiving notes secured by a mortgage on the vessel, which afterwards become worthless, does not constitute a waiver of the maritime lien. A libel may still be sustained, and the decisions as to waiver of liens under state statutes are not applicable.

[Cited in Starke v. The Napoleon, Case No. 13,011; The Cerro Gordo, 54 Fed. 395.]

[See The Active, Case No. 34.]

In admiralty. Libel for mariner's wages, filed by Daniel McFarlane, W. H. Thomas, Jno. O. Butler, Joshua Edginton and Philip Coonrod, setting forth in substance, that they were respectively "seamen on board the Gate City, of which the said Coonrod was master; that the said steamboat is a vessel of more than fifty tons burthen, was duly enrolled and licensed, and engaged in the business of commerce and navigation upon the waters of the Mississippi river, bordering upon the states of Illinois and Iowa, which said waters were navigable from the sea by vessels of more than ten tons burthen; that during the season of the year 1870–71, while said steamer was so engaged upon the waters aforesaid, the said libellants were duly engaged to render service as mariners in running and navigating the said steamer upon the waters aforesaid, and, in pursuance of the engagement aforesaid, did render such service during the season aforesaid; that the said services were rendered by Butler and McFarlane in the capacity of engineers of said steamer, said Edginton served as fireman, Thomas as pilot, and Philip Coonrod served as clerk and general manager of said boat." The hearing of the case shows that there was due the libellant Butler, for his services as pilot, the sum of $35; to McFarlane for his services as engineer, $275.40; to Thomas for his services as engineer, the sum of $251.45; that there remains unpaid to Edginton the sum of $32.45; that Coonrod, the other libellant, while he claimed in the libel for services as clerk and general manager of the boat, was, in point of fact, the captain.

BLODGETT, District Judge. Though Coonrod may have acted as captain of the boat, it is impossible to distinguish between the services which he rendered as captain and the services which he rendered as clerk or general manager, so far as his compensation is concerned.

It being a well established rule in admiralty that the captain or master of a ship has no lien for his wages, but that his contract is personal with the owner of the boat, the court cannot, either upon the libel as it stands, or the testimony, decide the compensation due to the master and allow him a lien in admiralty for what may be his fair compensation for the services rendered as clerk. If he performed the duties in both capacities, he should either have made a contract designating what he was to be paid as captain and how much extra as clerk, or he must be content to abide by the rule in admiralty and take his pay for all the services performed in capacity of captain alone and forego his lien.

So far as the libellant Edginton is concerned, the proof shows that he received a due-bill for the balance due him, on which he obtained a judgment, which he afterwards, and sometime prior to the filing of this bill, sold to Ebyard & Derano of Keithsburg.

The proof, being that of the libellant himself, is conclusive that he had no interest in this claim for wages at the time this suit was brought, and it is noticeable that while all the other libellants sign the libel and verify it, the name of Edginton does not appear upon the libel, either in the signing or verification. I, therefore, have no doubt but what this claim was properly assigned by Edginton to the parties named, and that he has parted with all his rights, and that this suit cannot be maintained, even in Edginton's name, for the benefit of these parties, the maritime lien being personal to the mariner and not being assignable to other parties, especially after he has had recourse to a common law court and obtained a judgment on it.

The proof also shows that McFarlane and Thomas performed services in their respective capacities, upon the boat, to the amount of the claims set up in the libel respectively,

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

that is to say, $275.40 for McFarlane, and $251.45 for Thomas.

The defense set up against the recovery of these claims is twofold.

First: That the steamer Gate City was nothing but a ferry-boat, and that a court of admiralty has no jurisdiction over the transactions of a boat merely engaged as a ferry-boat; that a maritime lien for wages does not attach to a boat engaged in such service.

The evidence shows that this steamer was employed in the transportation of passengers and freight between Keithsburg, in the county of Mercer in this state, and the opposite shore of Iowa, touching at various points upon the Iowa shore, ranging from three miles above Keithsburg to the same distance below, according as the stage of water or the business made it desirable to touch at one or the other point or the point directly opposite, the boat having, according to the proof, some five different landing points on the western bank. The vessel is above twenty tons burthen, and is enrolled and licensed to carry on the ferry, freight and towing business.

There is no doubt but what her tonnage, her equipment and her outfit, in every particular, was such as to bring her within admiralty jurisdiction. The only question is, whether the business in which she was employed was such as is contemplated by the law governing the transaction of maritime business.

The proof shows that the vessel was mainly employed as a ferry-boat—that is, in the transportation of persons and teams between the opposite sides of the Mississippi river; that she also touched at various islands in the river, from which she took wood and hay to Keithsburg, if not to the Iowa shore; that she also brought grain across the river from the Iowa side for transportation on the railroad which terminates at Keithsburg and runs thence east to some point on the Chicago, Burlington & Quincy road. She therefore plied between the ports of different states. The particular manner in which she transported her passengers and freight, and the length of her voyages, it seems to me, can make no difference, so far as the maritime character of the business is concerned. The question naturally suggests itself, how wide must a stream of water be across which a ferry-boat must pass in order to divest it of the character of a ferry-boat, contended for by the counsel for respondent, in contra-distinction to the maritime service alleged by the libellants? In one sense of the word, the Cunard Line of steamers consists but of ferry-boats, running from Liverpool to New York. They make regular trips on advertised schedules and transport freight and passengers from shore to shore. So, too, take the boats plying between this port and ports upon the opposite side of Lake Michigan. They make regular trips, and, in one sense, are but ferry-boats, and yet no one has ever denied that their business was maritime; and the mere fact that this boat was owned by a company possessing a ferry franchise from the states of Illinois and Iowa, authorizing them to maintain a ferry across the Mississippi river at that point, does not, as it seems to me, change the character of the service. An individual or corporation may be invested with a ferry franchise for the purpose of public convenience, by the state authorities, but when they use, for the purpose of exercising that franchise, a boat which comes within the definition and character which makes it amenable to the maritime laws, then the fact of the ownership of the boat and of the ownership of the right to perform the service in which the boat is engaged does not take from the admiralty courts jurisdiction over the boats, or remove those engaged in it from the protection of the admiralty courts. It seems to me that the width of a river or the length of the voyage makes no difference; it is no criterion by which to determine the character of the service.

I have, therefore, no doubt but what this boat, although performing numerous voyages every day, was, at the same time, engaged in such maritime occupation and business as makes her amenable to the admiralty law and the jurisdiction of the admiralty courts.

Second: The second point made by respondents is, that these libellants, sometime in the month of July, 1871, caused this steamboat to be attached by a writ of attachment, issued out of the circuit court of Louisa county, in the state of Iowa, upon the debt alleged to be due the attaching creditors respectively from the alleged owners of the boat, to wit: David Lloyd and Mrs. Coonrod; that the boat was held under this attachment for several days by the sheriff of Louisa county, when, as he testifies, he was directed by the attorney of the attaching creditors to release the boat and return his writ with an indorsement that the release was made by direction of the plaintiffs, which he did, and the record in the attachment case thus commenced, shows that the case was settled and dismissed. It further appears that, while the boat was held under this attachment, an agreement or arrangement was entered into between the attaching creditors and Cabeen & Elliot, who were merchants in Keithsburg, by which it was stipulated, or understood, that the owner of the boat should make a mortgage to Cabeen & Elliot for an amount sufficient to cover this indebtedness, and that Cabeen & Elliot should pay the amount that was due these libellants, together with other creditors, and that these attachment suits were dismissed by reason of this arrangement which was made for the giving of this chattel mortgage. It appears, further, that the boat, during the time these services were rendered,

was owned by Lloyd and Mrs. Coonrod in about the proportion of two-thirds to Lloyd and one-third to Mrs. Coonrod; that Lloyd had given a mortgage upon his interest in the boat to one John C. Pepper, to secure the payment of $150 and that he had given a further mortgage to Mrs. Griswold, to secure the payment of $100; that at about the time this attachment was levied, Pepper had proceeded to foreclose his mortgage, and had put some person on board the boat, ostensibly as keeper or custodian for him, but there is no evidence that Mrs. Coonrod or these attaching creditors had any knowledge or notice that this person was on board in any such capacity. After the boat was released from the attachment in Iowa and came over to Keithsburg, Mrs. Griswold purchased from Pepper Lloyd's interest in the boat, under a clause in the mortgage which authorized the mortgagee, in case of the non-payment of the mortgage debt, to sell the boat at either private or public sale, and the evidence is very conclusive to show that this was a secret purchase, made under such circumstances as go to show that there was collusive action between Lloyd, Pepper and Mrs. Griswold, with the intent of defeating this chattel mortgage which had been given to secure the libellants' wages and the amounts due them respectively. After this pretended purchase by Mrs. Griswold, a writ of replevin was issued from the Mercer county circuit court in her favor and executed, by which an attempt was made to place the boat in the hands of Mrs. Griswold under her assumed title. In consequence of these proceedings on the part of Mrs. Griswold, Cabeen & Elliot, the mortgagees, entirely refused to carry out the arrangement which had been made for the payment of the wages and other sums which had accrued against the boat; and the boat, at the time this libel was filed, was nominally in the possession of Mrs. Griswold, although her possession was resisted, and both parties seemed to have had captains or agents on board to represent their respective rights and interests.

Upon this state of facts, it is urged very strenuously by counsel for the respondents and intervening owner, that the maritime lien has been waived. I am cited to numerous authorities in this state and in the state of Missouri, to show that the taking of any other security, or the resorting to the state courts, waives the maritime lien of a seaman, but an examination of those cases shows that they were all cases where the question was not as to the general maritime lien, but upon the question of a lien created by the statute of the respective states—what are known as "statutory liens" under the boat and vessel acts of the states—which have always been treated by the admiralty courts as standing on a widely different footing from the admiralty or maritime liens known to the courts of admiralty and enforced through these courts.

The general principle in regard to mariners' wages is, that the mariner is, to a certain extent, the ward of courts of admiralty; that his lien for his wages is under the protection of the courts of admiralty, and that no act on the part of a seaman short of absolute payment, or such an act as shows an intelligent intention to waive his admiralty lien, shall be construed as a waiver of such lien. Courts of admiralty take notice of the improvidence, and the ignorance, and of the guilelessness of seamen, and protect their interests, in view of the liability of such persons to be imposed upon by the more shrewd and experienced persons with whom they may come in contact and deal; and, therefore, it is a settled principle of admiralty law, that a seaman or mariner who has acquired a maritime lien will not be construed as having parted with that lien and waived it by anything short of an express contract or payment.

Here the parties resorted, in the first instance, to the state courts of Iowa for the purpose of enforcing the payment of this indebtedness. They did not get their money by that proceeding, but they did obtain what, at the time, appeared to be an arrangement which would ultimately secure them the payment of their claims. Certain parties stepped forward and took a mortgage on the boat and libellants took the notes of the owner of the boat, which were secured by that mortgage. That act did not waive the maritime lien of the seamen, because they received nothing, and they did not, by express word or act, waive the maritime lien. The mortgage proved unavailing in the hands of the parties to whom it was made, by reason of the changes which took place in the title to the boat, and consequently the seamen or mariners took nothing by the mortgage and notes. They have not yet been paid, and the mortgage does not in terms, nor do the notes, in terms, or by necessary implication, waive the maritime lien. I cannot, therefore, consider the cases which have been cited as in point to sustain the position taken by the respondent's counsel. The case is not one of an attempt to enforce a mere statutory lien under a state law, which may be waived, under the authorities cited from the state courts, by any act which shows that the seaman or person holding the lien has accepted any other security, and I therefore shall overrule all the defenses interposed and direct a decree to be entered in favor of the libellant Butler for $35, McFarlane $275.40, Thomas $251.45, interest to be computed from July 1, 1871. The libel must be dismissed as to Coonrod.

Consult The Fanny Gardner [Case No. 4,642], as to mate's compensation, when acting in capacity of captain.

GATE VEIN COAL CO. (DETMOLD v.). See Case No. 3,830.

GATES (GOODYEAR DENTAL VULCANITE CO. v.). See Case No. 5,593.

Case No. 5,268.

GATES v. JOHNSON.

[Brunner, Col. Cas. 633;[1] 21 Law Rep. 279.]

Circuit Court, N. D. Ohio. 1857.

ADMIRALTY JURISDICTION — RULES OF, NOT RESTRICTIVE—DEPOSITARY OF SAVED PROPERTY—LIABILITY IN ADMIRALTY.

1. The rules in admiralty are not to be regarded as restrictive, but as enumerative of the more common remedies.

2. Where the depositary of saved property has rendered himself liable for the lien of the salvors, he may be proceeded against in admiralty.

This was a libel filed by the crew of the brig Gladiator to recover a salvage claim due them on certain barrels of flour and high wine, which had been lost or jettisoned from some vessel unknown, and which were found by the Gladiator, floating and derelict, on Lake Erie, in May, 1856. The property, valued at one thousand dollars and upwards, was brought into Cleveland, and deposited for safe keeping with Johnson, Willard & Co., who in violation of the rights of libelants, as was claimed, delivered it over to Lake Erie Navigation Company, receiving one hundred dollars, and a bond of indemnity. This one hundred and eighty dollars was paid over by them to Brooks, Adams & Upham, the owners of the Gladiator, who were made defendants in the libel, together with Johnson, Willard & Co. Exceptions to the libel were filed, on behalf of Johnson, Willard & Co., on the ground that they were not within the nineteenth rule in admiralty, which prescribes the modes of proceeding, and the parties who may be proceeded against in salvage cases.

Willey and Cary, for libelants.
Williamson and Riddle, for respondents.

McLEAN, Circuit Justice, held: 1. That Johnson, Willard & Co., as bailees, were responsible for the lien of libelants. Story, Bailm. §§ 98, 105, 108, 110, 113; Sedg. Dam. 482; 5 Wend. 315.

2. That the foundation of this proceeding being a salvage claim, it was most appropriately, if not alone, cognizable in admiralty. Brevoor v. The Fair American [Case No. 1,847]; 3 Sandf. 451, and other cases.

3. That libelants were entitled to their proportion of the amount paid their co-salvors; and that the rules in admiralty prescribing proceedings in certain cases were not to be regarded as restrictive, but only as enumerative of the more common remedies, leaving such other and further proceedings to be had by the courts as might be found necessary, in any case, to give effect to their jurisdiction. The Centurion [Case No. 2,554]; Gardner v. The New Jersey [Id. 5,233]; Brevoor v. The Fair American [supra]; 3 Kent, 371; Waterbury v. Myrick [Case No. 17,253]; Shepherd v. Taylor, 5 Pet. [30 U. S.] 675; [Bank of U. S. v. Deveaux] 5 Cranch [9 U. S.] 81; Ben. Adm. Pr. § 17.

The exceptions were overruled, and a decree entered in favor of libelants for five hundred dollars, being one half the value of the saved property; against Brooks, Adams & Upham, owners, for such proportion of the one hundred and eighty dollars received by them as the libelants were entitled to; and against Johnson, Willard & Co. for the libelants' proportion of three hundred and twenty dollars, which Johnson, Willard & Co. had become responsible for on giving up the property on which the libellants had a lien. The decree awarded one third of five hundred dollars to the owners of the Gladiator, one fourth of two thirds to the master, and three fourths of two thirds to be divided equally among the crew.

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

Case No. 5,269.

GATES v. SMITH.

[See Case No. 5,286.]

Case No. 5,270.

GATES v. WINOOSKI LUMBER CO.

[18 N. B. R. 31.][1]

Circuit Court, D. Vermont. April 2, 1878.

BANKRUPTCY — PROCEEDINGS BY ASSIGNEE TO RECOVER ASSETS—CONTRACTS.

An arrangement was entered into between defendant and a committee appointed by the bankrupt corporation, defendant, and the other owners, by which defendant was to furnish the lumber necessary to rebuild a dam owned by them all. Defendant furnished a part of the lumber, placing it where it would be taken for use on his land, but the dam was not rebuilt. Defendant proved his claim in the bankruptcy proceedings for the bankrupt's share of the purchase-price, but afterwards withdrew it, and neither the bankrupt nor its assignee ever paid anything for the lumber thus furnished or otherwise took possession of it. Subsequently, defendant obtained leave of the assignee to sell it, and promised thereupon to pay him his share of the avails; but after selling the same he refused, on demand made, to pay over plaintiff's share. In an action by the assignee to recover such share as money had and received to his use, *held*, that it was proper to submit to the jury the question whether anything remained to be done to this lumber by defendant before, under the contract, it was to be taken and used; that the question whether the title to the lumber passed to the bankrupt and therefore whether there was a consideration for defendant's promise, depended upon whether anything remained to be done by the seller.

[This was a suit by Joel H. Gates, assignee, against the Winooski Lumber Co.]

WHEELER, District Judge. This cause has been heard upon the motion of the defend-

[1] [Reprinted by permission.]

ant for a new trial, on account of alleged errors in matters of law at the former trial. The action is upon the common counts in assumpsit for money had and received to the plaintiff's use.

It appeared from evidence not contradicted that the defendant, conceding that the plaintiff, defendant, and others owned a lot of lumber together, obtained leave of the plaintiff to sell it, and promised thereupon to pay him his share of the avails; that the defendant did sell it and receive the avails and refused, on demand made, to pay the plaintiff's share to him. This evidence supported the declaration, and as it stood by itself the plaintiff was entitled to recover. It appeared further, however, that the defendant formerly owned the lumber; that a committee chosen by a corporation now a bankrupt, of which the plaintiff is the assignee, the defendant, and the other owners bargained with the defendant for the necessary lumber to be furnished by the defendant for rebuilding a dam owned by them all; and that this lumber was brought by the defendant and put where it would be taken for use, which was on the defendant's land, ready for use, according to the bargain, but the whole was not furnished, nor was the dam rebuilt. In the bankruptcy proceedings the defendant proved a claim for the bankrupt's share of the price, and afterwards, with leave of court, withdrew it, and neither the bankrupt nor the plaintiff ever paid anything for it or otherwise took possession of it.

The defendant claimed that upon the evidence the lumber never became the property of the bankrupt, and requested that a verdict be directed for the defendant. The court submitted the case to the jury, with directions to find whether anything remained to be done by the defendant to this lumber before, according to the contract, it was to be taken and used, and if there was anything so remaining to be done, to return a verdict for the defendant, but if not, for the plaintiff. The only error complained of is in these rulings. It was doubtful whether, as the evidence stood, there should not be a verdict for the plaintiff without reference to any question about delivery, as the defendant recognized the plaintiff's ownership by obtaining leave to sell under it and agreeing to pay over the proceeds of the sale. But there was then no controversy about the plaintiff's right, and no yielding or compromise that could form a consideration for the undertaking to pay over the share of the avails, and it was thought that, if the plaintiff had no title, there would be no consideration for that promise, and it could not be enforced, and so the question of delivery was submitted to ascertain whether the bankrupt really had acquired a title that passed to the plaintiff. When the plaintiff had shown the undertaking upon a consideration apparently good and ample, it lay upon the defendant to avoid the transaction in some way or submit to a judgment, and the only attempt to do so was by showing the facts, and when shown they had no effect towards defeating the plaintiff's claim unless they showed a want of consideration. And it was not for the plaintiff to show there was a consideration any further than that the defendant sold the lumber and received the avails, but after that it rested on the defendant to show that in fact the lumber, and consequently the avails of it, were its own. If the lumber had been delivered under the bargain with the committee of the owners of the dam, then the share of the bankrupt became vested, otherwise not. Nothing was shown whether credit was to be given or not. If not, the defendant was not bound to deliver the property until it was paid for, and the title would not pass without consent of defendant without payment. But the defendant has not shown any standing upon that right by refusal to deliver without payment. On the other hand, the proof of the claim, although it was withdrawn, tended to show that express credit was given or that delivery without payment was assented to. Altogether there is a clear failure to show that the property was withheld for want of payment.

If the whole quantity bargained for had been brought there would seem to have been no question at all about delivery. It was taken by the defendant from the other property of the defendant and placed where it was wanted by the purchasers under a contract of sale. But as part had been drawn, and part not, and it did not appear that the part drawn had been measured off at the time of the commencement of the bankruptcy proceedings, as of which time the plaintiff's title took effect, it was a little doubtful whether at that time there was not something remaining to be done about the property, by the seller.

That the question whether the title did pass or not depends, under such circumstances, upon whether anything remained to be done by the seller, appears clearly from Gibbs v. Benjamin, 45 Vt. 124, where the leading cases are ably brought together and reviewed, and that conclusion arrived at. That is doubtless the effect of the common law everywhere, and its effect as affected by a statute of frauds like that of Vermont wherever the common law prevails and there is such a statute, but whether that is so or not, that is a late and authoritative enunciation of the law of Vermont by the highest court of the state, and, as this is a question of property under the laws of the state, that statement of the law should control.

So if there was any question at all to be submitted to the jury upon the evidence, it was the one that was submitted, and that having been found for the plaintiff, it ought to end the controversy. Motion overruled and judgment on the verdict.

GATES (UNITED STATES v.). See Case No. 15,191.

GATE VEIN COAL CO. (DETMOLD v.). See Case No. 3,830.

Case No. 5,271.

GATTMAN et al. v. HONEA.

[12 N. B. R. 493;[1] 7 Chi. Leg. News, 395.]

District Court, N. D. Mississippi. Aug., 1875.

CONTRACTS—ADVANCE AS PART CONSIDERATION—BANKRUPTCY—CONVEYANCE FOR PRESENT CONSIDERATION—BONA FIDES—FRAUD.

1. When an advance is made upon an agreement that certain and specific property shall be conveyed, and the conveyance is made within a reasonable time thereafter, the advance will be considered as a present consideration for the conveyance.

2. An insolvent debtor may, for a present and sufficient consideration, sell or encumber his estate, provided the transaction is bona fide, and free from fraud, or an intention to defeat the operation of the bankrupt law [14 Stat. 517].

3. To defeat a conveyance for a present consideration, the proof must show that the party to whom or for whose benefit it was made knew or had reasonable cause to believe the grantor insolvent, and knew that a fraud upon the law was intended.

4. The knowledge that a fraud was intended may be established by circumstantial evidence.

[This was a suit by Gattman & Co. against R. A. Honea, assignee of J. M. Smith, a bankrupt.]

HILL, District Judge. This cause is submitted upon bill, cross bill, answers, exhibits, and proofs, from which it appears that said Smith was regarded as a successful cotton-planter of Monroe county; that to enable him to supply his plantation and laborers for the year 1873, he obtained an advance in money from a firm of commission merchants in Mobile, for which he gave his note, with one Randall as surety, and also the guarantee of complainants, which note was paid off by Smith with the exception of some three hundred dollars; that in February, 1874, Smith applied to complainants to procure for him an advance of two thousand dollars to meet his demands and carry on his farming operations for 1874. An agreement was entered into between them, by which complainants were to procure the loan from McIntosh & Gillespie, commission merchants, of Mobile, or to make the loan themselves. Negotiations were entered into with McIntosh & Gillespie, but there being some supposed defect in the title to a portion of the land upon which the security was to be given, in May they declined to make the loan, when the agreement was made between complainants and Smith. It was agreed that complainants would make such small advances as Smith might need, to be refunded out of the sum to be received from McIntosh & Gillespie, should that loan be obtained; but should it fail, then the advances so made were to be included in a deed of trust to be executed, conveying all his real and personal estate, for the payment of two thousand dollars or more, agreed to be made on the 12th of June, after McIntosh & Gillespie had declined to make the loan. In pursuance of the original agreement, Smith executed to complainants his three several notes, one payable October 15, 1874, for one thousand and sixty dollars and two cents; one payable November 15, 1874, for three hundred and seventy-one dollars and seventy-seven cents; and one note for one thousand and eighty dollars and fifty-eight cents, payable November 15, 1874,—all of which to bear three per cent. per month interest after maturity. These notes included interest at ten per cent. to the maturity of the notes; also, two and a half per cent. for advancing. On the same day said Smith executed to Elkin, as trustee, a deed of trust conveying all of his estate, real and personal, to secure the payment of these notes, and also promising to ship to McIntosh & Gillespie, in the city of Mobile, two hundred bales of cotton, and in default to pay two dollars per bale for each bale not so shipped. On the —— day of ——, 1874, and before the maturity of these notes or the crop of cotton, proceedings were commenced in involuntary bankruptcy against said J. M. Smith, and on the —— day of ——, 1874, he was adjudicated a bankrupt, and said Honea appointed his assignee, to whom the estate was assigned by the usual deed of assignment. Honea took possession of the estate, and has sold said cotton crop, none of which, or any other cotton has been shipped by Honea or Smith, in fulfillment of their part of the agreement, nor has any part of the money due upon said notes been paid. The original bill seeks payment, out of the proceeds of the property sold and that so conveyed, of these notes, with interest; also, the sum of four hundred dollars, being two dollars per bale for the cotton not delivered.

The cross bill charges that the said Smith, at the time said conveyance was made, was insolvent and in contemplation of bankruptcy, and that complainants had reasonable cause to believe or know that fact, and knew, at the time, that said conveyance was in fraud of the bankrupt law; that a portion of the consideration of said notes was a pre-existing debt, and not for advances then and thereafter to be made, and that said conveyance was intended to give complainants a preference, and was in fraud of the bankrupt law, and void; all of which is denied by the answers to the cross bill.

The question to be determined is whether or not this conveyance is valid under the bankrupt law, as shown from the pleadings and proofs. The conveyance embraced all the property of the grantor, and stipulated for an unusual and ruinous rate of interest, which casts a suspicion upon the transaction, which it is incumbent upon the complainants to remove. They state in their answers, and prove by their own depositions and that of Smith, that when the agreement

[1] [Reprinted from 12 N. B. R. 493, by permission.]

was made, in February, there was only a small balance due from Smith to complainants, too inconsiderable to affect the bona fides of the transaction; and that it was then agreed that, for the small advances made after that time and before the conclusion of the loan, whether with McIntosh & Gillespie or complainants, security was to be given by a conveyance in trust of all Smith's property. If the loan was obtained from the Mobile merchants, then it was to be refunded out of the amount received; and if not, then it was to be included in and secured by a trust deed on all Smith's property. There is no evidence to controvert this statement, and hence it must be held as established.

The rule, as I understand it, is this: When advances are made upon a general promise afterwards to give a security by mortgage or other conveyance, specifying no particular property upon which it is to be given, the promise amounts to nothing, and, when given, the advances so made constitute an antecedent or pre-existing debt; but when an agreement is made that certain and specific property shall be conveyed, and the conveyance is made within a reasonable time thereafter, the advances will be considered as a present consideration for the conveyance. I am of the opinion that the facts proven bring the advances made after the agreement under this latter rule. The amount due to McIntosh & Gillespie was secured by Randall; hence there was no inducement to secure this debt. Besides, the testimony shows that the payment of this balance was after or at the time the conveyance was made, and out of the money loaned, so that, under the testimony and rules stated, I am satisfied that these advances cannot be held as a pre-existing debt.

The next inquiry is, was or was not this conveyance made in fraud of, or with intent to defeat the operation of the bankrupt law, and with a knowledge on the part of the Gattmans that such was the object and purpose? To render it so, the evidence must show that Smith was then insolvent, or contemplated insolvency or bankruptcy: this is the first point to be ascertained. I am satisfied, from the evidence, that Smith was, in point of fact, then insolvent, but that, in his hopefulness and with his idea of insolvency, he did not so consider himself; but had he believed himself insolvent, the proof must go further, and show that the conveyance was intended to defeat the operation of the bankrupt law, by preventing his property from being administered under the law, the question of preference, as already stated, being out of the way.

The rule is well settled that an insolvent debtor may, for a present and sufficient consideration, sell or encumber his estate for the purpose of paying his debts, or to enable him to carry on his business, provided the transaction is bona fide, and free from fraud or an intention to defeat the operation of the bankrupt law. To defeat the conveyance the proof must go further, and show that the party to whom, or for whose benefit the conveyance was made, at the time knew or had reasonable cause to believe the grantor insolvent, and under the law, as amended by the act of June 22, 1874 [18 Stat. 178], knew that a fraud upon the law was intended.

I uniformly held, under the law, before this amendment, that where the party for whose benefit the transfer was made had a knowledge of such facts as would put an ordinary prudent business man upon the inquiry, and which inquiry would have led him to a knowledge of the fact that the party was insolvent, and that a preference of fraud was intended, and he failed to make the inquiry, he must be held to a knowledge of that which it was his duty to know; and, further, that, as in all other cases, a party must be held to intend that which is the natural and inevitable result of his own acts. I am satisfied that this construction was correct, and applies to the act as amended, with this one exception, and that is, that the party to whom or for whose benefit the conveyance is made must not only have cause to believe, but must actually know, that a fraud upon the bankrupt law is intended, and, with that knowledge, participate in it by taking the conveyance. The law-makers certainly intended something by the change in substituting the word "knowing" for those of "having reasonable cause to believe." But this knowledge of the party may be established by circumstantial evidence, as may any other fact, even the commission of the highest crime known to the law; and this is especially so in cases of fraud, rarely established by positive testimony, the knowledge and motives of men usually being ascertained by their acts more than their words.

Without entering into comment upon the evidence, I am satisfied that the Gattmans were not in possession, at the time, of such circumstances as to cause them to believe Smith insolvent, and that they did not know that a fraud upon the bankrupt law was intended—at least, the proof does not establish such knowledge. The result is that this conveyance must be held valid, as a security for so much of the debts claimed as are supported by a legal and valid consideration, which, in the first place, includes the amount advanced, with ten per cent. interest from the time of the advancement to the maturity of the notes; also, two and a half per cent. for the advancement, and including also the small balance due when the agreement was first made, with ten per cent. interest. The three per cent. interest per month after maturity of the notes, whilst exorbitant and ruinous, was not at the time forbidden by the law, and, as part of the contract, must be allowed. It, however, serves to show the wisdom of the legislature in again providing

some protection to the unfortunate and oppressed debtor, against the never-to-be-satisfied demands of the money-lender.

I have not been referred to any authority, either in the text-books or adjudicated cases, binding upon this court, to sustain the charge of four hundred dollars for failing to ship to McIntosh & Gillespie the two hundred bales of cotton. The evidence shows no consideration which in my judgment will uphold this agreement, which is but an artifice, upon the part of the money-lenders and commission merchants, to absorb the honest earnings of the farmer and his no less dependent laborer, and is inequitable, unjust, and oppressive, to be maintained by a court of equity. Therefore, this claim must be disallowed. Not being sufficiently advised of the amount really due according to the rules above stated, the cause must be referred to the clerk, as master, to ascertain the amount, and report the same to the court for the further order in relation thereto.

GATY, The SAM. See Case No. 12,276.

GAUGAR (GILBERT v.). See Case No. 5,412.

Case No. 5,272.

GAUGHAN v. NORTHWESTERN FERTILIZING CO.

[3 Biss. 485;[1] 12 Am. Law Reg. (N. S.) 569; 5 Chi. Leg. News, 337; 6 Am. Law T. Rep. 101; 18 Int. Rev. Rec. 162; 5 Leg. Op. 58.]

Circuit Court, N. D. Illinois. March Term, 1873.

REMOVAL FROM STATE COURTS.

1. The act of April 20, 1871 [17 Stat. 13], does not authorize the removal of a case from the state courts in every case in which the United States courts would have original jurisdiction.

2. Congress did not intend by the general words used to extend jurisdiction and to authorize removal, except under the circumstances specified in the several acts.

3. Doubtful jurisdiction not entertained.

This was a bill filed by John Gaughan, a property owner in the town of Hyde Park, against the defendants to restrain them from carrying on their business of manufacturing fertilizing material out of animal matter, on the ground that their works were a public nuisance, and injurious to his property and health. The bill was originally filed in the circuit court of Cook county, but removed to this court by a writ of certiorari on application of the defendants. This was a motion by the complainant to remand the case, on the ground that this court had no jurisdiction of the cause.

[In 1867, the legislature of Illinois granted to parties the right to manufacture a fertilizer out of the offal of animals slaughtered in the city of Chicago. [1 Priv. Laws 1867, p. 927.] The act created a corporation and authorized the location of the place of manufacture. Under this act of incorporation, the parties went on and constructed works, and commenced the manufacture of the fertilizer. The place at the time was not within the limits of the town of Hyde Park; afterwards it was included within its corporate limits, and this action was commenced in the state court on the ground that the works were a nuisance and an injury to plaintiff's property. Before that, an action was brought in this court by the present defendants against the town of Hyde Park [Case No. 10,336], the allegation being that the town, by ordinances, had interfered with the chartered rights of the company under this act of the legislature.] [2]

Beckwith, Ayer & Kales, and Bentley, Swett & Quigg, for complainant.

Hitchcock, Dupee & Evarts, and Sidney Smith, for defendants.

DRUMMOND, Circuit Judge. [There were two questions presented in the argument. One was whether this court had the right to maintain the bill filed here by the corporation called the Northwestern Fertilizing Company. The views of the court were presented upon that question [Case No. 10,336], and I was inclined to hold that, under the first section of the act of the 20th April, 1871 (17 Stat. 13), the court had original jurisdiction of the case, on the ground that there was a right claimed by the corporation and secured to it under the constitution of the United States, and there was an attempt on the part of the town of Hyde Park to interfere with a right thus claimed and protected. The other question, whether the company had the right to transfer the case pending in the state court to this court under the certiorari that was issued, was argued yesterday, and that question I will proceed to answer at this time.] [2]

After the best consideration I have been able to give the subject, I am not satisfied that the court has jurisdiction. And I think in all such cases the court ought not to take jurisdiction. The ground upon which it is claimed that the case can be transferred is certainly a plausible one. It is this: That the first section of the act of April 20, 1871 [supra], declares, "that such proceedings were to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the 9th of April, 1866, entitled, 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication;' and the other remedial laws

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

[2] [From 12 Am. Law Reg. (N. S.) 569.]

of the United States, which are in their nature applicable in such cases." Now, the position on the part of the counsel who claim that the court has jurisdiction to remove this case by certiorari, is, as I understand it, (and it comes to that,) that, wherever the court has original jurisdiction, it can transfer a case from the state to the federal court under this language of the act of April 20, 1871: "Other remedies provided in like cases in such courts and the other remedial laws of the United States which are in their nature applicable in such cases." If that is the true construction of this statute, then, of course, the court would have jurisdiction to issue a certiorari and to take cognizance of the case. But I am not satisfied that is the true construction, and it seems to me it would be going further than any court has yet gone to construe such general language as this so as to include within its scope every case where a question would arise under the constitution of the United States. As was stated the other day, numerous questions have arisen affecting rights under the constitution of the United States, where parties seeking their remedy have been obliged to seek it through the forum of the state courts, and so on up to the supreme court of the United States, under the twenty-fifth section of the act of 1789, and other legislation since.

It is necessary to consider what these previous statutes are—"other remedies provided in like cases." It refers particularly to the act of 1866 (14 Stat. 27). That act refers to the act of 1863 (12 Stat. 755). It is under the acts of 1833, 1863, 1866, and 1871, as I understand, that the claim is set up, that a fair construction of this act of April 20, 1871, will include within its scope all the cases, so as to authorize a transfer where it gives original jurisdiction to the district or the circuit court. While the argument is not without force, I cannot yield my convicion entirely to it. I will state very briefly some reasons why I cannot. If we look to the legislation of congress in relation to the cases which might be removed from the state to the federal courts, we see that, in all cases where a removal has been authorized, the circumstances under which it is to take place are specifically set forth. It is so under the act of 1833 (4 Stat. 632) the language of the second section of which is: "The jurisdiction of the circuit courts of the United States shall extend to all cases in law or equity arising under the revenue laws of the United States, for which other provisions are not already made by law." But the third section declares under what particular circumstances a case was to be removed from the state to the federal court: "In any case where suit or prosecution shall be commenced in a court of any state against any officer or other person for or on account of any act done under the revenue laws of the United States, or under color thereof, for or on account of any right, authority, or title set up or claimed by such officer, it shall be lawful for the," etc., —setting up in precise language under what circumstances the case was to be removed. And the third section is substantially copied into the sixteenth section of the act of February 28, 1871 (16 Stat. 433)—mutatis mutandis —simply changing the words in some particular instances. The language of that section is: "In any case where suit or prosecution, civil or criminal, shall be commenced in a court of any state against any officer of the United States, or other person, for or on account of any act done under the provisions of this act, or under color thereof, for or on account of any right, authority, or title set up or claimed by such officer or other person under any of said provisions," it shall be lawful to transfer, setting forth specifically, just like the act of 1833, the circumstances under which the transfer could be made. The fifth section of the act of 1863 is also specific: "If any suit or prosecution, civil or criminal, has been or shall be commenced in any state court against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespass, or wrongs done or committed, or any act omitted to be done at any time during the present rebellion by virtue of, or under color of authority or direction from and exercised by or under the president of the United States, or of any act of congress, he shall, at the time of entering his appearance in such court," have the right to transfer the case—showing the circumstances under which it can be transferred. The first section of the act of 1866 declares that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States, and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the parties shall have been duly convicted, shall have the same right in every state and territory in the United States to make and enforce contracts, to sue and be sued, to give evidence," etc. The third section declares that if certain circumstances occur where rights are affected by a proceeding in a state court, then the party shall have the right to transfer the case to the federal court. The language of the third section is quite peculiar: "That the district courts of the United States, within their respective districts, shall have, exclusive of the courts of the several states, cognizance of all crimes and offenses committed against the provisions of this act; * * * and if any suit or prosecution, civil or criminal, has been or shall be commenced in any state court against any such person for any cause whatsoever." Here is language more general than in any other statute, either before or after. Now, it could not be maintained that by this act of congress every person whose rights were affected could

transfer a case from the state to the federal court, simply because the language of the first section includes "all persons born in the United States." It certainly could not have been the intention of this section to give the federal courts jurisdiction of rights affecting any and all persons who were born in the United States. But it means, I apprehend, the persons referred to in the previous part of the section—who are denied or cannot enforce in the courts or judicial tribunals of the state or locality where they may be, any rights secured to them by the first section of the act. ["If any such suit or prosecution, civil or criminal, has been, or shall be, commenced against any such person, for any cause whatsoever,"—it must mean the persons who cannot have their rights enforced in the judicial tribunals of the state; and the section proceeds in the usual way in which all these laws do: "or against any officer, civil or military, or any person for any arrest, or imprisonment, or trespass or wrongs done," &c., "he shall have the right to remove the case."] [3] Now, this being the language of the various statutes upon the subject, thus setting out in a particular manner every contingency, which must concur in order to authorize the transfer of a case from the state to the federal court, is it to be supposed that congress intended, in this act of the 20th of April, 1871, by such general language (varying therein the rule which had always been adopted in previous legislation) to authorize the transfer? All these statutes give generally the rights, just as this law, and declare that the courts of the United States shall have jurisdiction; but they do not, on that account, declare that, in all such cases, they may be removed from the state to the federal court. They specify the circumstances which must exist in order to authorize the removal, and it seems to me the argument is very strong—so strong that I do not feel inclined to take jurisdiction of the case—as they have been specific in every other case they did not intend by this general language to authorize the removal of a case from the state to the federal court. It is not pretended that the right set up here is within the language of any one of the statutes authorizing the transfer. As I have said, we must take the ground that, in every case where this statute gives original jurisdiction, it was the intention that the case might be transferred. This is a right set up under the authority of the state—a charter created by the state. It may be when, by the charter, the corporation is clothed with certain rights, that then the constitution of the United States throws its protecting arm around those rights, and declares that they shall not be affected by subsequent legislation of the states; that the charter, for certain purposes, is in the nature of a contract, and that it cannot be impaired by subsequent legislation. That is the right which is set up; and it is claimed that where a party is sued in the state court, if this right is thus set up, the case can be transferred. I have thought, and for the purposes of the motion so held [Case No. 10,336], that the language of the first section of the act of April 20, 1871, was express in giving the court original jurisdiction, and that the only question was whether the fact that it was a corporation deprived it of the power to come into the federal court. I held that it did not; that if it was the case of an individual whose rights were affected it could come into the federal court, and that it did not lose that right because it was a corporation. But I am asked to go further, and hold that, in all these cases, wherever there is original jurisdiction, the case can be transferred, and that upon a particular showing it must be transferred, because the language of the various acts of congress is whenever the contingencies have occurred provided therein it shall be the duty of the state court to proceed no further in the cause, and it has been held that all acts subsequently done by the state court are simply void, and that the parties may disregard them. This is the view I take of the question. I admit it is one of importance. The other question is not free from difficulty, but I have felt inclined to sustain the jurisdiction in that case. The inclination of my mind is against it in this case, and I am willing to make an order remanding the case to the state court, and give the parties, if they so desire, an opportunity of testing the question before the supreme court of the United States, which they will have the right to do at once.

Case remanded.

[3] [From 12 Am. Law Reg. (N. S.) 569.]

Case No. 5,273.

GAUGHRAN v. ONE HUNDRED AND FIFTY-ONE TONS OF COAL.

[39 Hunt, Mer. Mag. 75.]

District Court, S. D. New York. 1858.[1]

ADMIRALTY—LIEN FOR FREIGHT—ADVANCES.

[1. Admiralty has jurisdiction of a libel for freight on goods transported over navigable tide waters lying between two states.]

[2. For transporting goods landwise after voyage completed, not expressly contracted for in the shipping contract, there is no lien in admiralty.]

[3. The lien in admiralty for freight on cargo shipped in bulk is not lost by delivering the same at the consignee's place of business on land.]

[4. On a libel for freight on coal, compensation for carting it to consignee's coal yard, for which there is no lien in admiralty, may be charged against advances made.]

In admiralty.

Before BETTS, District Judge.

This was a libel to recover freight upon the coal brought by the libelant [John Gaughran]

[1] [Affirmed in Case No. 10,520.]

from Schuylkill Haven to this port for $1.85 per ton. The libelant alleges that he brought the coal to this port and carted it to the claimant's place of business, for which he also claims compensation. The claimant sets up drafts paid by him, on account of the freight, to the amount of $169, denies any indebtedness, and alleges that, by delivery, the libelant has lost his lien.

HELD BY THE COURT. That, the route necessarily including navigable waters lying between two states, and waters subject to the ebb and flow of tide, the locus is now within the jurisdiction of the court. Such actions have been sustained in this court by its familiar practice for years. That the libelant did not lose his lien by delivering the coal to the claimant in his coal yard on land. But as the bill of lading does not undertake to deliver the cargo in bulk at any specific place, it will not be implied that the owner was bound to transport it landwise across the city, or to any place of deposit from the ship, and there may be, at least, doubt whether that service, if expressly contracted for, would come within the protection of the lien, or can in any form become a ground for a maritime action; and the court will not allow the libelant to recover his charges for carting the coal from the vessel to the yard. Decree for libelant, with a reference to ascertain and report the amount due after deducting previous payments. But the price of cartage may be charged against advances made to the libelant, if clear proof is given by him that the cartage was done or paid for at the instance of the defendants.

[On appeal to the circuit court, the decree of the district court was affirmed. Case No. 10,520.]

GAUGHRAN v. ONE HUNDRED AND FIFTY-ONE TONS OF COAL. See Case No. 10,520.

Case No. 5,274.

GAULT et al. v. McMILLAN et al.

[3 McLean, 20.] [1]

Circuit Court, D. Ohio. July Term, 1842.

PUBLIC LANDS — SURVEY AFTER WITHDRAWAL OF ENTRY—LOCATION BY ANOTHER WARRANT.

1. A survey after the entry is withdrawn, does not, under the act of congress of March 2, 1807 [2 Stat. 424], prevent the location of the land surveyed, by another warrant.

2. That act refers to a subsisting survey, which must be founded on an entry, though the survey may not have been made conformably to entry.

3. A survey made without an entry is of no validity, nor is the survey valid, after the withdrawal of the entry.

4. The withdrawal of an entry by a person wholly unauthorized to do so, does not affect the rights of the persons claiming under the entry.

5. But if the act of withdrawal be unauthorised, any subsequent sanction of it makes the act valid.

6. Claiming the land, and exercising acts of ownership over it, which has been located by the withdrawn warrant, is such an act.

At law.

Mr. Scott and Mr. Green, for plaintiffs.

Mr. Wright and Mr. Thurman, for defendants.

OPINION OF THE COURT. This is an ejectment to recover possession of two thousand acres of land, in the Virginia military tract, in Ohio. The plaintiffs claim under a patent dated the 15th of May, 1840. The patent under which the defendants claim, bears date the 11th April, 1815. The entry of the plaintiffs was made the 17th August, 1787, and was surveyed the 24th August, 1797. That of the defendants was made in 1812. As the defendants claim under the elder patent, they must succeed, unless their patent shall be invalidated. The plaintiffs insist, that the patent of the defendants is void, under the act of 1807, as it covers land which had been surveyed under their prior entry. The 1st section of the act of the 2d of March, 1807 [supra], provides "that no locations, in the above tract, shall, after the passing of this act, be made on tracts of land for which patents had been previously issued, or which had been previously surveyed; and any patent which may, nevertheless, be obtained for land located contrary to the provisions of this section, shall be considered as null and void." Now as the plaintiffs' survey was made long before the entry of the defendants, it follows that the defendants' patent is void, under the above act, unless it shall be shown that the plaintiffs' survey was not a subsisting one, at the time of the adverse entry; and the defendants insist, that the plaintiffs' survey was abandoned by a withdrawal of the entry. It seems the plaintiffs' entry of nineteen hundred acres was withdrawn the 22d November, 1804, and re-entered on the same day on the same land; and afterwards the entry for two thousand acres was withdrawn, and entered on a different tract. The land covered at first by this entry, is the land subsequently located by the defendants, and which gives rise to the present controversy. The act of 1807 must have meant a subsisting survey, and not one made without an entry, or after the withdrawal of an entry. A survey in either of these predicaments is, in every sense, inoperative. A survey without an entry to support it is void, and so is a survey which has been abandoned by the withdrawal of the entry. And this case must turn upon the act of withdrawal. If that act were done by a person wholly unauthorised, the withdrawal should not prejudice the rights of the plaintiffs, unless by subsequent acts they sanctioned it. Now there is no satisfactory proof as to the power of the person making the withdrawal. He was authorised to act in the premises by the

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

attorney of all the heirs of Gault except one; but in this power there was no authority of substitution. But this point is of less importance, as it appears that the land located by the withdrawn warrant has been claimed by the plaintiffs, and they have exercised acts of ownership over it. This is conclusive against their right to the land in controversy. They cannot claim under both entries. By claiming under the new entry, they not only indirectly sanction the act of withdrawal, but they show a determination to follow the warrant under the new entry. It is said this was done by the heirs, under an ignorance of their rights. But the facts were known to their agent, who, in making the withdrawal, it is admitted, acted bona fide, and with a desire to promote their interests. This being the case, the sanction given to his acts subsequently, by claiming the land, paying taxes for it, &c., goes to conclude the plaintiffs from the claim now made.

On this instruction, the jury found the defendants not guilty. Judgment.

Case No. 5,275.

GAULT v. WOODBRIDGE et al.

[4 McLean, 329.] [1]

Circuit Court, D. Ohio. Nov. Term, 1847.

EXECUTION—LEVY — NOTICE TO SUBSEQUENT PURCHASERS—DEFINITENESS OF LEVY—PAROL EVIDENCE.

1. A levy on property, real or personal, should have such certainty as to show to a subsequent purchaser, on what the levy was made. Short of this, there can, it would seem, be no notice to a subsequent purchaser.

2. Parol evidence, after conflicting rights have grown up, can not be received, to make the levy certain, which before was wholly uncertain.

3. A levy on one-half of a lot, without designating which half, or of one hundred acres, in a section, is too indefinite to convey the title.

4. A defective levy being set aside, on motion, makes good a junior levy.

In equity.

Mr. Stanbery, for plaintiff.

Mr. Swayne, for defendants.

OPINION OF THE COURT. This is an injunction bill. On the 2d of September, 1823, the Bank of the United States recovered a judgment in this court against Q. Davis as principal, the complainant W. W. Gault and John Evans, as sureties of Davis, for seven hundred fifty-four dollars and twenty-nine cents damages and costs. That the sum of forty-eight dollars eighty-one cents was made on execution April, 1824, and six hundred eighty-two dollars May the 23d, 1834, from Davis, the principal debtor. That upon a fi. fa. being issued on the judgment September 13th, 1839, the deputy marshal on the 26th of the same month made a levy, in fact, upon a part of out-lot number nine, adjoining the town of Newark, described in the agreed case and in the affidavits of the appraisers, but made return of the levy as is set forth in the answer—that is, without describing what part of the lot was levied upon. From the affidavit of the appraisers, it appears they appraised the specific part of the lot so levied upon. That at the time the levy was made, Davis was seised of the part of the lot levied on, and there was then no other lien or incumbrance upon it. That the part of the lot levied on was worth seventeen hundred dollars; and that Davis had no other property subject to execution. On the 16th of October, 1839, the specific part of lot nine was levied on, under another execution in favor of the Clinton Bank of Columbus, which was a subsisting levy, when the levy under the execution of the Bank of the United States was set aside. In June, 1840, Davis conveyed the part of the lot levied on to Hagg and others. At December term, 1841, on the motion of the attorney for [John] Woodbridge, the assignee of the judgment of the Bank of the United States, the levy under the said execution was set aside, and the property of the complainant Gault is now under execution, no other property of Davis being found to levy upon. And on the part of the complainant it is insisted, on the above facts, he is clearly entitled to relief.

It is contended that the levy, though vague, as returned, was not void. That a sale under it would have passed a good title, upon proof that the actual levy and appraisement were specific. Or it might have been amended on motion. And it is urged the cases of Matthews v. Thompson, 3 Ohio, 272, and Douglas v. McCoy, 5 Ohio, 522, are conclusive upon the point. In the first case the levy was upon one hundred acres in section four, town seven, range four, with no further description. A sale was had without amending the levy, and upon ejectment the court held that the uncertainty of description might be supplied by parol. In Douglas v. McCoy, the levy was upon two-thirds of lot number one. The court say such a description is defective, but may be made good by parol, and they refer to the testimony of the sheriff, that a specific part of the lot was appraised. This parol proof was admitted, and by force of it, the levy held good against a purchaser under a subsequent deed from the judgment debtor. That by this doctrine it was not necessary to amend the return. The act of Woodbridge in causing the levy to be set aside, at the December term, 1841, wholly released the lot, and thereby it became liable to the subsequent execution, in favor of the Clinton Bank of Columbus, and is wholly lost, so far as the Bank of the United States' judgment is concerned. The judgment of the Bank of the United States was not a lien, it is said, upon this lot, as the title to it was

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

acquired subsequent to the judgment. But, if the judgment were a lien upon it, the limitation of the lien had run, before the levy was set aside, so that by setting aside the levy, the subsequent levy in behalf of the Clinton Bank was made good.

We entertain great doubts whether the doctrine of making defective levies good by parol, under the sheriff's deed, has not been carried too far. It is important to the purchaser at sheriff's sale, and to the person whose land is levied upon and sold, that there should be no uncertainty in any part of the proceedings, which should involve the title. This would prevent the sale of the property at a reasonable price, as no one would give full value for land where the title is doubtful. And the purchaser would at least purchase a law suit, if he did not lose the property. As a question of policy, as well as one of great interest to the parties concerned, there should be required on a levy that degree of certainty which would enable any one to know the land taken in execution. Short of this, it is difficult to say that it gives the proper notice to a subsequent purchaser, or to a plaintiff who causes his execution to be levied upon it. How was it possible for a purchaser to say in what form the two-thirds of the lot levied on should be surveyed, or from what part of the section the one hundred acres levied on in the other case, should be taken? Where one-half of a lot was advertised and sold for taxes, the supreme court held the title was bad for uncertainty. Ronkendorf v. Taylor's Lessee, 4 Pet. [29 U. S.] 349. A motion made to correct the levy on a part of lot nine, would not have been granted by the court, after the second levy was made. At least, in granting such a motion, the entry could not have had relation back to the first levy, so as to give it an advantage over the second. The court could not in that form affect legal rights. They must stand or fall upon their original legality.

The only question in the case is, whether Woodbridge, the assignee of the judgment, in relinquishing the levy, gave up a legal or equitable right, which released the complainant from his suretyship. After an instrument, by which the principal and his surety are bound, is reduced to judgment, I suppose the suretyship is merged in the judgment, and that the relation and its consequences cease to exist. The statute makes a special provision that sureties shall be designated, or may be designated as such, in the rendition of the judgment, which shall require the property of the principal to be exhausted, before that of the surety shall be levied upon. But where the judgment is not so entered, it is supposed that the relation of principal and surety can not be carried beyond the judgment. The surety, by paying the judgment or debt, may secure an immediate recourse against his principal, and this seems to be his only recourse, except where a bill may be filed to compel the principal to bring suit. But the principal is not, on general principles, bound to active diligence. But if the rights of the surety exist after the judgment, we should not be inclined to say, that the complainant having been passive in the matter, he has no claim to a release from his suretyship by the withdrawal of the levy by Woodbridge. The right was too uncertain and doubtful to be followed by such a consequence. The bill is dismissed, and the injunction dissolved at the costs of the complainant.

Case No. 5,276.

GAUSE v. CLARKSVILLE.

[5 Dill. 165; 19 Alb. Law J. 253; 18 Am. Law Reg. (N. S.) 497; 8 Cent. Law J. 358; 7 Reporter, 519; 4 Cin. Law Bul. 585.] [1]

Circuit Court, E. D. Missouri. March, 1879.

MUNICIPAL CORPORATIONS — POWER TO BORROW MONEY—POWER TO ISSUE COMMERCIAL PAPER.

1. Whether a municipal corporation possesses the power to borrow money, and to issue negotiable securities therefor, depends upon a true construction of its charter and the legislation of the state applicable to it.

[Cited in Merrill v. Monticello, 138 U. S. 682, 11 Sup. Ct. 445; Francis v. Howard Co., 50 Fed. 56.]

[Cited in Bogart v. Lamotte Tp., 79 Mich. 298, 44 N. W. 613.]

2. It has no incidental or inherent authority under the usual grants of municipal powers as a means of discharging its ordinary municipal functions. Such authority may be inferred from special and extraordinary powers, which require the expenditure of unusual sums of money, when it is usual to execute such powers by means of borrowing, and when, upon the whole legislation applicable to the municipality, such appears to have been the legislative intent.

3. These principles applied, and coupon bonds to borrow money to erect and repair wharves and to open streets, issued under the general grants of municipal power in the charter, were *held* not to be binding upon the city, while other bonds, issued under a special act of the legislature, in payment of stock in companies organized to construct macadamized roads from the city, were *held* to be valid.

[Cited in Dorian v. City of Shreveport, 28 Fed. 295; Morton v. City of Nevada, 41 Fed. 588; Deland v. Platte Co., 54 Fed. 834.]

[Cited in Miller v. Board of Com'rs of Dearborn Co., 66 Ind. 168.]

4. Where bonds of a city are issued without authority for money borrowed and actually received by the city, the remedy against the city is not by an action on the bonds, but to recover the money.

[Cited in Green v. Dyersburg, Case No. 5,756 Approved in Erwin v. St. Joseph Board of Public Schools, 12 Fed. 684.]

On demurrer to counts 1 to 10 and 12 to 17 of the amended petition. All of the counts in the petition state, for causes of action, the making by defendant of divers ne-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 7 Reporter, 519, contains only a partial report.]

gotiable bonds, payable to bearer, and all acquired by plaintiff [William R. Gause] after maturity. All of them allege the defendant to be a corporation, incorporated (1) June 7th, 1847, under the general law of 1845 as to the incorporation of towns (Rev. St. 1845, p. 552), and (2) on February 24th, 1853, under a special act, approved that day, entitled, "An act to incorporate the town of Clarksville" (Acts 1853, p. 591). Counts 1 and 2 allege that the bonds therein named were made "for money borrowed by defendant for the purpose of erecting and repairing wharves in the corporate limits of its city, and for otherwise improving said city." Said bonds are respectively for $2,000 and $1,000—together $3,000. Counts 3 to 10 allege that the bonds named in them were made "for money borrowed by defendant for the purpose of opening, clearing, graduating, paving, and improving divers streets and alleys in said city, and of otherwise improving said city." Said bonds are respectively for $1,000, $1,000, $1,500, $400, $400, $200, $1,000, and $500—total $6,000. The bond named in count 1 reads thus: "$2,000. Wharf Improvement Bond. No. 1. City of Clarksville, Mo., Sept. 1st, 1864. Ten years after date the city of Clarksville, in the state of Missouri, promises to pay to William C. Prewitt, or bearer, at the treasury of said city of Clarksville, the sum of two thousand dollars, with interest at eight per cent per annum, payable annually on the first day of September in each year, upon the presentation of the coupon hereunto annexed, until the said principal sum is fully paid, without defalcation, for value received. In testimony whereof, in pursuance of ordinance No. 106 of said city, I, E. B. Carroll, mayor of said city, have hereto set my hand and caused the corporate seal of said city to be affixed, and the clerk of the city council to attest the same, at the city aforesaid, this first day of September, A. D. 1864. (Seal.) E. B. Carroll, Mayor. Attest: J. A. Manns, Clerk City Council. Countersigned: John M. Clifford, City Treasurer." The bonds named in counts 2 and 10 are substantially the same in form as this, except as to caption, dates, names, and amounts, and are headed "Street Improvement Bonds." All of the counts allege payment by defendant of interest on the bonds during all the time they were running, and until after maturity—that is, for from six to twelve years. While they do not allege anything as to the use made by the city of the money borrowed on them, yet the counsel for the plaintiff states the fact to be that it was in each instance used for the purposes for which it is alleged to have been borrowed, and plaintiff—if it be deemed by the court to be material to his cause of action—will, with leave, so state the facts by amendment. He contended, however, that no such averment is necessary.

The sole question raised by the demurrer to these counts is whether defendant had power to borrow money for the purposes alleged, and to give the bonds in suit for such money. The provisions of the charter in respect of these bonds sufficiently appear in the opinion of the court. The defendant's population is stated to be between one and two thousand. As to counts 12 to 17, on "Road Improvement Bonds:" The allegations of these counts show that the bonds declared on therein were given for money borrowed to pay other bonds previously given in payment of subscriptions made by defendant to stock in certain companies organized to build gravel roads from Clarksville to other points in Missouri. The bonds, in form, are substantially the same as those named in counts 1 to 10, except as to names of the payees, dates, and amounts. The interest is alleged to have been paid on them during the whole time they ran, and until after maturity.

The act which is alleged as the authority for the subscriptions by defendant to the stock of said road companies and the issue of bonds is found in Sess. Acts 1857, p. 302, and reads thus:

"Sec. 1. The city council are hereby authorized and empowered to levy, assess, and collect a direct tax on all real estate within the city limits, not to exceed two per cent per annum, for the purpose of aiding in the construction of macadamized or other roads leading from Clarksville to any other point in the state; and, for the purpose of securing the building of such roads, they may cause subscriptions of stock to be made by the city to any company now organized, or which may hereafter be organized, to construct such roads.

"Sec. 2. All dividends that may be declared to the city of Clarksville by any such company, upon stock paid in from the special tax authorized by the 1st section of this act, shall be by the city council paid over to the real estate owners paying the tax, in proportion to the amount of tax respectively paid by them."

The question raised by the demurrer to these counts is whether the city had the power, under this act, to issue bonds in payment of stock subscribed by it, and, when they became due, to issue other bonds for money borrowed to pay them.

Dryden & Dryden and Enoch Pepper, for plaintiff.

Wagner, Dyer & Emmons, for defendant.

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

DILLON, Circuit Judge. We are of opinion that the act of 1845 (Rev. St. 1845, p. 552) was superseded by the special act of February 24, 1853 (Acts 1853, p. 591), incorporating the defendant city.

Three classes of bonds are in question, headed and styled respectively, "Wharf Im-

provement Bonds," "Street Improvement Bonds," and "Road Improvement Bonds." The first two stand on the same, the last on a different, ground. The former will be first considered. The bonds purport to be unconditional obligations of the city, and are negotiable in form. They do not recite the purpose for which they were issued; this purpose only appears, if at all, from the heading.

The charter of the city (section 13) gives the city council power "to erect, repair, and regulate wharves," and "to open, clear, regulate, graduate, or improve the streets of the city." Section 1 creates the city a corporation, and provides that it shall have power to contract and to sue and be sued, etc., and "may grant, lease, purchase, receive, and hold property, real, personal, and mixed, and may do all other acts as natural persons; and may have a common seal, and alter and break the same at pleasure."

Section 12 gives to the council general power to levy taxes on property in the city, but limits such taxes to a rate of one-fourth of one per cent.

As to the "Wharf Improvement Bonds," the petition alleges that they were made for "money borrowed by defendant for the purpose of erecting and repairing wharves in the corporate limits of its city, and for otherwise improving said city." These bonds are respectively for $2,000 and $1,000—together $3,000.

As to the "Street Improvement Bonds," it is alleged in the petition that they were executed "for money borrowed by the defendant for the purpose of opening, clearing, graduating, paving, and improving divers streets and alleys in said city, and of otherwise improving said city." These bonds are respectively for $1,000, $1,000, $1,500, $400, $400, $200, $1,000, and $500—total, $6,000.

The demurrer to the petition upon the foregoing classes of bonds is upon the ground that the defendant had no power to borrow money for the purposes alleged, or to execute the bonds.

The questions to be decided are, therefore, two: 1st. Had the city power to borrow money for the purposes alleged? 2d. If so, whether it had the power to execute negotiable bonds therefor.

The charter contains no express power to do either, unless it is conferred by the clause in section 1 above quoted, that the city "may do all other acts as natural persons." This general language must necessarily be restrained to such other acts as are authorized by its charter or the statutes of the state applicable to the city, if any, and cannot be construed to remove all the limitations inseparable from corporate existence, and to confer upon the city authority to engage in business of a private nature, or to make its powers commensurate with those of natural persons. It is not, therefore, an express power to borrow money or to issue commercial paper. No such powers are in terms conferred. If they exist, they exist as incidental to the express powers to erect and repair wharves, and to open and improve streets, and not otherwise.

As the power to borrow money and the power to issue negotiable paper are, though closely related, not identical, they will be to some extent separately considered. And, first, as to the power to borrow money: As the case stands, it is to be taken that the money evidenced by the bonds now under consideration was borrowed in advance of any debt incurred in respect of the wharves or streets, and as a means of raising by their sale in the market a fund to pay for contemplated improvements of that character.

The general question as to the implied power of municipal corporations to borrow money and to execute negotiable securities therefor has been recently much examined. The American cases on the subject are conflicting, and it is impossible to harmonize them. A careful examination of them, however, has left us with the conviction that the questions here involved are not only open to discussion, but remain yet to be judicially settled. The unsettled state of the law, concurring with the great importance of the question, has induced us to examine it with care, and must be our justification for discussing the subject with more than ordinary fulness.

The following cases favor the existence of the incidental powers here in question: Bank of Chillicothe v. Town of Chillicothe (1836) 7 Ohio, pt. 2, p. 31; Mills v. Gleason, 11 Wis. 470; Williamsport v. Com., 84 Pa. St. 487 (three judges dissenting); Clarke v. School-Dist., 3 R. I. 199; Sheffield Tp. v. Andress, 56 Ind. 157. And see cases collected in notes to sections 82 and 407, Dill. Mun. Corp.

The following cases are opposed to the existence of such powers: Hackettstown v. Swackhamer, 37 N. J. Law, 191; Knapp v. Hoboken, 38 N. J. Law, 371; Beaman v. Leake Co. (power of counties) 42 Miss. 237; Police Jury v. Britton (power of counties) 15 Wall. [82 U. S.] 566, 572; opinion of Bradley, J., in Nashville v. Ray, 19 Wall. [86 U. S.] 468.

It is not proposed to examine and review these cases separately. In the existing uncertainty of the law on the subject, it is better, perhaps, to discuss the questions upon principle, rather than to place our judgment respecting them upon one class of the conflicting decisions.

Corporations in this country can exist only by virtue of legislative enactment, and it necessarily follows that whether they possess the power to borrow money or to make negotiable paper depends upon a true construction of their charters and the legislation applicable to them. This is true of all corporations, private as well as municipal.

An examination of the judicial judgments in England and in this country shows considerable diversity of opinion between the Eng-

lish and American courts as to the extent of the implied powers of corporations. The English courts have at all times wisely set a strong face against an elastic construction of corporate charters. The American courts have too often favored the existence of constructive powers.

In England, if a private corporation wishes power to borrow money, the power and the purposes for which, and the conditions on which, it may be exercised, are expressed in the charter of constituent acts, or in the memorandum and articles of association; and the power is not held to exist unless the charter or articles of association confer it, or unless the nature of the business for which the corporation is chartered or organized raises a necessary or reasonable implication of its existence.

But in this country it must be admitted that the courts have held, quite without exception, that all corporations for pecuniary profit, unless specially restrained, may not only borrow money, but issue negotiable paper for any corporate debt. Dill. Mun. Corp., §§ 82, 407, and cases cited in notes; Lucas v. Pitney, 3 Dutch. [27 N. J. Law] 221; Hackettstown v. Swackhamer, 37 N. J. Law, 191, per Beasley, C. J.

The original of our municipal institutions are derived from England, and it is the unquestionable law of that country that municipal corporations have no power to borrow money unless conferred by statute. Regina v. Lichfield, 4 Adol. & E. (N. S.) 891, 906. In the case just cited it was held that there could be no recovery upon the note of the corporation given for money borrowed and used to pay the debts of the corporation. Patteson, J., without saying that the lender was absolutely remediless in any form of action or suit, did say that he had no remedy upon the note, because this is "not a trading corporation."

In this country municipal corporations are by statute invested with certain defined powers, and they are almost wholly dependent upon revenues derived from the authority given to levy taxes for the means of executing their municipal functions.

In the case before us the defendant city had, inter alia, the usual power to erect and repair wharves and to improve streets, and to make contracts and to incur debts therefor. It had the power to levy taxes to raise the means to pay debts thus created. The amount of taxes authorized to be laid in any one year was limited. It is entirely practicable for the city to execute its ordinary municipal powers, and discharge its ordinary municipal duties, without resorting to borrowing money. If, in erecting wharves or improving streets, it incurs a general debt, it seems to us plainly to have been the intention of the legislature, as shown by the charter, that it should be paid out of its ordinary revenue. It is not necessary to resort to the perilous expedient of borrowing money in advance, which may be lost, embezzled, or misappropriated; much less to borrow it on a long credit, which inevitably leads to abuse and extravagance, and issue therefor, as the means of obtaining it, its negotiable securities. There is an obvious and essential difference in incurring a debt to be paid in the usual manner, out of the ordinary revenues of the corporation derived from taxation, and the raising of money in advance by a pledge of credit and the issue of coupon bonds, payable at a long-distant day, for sale in the money markets of the country.

What are the consequences of holding that there is, under these circumstances, an implied power to borrow money in this manner and for this purpose? The temptation to extravagance and the danger of loss have been already mentioned, and the history of the workings of our municipal institutions shows that this temptation always operates to their injury, and that burdensome debts and oppressive taxation are its natural and almost inevitable results. But this is not all. Legal consequences of a serious nature follow from the doctrine that there is an incidental power to borrow money to execute the ordinary powers of the municipality. If the power thus to borrow exists, it is without legal limits. Its only possible limit is the credit of the corporation—the amount of bonds its officers can sell. Nor is this all. If the power to borrow money exists, then, under the view of the courts as almost universally held in this country, the power to borrow implies the further power to give, like any other borrower, a note, bill, or bond, negotiable in form and effect, for the sum borrowed; the time of payment and the discount to be such as may be agreed upon between the corporation and the proposed lender. The bonds may, as in the recent case of the city of Williamsport, be issued for an enormous amount, and be sold, as in that instance, for sixty-seven per cent. of their par value, or even less, and the corporation is bound. Williamsport v. Com., 84 Pa. St. 487. Nor is this all. The supreme court of the United States has firmly established the doctrine, by a long series of well-known decisions upon municipal bonds, "that when a corporation has power, under any circumstances, to issue negotiable securities, the bona fide holder has the right to presume that they were issued under the circumstances which gave the requisite authority, and they are no more to be impeached in the hands of such a holder than any other commercial paper." Lexington v. Butler, 14 Wall. [81 U. S.] 282.

Such are the mischievous and alarming consequences of the unsound doctrine that a municipality has, by virtue of its ordinary powers, and merely as a means of executing its ordinary duties, the power to pledge its credit by the issue and sale of its commercial obligations. It is not the law. No such doctrine can permanently stand. Although it has taken as yet no deep root in our jurisprudence, it has nevertheless attained suffi-

cient development to show its noxious character. The general, and, until a period comparatively recent, the universal, practice of municipalities not to issue, without express legislative authority, bonds or commercial obligations as a means of raising loans, demonstrates the non-existence of an implied power to do this by demonstrating that no such power is necessary to enable a municipality to execute its usual powers and to discharge its ordinary duties.

We are required in this case only to determine the inherent or incidental power of the city to raise loans by a sale of its negotiable securities, payable at a distant day. We deny any such power. Whether all borrowing to meet debts actually incurred under an arrangement which contemplates repayment out of the regular revenue, and for which a mere voucher or certificate of indebtedness is issued, is ultra vires unless the authority is expressly given, we need not now decide. What we decide on this point is that the power to erect wharves and to improve streets, conferred by the defendant's charter, does not carry with it the power to raise funds for this purpose by the issue and sale of negotiable securities like those here in suit.

Whatever doubt may be considered to exist as to the implied right to borrow, the want of authority in a municipal corporation, as merely incidental to its usual municipal powers, to issue negotiable securities which shall be invested with all the attributes of commercial paper, seems, on reason and principle, to be plain. Commercial paper had its origin in the conveniences or necessities of trade among merchants. Originally only merchants made such paper; afterwards the making of it was extended to all persons acting in their individual capacity. It extends to trading, commercial, and other partnerships; but if the partnership is not a trading partnership, "the question," says Mr. Lindley, "whether one partner has implied authority to bind his copartners by putting the name of the firm to a negotiable instrument depends upon whether the business of the partnership is such that dealings in negotiable instruments are necessary for its transaction, or are usual in partnerships of the same description." 1 Lindl. Partn. (Eng. Ed.) 213, 214.

As to the power of corporations to issue commercial paper, the law of England is settled. In England no corporation, whether municipal (Regina v. Lichfield, 4 Adol. & E. (N. S.) 891, 906) or private (Bateman v. Mid-Wales Ry. Co., L. R. 1 C. P. 499, A. D. 1866), has the incidental right to make commercial paper, except the Bank of England, which was incorporated for the very purpose, and trading corporations strictly, such as the East India Company. We state the foregoing propositions after a careful examination of the English books. Accordingly it is laid down by Mr. Justice Byles, in his work on Bills, that, "without special authority, expressed or implied, a corporation has no power to make, endorse, or accept bills or notes." Byles, Bills (8th Eng. Ed.) 62. Thus, a waterworks company (Broughton v. Manchester & S. Water-Works, 3 Barn. & Ald. 1), a gas joint stock company (Bramah v. Roberts, 3 Bing. N. C. 963), or even trading companies, unless such a power is essential to the purposes for which they are formed (Bateman v. Mid-Wales Ry. Co., supra), have no general or implied authority to make commercial paper. In Bateman's Case (just cited), the question for the first time arose in England, as late as 1866, as to the right of a railway company, with an authorized capital of £170,000, to make or accept bills of exchange, and it was unanimously decided, by judges of great eminence (Erle, C. J., Byles, Keating, and Montague Smith, JJ.), that the company had no such power. The acceptance was under seal, and it is a mistake to suppose that the decision rested on the technical ground that a corporation can only contract under seal. It was placed upon the broad ground that there was no act of parliament, general or special, which conferred the power. It was admitted by all the judges that the railway company might incur debts in the construction or operation of the road; "but it is one thing," says Keating, J., "to say that they shall be liable to be sued for goods sold and delivered or for work done, and an entirely different thing to say that they may accept bills in payment." And to the same effect was the opinion of the other judges.

The principle of this case was approved in the Peruvian Ry. Co. v. Thames & M. Marine Ins. Co., 2 Ch. App. 617, when a general incidental power to issue bills of exchange and negotiable instruments under the companies act of 1862 was denied, and the power held to depend upon the proper construction of the memorandum and articles of association. The companies organized under that act may communicate this power to their directors, but it must be given expressly or by fair intendment in the memorandum and articles of association of the company, or it will not exist.

We are aware that the American courts, as to private corporations organized for pecuniary profit, have very generally held a different doctrine, and affirmed their implied or incidental power to make commercial paper. Dill. Mun. Corp. §§ 81, 82, 407, and cases cited. But the powers of private corporations in this regard are not here material.

The American judgments which have affirmed the like power in municipal corporations have done so upon this course of reasoning: The corporation, they argue, has power to contract a debt, and it is assumed to be incident to that power to give a note or bill or bond in payment of it. Thus, in Kelley v. Mayor, etc., of Brooklyn, 4 Hill, 263, Cowen, J., makes the basis of the judg-

ment the erroneous proposition that, independent of any statute provision, all corporations, private and municipal, may issue negotiable paper for a debt contracted in the course of its business; and other courts have, without examination, adopted this mistaken view of the law. City of Galena v. Corinth, 48 Ill. 423; Clarke v. School-Dist., 3 R. I. 199; Sheffield Tp. v. Andress, 56 Ind. 157; Tucker v. Raleigh, 75 N. C. 267; Ketchum v. Buffalo, 14 N. Y. 356; Douglass v. Virginia City, 5 Nev. 147; Sturtevants v. Alton [Case No. 13,580].

It sufficiently appears from the foregoing that it is a mistake to affirm that the power to issue negotiable paper necessarily or legally results from the corporate power to create debts.

In England, as shown by Bateman's Case, supra, it is held that, inasmuch as the corporation has no power to accept bills, it cannot be made liable on its acceptance, though the bill was drawn for a valid and binding debt.

On this point Erle, C. J., says: "The bill of exchange is a cause of action—a contract by itself—which binds the acceptor in the hands of an endorsee for value; and I conceive it would be altogether contrary to the principles of the law which regulates such instruments that they should be valid or not according as the consideration between the original parties was good or bad, or whether, in the case of a corporation, the consideration in respect of which the acceptance is given is sufficiently connected with the purpose for which the acceptors are incorporated. It would be inconvenient to the last degree if such an inquiry could be gone into. Some bills might be given for a consideration which was valid, as for work done for the company and others as a security for money obtained on loans beyond their borrowing powers. It would be a pernicious thing to hold that, in respect of the former, the corporation might be sued by an endorsee, but in respect of the latter not."

Whether we consider the question in the light of the nature and objects of the ordinary grants of municipal power, or in the light of the purposes which led to the invention and which sustain the use of negotiable paper with the qualities attributed to it by the law-merchant, we are alike led to the conclusion that the mere power to create a municipal liability for ordinary municipal purposes does not carry with it as an incident the authority to raise loans by the issue and sale of commercial obligations. The implied power to issue vouchers or evidences of indebtedness for authorized and valid municipal debts undoubtedly exists, and it may be true that such vouchers or evidences of indebtedness, though put in the form of negotiable paper, are not, for that reason, void, but if not void it is clear that they derive no additional force from that circumstance.

The only safe, as well as sound, doctrine is that there is no power in a municipal corporation, as incidental to the execution of its ordinary duties, to invest its vouchers, or notes, or bonds, with the character of commercial paper. By statute or usage they may be transferable, but the transferee always takes instruments thus issued, whatever their form, cum onere. We are not now referring to municipal bonds, negotiable in form, issued by express legislative authority; these possess, according to the settled law of this country, all of the incidents of commercial paper.

We have looked closely into the American cases against municipal and public corporations which hold that it is incidental to the power to create a debt to give a note or bond in payment of it, but we have found no judgment which holds that the note or bond thus issued partakes of that quality of commercial paper which protects an innocent holder for value from defences or equities to which it would be subject in the hands of the payee. What we wish distinctly to hold is that this supreme and dangerous attribute of commercial paper cannot be imparted to the issues of municipal corporations, whatever their form, unless the power to do so is plainly conferred, either expressly or by implication, by the legislature, and that no such implication exists in respect to debts or liabilities arising from the discharge of ordinary municipal duties.

The argument against a general implied power in municipalities to issue commercial paper with all of the incidents of negotiability, may be briefly summarized as follows:

For hundreds of years the original of our municipal corporations have existed in England without it ever being contended or held that they could, without express authority from parliament, issue such paper. On the contrary, it is there alike conceded and decided that such authority is necessary as the basis of the power. And such has been the view always practised upon in this country from the earliest period until a very recent date. The soundness of this view is strengthened by the almost invariable practice of the legislature to confer, when it is deemed expedient, upon municipal and public corporations, in express terms, the power to borrow money and issue bonds or negotiable securities therefor.

It is a non sequitur, as applied to municipal and public corporations, to affirm that this power to create debts implies the power to give a negotiable bill, bond, or note therefor, which shall be invested with all the incidents of negotiability. Such an implied power is denied in England even as to private corporations organized for pecuniary profit (other than banking or trading corporations), and this demonstrates that the alleged implication of such a power in municipal corporations is neither logically nor legally sound. But if it be conceded that,

as respects private corporations, the American doctrine is otherwise, and that it is rightly so, still it does not follow that the same rule does apply, or ought to apply, to municipal corporations. They are not created for trading, commercial, or business purposes. Private corporations are more vigilant of their interests than it is possible for municipal corporations to be. The latter are in their nature governmental agencies, having in general but one resource with which to meet their liabilities, and that is by taxation, and it is upon this resource that creditors must be taken to rely. The frauds such a doctrine will enable unscrupulous officers successfully to practice, ought to weigh with decisive force against its unnecessary judicial entertainment.

It is a power without assignable limits, intrinsically dangerous, and one which will not fail to prove baneful in the last degree. Courts, when called upon to establish a new doctrine, ought to consider not only its nature, but its consequences, and cannot properly disregard the lessons of experience. A judge may well tremble when he contemplates in the light of recent experience the disasters which such a doctrine will bring upon our municipalities when it shall become generally known that such a tremendous power to Schuylerize them is lodged in the hands of their temporary officers.

Sound policy and sound legal principles are generally coincident, and so it is here. If the power to issue negotiable paper is needful or expedient for our municipalities, let it be given by the legislature that can prescribe the limits, purposes, and conditions of its exercise, and provide for the payment of the liabilities which are thus authorized.

And, finally, the argument against the existence of a general implied power in municipalities to issue commercial paper becomes, as it seems to us, absolutely conclusive in view of the rule, wisely settled, that corporate powers, especially powers whose exercise looks to the creation of public burdens, are to be strictly construed, and that however convenient at times such a power might be, it is one which is not necessary (as shown by universal experience and practice in England, and generally in this country) to enable the corporation to exercise its ordinary functions, or to carry into effect the purposes for which it was created. It is, therefore, a power which does not exist.

Our justification for this extended discussion is found in the fact that the doctrine here combated is struggling for admission into our jurisprudence. It is one which, as we conceive, is founded in a radical misconception of sound legal principles, and one, moreover, whose consequences, if it shall be incorporated into our general law, cannot be contemplated without anxiety.

It follows that, since the defendant city had no power to borrow money, in the manner attempted, to erect the wharf or to improve the streets, the bonds issued therefor are not legally binding upon it, and there can be no recovery upon them. Bateman v. Mid-Wales Ry. Co., supra; Thomas v. Port Huron, 27 Mich. 320; Hackettstown v. Swackhamer, 37 N. J. Law, 191; Regina v. Lichfield, 4 Adol. & E. (N. S.) 891, 906; Mayor, etc., v. Ray, 19 Wall. [86 U. S.] 468, 480, per Bradley, J.

It will not validate these bonds, so as to make them the basis of a recovery, even if it be shown that the money borrowed was in each instance used for the purpose for which recited in the bonds to have been borrowed. But the plaintiff may amend and add in respect of these bonds counts in the nature of counts for money had and received. Adhering to the decision of this court (Treat, J.) in Wood v. City of Louisiana [Case No. 17,948], at the last term, the present holder of the bonds will then be treated as the assignee of the original holder or payee in respect of the money actually lent to the city; and if, after the city obtained it, the same was in fact expended for the erection and repair of wharves, or the improvement of streets, or, possibly, if expended for other authorized municipal purposes under the authority of the city council, the amount advanced, with lawful interest, less payments received on account thereof, may be recovered. Dill. Mun. Corp. § 730; Paul v. Kenosha, 22 Wis. 266; Shirk v. Pulaski Co. [Case No. 12,794]; Oneida Bank v. Ontario Bank, 21 N. Y. 490; Mayor, etc., v. Ray, 19 Wall. [86 U. S.] 468, 484, per Hunt, J.

The case might be different, even in this aspect of it, if the contract was one expressly prohibited by statute; but this is a question not unattended with difficulties which it is not necessary to consider.

II. The other class of bonds, known as "Road Improvement Bonds," were issued in renewal of bonds issued by the city in payment for stock subscribed to certain companies organized to build gravel roads from the defendant city to points in Missouri. Subscriptions to the stock of such companies were expressly authorized by the act of the legislature of February 24, 1857 (Acts 1857, p. 302), quoted at large in the statement of the case.

Under the true construction of this act, in view of the general legislation of the state of Missouri at this period on the subject of municipal aid to railway and other companies; the almost universal practice under such legislation to issue bonds for debts of this kind; the practical construction put upon this act by the city; the special nature of the authority given; the limited amount of tax authorized by the charter to be laid for the ordinary uses of the municipality, and the decisions of the supreme court of the United States as to the scope of the power to issue bonds to pay for stock subscriptions in railways, and the general tenor of the

judgments of the supreme court of the United States on the subject (Lynde v. Winnebago Co., 16 Wall. [83 U. S.] 6, 12; Police Jury v. Britton, 15 Wall. [82 U. S.] 572; Dill. Mun. Corp. §§ 106, 107, 407, and notes), and that the inference of the power to issue bonds is in no way inconsistent with the provisions of the act—my judgment is (Treat, J., dissenting on this point), that the city was authorized to issue bonds in payment for the stock subscribed in those companies; that it would be liable to a general judgment on such bonds, and that on those bonds falling due they might be renewed by other bonds.

The demurrer to counts 1 to 10 of the petition is sustained; to counts 12 to 17, overruled, with leave to amend, if the plaintiff is so advised.

Judgment accordingly.

TREAT, District Judge (dissenting). I dissent as to the last class of bonds named, but fully concur as to the other bonds. True, the dicta of the supreme court justify the conclusion in that respect reached in the opinion just delivered; yet a rigid analysis might possibly show distinguishing features. If the power conferred on a municipal corporation to do certain work, or make specified improvements, is not accompanied with the power to borrow money or issue bonds—especially where a limit on the power to tax for such purposes is made—it seems untenable, as a legal proposition, that such a corporation may proceed beyond the limits of taxation permitted, not only to incur a debt therefor, but to borrow money and issue negotiable securities, cutting off all the equities between the original parties. The various legislative enactments whereby municipal corporations are created grant different powers. Some are framed on a non-debt-creating policy, so that those who insist upon immediate expenditure shall pay for the same at once, and not create obligations for another generation or subsequent voters or property-holders to pay. Other charters are framed so as to allow borrowing, looking to prospective benefits from present improvements, and, therefore, permitting the payment therefor to be postponed. Restrictions on taxation would be useless if unlimited borrowing were permitted. It is for the legislative power to determine when borrowing is permissible, and for what purposes, and to what extent, and in what form evidences of indebtedness may be issued. The rulings of the supreme court of the United States concerning municipal bonds, whereby the equities of the original transaction are not open to inquiry when the bonds are held bona fide and for value by others than the original holder, make it the more important to look closely into the powers under which such bonds are issued.

I can detect no controlling reason for the distinction between bonds issued for improvements made directly by the city and bonds issued in payment of subscriptions to the stock of a company empowered to make road or other improvements, unless the broad doctrine is to prevail that the power to subscribe for such stock is to be held to carry with it the power to issue bonds in payment thereof, while the power to make improvements directly does not imply the power to issue bonds to pay therefor.

If there were in the city charter, or in the charter of the railroad corporation, any authority for the city to borrow or issue bonds in payment of a subscription to shares of stock, then another proposition would be presented. In the absence of any authority beyond that to subscribe for such shares, it seems to me that the equities of the original transaction cannot be cut off by issue of negotiable securities for the payment thereof. The argument ab inconvenienti, always a dangerous one, cannot help out the absence of authority to borrow and issue negotiable securities. The holders of bonds under such a state of legislative enactments must rely for recovery on the doctrines announced in the opinion delivered in the case of Wood v. City of Louisiana [supra].

Hence my view is that the last class of bonds stand in the same position as the other bonds sued on, and the rulings with respect thereto should be the same, viz.: That the equities are fully open for consideration with respect to all of said bonds, so that the money really advanced for legitimate purposes may be recovered as in assumpsit, and not formally on the bonds, which were issued without authority.

[For a subsequent hearing, see 1 Fed. 353.]

GAUSSEN (UNITED STATES v.). See Case No. 15,192.

Case No. 5,277.

GAUTHIER v. BELL.

[23 Int. Rev. Rec. 210; 2 Cin. Law Bul. 153.]

Circuit Court, E. D. Michigan. 1877.

CUSTOMS DUTIES — "FISH, FRESH FOR IMMEDIATE CONSUMPTION"—FISH FROZEN IN CANADA.

1. Fresh fish imported frozen together in barrels or large cakes are not "fish, fresh for immediate consumption," within the meaning of Rev. St. § 2505, and therefore not exempt from duty.

2. Though originally caught in American waters and frozen in Canada they are still subject to duty, unless upon importation proof of identity be made under the treasury regulations.

This was an action [by Charles W. Gauthier] against [Digby V. Bell] the collector of the port of Detroit, to recover duties alleged to have been illegally exacted upon certain imported fish. Plaintiff was in the habit of purchasing fish caught in the Detroit river

and Lake Erie, and of freezing them in barrels or large cakes and exporting them to Detroit, where they were put upon the market or shipped in this frozen condition to distant cities and sold as fresh fish. Plaintiff claimed them to be free of duty under Rev. St. § 2505, which exempts from duty "fish, fresh, for immediate consumption." Defendant upon the other hand claimed them subject to a duty of 50 cents per 100 pounds under section 2504, Sched. F.

F. H. Canfield, for plaintiff.
S. M. Cutcheon, Dist. Atty., for defendant.

BROWN, District Judge. Although the fish in question are frozen in barrels or in large pans in a solid mass or cake, I think they are still to be considered as fresh fish. This term is obviously used in contradistinction to fish which are cured, salted, smoked, dried, pickled, or otherwise rendered capable of preservation for an indefinite length of time. The testimony shows clearly that frozen fish retain their flavor so long as the temperature is preserved below the freezing point, and that they are sold in the market and known to the trade as fresh fish.

The only difficulty in this case arises from the use of the words "for immediate consumption." While I am strongly inclined to the opinion that fish imported in their natural state, whether to be sold upon the market at the place of importation or to be shipped to distant towns, would still be for immediate consumption, I think the fact of their being frozen in cakes prior to their importation evinces a manifest intention that they shall not be immediately consumed. While these importations were sometimes broken up and placed at once upon the market at Detroit, they were more frequently shipped to Cincinnati and Philadelphia in common cars, and there put upon the market and sold. It was shown that fish so frozen could be kept for months, and even years, with no material loss of flavor or perceptible decay, and that, in the winter, it was no uncommon thing for them to be kept for two or three months, the length of time, of course, depending upon the state of the weather. Under these circumstances, I think they cannot be classified as fresh fish for immediate consumption.

A portion of these fish were originally caught in American waters, carried to Canada for the purpose of being frozen, and a bond given to the Canadian customs for their re-exportation to the United States. It was claimed that even under Schedule F, § 2504, these were exempt, as this schedule applies only to "foreign caught" fish I think the fish in question fall within the provision of section 2505, p. 486, viz.: "Articles of growth, produce and manufacture of the United States, when returned in the same condition as when exported, but proof of identity of such articles shall be made under regulations prescribed by the secretary of the treasury." These regulations are contained in the printed copy of the general regulations, art. 373–377, and it was admitted they had not been complied with. This was an indispensable prerequisite to their admission free of duty. It was not the intention of congress by the use of the words "foreign caught," to place domestic fish in a category distinct from that of other articles of home production, or to dispense with the proof of identity required in all other cases and so necessary to prevent fraud. There must be a judgment for defendant.

Case No. 5,278.

GAUTIER et al. v. ARTHUR.

[13 Blatchf. 432;[1] 22 Int. Rev. Rec. 256.]

Circuit Court, S. D. New York. June 22, 1876.[2]

CUSTOMS DUTIES—DISCRIMINATING DUTIES OF ACT OF JUNE 30, 1864—REPEALING ACT OF 1872.

By section 18 of the act of June 30, 1864 (13 Stat. 216), all goods, wares and merchandise of the growth or produce of countries east of the Cape of Good Hope, (except raw cotton,) when imported from places west of the Cape of Good Hope, were subjected to a discriminating "duty of ten per centum ad valorem, in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production." By section 5 of the act of June 6, 1872 (17 Stat. 233), certain articles were declared to be "exempt from duty." The act of 1872 did not have the effect to repeal the act of 1864, so as to exempt from such discriminating duty articles falling within the description in the act of 1864, although they were articles made exempt from duty by the act of 1872.

[This was an action at law by James Gautier and another against Chester A. Arthur to recover a sum of money illegally exacted by him as collector of the port of New York.]

Abram Wakeman, for plaintiffs. George Bliss, Dist. Atty., for defendant.

WALLACE, District Judge. The plaintiffs imported plumbago and citronella, the produce of a country east of the Cape of Good Hope, in a French vessel, from the British possessions west of the Cape of Good Hope. By section 18 of the act of June 30th, 1864 (13 Stat. 216), these products, thus imported, were subject to a discriminating "duty of ten per centum ad valorem, in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production." By section 5 of the act of June 6, 1872 (17 Stat. 233), certain enumerated articles, among which are plumbago and citronella, were declared to be "exempt from duty." The plaintiffs' importation having been made after the last act took effect, and the defendant, as collector of the port of New York, having exacted the discriminating duty of ten per centum, the plaintiffs

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]
[2] [Reversed in 104 U. S. 345.]

bring this action to recover the sum thus exacted.

The case presents the question, whether the act of 1872 repeals by implication, as to articles placed on the free list, the act of 1864. A repeal by implication is not favored, and the earlier act remains in force unless the later is manifestly repugnant to and inconsistent with it. Both acts must stand if both can be given effect as to the particular application involved. This may be done by exempting the articles placed on the free list, except when imported under the special circumstances which subject all importations to a discriminating duty.

Viewing the question as though the earlier and later acts had been passed at the same time, and made separate sections of a comprehensive tariff code, would there be any reasonable doubt that articles not otherwise dutiable would be subject to the discriminating duty? It would seem evident that it was the legislative intent to lay a duty on all products of the growth of countries east of the Cape of Good Hope, without regard to the consideration whether or not such products were otherwise dutiable, because, it is imposed on such as are otherwise subject to a very low duty, as well as upon those subject to the highest duty. The discrimination regards solely the commerce which is the subject of the provision. Acts imposing discriminating duties are retaliatory measures, designed to countervail the unfriendly or illiberal policy of foreign powers towards our own commerce, and to coerce the removal of obnoxious restrictions which have been placed upon it, and to this end the interests of our own consumers are subordinated or ignored.

Upon the argument, it was urged that the discriminating duty is imposed only on articles otherwise dutiable, and does not apply where no other duty is imposed, and that the language used is so clear as to leave no room for deductions based upon general principles of construction, or predicated upon the general theory of such statutes. If the duty were one "in addition to the duties now imposed by law," there would be room for fair argument that it was intended to be applicable only to articles otherwise dutiable. But, such is not the language. The duty imposed is in addition to the duties imposed upon the products "when imported directly from the place or places of their growth or production." There are no duties imposed specifically on any products "when imported directly from the place of their growth or production;" and, if the argument is sound, it would result that no products are subject to the discriminating duty. There is nothing, therefore, in the language used, to indicate that any distinction between products dutiable and not dutiable was present in the minds of the law makers, when they imposed the discriminating duty. Judgment is ordered for the defendant.

[NOTE. On writ of error sued out by the plaintiffs, this judgment was reversed by the supreme court, Mr. Justice Field delivering the opinion. It was held that the general repealing clause of the act of 1872 declares that all acts and parts of acts inconsistent with its provisions are repealed, and excepts from its operation certain other specified acts and sections, among which the discriminating section of the act of 1864 is not mentioned. From the general language of the repealing clause, and the enumeration of the provisions of the acts excepted from it, it was concluded that it was the intention of congress to put an end, so far as the free list in the fifth section of the act of 1872 is concerned, to the operation of the discriminating act of 1864. 104 U. S. 345.]

GAUTIER (PARASSET v.). See Case No. 10,709.

GAUTIER, The J. H. See Cases Nos. 6,399 and 7,319.

GAVIT (KNIGHT v.). See Case No. 7,884.

GAWLEY (HARLEY v.). See Case No. 6,069.

Case No. 5,279.

In re GAY.

[1 Hask. 108; 2 N. B. R. 358 (Quarto, 114); 1 Am. Law T. Rep. Bankr. 73; 2 Am. Law T. Rep. Bankr. 52.] [1]

District Court, D. Maine. Jan., 1868.

BANKRUPTCY—DISCHARGE—PREFERENCES—INSOLVENCY—BOOKS OF ACCOUNT.

1. To bar a discharge in bankruptcy for having given a preference to a creditor, the bankrupt, when he gave the preference must have either contemplated bankruptcy or insolvency, or in fact have been insolvent and knew it, or had good grounds for believing it, and have acted on such belief.

[Quoted in Re Doyle, Case No. 4,051. Cited in Re Warner, Id. 17,177.]

2. To bar a discharge, the bankrupt must have designedly and intentionally given a preference, but the creditor receiving it need not have known that his debtor was insolvent.

[Approved in Re Louis, Case No. 8,527. Cited in Martin v. Toof, Id. 9,167; Re Hannahs, Id. 6,032.]

3. A trader is insolvent when he cannot pay his debts in the ordinary course as traders usually do.

[Cited in Graham v. Stark, Case No. 5,676; Hardy v. Clark, Id. 6,058; Re Bininger, Id. 1,420; Hurley v. Smith, Id. 6,920; Re Doyle, Id. 4,050; Grover & Baker Sewing Mach. Co. v. Clinton, Id. 5,845.]

4. Proper books of account for a tradesman are such as disclose the real condition of his affairs, and need not be in any particular form.

[Cited in Re Bellis, Case No. 1,275; Re Brockway, Id. 1,917; Re Archenbrown, Id. 505.]

5. The want of such books will prevent a discharge in bankruptcy.

[Cited in Re Howard, 59 Vt. 595, 10 Atl. 716.]

In bankruptcy. Petition by a bankrupt [Benjamin C. Gay] for his discharge. Credit-

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission. 2 Am. Law T. Rep. Bankr. 52, contains only a partial report.]

ors objected upon the ground that the bankrupt had given a fraudulent preference, and had not kept proper books of account.

Manasseh Smith, Thomas B. Reed, Josiah H. Drummond, and Woodbury Davis, for petitioner.

Almon A. Strout and George F. Shepley, for objecting creditors.

FOX, District Judge. [The bankrupt having presented his petition for a discharge, seven of his creditors, merchants in this city, having duly proven their claims, appeared on the return day of the petition, and have filed specifications of their objections to his discharge, being sixteen in number. At the hearing, several of these specifications were adjudged defective, not sufficiently exact and precise to require the bankrupt to make defence thereto, and upon others, an opinion was also intimated, that they were not sustained by the testimony. There were others, however, which were fully argued at the bar, and they have since received the careful attention of the court—the examination of the bankrupt and depositions, together with all the other evidence in the case, having been diligently examined by me.][2] It appears from all the evidence that the bankrupt began trading in Casco, in the county of Cumberland, in June 1866, with a small stock, not exceeding $800 in value; that at that time he was in fact insolvent, having some years previously been engaged in business. His property at this time, besides his stock in trade, consisted of fifty-five acres of land called the "Merritt Gay Place," for which he was then considerably in debt, and his homestead of the value of $1,000 or $1,200, of which $500 in value he had in 1865 exempted from liability for his debts by availing himself of the provisions of the laws of Maine exonerating a man's homestead from his debts subsequently contracted; and he had also some lands in Kansas, for which less than $100 was realized by his assignee. From my examination of all his property, I am well satisfied that in June, 1866, he was owing $1,000 at least more than he could have been made to pay, allowing him the benefit of the exemption of his homestead. He admits in his examination that he was then insolvent, but denies that he was aware of his situation. A large part of his indebtment was to the town of Casco for moneys received by him as its collector of taxes for the years 1865 and 1866, more than $1,200 being then due from him on this account. The bankrupt continued on in business until Sept. 15th, 1867, when his goods were attached by some of his creditors. His stock was afterwards sold by the assignee in bankruptcy, and about $1,100 were realized from it. His liabilities to the town of Casco continued to increase, instead of diminishing, after he commenced business in June, 1866, so that, in the spring of 1867 he was indebted to the town of Casco on this account over $2,100. At first he appears to have purchased goods quite sparingly, but at the time of his failure he was indebted to his Portland creditors for over $6,300. He owed one Nutting $1,000 for borrowed money, as he says, which was secured by a mortgage of his stock, made Aug. 30, 1867; and it appears from his schedule annexed to his petition in bankruptcy, that he owed other parties about fourteen hundred dollars.

The property he then possessed, according to his schedule, consisted of his homestead, valued by him at $1,000, and which was subject to mortgages for $637, and to an exemption to the extent of $500, the lot in Kansas, valued by him at $200, and for which less than $100 was realized, and certain standing timber to be taken off from a part of the "Merritt Gay Farm" before May, 1868, the interest in which he valued at $75. He had also his accounts and notes, nominally amounting to $2,000, and his stock, valued by him at not exceeding $1,700, and which was sold for about $1,100, and a small amount of furniture, stock, and farming tools, not subject to be taken for his debts. Most of this large amount of debts for his stock in trade was contracted by him subsequently to the first of April, 1867, but the larger part in July, August and September.

He states in his examination, "That on the fourth of September, 1867, he had no property in this state not exempt from attachment or not incumbered nearly to its full value, except $75 worth of standing timber and his book accounts." His debts, not secured, then exceeded $7,500; and all the property subject to his control to apply to their discharge was the book accounts, nominally amounting to $2,000, but in reality not available for much more than half that sum. He swears that he did not discover the condition of his affairs until Sept. 14th or 15th, 1867.

On the 30th of August he mortgaged to George Nutting his stock in trade to secure the payment of his note given to Nutting on that day, the consideration of the note, as he said, being $400 lent to him by Nutting July 8th, 1867, $400 more lent to him on Aug. 3d, and $195 lent at date of the mortgage, the balance, $5, being allowed for interest on the several loans.

On the 4th or 5th of September, the bankrupt paid to Wilkinson Edes $541 in discharge of a note signed by the bankrupt and Andrew R. Gay, his brother, as principals, and Lewis Gay, his father, as surety. The note was originally given to Merritt Gay as part consideration for the purchase of the Gay farm, and was to be paid by the bankrupt; a portion of the amount thus paid to Edes was borrowed Sept. 4th of one Ephraim Brown by the bankrupt, viz: $415, which was secured by a mortgage of his homestead to Brown.

On the 6th of Sept. the bankrupt paid one

[2] [From 2 N. B. R. 358 (Quarto, 114).]

Charles Jordan the amount of his note given in '62 or '63 for $225 and interest, his payment being made by goods from the store.

These three transactions are charged as fraudulent preferences given by the bankrupt, he then being insolvent, or in contemplation of insolvency or bankruptcy, and are presented in various ways as grounds of opposition to his discharge.

The 29th section of the bankrupt act [of 1867 (14 Stat. 517)] declares that no discharge shall be granted if the bankrupt has given any fraudulent preference contrary to the provisions of that act, "or if he has in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally for the purpose of preferring any creditor or person having a claim against him, or who is or may be under any liability for him."

By the 35th section, it is enacted "that if any person being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, etc., or makes any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, &c., having reasonable cause to believe such person is insolvent, and that" the same "is made in fraud of the provisions of this act, the same shall be void."

Taking these two provisions in connection, I hold that in order to deprive a party of his discharge, the transfer or conveyance constituting the preference must be made by him in contemplation of bankruptcy or insolvency, or when he is in fact insolvent; and in the latter case the court must not only be satisfied that he was insolvent, but further, that he either had actual knowledge of his insolvency, or had good grounds for fearing and believing that he was insolvent, and acted on such belief in making the preference. In short, he must have designedly and intentionally given a preference, meaning to secure or pay that particular creditor, when he was not able to pay all his debts in the usual and ordinary course of business at the time, fearing and believing such to be the condition of his affairs. If such is his situation, and he so acts, meaning to secure a favored creditor, whether his other creditors shall get their pay or not, I am of opinion that he is not entitled to his discharge; he has a fraudulent purpose and design to violate the law by giving one of his creditors security, when he believes he cannot do the same by all the others, or discharge his liabilities to them as they accrue. This is directly in opposition to one great and leading purpose of the law, which is to distribute the property of an insolvent man among all his creditors equally and without preference, and it is this fraudulent intent of preference, if carried out by the bankrupt, which the law punishes by depriving him of his discharge. I do not think it is necessary that the creditor, receiving payment or security, should know of the insolvency, in order to defeat the discharge by the preference given to him; but such knowledge is necessary, to enable the assignee to avoid the payment or security. On the part of the creditor there must be a guilty participation in taking the transfer, which the law declares shall consist in the knowledge of the insolvency, and that the preference was given in fraud of the act; unless this is shown, he can retain what he may have received. But whether the creditor is or is not aware of the fraudulent purpose and design of the bankrupt, this fact can in no way affect the condition of the bankrupt himself; he must be held responsible for his own actions, and abide the consequences of his own fraudulent purposes and designs, and should not be permitted to derive any benefit from the fact, that in accomplishing his fraudulent purpose, he was shrewd enough to conceal from the other party his insolvent condition. He should present himself with a clear conscience, and the court should be satisfied that he has been entirely innocent of carrying into execution any intent to violate an act, from which he claims so great a benefit as a discharge from all his debts. If he has given a preference in fraud of the act to one of his creditors, who is so ignorant of his circumstances that the law permits him to retain the profits of the preference, it is certainly as great a fraud on the part of the bankrupt, as if the preference had been given to one well knowing his condition and design. The other creditors suffer more in the former case than in the latter, because, in the former, the preference is valid, whilst in the latter it can be impeached and set aside. To that extent the bankrupt has succeeded in violating the object and purpose of the law; having thus placed his property beyond its reach, it would be most extraordinary for him to be permitted to enjoy the benefit of the act, when he had thus defeated its provisions, and obtained a discharge because he had concealed from his grantee the knowledge of his situation. If under such circumstances he was entitled to his discharge, a bankrupt with ordinary shrewdness might secure or pay all the creditors that he desired to, and leave nothing of his estate to be applied in bankruptcy to the payment of his general creditors. I cannot accede to such a construction of the law; and although it is apparently adopted by some of the text writers in their commentaries on the bankrupt act, I do not find it sustained by any decision of any one of the district courts of the Unit-

ed States, and I shall not be the first to sanction a proceeding, in my view, so directly in conflict with the great object and design of the law.

What then, was the condition of the bankrupt on the 30th day of August, 1867, and how far was he aware of his condition? On an examination of his statement and the depositions, it appears that when he commenced his business in June, 1866, he was indebted to about $1,000 more than he had property which could by law be applied to the payment of his debts, his greatest liability being to the town for the taxes collected by him, amounting at that time to $1,200, and which the next spring, in April or May, had increased to over $2,000, he having used that amount of the town's money for his own purposes, only a small part of which was applied to payment of debts contracted in his trade. The bankrupt states in his examination that, "I paid up my indebtedness to the town in consequence of measures which they took. Received a letter from the town treasurer in June or July, calling my attention to the town taxes, and saying 'if they were not settled immediately, he would issue his warrant against me and my bondsmen,' adding in a postcript, that 'he wrote this by order of the selectmen.' It was necessary I should have the thousand dollars I borrowed of Nutting to pay my state tax and my creditors. I felt when I borrowed it that it was necessary to enable me to keep along in my business. I not only thought so, but knew it was so. When I got the note from the state treasurer, I knew that I must have the money to pay him. I got the note from him in June or July, before I borrowed the money." Upon his own admissions he was thus pressed by both the state and town treasurers for payment of the large amount he was thus delinquent. He says he borrowed of Nutting on the 8th of July $400, and on the 3d of August a like amount for the purpose of paying the state treasurer. About the first of August, he also sold to Mayberry his peddler's cart and contents, receiving in part payment therefor a town note of $468, which he turned over to the town in part satisfaction of his indebtedness, thus, in fact, applying more than $1,200 of his stock in trade to the discharge of an independent liability, in no way connected with his business as a trader.

On the 30th of August he secured by mortgage on his stock in trade the $800 previously borrowed by him of Nutting, and in a very few days after incumbered by a mortgage his homestead, being all his other available property, the money realized therefrom being applied by him to the payment of a note upon which his father and brother were responsible, but which he had agreed with them to pay.

At the time of giving the mortgage to Nutting on his stock, he was indebted to his Portland creditors for his stock in trade to an amount exceeding $6,000, nearly all of which had been contracted within four months, and a large portion of which he was liable to be called upon to pay at any moment. The Nutting mortgage and the mortgage of his homestead swept from his control all of his available means, excepting his book accounts, and from them he must have known he could not realize enough to pay twenty-five per cent. of his other liabilities.

Looking at the short time in which he had contracted this large amount of indebtedness for his stock in trade, and considering that he was also owing more than one thousand dollars besides, five hundred dollars of which had been contracted by him in the years 1861 and 1864, I am forced to the conclusion, that at the time the bankrupt executed the mortgage to Nutting, he must have been quite aware that he was in that situation which the bankrupt act deems insolvency; that being pressed by the treasurer of the town and state to pay the amounts for which his sureties on his official bond would be otherwise accountable, he saw fit to raise all the money he could obtain, apply the most of it to that object, or to the payment of debts to his friends and relatives, giving security therefor on all his available property.

Instead of supposing that he could, by so doing, go on with his business as a trader, he must have had a sufficient knowledge of his general indebtedness to know that the inevitable result of such conduct would be to break up his business, and leave him without any other means to discharge his other debts. Can any man suppose that the bankrupt did not know at the time he gave the mortgage to Nutting, that it would require nearly the whole of the proceeds of his stock in trade to pay the amount of this incumbrance? And must he not have understood that when his creditors were advised of the mortgage, its purpose and object, and that but a small portion if any of the amount received from the mortgage had been applied to the payment of his business liabilities, they would at once cease from further credit, and that his business would necessarily be determined? No reasonable man could have arrived at any other conclusion; and no man, who was not willfully blind to his condition, could be ignorant of his position in such a posture of affairs. I am apprehensive that the bankrupt was well aware of his condition in May or June, and in order to save his bondsmen obtained this large amount of goods on credit, taking good care to protect his friends and bondsmen by payments and securities, before his other creditors should be aware of his situation.

But it is said that the bankrupt swears he was not aware of his condition until the 15th or 16th of September, and that, therefore, he could not have known before that time that he was insolvent. If, in his statement, he means to be understood that he did not know precisely the exact position of his affairs, I am inclined to believe him; but I

cannot believe that he did not, on the 30th of August, know that he was insolvent within the meaning of the bankrupt act.

Insolvency, as used in this act, does not mean an absolute inability to pay one's debts at a future time upon a settlement and winding up of all a trader's concerns; but a trader may be said to be in insolvent circumstances, when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do. Such is the definition given to insolvency by the court of queen's bench (Bayly v. Schofield, 1 Maule & S. 338), and it was adopted by the supreme court of Massachusetts in Thompson v. Thompson, 4 Cush. 127; and in Lee v. Kilburn, 3 Gray, 600; and affirmed by Cowen, J., in Herrick v. Borst, 4 Hill, 650. In Barnard v. Crosby, 6 Allen, 331, the court says: "The instruction requires the jury to find that Moore & Crosby were unable to pay their notes and meet their business engagements in the ordinary course of business, and such a state of things constitutes insolvency within the statute." In Re Black [Case No. 1,457], Judge Blatchford makes use of substantially this language in defining insolvency under the present bankrupt act, and so does Nelson, J., in Minnesota, in Merchants' Nat. Bank of Hastings v. Truax [Id. 9,451]. Under the former bankrupt law the supreme court of the United States, in Buckingham v. McLean, 13 How. [54 U. S.] 167, defines insolvency as "a simple inability to pay, as debts should become payable, whereby the business would be broken up."

I entertain no doubt that this bankrupt, at the time of his executing the mortgage to Nutting, must have been so far aware of his condition as to know that he could not meet his debts as they would become payable, and that thereby his business would be broken up; that is to say, he must have known he was insolvent. The very fact of giving a mortgage on his stock for nearly its full amount, leaving little or nothing to apply in satisfaction of the large amount he owed the other creditors, especially when but a small part, if any, of the funds realized from the mortgage were applied to payments for the stock, could not but destroy his credit as a trader. The inevitable result must have been to break up his business; no one, knowing of the mortgage, would afterwards trust him for a dollar, and he must be held to have contemplated the necessary and inevitable result of such transaction. I think therefore, the mortgage given to Nutting was a fraudulent preference by the bankrupt, he being actually insolvent, and that it was made by him with knowledge of, and in contemplation of, his insolvency; and for similar reasons, I find the subsequent payments, made to Jordan and to Edes on the note signed by Lewis and Andrew R. Gay, were alike fraudulent on the part of the bankrupt, and prevent his discharge; and I am satisfied that Nutting, at least, was well aware of the condition of the bankrupt at the time when he made the mortgage.

There is another objection presented by the specifications, upon which a few words may not be inappropriate. The 11th specification charges the bankrupt with not having kept proper books of account subsequent to the passage of the bankrupt act, and especially with not keeping a cash book. The 29th section of the bankrupt law declares that a bankrupt shall not be entitled to his discharge, if, "being a merchant, or a tradesman, he has not, subsequently to the passage of this act, kept proper books of account." The object of this provision is quite apparent, and, in my view, is wise and salutary, and will be enforced by me in all cases where the bankrupt has failed to comply with its requirements. The law intends that a merchants' or traders' books and documents should be in such a condition as to show his business situation to his creditors, as well as to himself. By keeping such books in a proper manner, he cannot but be aware of his standing, of his property and effects, and of his liabilities, and whether his business is profitable or otherwise, and whether he ought to avail himself of the bankrupt act, as well for his own protection as for the benefit of his creditors. On the other hand, his books should exhibit to his creditors his position, so that when placed before them for investigation, they may at once ascertain his standing and property, and the result of his business, and whether everything has been fair and honest on his part.

The bankrupt, in the present cause, kept a journal and ledger, in which most of his sales on credit appear, but they do not exhibit, as I understand, his sales when made for cash or barter; nor does there anywhere appear on his book, any entry of cash borrowed, or of sums paid, either for goods or on other accounts. He states, referring to certain pages of the ledger: "These pages do not contain entries of all the goods which I bought during the time specified therein, from June 6th to July 17th, 1867. I did not enter goods bought for cash; they do not contain accounts of all the goods bought on credit, nor of all the goods bought of business houses in Portland on credit. I bought a large amount of goods on credit after the record of the book ends; these goods were not entered on any book. I did not keep a cash book; these books do not show all the goods sold on credit from March 2d, 1867, down to the time of failure; they do not show all that is due me on account in the course of my business; I have no means of telling how much is now due me that is not on these books; they contain pretty much all, there are a few accounts they do not contain, there are some little items that were never entered at all. Lent ten dollars, which I never entered, and some few little things of that sort. I cannot tell all the cash I have received since March, 1867, and my books do not show. Never entered the goods I sold for cash, or for ready pay, or

for produce, except that I sometimes put it down for a day or two on a piece of paper, to see how much I was doing. When I bought goods in the city, I sometimes took bills, and sometimes did not take bills when I bought for cash and knew the price of the goods. My books do not show all my barter trade since March, 1867, they show nearly all. I have no means of stating the exact amount that they do not show."

In Re Solomon [Case No. 13,167], Mr. Justice Grier, commenting on this provision of the act, says: "It is the policy of this clause of the act, that after its passage, every merchant or tradesman should keep such books of account, as, considering the business and condition of the debtor, would enable any competent person to determine from the books the real condition of the debtor's affairs. It is not necessary that these books of account should be kept according to the forms taught in the schools, or in ledger and day-book, bound in leather. Could any competent person, from the bank books, checks, and other papers kept, without any cash account of receipts and expenditures, determine the real condition of the debtor's affairs? It seems to me the question should be answered in the negative." Tested by this rule, I think it would be extremely difficult for the most competent person to investigate, and ascertain accurately the bankrupt's condition from his books and papers, it appearing that he did not always take bills of his purchases, and that such purchases are not entered on his books, he not keeping "cash accounts of receipts and expenditures."

A cash account, it will be observed, is considered by Judge Grier as of great importance, and with this opinion of the learned judge, I fully concur. I fear that it is a custom not as common with merchants and traders as it should be. There is no account which can be kept, which will be as useful to the honest merchant and trader, as one exhibiting from day to day, his cash receipts and disbursements, the same being at least every week adjusted and settled, and if he should prove unfortunate, it will be the surest protection against any charges of fraud on the part of his creditors; it will always be in readiness for him to appeal to when adjusting accounts with others, if questions should arise as to their correctness, and if called upon to disclose his business affairs before a court of bankruptcy, and to account for the estate and property which he may have had, the cash-book of the honest bankrupt will bear the severest scrutiny, will afford the court the greatest assistance in its investigations, and will be the strongest and most satisfactory evidence which can be produced by the bankrupt in his behalf; whilst, on the contrary, if none such has been kept, the fact must always be looked upon by the court with suspicion, and its absence will deprive the court of the aid and assistance which might otherwise have been obtained from its investigations and disclosures, and the court, for want of this information, may be compelled to refuse the bankrupt a discharge from his debts, which he might have received, if a proper cash-book had been kept by him and produced.

Finding, as I have been compelled to do, that the bankrupt has been guilty of a fraudulent preference to some of his creditors, when he was within the meaning of the bankrupt act insolvent, I must refuse him his discharge. I trust that this may prove a salutary warning and lesson to all other merchants and traders in this state, who may hereafter find themselves in a condition in which they are unable to pay their debts, as they shall become payable, and thereby their business be broken up. In such a situation they are insolvent, and it is seldom that a man is not aware of such a condition of his affairs, and a court is not much inclined to listen to his assertion, that he was not aware of it. Instead of attempting to pay or secure any of their creditors, such persons should at once avail themselves of the benefit of the bankrupt law, affording to each of their creditors a just and equal portion of their estate, and any preferences given by them under such circumstances will subject them to the provisions of the act, which authorize their creditors to force them into bankruptcy, under the section providing for involuntary bankruptcy. In such a case, the same as upon their own voluntary petition, they will not be enabled to obtain their discharge, if opposed by their creditors, and the party receiving the fraudulent preference may be compelled to refund the entire amount he has received in violation of the act.

The only prudent course for one, who may be so unfortunate as to find himself in insolvent circumstances, is for him immediately to appeal to the law for its aid and relief, and if his business has been fairly and honestly conducted, he will certainly find his appeal has not been in vain, but, on the surrender of all his estate, he will again become a free man, discharged from the burden of his indebtedness, and at liberty to commence anew, and be protected in the enjoyment and possession of the fruits of his own labor and industry for the future. Discharge denied.

Case No. 5,280.

GAY v. CORNELL.

[1 Blatchf. 506;[1] 1 Fish. Pat. Rep. 312.]

Circuit Court, S. D. New York. Oct. Term, 1849.

PATENTS—ASSIGNMENT BEFORE ISSUE—VALIDITY—RECORDING—SUIT BY ASSIGNEE.

1. An assignment of an invention before the issuing of a patent, is valid under section 6 of the act of March 3, 1837 (5 Stat. 193), although it is made after the rejection by the commissioner of patents of the assignor's application for a patent, and after an appeal

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

thereon to the chief justice of the District of Columbia.

2. The assignee under such an assignment may file a bill in his own name, under section 16 of the act of July 4, 1836 (5 Stat. 123), and section 10 of the act of March 3, 1839 (5 Stat. 354), against the patentee to whom the patent was issued on the rejection of the assignor's application, for the purpose of annulling the patent issued, and having one granted to him as assignee.

3. And it is not necessary that the assignment should be recorded in the patent office before the filing of the bill. It is enough, if it be recorded at any time before the issuing of the patent.

In equity. The bill in this case was filed under the tenth section of the act of March 3, 1839 (5 Stat. 354), which amended and enlarged the sixteenth section of the act of July 4, 1836 (5 Stat. 123). It prayed, that certain letters patent granted to the defendant [Samuel G. Cornell], on the 21st of August, 1847, for an improvement in machinery for making lead pipe by pressure, might be annulled and cancelled, and that one Alonzo D. Perry might be declared to be the first discoverer of the improvement and entitled to a patent for it, and that a patent for it might be ordered to be granted to the plaintiff [Frederick A. Gay] as assignee of Perry. The bill set forth, that Perry was the original and first inventor of the improvement and made application to the commissioner of patents in due form for a patent for it on the 6th of October, 1846; that the application was denied on the 24th of March, 1847, on an interference declared by the patent office, between Perry and the defendant, and two other applicants, testimony having been taken on the interference, and a hearing had on the 1st of March, 1847, and the commissioner holding that the defendant was entitled to the patent; that thereupon Perry appealed from the decision of the commissioner to the chief justice of the district court of the United States for the District of Columbia, who affirmed the decision; that the patent was then issued to the defendant; and that, on the 6th of April, 1847, Perry assigned to the plaintiff, by an instrument in writing under his hand and seal, and for a valuable consideration, all his right to the improvement as set forth in the specification filed by him, and authorized the commissioner of patents to issue the patent for it to the plaintiff. There was no averment of the recording of the assignment in the patent office. The bill also set forth various facts as going to show Perry's title to the patent. The defendant demurred to the bill, and the principal question raised was, whether the assignment, under the circumstances stated, was valid, and passed the interest in the invention, so as to enable the plaintiff to sustain the suit in his own name.

Edwin W. Stoughton, for defendant.

I. The assignment from Perry to the plaintiff, being designed to transfer a mere title in litigation, and thereby to give the plaintiff only the right to stand as a hostile party in a legal proceeding, is absolutely void. Prosser v. Edmonds, 1 Younge & C. Exch. 491; Wood v. Downes, 18 Ves. 120; 2 Story, Eq. Jur. § 1040 et seq.; Gardner v. Adams, 12 Wend. 297. II. Assuming, however, that the assignment is valid, it must be recorded, as a condition precedent to issuing the patent to the plaintiff as assignee. Act March 3, 1837, § 6 (5 Stat. 193). The plaintiff is bound to show a title to the patent at the time of filing the bill, and, to do this, he must aver in the bill the recording of the assignment. Dobson v. Campbell [Case No. 3,945]; Wyeth v. Stone [Id. 18,107]; Nesmith v. Calvert [Id. 10,123]. III. The act of 1839 authorizes the applicant for a patent, and him only, to institute proceedings in equity after a decision against him by the commissioner or on appeal. Even though the assignment from Perry to the plaintiff may be valid, Perry should have been the plaintiff in this action.

Charles B. Moore, for plaintiff.

I. The application for the patent having been made by Perry in October, 1846, testimony taken, and the applicants heard in March, 1847, Perry's right to a patent became and was a valuable vested right, which could be assigned, and the assignment of it will be protected. Curt. Pat. § 189; Wilson v. Rousseau, 4 How. [45 U. S.] 674. II. No record of the assignment is necessary as a condition to any relief. If necessary, it will be sufficient to record it before a decree. Dixon v. Moyer [Case No. 3,931]; Brooks v. Byam [Id. 1,948]; Pitts v. Whitman [Id. 11,196]. III. A court of equity always recognizes an assignee, and requires the real party in interest to sue. Ogle v. Ege [Id. 10,462]; Field v. Maghee, 5 Paige, 539; Rogers v. Traders' Ins. Co., 6 Paige, 583; Sedgwick v. Cleveland, 7 Paige, 287; Van Hook v. Throckmorton, 8 Paige, 33.

NELSON, Circuit Justice. The sixteenth section of the act of July 4, 1836, speaks of the party making the application for the patent, as the proper person to file a bill in case of a refusal by the board of examiners to grant the patent, (the chief justice of the District of Columbia was afterwards substituted in their place,) and, doubtless, referred to the inventor, as no provision then existed authorizing him to assign his interest before the issuing of the patent. But, the sixth section of the act of March 3, 1837 (5 Stat. 193), provides, that any patent thereafter to be issued, may be issued to the assignee of the inventor, the assignment being first entered of record; the application still to be made in the name of the inventor, and the specification to be sworn to by him. After the assignment of the invention, under this section, by which the inventor divests himself of all interest therein, and transfers it to the assignee, although the application

for the patent must be made in his name, in conformity with the statute, still, for all substantial purposes, and in judgment of law, the assignee is the party making the application, and, we think, comes, if not within the letter, at least within the spirit of the provisions of the sixteenth section of the act of 1836, and of the tenth section of the act of March 3, 1839. He would, no doubt, be held liable as such for the expenses mentioned in the latter part of the sixteenth section, and for any other to which the applicant might become subject.

We are also inclined to think, that the assignment in the present case is valid, notwithstanding it was made after the rejection of Perry's application by the commissioner, and his appeal to the chief justice from that decision; and that the objection, on the ground that the invention was the subject of doubt and dispute, and had even been set aside by the commissioner, is not well founded. Most of such applications are resisted, and become the subjects of discussion before the commissioner, and frequently without any person objecting except the commissioner himself. The case does not stand on the footing of a right or claim in litigation in a court of justice. The hearing before the commissioner is informal and summary, and not final. The application may be renewed from time to time, on the same or additional evidence, the previous hearings and decisions creating no bar to a further investigation. The chief object of the provision authorizing a sale of the whole or of any part of the invention before the issuing of the patent, was, doubtless, to enable the inventor to obtain means to pursue his application before the proper authorities, until it was allowed or refused; and the more obstinate the resistance, the greater the necessity for the provision. We are not aware that it has ever been doubted, that an assignment of the whole or of any part of the interest in a patent, after it was granted, would be valid, notwithstanding it was at the time the subject of litigation; and yet, the argument would be as strong, if not stronger, in favor of the invalidity in such a case, as it is in the present one. This case is distinguishable from that of Prosser v. Edmonds, 1 Younge & C. Exch. 491, referred to on the argument, in two particulars: First, an invention is, within the contemplation of the patent laws, a species of property; and secondly, the assignment is made in pursuance of express enactment. 2 Story Eq. Jur. §§ 1039–1048, and cases there referred to.

As it respects the recording of the assignment in the patent office, it is enough, within the terms of the sixth section of the act of 1837, if it be recorded at any time before the issuing of the patent. See, also, in this connection, the latter part of section 16 of the act of 1836.

On looking into the bill, we are of opinion that there is a sufficient averment that Perry was the first and original inventor of the improvement, and the facts and circumstances detailed go to support, rather than weaken, as has been insisted, the general allegation.

Upon the whole, we think the assignment is valid, and the bill properly filed in the name of the assignee, he being the only real party in interest, and that the averments and facts set forth therein show a sufficient title prima facie in him to the patent, on the ground that Perry was the first and original inventor.

Demurrer overruled.

Case No. 5,281.

GAY v. LYONS et al.

[3 Woods, 56.] [1]

Circuit Court, E. D. Louisiana. April Term, 1877.

REMOVAL OF CAUSES — PROCEEDING TO TEST THE VALIDITY OF MARSHAL'S SALE.

1. A plaintiff who has a suit in a state court in which there is a controversy between him and a citizen of the same state touching the title to a tract of land, cannot remove the case to the federal court merely because he claims title under a sale made by the United States marshal upon a fieri facias issued from the federal court.

2. Such a case cannot be removed unless the validity or effect of the judgment, or the proceedings and sale under which the plaintiff claims title, is brought in question.

This cause came on to be heard upon the motion of the defendants [G. Lyons and others] to remand the case to the district court for the fifteenth judicial district, where the action had been originally brought, and from which the plaintiff had removed it.

The petition filed in the state court represented that Edward J. Gay, the plaintiff, on June 5, 1875, became the purchaser at a sale made by the United States marshal, by virtue of an execution issued from this court on a judgment rendered therein, in the case of James Brown v. John Nelson, of a certain Acadia plantation, situated in the parishes of Lafourche and Terbonne; that the marshal made and delivered to him a deed for the lands so purchased, which was duly recorded in the proper offices in said parishes; that in executing said judgment and completing the proceedings, the marshal in accordance with the requirements of article 708 of the Louisiana Code of Practice, directed and required the recorders of said two parishes to release all mortgages standing recorded in said parishes against said Acadia plantation, and the recorder of the parish of Terbonne having refused to erase said mortgages, the said plaintiff, Edward J. Gay, Edward J. Gay, Jr., and Samuel Cranwell, composing the firm of E. J. Gay & Co., had

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

filed in this court a bill against all parties in whose name any mortgage or privilege stood recorded in said parish of Terbonne, and particularly against Flavillus S. Good and H. M. Johnson, the recorder of said parish, in which bill they averred that they were the owners of said property, and prayed that the said defendants thereto might be compelled to erase and cancel all said mortgages, and that it might be decreed and determined that the mortgage and vendor's lien recognized in said judgment of James Brown v. John Nelson were the superior lien on said property, and the price at which said property was sold not being sufficient to meet the whole of the vendor's privilege and mortgage, to have it decreed that all other mortgages should be erased. The petition averred that said case was still pending in the state court. The petition in the case under consideration, further alleged that the plaintiff, Edward J. Gay, immediately after said adjudication by the marshal on June 5, 1875, as aforesaid, went into possession of the property sold to him and remained in quiet possession thereof until the sheriff of the parish of Terbonne, to wit, the defendant, G. Lyons, disturbed his possession by seizing certain portions of said plantation which were particularly described; that said seizure was made by virtue of a writ of fieri facias issued from the district court of the fifteenth judicial district of the state of Louisiana in the suit of F. S. Good v. John Nelson and Others. The petition claimed and averred that said seizure and all the proceedings of the sheriff and said Good under said judgment were illegal and an infringement on the rights of plaintiff, (1) because the property having been sold and conveyed to the plaintiff as aforesaid, and his deed having been recorded before Good issued his fieri facias, and plaintiff being in possession under his purchase and deed, his deed and conveyance could not be treated as a nullity, and until said sale was set aside no seizure could be made, and (2) that if any nullity existed the same was relative only and depended on the questions and issues raised in said bill filed by the said members of the firm of E. J. Gay & Co., and that all proceedings of said Good against said property should be suspended until said issues are determined by the court. The petition further alleged that the claim of James Brown on which said property was seized and sold, was the paramount claim against said property, and had preference over the claim set up by Good; that the claim of James Brown on which the property was sold was a partnership debt of the firm of Nelson & Donelson, and said property was sold as partnership property of said firm, and that the claim of Good was an individual claim against some of the heirs of one of the members of said firm; that Nelson & Donelson were partners in planting in the state of Louisiana; that they purchased as such partners the said Acadia plantation, and the notes on which the suit of James Brown v. John Nelson and Others was based represented the vendors' privilege, and were superior to all claims and pretensions of said Good; that Good and those under whom he claimed had notice of the existence of the outstanding claim for a part of the purchase price of said Acadia plantation. The petition then proceeded to allege various grounds on which it was claimed that the writ of fieri facias issued at the instance of Good was without warrant of law, and could not be executed. The petition prayed for the writ of injunction enjoining and prohibiting the said Lyons as sheriff, and the said Good from selling the said property until the further order of the court. The injunction as prayed for in the petition was allowed by the state court and served. Afterwards, and before any answer of the defendant had been filed, the plaintiff filed his petition for the removal of the cause to this court and tendered his bond as required by law. The state court refused the application for removal. Nevertheless, the plaintiff, having obtained a transcript of the record, filed it in this court. Thereupon, the defendant moved to remand the cause to the state court, and upon this motion the case was heard.

John Finney, H. C. Miller, and Lyman Harding, for motion to remand.

J. R. Beckwith and Barrow & Pope, contra.

WOODS, Circuit Judge. The ground upon which the motion to remand is based is that this is not a case of which the court has jurisdiction, all the parties being citizens of the state of Louisiana. To this the plaintiff, conceding the fact that the controversy is not between citizens of different states, replies that it is a case "arising under the constitution and laws of the United States," and is therefore removable to this court under section 2 of the act of March 3, 1875 (18 Stat. 470). The plaintiff's claim is that his rights rest on judgments of the United States circuit courts. He avers that "the validity of the judgments depends on the laws of the United States creating the circuit courts; so far as the claim of plaintiff rests on sales, the validity of the sale depends on the laws regulating the proceedings in execution of the judgment, and these are federal and not state laws. Without the laws of the United States creating the circuit court, fixing its jurisdiction, providing for issuing execution, the officers to execute the same, and prescribing the manner and effect of said execution, the plaintiff's rights would never have arisen at all."

To give full effect to this line of argument, it would follow that whenever a person buys real or personal estate at a sale made by a United States marshal by virtue of a judgment of a United States court, that court has ever after jurisdiction over all controversies

arising in relation to the title of the property sold, without respect to the citizenship of the parties to the suit. If the marshal sells a tract of land to A, and B sets up title to it, claiming under an older and better title than that derived from the marshal's sale, the argument is that the case presented is one arising under the laws of the United States. Such a position is not tenable. Now, in the case under consideration, the plaintiff sets up title by virtue of the marshal's sale to himself of the premises in controversy. It does not appear that the validity of this sale, or of the proceedings of the marshal antecedent to the sale, or of the judgment under which the sale was made, is at all questioned. What the answer of the defendant may be it is impossible to know until it is filed. So far as we can gather from the petition, the claim of Good may rest on the fact that he has an older and better lien on the premises, or that he had no notice of the vendor's lien under which the plaintiff claims priority. The dispute seems to be between citizens of Louisiana concerning the rank and priority of mortgages; matters settled by the law of Louisiana, and to be construed and take effect according to that law. At all events it does not appear that the validity of the judgment or proceedings and sale under which the plaintiff claims is at all called in question. Clearly until such question is raised, the case, when it is between citizens of the same state, cannot be removed to the federal court on the ground that it is one arising under the constitution and laws of the United States.

In the case of Dupasseur v. Rochereau, 21 Wall. [88 U. S.] 130, the court said, "that when a state court refuses to give effect to the judgment of a court of the United States, rendered upon the point in dispute, and with jurisdiction of the case and parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for review. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States establishing the circuit court and giving it jurisdiction, and hence it would be within the judicial power of the United States as defined by the constitution." But it is plain from this language that, if the state court did not refuse to give effect to the judgment of the federal court, the United States supreme court would not entertain jurisdiction. And so, unless the effect of the judgment and proceedings of a federal court are brought into controversy in a suit in a state court, there is no ground for removal.

It has been expressly held by the supreme court of the United States, in McStay v. Friedman, 92 U. S. 723, that it had no jurisdiction of a case brought up on writ of error to the supreme court of California, where, in ejectment for a part of the lands confirmed to the city of San Francisco by an act of congress, the validity and operative effect of which were not questioned, the judgment of the state supreme court was adverse to the defendant, who endeavored to make out such possession as would, under the operation of the city ordinance and the act of the legislature, transfer, as he claimed, the title of the city to him. See also Romie v. Casanova, 91 U. S. 379. In the case of Trafton v. Nougues [Case No. 14,134], Sawyer, Circuit Judge, held that only suits involving rights dependent on a disputed construction of the constitution and laws of the United States could be transferred from the state to the federal courts under the clause "arising under the constitution and laws of the United States," of section 2 of the act of March 3, 1875, to determine the jurisdiction of the United States courts, etc.

I am of opinion, therefore, as it does not appear from the record that there are any rights in this case dependent on a disputed construction of either the constitution or laws of the United States, nor that the effect of the judgment of a federal court is called in question in the state court, that this court has not jurisdiction of the case, and the motion to remand it should prevail. Ordered accordingly.

Case No. 5,282.

GAY v. UNION MUT. LIFE INS. CO.

[9 Blatchf. 142;[1] 2 Bigelow, Ins. Cas. 4.]

Circuit Court, D. Connecticut. Sept. 21, 1871.

LIFE INSURANCE—SUICIDE—MORAL CONSCIOUSNESS OF ASSURED.

1. A policy of insurance on the life of a person contained the condition, that, if he should die by suicide, the policy should be null and void, and the insurers should not be liable for the loss. The subject insured died by an act of self-killing, by himself firing a pistol at his head: *Held*, that, if the subject insured, at the time he fired the pistol, was conscious of the act he was committing, intended to take his own life, and was capable of understanding the nature and consequences of the act, the insurers were not liable; that, if the act was thus committed, it was immaterial whether he was capable of understanding its moral aspects, or of distinguishing between right and wrong; and that, if he was not thus conscious, or had no such capacity, but acted under an insane delusion, overpowering his understanding and will, or was impelled by an uncontrollable impulse, which neither his understanding nor will could resist, the insurers were liable.

[Cited in Mutual Life Ins. Co. v. Terry, 15 Wall. (82 U. S.) 583.]

[Cited in Van Zandt v. Mutual Ben. Life Ins. Co., 55 N. Y. 177.]

2. The fact of self-killing being conceded, it was for the party claiming to recover on the policy, to establish that the subject insured was in the condition, when he committed the act, which left the insurers liable.

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

3. The value of the testimony of expert witnesses, considered.

This was an action at law, founded on a policy of insurance on the life of Sheridan Gay, for $5,000, payable, in the event of his death, to his widow, the plaintiff [Ellen M. Gay]. The policy was dated June 3d, 1863, and Gay, whose life was insured, shot himself, in a passenger train, on the Hartford, Providence and Fishkill Railroad, December 10th, 1868. The annual premiums on the policy had been regularly paid. One of its conditions was, that, "in case he shall die by suicide, * * * this policy shall be null and void, and said company shall not be liable for the loss." The company declining to pay the loss, the plaintiff brought this suit. The defendants pleaded the general issue, and, by way of special plea, averred, that Sheridan Gay, whose life was insured, did commit suicide, and that thereby, the policy became void. Issue was joined on these pleas. On the trial, the plaintiff admitted that Gay's life was terminated by self-killing, but denied that the act was "suicide," within the meaning of that word as used in the policy, and contended, that, when he shot himself, he was insane, incapable of distinguishing between right and wrong, and unconscious of the nature and consequences of the act he was committing, and that he was driven to it by a mere blind and irresistible impulse, during a paroxysm of insanity which overwhelmed his reason and will. The defendants, on the contrary, insisted, that the facts clearly proved that Gay, though he might have been under some delusions originating in a painful and guilty secret which he carried in his breast, and which had impaired his health, and, to some extent, unsettled his mind, understood the nature and, at least, the physical consequences of his act, and intended to take his own life; and that, therefore, his act of self-destruction was suicide, within the meaning of the policy, and rendered the policy void.

John T. Wait and Richard D. Hubbard, for plaintiff.

Jeremiah Halsey, Henry C. Robinson, and Daniel P. Tyler, for defendants.

WOODRUFF, Circuit Judge (charging jury). The case to which you have listened so patiently during several days is one of no inconsiderable importance. To the plaintiff it involves the question whether she shall recover the provision which was made for her in contemplation of the loss of him to whom she looked for support, maintenance, and protection; and to the defendants, as claimed by them, and as conceded by the plaintiff, it involves not merely the loss of the money that is demanded, but the construction and effect of an important contract in general use, on the meaning and effect of which rests, as the case may be, their responsibility to great numbers who have effected like insurances with them. This special importance is not, perhaps, very material. It is always important, in courts of justice, that the court and jury should feel that, whether amounts in controversy are great or small, their duty is single, and is to be performed under a serious sense of responsibility, and with the sole purpose to render justice according to the evidence and according to the law.

The action is brought upon a contract by which these defendants, in general terms, and in their principal assumption, agree to pay to the plaintiff five thousand dollars, on the death of Sheridan Gay, and on due notice and proof thereof, but, nevertheless, with a condition, that, if he die by suicide, the policy shall be void, and the obligation, thus assumed in such general phrase, shall be of no force or effect.

It was entirely competent for the parties to the instrument to make just that agreement. Parties to a contract may consent to any stipulation not in violation of law; and, when they volutarily enter into an agreement, or when they voluntarily annex to an engagement conditions and limitations, they are entitled to have those conditions and limitations observed, according to their true import and meaning. It is not for the court, and it is not for you, to pause in your deliberations, to consider whether such conditions, rightly interpreted, are wise—whether their enforcement is humane—whether, under any circumstances, such enforcement may seem harsh or unkind. It is not for you to yield to considerations suggested by the infirmities, or even misfortunes, of our poor human nature. These considerations belong to the parties who enter into the engagement, who, when agreeing together, consent that their contract shall bear its just construction, and shall, if it be enforced, be enforced according to its proper legal effect. Both are bound by it; and I may add to this, that, upon this trial, as it seems to me, both parties come into court ready and willing to be bound by this instrument, with its conditions. They differ, however, as to its meaning in reference to the facts to which it is be applied; and, next, they differ as to the facts themselves. The plaintiff claims that, Sheridan Gay having died, the sum insured is due to her; and that the circumstances of his death are not within the condition of the contract relieving the defendants from liability to pay the money to her. The defendants, on the other hand, claim that, although the subject of the insurance, the life of Sheridan Gay, is at an end, and he is dead, nevertheless, his death occurred in a manner which is within the meaning of the term "suicide," as that is used in the condition annexed to the policy; and that, therefore, the money, the sum named in the policy, is not due. Each party, plaintiff and defendant, is here asking that this case may be decided according to their legal rights,

neither asking, nor having any right to ask, anything out of pity for the deceased, sympathy for his widow, or regret that the defendants should be subjected to loss. Each is doubtless sincere in the views presented by the respective counsel. It is right that the plaintiff should insist upon payment of the sum insured for her benefit, if it is rightly due to her; and it is right that the defendants, if the money is not payable, should decline to pay it. The officers of the defendants' company would have been derelict in the performance of their duty if they had not resisted the claim of the plaintiff, if they had good reason to believe, and did believe, that the defendants are not liable.

The candor of the counsel, and the distinctness of the uncontradicted evidence, have reduced the subject of examination and decision to two inquiries, one of which is addressed to the court, and the other to you.

The making of the contract, its terms and conditions, the payment of the premium to the defendants, the death of the person whose life was the subject of insurance, and that his death was caused by the physical act of that person, or, in the language of the concession, by self-killing, the instrument of that killing being a pistol discharged by himself, the ball penetrating his head and causing death, are all conceded. From this point the parties differ. The plaintiff insists that this self-killing was not "suicide," within the meaning of that term, as employed in the policy; but, on the contrary, that, when Sheridan Gay discharged the pistol, he was insane, by reason of disease, and, at the time, was so far unconscious of the nature and the consequences of the act which he was committing, and so beyond the government of his will, by the pressure of delusion and other blind, ungovernable impulse, as to be incapable of legal understanding, and not the subject of legal responsibility, and, therefore, in judgment of law, incapacitated to do any act which could operate to defeat this policy. The defendants, on the other hand, insist, that, when Sheridan Gay killed himself, he had consciousness enough, sufficient power to choose, understanding sufficiently capable of comprehending what he was doing, and the consequences of his act, to make the act suicide, within the condition of the policy. This exhibits the case as I first stated it. The parties differ as to the meaning of the term "suicide," as employed in the policy, and to be applied to the facts which you may find to be established by the evidence; and they differ as to the actual facts which, in reference to the contract, you ought to find to be established.

The first point of difference, that is to say, the meaning and legal effect of this condition of the policy, is for the court to determine. In regard to that, the duty and responsibility is upon us, and not upon you. With it you have no concern, except to see to it that you accept the instruction of the court, and, in good faith, make it your guide in determining the other question, which is, what facts the proofs do establish. This should be so. The question is a grave one, one upon which just and learned men have differed. If we should err in our instructions to you, the matter can be further considered, and even more deliberately than on this occasion, in this, and if need be, in a higher tribunal; while, if you should make a mistake in the matter, it might be impossible, according to our modes of judicial administration, to prevent the injustice. In the discharge of our duty, we shall not attempt to give a definition of the word "suicide," as employed in this and like policies of insurance, which will necessarily be apt to every supposable case, and cover the whole question, as it may arise in other cases. What we say will be with sole reference to what is conceded or uncontroverted, or which may, perhaps, be found by you to be established, in this particular case. We are not called upon to speak of accidental self-killing, when there is not merely no intention to kill, but every instinct and desire to continue in life is in full force; nor of a choice of the mode of death, when death itself is absolutely certain, as if, to escape the torture of death by gradual burning in a burning ship, the sufferer should cast himself, as an act of choice and will, into the water; nor of a case where erroneous opinions and unbelief of a future leads one (as perhaps it has many) to make the question of life or death, one of mere choice to endure, or not longer to submit to live; nor of a case where the opinions of the subject are such that the question of life or death has no moral aspects whatsoever. Of these, or like cases, we say nothing. Not, however, to intimate any doubt in relation to them, but to say, that the rule we give for your guidance is not given to be applied to them. It is enough, if it be a just rule in this case, whatever more restricted or more comprehensive rule might be necessary, if it be possible, by any rule, to reach and cover all cases. Nor are we called upon, nor do we intend to go, beyond the claim which the defendants make in this case. We understand them to concede, that, if Sheridan Gay, when he fired the pistol, was unconscious of the act, did not intend to take his own life, or was incapable of understanding the physical consequences of the act, then the act was not "suicide," within the meaning of the condition of the policy, and the company are liable. But they claim, that, whether he was capable of appreciating the moral consequences of the act, as an act right or wrong, is immaterial; and their claim, therefore, is, that, if the deceased intended to kill himself, and did kill himself, when capable of understanding the physical consequences of the act, irrespective of its moral bearings, as right or wrong, the defendants are not liable. They further claim, that the contract is governed by the law of Massachusetts, or,

rather, the exposition of the law, applicable to contracts like this, by her judicial tribunals; and that the rule claimed by them here is in accordance with the decisions of the courts of that state. This presents the defendants' view of the construction of the contract. The plaintiff, on the other hand, cliams a different signification of the term "suicide" in this policy, and denies that this court is bound to follow the decisions of Massachusetts courts.

Not deeming it necessary for the purposes of this trial, to say anything to you upon the subject, we pass the legal question raised by counsel, whether the decisions of the courts of Massachusetts are controlling upon us, in determining the interpretation or legal effect of this policy. That, if it be a question, is for us and not for you.

We do instruct you, in view of the claims, and of the concessions, expressed or implied, in the positions taken by counsel, that, if Sheridan Gay, at the time he fired the pistol, was conscious of the act he was committing, intended to take his own life, and was capable of understanding the nature and consequences of the act, the defendants are not liable; and that, if the act was thus committed, it is immaterial whether he was capable of understanding its moral aspects, or of distinguishing between right and wrong. And, to give you the alternative, if, on the other hand, he was not thus conscious, or had no such capacity, but acted under an insane delusion, overpowering his understanding and will, or was impelled by an uncontrollable impulse, which neither understanding nor will could resist, then the defendants are liable. Under this alternative view of the liability or non-liability of the defendants, you are to determine the question of fact—What was the condition of Sheridan Gay when he fired the pistol? The defendants' counsel rightly claim, that it is for the plaintiff (having conceded the fact of self-killing) to satisfy you that he was in the condition, when he committed the act, which leaves the company liable, as we have stated the rule.

The plaintiff claims, that the proof does establish that state of insanity, or overpowering influence of delusion, or uncontrollable impulse, which rendered him incapable of committing suicide, within the definition given you. In support of that claim the plaintiff, in the testimony elicited on her behalf, points to his overwork in New York; his failure in health; his consequent depression of spirits; the alleged evidence of disease affecting his head—symptoms, as claimed, not then suggesting derangement, but now denoting its incipient stage; his abandonment of his employment, and subjecting himself to the morbid tendencies of a comparatively idle life; his exposure and over-tasking himself, on his visit to Rochester, and the consequent pain in his head, and fainting, claimed to indicate a diseased condition, in which the head and brain were involved; his apparently increased debility and dejection on his return; the exhibition of reserve, or less freedom in social intercourse; his more than usual nervous excitement, restlessness, inability to sleep, and alternations of flush and pallor in his countenance; his groundless suspicion and jealousy of his brother-in-law, Mr. Ames; towards the last days of his life, his false hearing, freely commented upon by counsel, and claimed to be the effect of a diseased mind and an unduly excited imagination, suggesting to him what was unreal; his excited sense of hearing, claimed to be shown by his twice hearing, when up stairs, in his room, what was said in an ordinary tone of voice down stairs in the dining room; his restless, wild appearance, starting and looking suddenly, from time to time, as if in expectation or fear of something approaching; his irrational conduct on Friday towards Mrs. Ames and her husband, and especially on Tuesday night; his suspicion of an attempt to poison him, and apprehension of an endeavor to arrest him; his persistent belief that reports were in circulation prejudicial to his character; and, on the last morning, his apparent purpose to ride to Amyville, with his wife to accompany him, causelessly and suddenly abandoned, or, if no such purpose existed, then, his crafty deception practiced on his wife, to elude her, and conceal the purpose or the impulse under which he was acting; his leaving behind him a note intimating that he left from a fear that he should shoot Mr. Ames; his vacillating conduct, in taking the train westward, towards Hartford, leaving the cars at Plainfield; his depressed appearance there; his return towards Moosup without any fixed design, or, at least, expressing a state of indecision; his continuing his journey a little further; the evidence of nervous excitement in the cars; and, finally, his sudden entrance into the ante-room of the car, and the discharge of the pistol at his head.

Although the counsel for the plaintiff insists that there is not any sufficient proof to warrant the submission of the question to you, whether he had been unfaithful to his employers at the time he lived in New York, and had unlawfully taken and appropriated their funds to his own use, the court is of the opinion that there is evidence on that subject which is proper for your consideration; and the suggestion of counsel is pertinent, that such a fact, if proved, would not weaken the force of the other evidence of his insanity, but rather suggests a cause, or, at least, an aggravation, of his disease, and makes his insanity more probable. A guilty conscience, fear of detection, and, perhaps, of punishment and disgrace, exciting his nervous system, stimulating his imagination, and thus increasing or co-operating with physical infirmity—all these, and other indications suggested by counsel, are claimed by the plaintiff to be established by the proofs, and to show that Mr. Gay, when he killed himself, was not in a condition in which he did or could commit

suicide, within the test which we have given for your guidance, but, on the contrary, that he was under the controlling influence of insane delusion, and overwhelmed by a sudden and violent paroxysm, and acted without consciousness or capacity to understand the consequences, and without an intent to effect the result. Whether these facts, relied upon by the plaintiff, are proved, and whether, if proved, they establish the claim of the plaintiff in this respect, is for you to consider and determine.

On the other hand, the defendants, in their presentation of the evidence for your consideration, admit that the testimony shows that Mr. Gay was under an insane delusion. They say that his health was impaired; that he was conscious of being guilty in his transactions with his employers in New York, and, concealing this secret, was in constant dread of discovery, punishment and disgrace; that his nervous system was affected, his imagination unduly excited, a groundless jealousy and suspicion of his brother-in-law were produced, and a delusion, that, by his (Mr. Ames') agency, discovery and disgrace were impending, possessed his mind to such a degree, that he was, in the language of the defendants' counsel, an insane man. But they claim and urge that this insanity, on the subjects to which it related, however produced, was not such as to deprive him of capacity to know and comprehend what he did, or of actual knowledge and intention to do as he did, with a distinct understanding of the nature and consequence of his acts; that, although his judgment was perverted, he acted intentionally, knowing what he did, and his final act of killing himself was with plan, intention and comprehension, such as made him a suicide, as that term has been defined by the court; that, when he thought of the deficiency in his accounts, he understood what were the natural and probable consequences of discovery; that, when, under the influence of his delusion, he thought Mr. and Mrs. Ames were talking upon that subject, and that Mr. Ames had written or was about to write to New York, he understood that discovery would be the result; that, when he meditated or spoke of shooting Mr. Ames, if he had seen him put the letter in the post office, he knew the effect of shooting him, either to prevent the discovery, or to revenge it, or, at all events, that shooting him would kill him; that, when he took the pistol, notwithstanding the remonstrances of his wife, he knew and comprehended how to use it, and understood its effects; that, when he heard the steps of his mother-in-law on the stairs, and alarmed his wife by the fear that he was going to shoot her, and gave the explanation, now conceded by the defendants to have been an insane delusion, that some one was coming to arrest him, he, nevertheless, knew the consequences of shooting the person approaching for such a purpose; that, when he assured his mother-in-law that he would not hurt a hair of her head, he comprehended the fear expressed by his wife, and knew what it would be to shoot her mother; that, when, in his letter to Mr. Ames, he declared that Mr. Ames would know why he got away to avoid shooting him, he comprehended both the consequences of shooting Mr. Ames and the consequences of getting away, and that he intended to accomplish the latter and avoid the former; that his taking the can for oil that morning, his purchase of the cigar, and the payment of his fare, indicated knowledge, intention, capacity and understanding; that even the deception practiced upon his wife, if it was a deception, as has been claimed, is to be explained, either by a purpose to conceal his then existing intention, and avoid inquiry, or to spare himself the pain of a conscious final parting; that, under the influence of fear of discovery and disgrace, and acted upon by the insane delusion that his misconduct had been or would be disclosed, he determined to kill himself; that his appearance at Plainfield, and in the cars, indicates comprehension of the act he was then intending and of its consequences; that the manner in which the act was committed shows not impulse, but determination and deliberation; and, finally, that the evidence does not warrant the conclusion, that any sudden outbreak or paroxysm of violence, overpowering reason, memory or will, made him unconscious of the act he was committing, made him incapable of exercising will or volition, or deprived him of capacity to understand the consequences which would result from the act itself. Now, whether all the facts embraced in these claims of the defendants, and others more fully presented by the counsel, are established by the evidence, and, especially, whether the inferences which they deduce therefrom are warranted or not, it is for you to decide; but, whatever you conclude in that respect, you must bring all the facts, and your inferences, to the test which we have given for your guidance.

Counsel had a right to request us to say, that one who is conscious of the act which he commits, and has capacity to comprehend its nature and consequences, is presumed to intend the results which naturally and ordinarily follow from it; and counsel had a right to ask the court to explain the nature, and to remark upon the force, of the testimony of an expert expressing an opinion upon the case presented by other witnesses.

In the departments of science and the arts, there are many facts and many deductions inferable from facts, which are out of the sphere of the knowledge of men in general. They are not supposed to be understood by the court or by the jury. Men of study, experience and skill in the particular art or science to which a judicial investigation may relate, are permitted to aid, by giving the light which such study, experience and skill will throw upon the subject. Their opinions are stated as deductions which are proved, in such study and experience, to flow from

the facts stated. The confidence placed in such opinions, in ordinary life, illustrates the reason, and, to some extent, the ground, upon which such opinions are permitted to be received and weighed by the jury. If we are ill, we may know how we feel or suffer, and how we have felt or suffered, and may know all that are called "symptoms," and all the visible physical indications; but we do not know the cause or nature of the illness. Our physician, being consulted, declares his opinion, and, to a greater or less extent, according to the nature of the case, and our confidence in him, and the clearness and distinctness of his opinions, we rely upon it. This illustration shows, to some extent, the ground upon which such testimony is permitted and courts of justice receive the opinions of those whose study, experience and skill enable them to deduce inferences and express opinions of which courts and juries are incapable. The value, however, of the opinions of experts differs largely in degree, in different cases. It is of first importance that the facts upon which they are founded be satisfactorily established. In the present case, it does not occur to us that there was any dispute as to the facts in relation to which the expert spoke. It is, next, of importance, that the integrity and skill of the witness be known. I may add here, that no question is made of the competency of the witness who has testified here, or of the confidence due to his integrity. But this is not all. Where the expert states precise facts in science, as ascertained and settled, or states the necessary and invariable conclusion which results from the facts stated, his opinion is entitled to great weight. Where he gives only the probable inference from the facts stated, his opinion is of less importance, because it states only a probability. Where the opinion is speculative, theoretical, and states only the belief of the witness, while yet some other opinion is consistent with the facts stated, it is entitled to but little weight in the minds of the jury.

Testimony of experts of this latter description, and especially where the speculative and theoretical character of the testimony is illustrated by opinions of experts on both sides of the question, is justly the subject of remark, and has often been condemned by judges as of slight value. Like observations apply, in a greater or less degree, to the opinions of witnesses who are employed for a purpose, and paid for their services, who are brought to testify as witnesses for their employers. This last observation has no pertinency to the present case, and is only made for the purpose of explaining the reason why testimony of this sort has been the subject sometimes of such comments as have been made in your hearing. This condemnation is not always applicable. Often it would be unjust. Where an expert of integrity and skill states conclusions which are the necessary, or even the usual, results of the facts upon which his opinion is based, the evidence should not be lightly esteemed or hastily discredited. But, after all, the question of fact in issue is not for the expert to decide. The question of fact in this case is neither for the expert nor for the court. It is for you to decide, upon your sound judgment, under the oaths which you have taken, to render a verdict according to the whole of the evidence submitted to you for consideration. I, therefore, repeat the test or rule of law by which you are to be guided in determining this case. If Sheridan Gay, at the time he fired the pistol, was conscious of the act he was committing, intended to take his own life, and was capable of understanding the nature and consequences of the act, the defendants are not liable; and, if the act was thus committed, it is immaterial whether he was capable of understanding its moral aspects, or of distinguishing between right and wrong. If, on the other hand, he was not thus conscious, or had no such capacity, but acted under an insane delusion, overpowering his understanding and will, or was impelled by an uncontrollable impulse, which neither understanding nor will could resist, then the defendants are liable, and your verdict must be for the plaintiff.

If, under these instructions, you find for the plaintiff, your verdict will be for the sum of $5,000, with interest from the time the sum insured was payable by the policy, which, for the purposes of the verdict, is conceded to be March 17th, 1869.

The jury found a verdict for the plaintiff.

NOTE [from the original report in 2 Bigelow Ins. Cas. 4]. In a letter from Hon. W. D. Shipman, one of the learned judges before whom this case was tried, he says in reference to this case: "The rule of law laid down in this charge was the result of repeated and protracted consultations between the judges who heard the cause; and we fully agreed on the point as stated by Judge Woodruff to the jury." In the note to Borradaile v. Hunter [2 Bigelow, Ins. Cas. 280], all the cases upon this subject are collected, and the rulings in them stated. See, also, Terry v. Life Ins. Co. [Case No. 13,839], decided the present year.

GAY (UNITED STATES v.). See Case No. 15,193.

GAYLER (WILDER v.). See Cases Nos. 17,648 and 17,649.

Case No. 5,282a.

In re GAYLOR.

[Betts, Scr. Bk. 65.]

District Court, S. D. New York. May, 1842.

BANKRUPTCY—PROOF OF DEBTS.

[1. Debts may be proven at any time during the sitting of the court on the day for showing cause, and are not restricted to the hour fixed in the notice.]

[2. The clerk of the district court, who is a standing commissioner, is not empowered to take proof of debts in bankruptcy.]

In bankruptcy.

The counsel for the bankrupt [Charles G. Gaylor] moves his final discharge non obstante objections filed by one of his creditors, or that those objections be disallowed as irregular and filed out of time.

BETTS, District Judge. This is a point of practice touching proceedings on the day for showing cause under the 70 day notice. The order was that the creditors should show cause against the discharge on the 13th June, at 10 o'clock. The court since the commencement of the June term, did not commence till 11 a. m., and this case was therefore not before the court, or in a situation for any proceeding in his behalf under the notice, before 11 o'clock, and creditors and others in interest would not be prevented coming in at that time and meeting his application. But it is a misapprehension of the practice to suppose that creditors are restricted to the precise hour in their appearance and opposition to the final discharge of the bankrupt. The act requires notice to appear at a particular time and place to show cause, &c., at which time and place any creditor may appear and contest the right of the bankrupt to a discharge and certificate. The exception to the objections in this case, that they were not filed previous to 10 a. m. or 4 or 5 minutes before 11, is of no avail. It was sufficient if they were on file when the case was moved or had been offered in court, and indeed under the 77th rule, objections may come in at any time during the sitting of the court on the day for showing cause. I do not intend now to say but that the bankrupt may file his petition for his certificate after the sitting on the day appointed for showing cause, but clearly under rule 77, he cannot take that step until the opportunity to oppose him in court, throughout its session, that day has been allowed for his creditors and it would therefore be more prudent and more in consonance with the terms of the rule not to put the petition on file until the day subsequent.

I shall allow the creditor to prove his debt nunc pro tunc before a commissioner, and on such proof being made, his dissent already interposed to stand. That probably will not be urged as of any avail, he being the only dissenting creditor and only representing $5,000 or $6,000 of debt out of a gross amount of $130,000, but the point being as to regularity and right, I shall permit his papers to have the same effect as if no mistake had occurred as to the officer who could verify his debt, and leave the case to be disposed as if his debt had been regularly proved at the time. The new proof must be taken and filed within two days. In the above case, the exceptions taken to the objections were that they were not filed before 10 a. m. on the day for showing cause, and that the debt was proved before the clerk of the court instead of a commissioner in bankruptcy. The decision settles the questions that debts may be proved any time during the sitting of the court on the day for showing cause, and that the clerk of the U. S. district court, who is a standing commissioner, is not empowered to take proof of debts in bankruptcy.

Case No. 5,283.

GAYLOR et al. v. DYER.

[5 Cranch, C. C. 461.] [1]

Circuit Court, District of Columbia. March Term, 1838.

REPLEVIN.

If the vendee of goods on a credit, upon receiving possession of them, agree in writing that they shall remain the property of the vendors until the purchase-money is paid, the vendors may, before payment, maintain replevin for them as their property against the marshal, who has seized them under an execution against the vendee.

[This was an action at law by Gaylor and Spicer against Edward Dyer.] The marshal had seized an iron chest as the property of one George K. Myers, under a fieri facias against him. The plaintiffs replevied it as their property, and produced in evidence the following writing, given to them by Myers, upon his receiving from them possession of the chest: "Philadelphia, Feb. 15th, 1836. This is to certify that I have this day purchased from C. J. Gaylor & Co., one iron chest for the Union Agency of Washington City, D. C., for which I have given them three notes of one hundred dollars each, payable on the last Friday of May next ensuing, and the said chest is to remain the property of C. J. Gaylor & Co. until the said notes are paid. Geo. K. Myers, for Thos. G. Henderson, Thos. Gibbons. Witness: J. B. Pickering."

Upon the trial, THE COURT (CRANCH, Chief Judge, giving no opinion) instructed the jury, at the motion of Mr. Coxe, for the plaintiffs, that the said instrument of writing, "is evidence of a conditional sale; and that the chest therein mentioned was, under said agreement, the property of plaintiffs until the payment of the notes given by said Myers; and unless the jury shall believe, from the evidence, that said notes are paid, the plaintiffs are entitled to recover." Verdict for plaintiffs.

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

Case No. 5,284.

GAYLORD et al. v. FT. WAYNE, M. & C. R. CO.

[6 Biss. 286.] [1]

Circuit Court, D. Indiana. Feb., 1875.

CORPORATIONS—FORFEITURE OF FRANCHISE—PRACTICE—CONFLICT OF JURISDICTION—PRIORITY OF POSSESSION—AMENDMENTS—LIS PENDENS.

1. The court will not forfeit the franchise of a corporation on the application of individuals; the right belongs to the state alone.

[Cited in Hardon v. Newton, Case No. 6,054.]

2. But if a bill prays for a receiver and general relief, the court will retain the bill for that purpose; a forfeiture of the franchise is not essential to the power of appointing a receiver.

3. The court which first takes jurisdiction of a controversy and the parties, is entitled to retain it to its final termination, and also to take possession of the res, subject of the controversy, exclusive of all interference from any other court of concurrent jurisdiction; and it is not essential that the court first taking jurisdiction of the controversy should also first take the actual possession of the res.

[Cited in Sharon v. Terry, 36 Fed. 357.]

[Cited in Texas Trunk R. Co. v. Lewis (Tex. Sup.) 16 S. W. 648; Sharon v. Sharon, 23 Pac. 1101; Smith v. Ford, 2 N. W. 159.]

4. If a receiver appointed by another court on bill filed pending this controversy, takes prior possession of the res, his possession is wrongful and should give way to the prior jurisdiction of this court.

5. The fact that the allegations of the bill were imperfect, and a demurrer was sustained, with leave to amend, does not change the fact of jurisdiction; as the amendments relate back to, and become part of, the original bill.

6. This doctrine does not apply to such a case.

[This was a bill in equity by Thomas G. Gaylord and others against the Ft. Wayne, Muncie & Cincinnati Railroad Company.]

McDonald & Butler and Hanna & Knefler, for complainants.

Coombs, Morris & Bell, for defendant.

Before DRUMMOND, Circuit Judge, and HOPKINS and BLODGETT, District Judges.

DRUMMOND, Circuit Judge. By the act of June 16, 1852, of this state [1 Rev. St. Ind. p. 242, § 16], it was provided that whenever a judgment was recovered against a corporation other than banking, and it remained unpaid for the space of a year after the rendition thereof, and execution was not stayed by appeal or supersedeas, the proper court should have power to declare the franchise of the corporation forfeited, and to appoint a receiver, who was to reduce the assets of such corporation to possession, and pay the debts of the same.

The plaintiffs in this case, having recovered a judgment against the defendant in this court in January, 1873, and the same remaining unpaid within the terms of the statute for more than a year, in April, 1874, filed a bill in this court asking for the forfeiture of the franchise of the corporation, and also that a receiver be appointed by the court, that he be ordered to reduce the assets of the corporation to possession, and use the same to pay its debts, and particularly the debts of the plaintiffs, and also asking for such other and further relief as would consist with equity and good conscience.

A demurrer to this bill was filed on the 6th of July, 1874. Upon the argument of the demurrer in December last, the court sustained the demurrer, and granted leave to the plaintiffs to amend their bill by the first day of January next following, the court being of opinion that it could not forfeit the franchise, that having been granted by the state, and that the state alone had the right to have the same forfeited; but the court stated, at the same time, that it would retain the bill and grant any equitable relief to which the parties were entitled; and, therefore, the bill was not dismissed, but leave given to amend. No controversy is made in this case but that the parties may have had a right to file a bill in the federal court, provided it was in the nature of a creditor's bill. The theory upon which the statute proceeds seems to be, that whenever a judgment is recovered, and remains unsatisfied for more than a year, no appeal or supersedeas being allowed, that of itself constitutes a legal insolvency of the corporation, and, authorizes an application for the relief named in the statute, namely, the appropriation of the assets of the corporation to the payment of its debts through a receiver. Therefore many of the allegations which are usually contained in a creditor's bill, and which have been considered necessary, are by the terms of this statute dispensed with; for example, the return of an execution nulla bona, before filing the bill.

In accordance with the permission given by the court on the 10th of December, when the demurrer was overruled, an amendment was filed to the bill on the 31st of December last. No question is made but that the bill as amended contains sufficient allegations upon which the court could grant equitable relief by the appointment of a receiver. Accordingly, on the application of the plaintiff, after this amendment was filed, a receiver was appointed, on the second day of January, 1875, who entered upon the performance of his duties, and took possession of the property of the defendant under the order made by the court. This possession was taken in a peaceable manner, without the use of any force; the parties who were in the actual possession at the time, upon the presentation of the order of the court, surrendering the property to the receiver of this court.

At the time the receiver was appointed by this court there was nothing in the pleadings

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

or on the files of the court to show that there had been a receiver appointed by another court to take charge of the property, or that any such receiver was in possession of the same; the fact being, however, that a receiver had been placed in possession of the property by the order of the Wayne circuit court prior to the appointment of the receiver by this court, and it being claimed that the possession was taken by the receiver of this court without consent or acquiescence of the receiver of the Wayne circuit court. The circuit court of Wayne county directed the arrest of the receiver appointed by this court for an illegal interference with its own order, and thereupon the receiver applied to this court at Indianapolis for a writ of habeas corpus, on which the receiver of this court was brought before it and a statement made of the facts in the case.

Inasmuch as it is conceded that the receiver appointed by this court was acting under an order duly made, and took peaceable possession of the property in pursuance of the order, no objection seems to be made by any of the counsel in this court to the discharge of the receiver from arrest; he is accordingly discharged. But the plaintiff in the suit in the circuit court of Wayne county has come before this court and alleged the filing of a bill of complaint, on the 10th day of November, 1874, and the appointment, on that day, of a receiver by that court and moves that the order made by this court appointing a receiver be rescinded, for the reason that there was a receiver of the state court then in possession of the property; and the question is whether this order should be rescinded, or should stand as an order properly made under the facts in the case.

It will be seen that the bill was first filed in this court. It was a bill asking the court to take possession of the property of the defendant, and to administer it for the benefit of its creditors. It is true that the bill asked, in addition to this, that the court should forfeit the franchise of the defendant; but the main object of the bill was to enable the plaintiffs to obtain payment, in whole or in part, of the judgment which they had obtained against the defendant. A declaration of forfeiture of the franchise would, of course, constitute no satisfaction of the claim which the plaintiffs had against it. The main purpose, therefore, of the bill was for the court by its receiver to take possession of the defendant's property. It is claimed this could not be done without a previous decree of forfeiture of the franchise. But the forfeiture of the franchise was only one of the prayers named in the bill, and which, so far as the plaintiffs were concerned, was immaterial. And it will be observed that the bill asks not only for the payment of their debt, but for the payment of the debts generally of the corporation, alleging that the assets of the corporation had become subject to the payment of its debts.

The demurrer was sustained on the ground that the allegations of the bill for the full relief asked on the part of the plaintiffs were defectively or imperfectly stated, not that there was no case made upon the bill, which, if properly stated, would entitle the plaintiffs to any relief. In other words, the court took jurisdiction of the controversy, although the allegations may be said to have been insufficient and imperfect.

The principle upon this subject is properly stated in the opinion of the circuit court of the Northern district of Illinois in the case of the Union Trust Co. v. Rockford, R. I. & St. L. R. Co. [Case No. 14,401], that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take the possession or control of the res, the subject matter of the controversy, to the exclusion of all interference from other courts of concurrent jurisdiction, and that the proper application of this principle does not require that the court which first takes jurisdiction of the controversy shall also first take the actual possession of the thing in controversy.

Then the question is as to the application of this rule or principle to the present case. It is insisted that, because the bill was amended, and, between the date of the filing of the bill and the amendment, another creditor instituted a suit in the state court and had a receiver appointed who took possession, therefore this court lost jurisdiction of the res, and could not permit the imperfect allegations to be amended, and thereby affect the assumed right of the state court over the res. The only question that arises in this aspect of the case is whether the federal court had jurisdiction; if it had, then the principle applies that no other court of concurrent jurisdiction could interfere with the res, which was the subject matter of controversy.

It is to be presumed that each court would equally protect the rights of the creditors of the defendant. But which court has first obtained jurisdiction, and has the right to call upon creditors to come before it for the protection of their rights? In deciding this question, we have to lay down a rule which would apply to both courts, state and federal; one by which we would be bound if the state court first obtained jurisdiction of the res, and by which the state courts should also be bound when the federal court has first obtained jurisdiction; and we are not prepared to hold that because the allegations in the bill are imperfectly stated, or because an amendment is made to the bill, that thereby the court loses jurisdiction of the subject matter. All amendments germane to the bill and allowed by the court, relate back to the time when the bill was filed, and are considered as incorporated into, and a part of, the original bill. And it cannot affect the question that the amendment asks that the re-

ceiver shall do something else, as by adopting a change in the manner of administering the assets. We think that there is no other safe rule to adopt, in our mixed system of state and federal jurisprudence, than to hold that the court which first obtains jurisdiction of the controversy, and thereby of the res, is entitled to retain it until the litigation is settled. Where a bill is filed, the object of which is to obtain payment of a judgment or of a debt out of the assets of the defendant, if the assets are withdrawn from the court by another court, of course the object of the bill can never be attained; there is really nothing about which there can be litigation. The continuance, therefore, of a suit, under such circumstances, would be useless. The only relief that the party could have would be to follow the property to the other court. Whether or not in a race among creditors against an insolvent party, where bills are filed in courts of concurrent jurisdiction, and a receiver asked to take possession of the property, the receiver who first obtains actual possession can hold it without regard to the time when the court took jurisdiction of the case, is a very serious question. It was held by the circuit court of the Northern district of Illinois, in the case already referred to, that it was not material that a receiver appointed by the state court had first taken actual possession of the property provided the federal court had the prior right to control the res. We think that decision was correct; otherwise in the case supposed, where a bill is filed in one of the courts, and an application made for the appointment of a receiver, and the case presented, argued and considered, and a receiver appointed, at any time before the receiver takes actual possession of the property another creditor can go into another court, make his application, have the appointment made, and the receiver take possession of the property. This would seem to be in violation of the principle which has been so often sanctioned by the decisions, that that court which first takes cognizance of the controversy, and, incidentally, of the res, has the right to proceed and terminate the litigation.

This being so, it becomes simply a question of jurisdiction, not a question whether or not the case of the plaintiffs is perfectly stated. Defects can be supplied and the jurisdiction of the court not affected. Suppose that, upon an application to a court of equity for relief by a creditor against an insolvent estate, an omission were made to state in the bill that an execution was issued and returned nulla bona; if the fact warranted it, that defect might be supplied, and it would not affect the right of the court to proceed and give relief; so with the omission of any other allegation not affecting the question of the jurisdiction of the court over the subject matter. Of course, in all that has been said, it is assumed, what was the fact in this case, that the bill was not only filed first in this court, but that the process was issued and duly served upon the parties, and that they were in court subject to its jurisdiction before any proceeding was instituted in the state court.

It is contended on the part of the counsel who ask that the court shall vacate the order made in this case, that this is like the case of lis pendens, and that the same principle applies as would apply there.

It is well known that the application of that principle proceeds no further than this; that, whenever, upon the face of the record, by the institution of a suit and service of process it is shown that property or rights are to be affected, no one can deal with the property or those rights except subject to the suit; and if, after a person deals with the property, amendments are made upon the record, which show that the particular property with which he has dealt is affected, when the original record did not, that he is not bound by virtue of lis pendens; because, having dealt in good faith with the property, and there appearing nothing upon the records of the court to prevent any third party from dealing with it, the record cannot be amended so as to affect his rights, and it is for the reason that he is not at the time judicially informed of anything to prevent his dealing with the property.

We hardly think that the principle should apply to the case of a receiver. It is simply a question what court shall control the assets of the defendant in this case, and distribute them among creditors. A receiver has no right of ownership in the property. He is not a purchaser in good faith for value. He is simply the officer of the court, and therefore no rights of creditors or of third parties in any way are affected by refusing to allow another court to interfere with the res, which is the subject of controversy in the case.

We think, therefore, upon the whole, as we have already said, that the only safe rule to follow, in our mixed system, is that the court which first takes control of the controversy, (even although it may be by an imperfect bill, so that it gives jurisdiction of the controversy, and thereby of the res,) is entitled to maintain it to the end, without being disturbed by any other court of concurrent jurisdiction.

We therefore overrule the application made to rescind the order appointing a receiver in this case.

In a subsequent case the above principles were re-argued before Judge Drummond, who adhered to the rulings in the foregoing opinion, as being satisfactory to himself and his colleagues.

Case No. 5,285.

GAYLORD v. JOHNSON.

[5 McLean, 448.] [1]

Circuit Court, D. Indiana. May Term, 1850.

COURTS—JURISDICTION — CITIZENSHIP — SUIT BETWEEN ASSIGNOR AND ASSIGNEE OF PROMISSORY NOTE.

1. The assignee of a note, a citizen of Ohio, may bring his action in the circuit court against the assignor, a citizen of Indiana.

2. A note made payable in Ohio is an Ohio contract, and demand of payment when the note is due, protest and notice are due diligence.

3. Where the action is between the assignor and his immediate assignee, it is only necessary to sustain the jurisdiction of the circuit court that plaintiff and defendant are citizens of different states.

4. The action is on the contract of assignment.

At law.

Mr. Henderson, for plaintiff.

Mr. Ray, for defendant.

OPINION OF THE COURT. This action is brought by the plaintiff [T. G. Gaylord], as assignee of a promissory note by the defendant [Howard P. Johnson], the payee, who was a citizen of Indiana. Two objections are made by the defendant: (1) That the assignor could not sue in this court, consequently his assignee cannot sue. (2) By the laws of Indiana, the maker of the note must be prosecuted to insolvency,—the note, not being payable to or at a bank, is not negotiable by the laws of Indiana.

This suit is brought against the indorser, to which no objection can be made, under the eleventh section of the judiciary act [1 Stat. 73], which applies to assignments, where the action is brought by the assignee against the maker of the note. There was a special plea that the note was assigned in Indiana, to which there was a demurrer. The note was payable in Ohio, it was therefore an Ohio contract, and governed by the laws of Ohio. Demand of payment of the note when due, protest and notice, are due diligence. As this action is brought against the assignor, by his assignee, the place of assignment is immaterial. The action is founded on the assignment, and the plaintiff and defendant are citizens of different states. This gives jurisdiction. The demurrer is sustained, and judgment.

GAYLORD (McNAMARA v.). See Case No. 8,910.

GAYLORD PATENT COUPLING & MANUF'G CO. (BLISS v.). See Case No. 1,547.

GAY'S GOLD (UNITED STATES v.). See Case No. 15,194.

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

Case No. 5,286.

GAYTES v. AMERICAN et al.

[5 Biss. 86; [1] 14 N. B. R. 141.]

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

TROVER—SUIT BY ASSIGNEE IN BANKRUPTCY TO RECOVER ASSETS.

An action of trover will not lie by the assignee against judgment creditors to recover the value of the bankrupt's property, sold on execution, prior to the commencement of bankruptcy proceedings.

Trover by [Carol Gaytes] the assignee against [Oscar L.] American and [John] Smith, judgment creditors of the bankrupt, to recover the value of personal property levied upon by the sheriff under an execution from the superior court of Cook county issued and levied January 13th, 1868. The property was sold January 25th, and on the 13th of February following the debtor filed a petition in bankruptcy, upon which he was afterwards adjudged a bankrupt. Verdict having been rendered against the defendants, they moved for a new trial.

Bently & Hart, for plaintiff.

W. C. Grant, for defendants.

DRUMMOND, District Judge. The question raised on the trial and reserved was whether the action of trover was maintainable under the circumstances.

The cases of Cooper v. Chitty, 1 Burrows, 20, of Smith v. Milles, 1 Term R. 475, and Price v. Helyar, 4 Bing. 597, decide that a sale by a sheriff after an act of bankruptcy, although it may be before the issuing of the commission of bankruptcy, was a conversion of the property under the English law of bankruptcy, and also that an action of trover could be maintained under such circumstances, but that an action of trespass could not be maintained when it was sought to make the officer a trespasser by relation merely. Under the English bankrupt law the transfer of the property to the assignee related back to the act of bankruptcy, and it made no difference how secret that act might be (it might be entirely unknown to the officer who took the property) if there had been an act of bankruptcy prior to the time when the sheriff took possession of the property under his writ, the transfer relating back to the act of bankruptcy interrupted and set aside all subsequent acts, and therefore the sheriff was held responsible,—a rather hard rule where he acted in good faith; but that was the undoubted law under the English act of bankruptcy. Inasmuch as it was held by these authorities that there was relation back to the act of bankruptcy whenever there was a conversion of the property after the act of bankruptcy, then the sheriff was responsible in an action of trover, because the gist of the action was the wrongful conversion of the property.

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

Now, what is the reason of the rule under our law? The 38th section of the bankrupt law [of 1867 (14 Stat. 517)] provides "that the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, upon which an order may be issued by the court, or by a register in the manner provided in section four, shall be deemed and taken to be the commencement of proceedings in bankruptcy, under this act." Then the filing of the petition is the commencement of proceedings in bankruptcy, and the 14th section declares that the assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, so that it will be seen that our law is different from the English law. The transfer of the property under the English law related back to the act of bankruptcy, while the transfer of the property under our law relates back to the commencement of proceedings in bankruptcy, viz., the filing of the petition. That being so, upon what principle is it that the action of trover can be maintained in this case consistently with the rule established under the English law, unless there is a wrongful conversion of the property, when by relation it belongs to the assignee? What were the facts? At the time that the execution issued, viz., on the 13th day of January, 1868, the bankrupt had not filed his petition. The assignment, then, did not relate back to that time. At the time of the sale, which was on January 25, 1868, the petition had not been filed. The relation of the transfer of title to the property which belonged to the bankrupt was only to the 13th of February, 1868, when the petition was actually filed. The question then arises, the whole act of possession and of conversion having been committed before the filing of the petition, whether the assignee can maintain the action of trover. I am inclined to think that he cannot.

All that existed at the time of the commencement of the proceedings in bankruptcy was a right of action. There was no conversion of the property after the filing of the petition. We have seen how, by the doctrine of relation, a conversion subsequently would authorize the assignee to maintain the action of trover. The argument of Lord Mansfield, in the case of Cooper v. Chitty, 1 Burrows, 20, is unanswerable on this point, that, although the assignee has not the possession of the property at the time of the conversion, and it is not in existence and may not be until long after the conversion, still the doctrine of relation comes in and declares that if there is a conversion after the act of bankruptcy that clothes the assignee with all the rights that the bankrupt would himself have had over the property; so, in order to preserve the rights of the general creditors, the action is maintainable. But I think, considering the peculiarity of the action of trover, and as the essence of it is a wrongful conversion, that the assignee must have been able to maintain this action at the time of the conversion, and, inasmuch as he could not have done so, the doctrine of relation did not go far enough back in this instance. I think that the action of trover is not maintainable.

New trial granted.

NOTE. The assignee may sue in trover for a conversion after proceedings in bankruptcy commenced before his appointment, though for a conversion prior to the filing of petition he must sue in equity. Garland v. Carlisle, 4 Clark & F. 693, approved and cited in Mitchell v. McKibbin [Case No. 9,666].

Case No. 5,287

GAYTES v. HIBBARD et al.

[5 Biss. 99.] [1]

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

BILLS AND NOTES—CERTAINTY OF TIME OF PAYMENT—CERTAINTY OF PAYEE.

1. A premium note to a mutual insurance company, payable "at such times as the directors of said company may, agreeably to their act of incorporation, require," is rendered due and payable when the directors have properly required the money to be paid.

2. If made payable to the company, "or the treasurer for the time being," these latter words are simply indicative of the officer through whom the payment might be made.

[This was a suit by Carol Gaytes, assignee of the Mercantile Mutual Fire Insurance Company, against William G. Hibbard and Franklin F. Spencer.]

Demurrer to declaration upon the following instrument, given for premium upon a policy of insurance: "For value received in policy No. 73, dated 12 August, 1865, issued by the Mercantile Mutual Fire Insurance Company of Chicago, we promise to pay said company, or the treasurer for the time being, the sum of two hundred and fifty dollars, in such portions and at such times as the directors of said company may, agreeably to their act of incorporation, require." The grounds of the demurrer appear in the opinion.

Hitchcock, Dupee & Evarts, for plaintiff.

Clarkson & Van Schaack, for defendants.

DRUMMOND, District Judge. In support of the demurrer it is insisted that the instrument sued on is not a promissory note; that it is not certain as to the person to whom the money was payable, it being to the Mercantile Mutual Fire Insurance Company or its treasurer for the time being. Secondly, that it is not certain as to the time of payment, there being no time specified in the instrument when the money was to be paid.

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

And, thirdly, that there is no certainty in relation to the fact of payment at all.

I do not know that it is necessary for the court to decide whether this was a "promissory note," technically so called. The question is, whether the count in the declaration is sufficient. It avers that the directors of the company did require a certain portion of the $250 to be paid at a fixed time, naming the time, and that the money was not paid at that time, and that, by the charter of the company, the whole sum became payable.

I hold this to be a contract, in substance, to pay two hundred and fifty dollars to the Mercantile Mutual Fire Insurance Company of Chicago; the words "or the treasurer for the time being," being simply, I think, indicative that the money might be paid to the company through its treasurer.

Then the time at which payment was to be made became certain when the directors of the company, agreeably to their act of incorporation, fixed the time requiring the money to be paid. So, according to the rule, "Id certum est quod certum reddi potest," it will become certain precisely on the same principle as money payable on demand. There the time when it is payable is uncertain. It does not technically become payable until the demand is made. The demand having been made, that which was uncertain has become certain. So here, this is in the nature of a demand by the directors of the company to make payment, and when that demand is made, then the time is fixed and certain.

I think the demurrer must be overruled, with leave to the defendants to plead if they so elect.

NOTE. A written promise to pay a sum "in such manner and proportions, and at such time and place as he shall from time to time require," is a promissory note. Goshen, etc., Turnpike Co. v. Hurtin, 9 Johns. 217; Washington Co. Mut. Ins. Co. v. Miller, 26 Vt. 77. An instrument as follows: "I promise to pay M. $172 when I collect a note received from him on T.," is due and payable on the occurrence of the contingency. Walker v. Phillips, 35 Tex. 784. For a full exposition of the maxim "Id certum est quod certum reddi potest," consult Broom, Leg. Max. 599.

Case No. 5,288.

GAYTES v. LEWIS.

[2 Biss. 136; [1] 2 Chi. Leg. News, 385.]

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

CORPORATIONS—POWER TO MORTGAGE PROPERTY.

1. A corporation organized under the Illinois statute of February 18, 1857 [Gross' St. 1871, p. 130], has the power to mortgage its property.

2. This statute is independent of the act of February 10, 1849 [Gross' St. 1871, p. 126].

This was a bill in equity by Carol Gaytes, assignee of the Union Glass Company, bankrupt, to enjoin —— Lewis from foreclosing a mortgage given to the defendant by the company prior to its bankruptcy.

Asay & Lawrence, for plaintiff.
Hitchcock & Dupee, for defendant.

DRUMMOND, District Judge. The only question in this case is as to the power of the Union Glass Company to make a mortgage of some property belonging to the company. It is contended on the part of the plaintiff that a mortgage made by the company was invalid, as being ultra vires, and not within the authority of the company to make. The question arises under the act of 1849 and the act of 1857 (Gross' St. 1871, pp. 126, 130, tit. "Corporations," etc.). It is claimed on the part of the plaintiff, that the act of 1849 operates upon the company and disables it from making a mortgage.

The second section of the act of 1849 provided that when a company had been created, as provided in the first section, and a certificate had been filed, properly signed and acknowledged, the persons who thus become a body corporate and their successors, should be a corporation by the name stated in such certificate; that they should have succession, sue and be sued; have a common seal, "and they shall by their corporate name be capable in law of purchasing, holding and conveying any real or personal estate whatever, which may be necessary to enable the said company to carry on their operations named in such certificate, but shall not mortgage the same or give any lien thereon."

Undoubtedly if this law was binding on the company, it would not have the power of making a mortgage such as was made in this case; but the act of 1857 contains no such restriction. In many respects it seems to be a duplicate of the act of 1849, but in some particulars, the act of 1857 is different; for example, the act of 1849 requires the certificate to be filed in the office of the clerk of the county in which the business was to be transacted. The act of 1857 requires the certificate to be filed in the office of the clerk of circuit court, etc., and there are some minor differences in the two acts; and the second section of the act of 1857 declared that the capital stock of the company should not be less than $10,000, nor more than $500,000; the time of its existence was not to exceed fifty years, and also provided that the capital stock should be fully paid within four years, otherwise it was to work a dissolution of the company, and then the third section declared, "when the certificate, shall have been filed, as aforesaid with the clerk of said court, and a duplicate thereof filed in the office of the secretary of state, the said clerk shall issue a license to the person who shall have signed and acknowledged the same, on the reception of which they and their successors shall be a body politic and corporate, in fact and in name by the

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name stated in such certificate, and by that name shall have succession, and be capable of suing and being sued in any court of law or equity in this state, and may have a common seal, and alter the same at pleasure and be capable, in law, of purchasing and holding, conveying and disposing of any such real or personal estate," &c.

Now, it is admitted by the case that the company was organized under this law of 1857. The question is whether the provision contained in the second section of the act of 1849 operated upon it and continued as a binding condition upon a company organization under the act of 1857. Independent of that, there is no doubt that the language contained in the third section of the act of 1857 would be sufficient to enable the company to make a mortgage. The language is of such a character as in similar cases has been held to imply the power to encumber and mortgage property. "Shall be capable in law of purchasing and holding, conveying and disposing of any such real and personal estate, choses in action, and securities, negotiable or otherwise, as may be expedient and necessary to enable the said company to carry on their operations and business, named in such certificate."

Without some limitation upon that language, the necessary construction of it would be that the company would have the power to mortgage and encumber their real property.

I am inclined to think that this law of 1857 must be construed as independent of the law of 1849; that the condition annexed to the law of 1849 did not necessarily follow and operate upon the law of 1857. Therefore, I think the mortgage a valid lien. Bill dismissed.

Case No. 5,289.

The GAZELLE.

[1 Spr. 378.] [1]

District Court, D. Massachusetts. Feb., 1858.

ADMIRALTY — ARREST OF VESSEL IN HANDS OF SHERIFF—EFFECT OF SHERIFF'S SALE ON PARAMOUNT LIENS FOR WAGES.

1. A vessel being in the possession of a sheriff, by virtue of a writ of attachment on mesne process, from a state court, and the marshal holding a warrant to arrest the same vessel, in a suit by seamen for wages, the sheriff refused to permit the marshal to take possession of the vessel, and the latter returned his precept unexecuted. The court refused to proceed to exercise jurisdiction over the vessel.

2. Whether the sheriff had a right to exclude the marshal from executing process, to enforce a paramount lien, and whether the marshal might have taken possession by force, are grave questions.

3. A sale by a sheriff, on execution for debt, under the laws of Massachusetts, has none of the characteristics of an admiralty sale, and does not divest paramount liens.

[Cited in The Island City, Case No. 7,109; Crosby v. The Lillie, 40 Fed. 368; The Cerro Gordo, 54 Fed. 392.]

4. A court of admiralty will enforce such liens, by ordering the arrest and sale of the vessel, and from the proceeds satisfy the liens, and then pay over the residue to the purchaser under the sheriff's sale.

5. Where a voyage was broken up by a sale of the vessel on execution, the seamen were allowed wages up to the time of the sale, and compensation for their time and expenses in returning to their home port.

6. While mariners properly remain by their vessel, if subsistence be not furnished them by the master, they may recover the amount which they have properly paid therefor.

[Cited in The Champion, Case No. 2,584; Worth v. The Lioness No. 2, 3 Fed. 925.]

[See Brown v. The Alexander McNeil, Case No. 1,988.]

7. An attachment of a vessel on mense process, does not break up the voyage.

[8. Cited in The Maggie Hammond, 9 Wall. (76 U. S.) 457, and in The Becherdass Ambaidass, Case No. 1,203, to the point that our admiralty courts have full jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature; but that the question is one of discretion in every case.]

In admiralty.

E. F. Miller, for libellants.

Josiah W. Hubbard, for claimants.

SPRAGUE, District Judge. This is a libel for wages, by two seamen, against a small British vessel, belonging to Cornwallis, in the province of Nova Scotia. The suit is prosecuted with the approbation of the British consul at Boston, and is resisted by the claimants [Young and others], purchasers under a sheriff's sale. On the sixth day of November, 1857, these libellants shipped at Cornwallis, for a voyage from that place to Boston, and back; one of them, Clark, as mate, for $19 per month, and the other, Murphy, as seaman, for $15 per month. Under this contract the vessel arrived at Boston, on the seventh day of December last; and on the eighth of the same month, she was arrested by a sheriff, by virtue of a process from a state court, sued out by a creditor of the owners of the vessel. This proceeding is called an "attachment on mesne process." Those not conversant with the local law of Massachusetts, are often misled by the use of the word "attachment." The object is not to compel an appearance by the defendant; but the property of the debtor is taken by the sheriff, and held by him, as security for the payment of any judgment which the plaintiff may recover. A judgment was recovered by the creditor in the state court, and execution issued thereon; and on the 30th day of January last, the sheriff sold the vessel at auction, by virtue of that execution, and she was immediately afterwards delivered to the purchasers. This libel was filed on the 23d of December, 1857, and on the same day, a warrant was issued for the arrest of the vessel.

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

The marshal attempted to execute this process, but found the sheriff in possession, claiming to hold her under the writ of attachment from the state court; and as he refused to permit the marshal to enter upon the vessel, or to take her into his custody, the latter desisted from the attempt. In that state of the case, I refused to proceed to exercise jurisdiction over her. Whether the sheriff could rightfully refuse to permit the marshal to take possession, in order to enforce a paramount lien, and whether the marshal could properly have proceeded to execute his precept, by force, in the same manner as against unlawful resistance by a private individual, are grave questions, which I do not now decide. Whatever may have been the respective rights and duties of the two executive officers, the fact was, that the marshal had never had possession, and returned his precept unexecuted, and this debarred the court from proceeding further. I could not exercise jurisdiction over a vessel which was not, and had never been, in the custody of any officer of the court.

On the 27th day of January, 1838, on motion of the proctor for the libellant, another warrant to arrest the vessel was issued, which was duly executed on the 5th of February, before which time the custody of the sheriff had ceased, he having delivered the vessel to the purchasers under the sheriff's sale.

Although the sheriff was permitted to hold possession of this vessel, until he had sold her on execution, and had terminated his custody by a delivery to the purchaser, such sale and delivery did not divest or impair the lien of the libellants. The purchaser took the vessel cum onere. The sale by the sheriff was by the common-law writ of fieri facias only. The prior attachment on mesne process had only the effect of bringing the property within the reach of the writ of execution, but gave no efficacy to the sale, which derived all its force from the execution. In such a suit, no notice is given, except to the debtor, and his rights alone are affected. It is a suit in personam merely. It is in no respect a suit in rem. Neither the writ of attachment, nor of execution, directed the officer to take this vessel, or even named her, but they both ran against the debtor, and all his goods and chattels. Such a sale has none of the characteristics of an admiralty sale, upon process in rem, after notice to all the world, to intervene for their rights or interests. As soon, therefore, as the sheriff had delivered this vessel to the purchaser, the marshal arrested her, to enforce the lien of these libellants; and the purchaser being well advised by counsel, has not contested the paramount right of the libellants to proceed against the vessel, and to have her sold under a decree of this court, for the payment of their claim. The only question now made is, as to the amount which should be decreed to the respective libellants. The voyage has been broken up by the fault of the owner, as he permitted the vessel to be sold for his debt. This was a violation of his contract with the libellants, for which they have a right to recover a full indemnity. To constitute this indemnity, they are entitled to their wages, so long as they were properly attached to the vessel, and thereafter, up to the time when, with reasonable diligence, they may return to Cornwallis, and their necessary expenses while remaining here, and in so returning.

It is insisted in behalf of the claimants, that the voyage was broken up by the attachment, and that the connection of the libellants with the vessel then ceased; but this position is not tenable; it would be unsound in principle, and of the most mischievous consequences, to hold that a mere attachment by mesne process, under the law of Massachusetts, terminated the voyage, and dissolved the contract between the mariners and the owners. Such an attachment may be made for any alleged amount of debt, by any person, without previous application to any court or magistrate, and without even an affidavit that any debt was due. The attachment may be dissolved, and possession restored to the owner, in various ways, as by payment of the debt, or giving security for the payment of the judgment that may be recovered, or by withdrawal of the suit, or by judgment's being rendered in favor of the defendant. Where a neutral vessel has been taken on the high seas, by the cruisers of a belligerent, and carried into port, for trial, it has been held that the seamen who remained by the ship are entitled to wages, to the time of condemnation. That is a stronger case than the present, for there the owner has no power to release the vessel, but she must be held, at the option of the captors, until adjudication. An attachment, under the law of Massachusetts, may not even delay the voyage, as it may be dissolved before the cargo is unladen. But although a mere attachment on mesne process does not break up the voyage, yet it may be attended with circumstances which will have that effect, as, indeed, it may be broken up where there is no seizure on process. Whenever it appears clearly, that the owner's possession is irretrievably lost, and that the voyage cannot be further prosecuted, the court will not permit the seamen to burden the vessel by unnecessary and wilfully adhering to her. But in the present case, the libellants have acted with propriety and good faith, in remaining by the vessel. At the time of the attachment, the owner was in Boston, and remained here until the 15th December, when he and the master left for Cornwallis, directing the libellants to remain by the vessel, as the owner intended to return and reinstate himself in possession, and pursue the voyage. The British consul also instructed them to remain. Neither the sheriff nor the attaching creditor paid, or offered to pay them any part of their wages; but on the contrary, it is apparent that the creditor was endeavoring, by means of the state process,

to deprive them of their lien, and leave them here in a foreign country, without the means of support, or of returning home, and with no ultimate remedy, except a personal suit against the owner. If he had not prevented the service of the process of this court, by the marshal, when the libel was filed, a decree might have been had, the vessel sold, and the money paid into court, within two weeks from the filing of the libel; and thus not only the wages and board of the libellants, but all the expense of detention and sale by the sheriff might have been saved. It is not for the creditor to complain that the expense, which he has created, may have diminished the amount which may be appropriated to the payment of his debt. The purchaser at the sheriff's sale knew, or ought to have known, that the vessel was subject to the lien of the libellants, and that he could purchase only in subordination thereto.

These seamen remained by the vessel, until she was sold by the sheriff, and since the 17th of December last, have been obliged to obtain their food at their own expense, the owner having made no provision for their subsistence. The supplemental libel, which was filed on the 20th January, claims wages up to that time, and the expense of board, at the rate of $3.50 per week, from the 17th December. [9] These claims must be allowed. The libel further asks the sum of $10 for each of the libellants, for their time and expense, in returning to their homes, and I am satisfied that this also is a proper and reasonable claim. At the time this voyage was begun, there were due to Clark wages for the preceding voyage, from the 6th July to the 6th November, at $16 per month; this also must be included in the decree.

Decree for the libellant, Clark, for the sum of $102.18; and for Murphy, the sum of $71.50, and costs.

The vessel was sold by order of the court, and from the proceeds the amount of the decree was paid to the libellants, and the residue was paid over to the purchaser at the sheriff's sale, who intervened as claimant.

See The Havana [Case No. 6,226]; The Julia Ann [Id. 7,577].

G. C. BARRAS, The (CONLEY v.). See Case No. 3,103.

Case No. 5,290.

GEAR v. FITCH et al.

[3 Ban. & A. 573; [1] 16 O. G. 1231.]

Circuit Court, D. Massachusetts. Oct. 7, 1878.

PATENTS—ASSIGNMENT OF RIGHT OF ACTION—RECORDING—PROOF OF INFRINGEMENT—COMPLAINANT'S TITLE — PROOF — BANKRUPTCY OF COMPLAINANT.

1. Where the complainant derives his title from an administrator: *Held*, that such title was proved by evidence of the signature of the administrator, and of the fact that the consideration for the assignment was paid to him, and by copies from the records of the probate court showing that such assignor was in fact the administrator of the deceased owner of the patent.

2. In equity, the bankruptcy of the complainant and appointment of an assignee, pending a suit on a patent, would not abate the suit, but would only necessitate the filing of a supplemental bill making the assignee a party; and the reconveyance of the patent to the complainant, pending the suit, would render such a proceeding unnecessary.

3. There is no law which requires an assignment of a right of action under a patent to be recorded in the patent office.

4. In assigning a right in action after the suit has been commenced, the person to be notified is he against whom the action is pending, so that he may not pay the wrong person.

5. The answer did not explicitly deny infringement, and a witness was produced who saw one or more infringing machines in the defendants' possession, although not in actual use: *Held*, under the circumstances of this case, that the proof of infringement was sufficient.

In equity. There were eleven of these suits brought [by Alonzo S. Gear against Jonas Fitch and various other defendants] upon the same patent, the pleadings in all of which were the same. Prior to the filing of the bills, a witness visited the several defendants at their respective places of business, and notified them that the complainant was the owner of the patent, and also not to use any machine that infringed the patent, and to make settlement for damages for past use. At the times of making these visits, witness saw, in some instances, the machines in actual use, while, in others, he saw the machines in the possession of the defendants, but not in actual use.

Thomas L. Livermore, for complainant.

D. Hall Rice, for defendants.

LOWELL, District Judge. A patent [No. 10,204] for improvements in moulding-machines was issued to Nathaniel Gear, November 8, 1853, and renewed for seven years in November, 1867. The patent was pronounced valid by Judge Shepley in 1873 (Gear v. Grosvenor [Case No. 5,291]), but the bill in that case was afterward dismissed on a rehearing, in which it appeared that one Scott had an assignment of the invention, which, under a then recent decision of the supreme court, was held to include the extended term of the patent. See the note to the case, Gear v. Grosvenor [supra].

The bills in these cases were filed November 5, 1873, and evidence is given in the record that the complainant at that time held an assignment from the administrator of Scott, which supplies the defect found in his title, in the case against Grosvenor. In the defendants' brief, it is said that this assignment is not sufficiently proved; but the complainant swears to the signature of Smith, the administrator, and to having paid him

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

the money, and copies from the records of the probate court prove that Smith was Scott's administrator, which is all that could be asked.

When the argument was opened the defendants asked leave to amend their pleadings so as to set up certain matters occurring since the bills were filed, namely, that in January, 1874, the complainant had conveyed all his rights in the patent, and in the damages, to one S. K. Lovewell, on certain terms of sharing profits and damages with Gear; that in February, 1874, Gear was made bankrupt, and that T. F. Nutter has been duly appointed assignee of his estate and effects, and the prayer was that the complainant be ordered to file a supplemental bill. The evidence upon which this motion was made was printed in the record.

Judge Shepley had refused a similar motion, but, as it was argued again, we have looked at the point. Before the motion was made to Judge Shepley, a bill had been filed against Lovewell by the assignee of Gear's estate in bankruptcy, which had been compromised by leave of court, and Lovewell had conveyed all his interest in the subject-matter to Mr. Nutter, the assignee in bankruptcy, and Mr. Nutter had conveyed to Mr. Livermore, and he to the complainant, so that the complainant has all the title he had when the suit was begun. It was for this reason that Judge Shepley denied the motion. These last-mentioned conveyances from Lovewell to Nutter, and from Nutter through Livermore to the complainant, were made after the extended term of the patent had expired, and were, therefore, assignments of a right of action only.

Where a plaintiff in an action at law, pending when he became bankrupt, had bought the right of action from his assignee in bankruptcy before any plea was interposed, it was held to be too late for the defendant to plead in abatement, and the case proceeded as if he never had been bankrupt. Gerrish v. Gary, 1 Allen, 213.

In equity the case is stronger, because bankruptcy and the appointment of an assignee would not abate the suit, but only require a supplemental bill to be filed, and perhaps under our bankrupt law, which provides that the assignee shall be admitted to prosecute pending actions, even that might not be necessary. But in whatever mode he is to be made a party, there is no occasion to make him one after he has reconveyed his interest to the complainant in the suit. The plea of matters occurring since the original pleadings is met by a replication of other matters still later.

The defendants objected to the admission of these assignments in evidence, because they had not been recorded in the patent office. But we have already seen that they were mere conveyances of the right to maintain these several suits or other similar actions—mere choses in action, in the narrow sense—after the patent itself had expired, and there is no law requiring such assignments to be recorded. Rev. St. § 4898, give the patentee or his assignee a right to grant and convey an exclusive right under his patent to the whole or any specified part of the United States, and add that a grant or conveyance shall be void as against a subsequent purchaser or mortgagee without notice, unless it is recorded. This means such a grant or conveyance of the patent right as had been before mentioned. In assigning a right in action, the person to be notified is he against whom the action is pending, so that he may not pay the wrong person. The defendants made no settlement with Lovewell or with Nutter, and may now safely account with the complainant.

It is urged that the evidence of infringement is insufficient in some of the cases. The charge being that the several defendants have used the machine, a witness is introduced who saw one or more infringing machines in the possession of each of the defendants. The objection is, that the court cannot properly infer a use of any of the machines, excepting those which the witness saw in actual use at the time of his visit. The complainant has called attention to the fact that the answers do not explicitly deny the infringement. Taking this circumstance with the other evidence, we think a jury would be warranted, if this were an action at law, to find infringement in all the cases.

Interlocutory decree for the complainant in each case.

[For other cases involving this patent, see note to Gear v. Holmes, Case No. 5,292.]

Case No. 5,291.

GEAR et al. v. GROSVENOR et al.

[6 Fish. Pat. Cas. 314; Holmes, 215; 3 O. G. 380.] [1]

Circuit Court, D. Massachusetts. March 11, 1873.

PATENTS—VALIDITY—FRAUD IN PROCURING—IMPEACHMENT IN COLLATERAL PROCEEDING—PUBLICATION OF NOTICE OF HEARING—COMMISSIONER OF PATENTS—JURISDICTION—PRACTICE—ASSIGNMENT—ANTICIPATION—NOVELTY.

1. Patent granted Nathaniel Gear, November 8, 1853, for a machine for turning and cutting irregular forms, sustained.

2. A patent from the government can not, in a collateral proceeding, be impeached for fraud in procuring it. The allegation, that "the same was procured by fraud, misrepresentation, and in violation of law," is simply an allegation of a conclusion of law from facts, which facts are not pleaded.

3. The provision, that "notice of the day set for the hearing of the case shall be published, as now required by law, for at least sixty days:" *Held*, to be satisfied by a publication for three successive weeks, the first of said publications being at least sixty days before the hearing.

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

4. The construction given to a statute by the officers appointed to execute it, and acted upon for a long term of years, though not conclusive, is entitled to great consideration by the court.

5. The jurisdiction of the commissioner over the subject-matter commences with the filing of the petition, which makes it his duty to exercise that jurisdiction, by causing a proper notice to be published.

6. The filing by the patentee of a petition for extension, and the payment of the required sum for expenses, confers the jurisdiction.

7. Where an act is to be done, or a patent granted, upon proof to be laid before a public officer, upon which he is to decide, the fact that he has done the act, or granted the patent, is prima facie evidence that the proofs have been regularly made, and were satisfactory. No other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs, if laid before him, when the law has made such officer the proper judge of their competency and sufficiency.

8. It is not necessary that the patent should contain any recitals that the prerequisites to the grant of it have been duly complied with, for the law makes the presumption.

9. A conveyance made before a grant of extension, becomes operative upon the right as soon as the extension has been granted, and, by force of such conveyance, the legal title under the extended, as well as the original, term passes to the grantee.

10. The policy of the law would seem to require that the patentee applying for the extension, should himself have an interest, but an equitable interest is sufficient. Such an interest the patentee in this case had by virtue of the stipulation between himself and his grantee, that he should be interested to the extent of one-half the proceeds from sales or uses of the patented invention.

11. An assignment of an interest in an invention and letters patent therefor, before the expiration of the original term, does not carry with it any interest in a subsequently extended term, unless the assignment contains a specific provision to that effect.

[Cited in Johnson v. Wilcox & Gibbs Sewing Mach. Co., 27 Fed. 691.]

12. The words "may be granted," in the habendum of a deed, must be construed with reference to what precedes them, and may refer to the reissues. If the thing granted be only in the habendum, the deed will not pass it.

13. The owners of a patent are estopped from prosecuting those who have worked the invention under a license from a third party, relying upon the admission of the owners that said third party had the right to grant such license. Whether such admission would avail the respondents, would depend upon whether the acts relied upon to prove infringement were after, and in consequence of, these admissions, and before they had notice that they were recalled and withdrawn.

14. The invention described in letters patent to Levy, assignee of Hazard Knowles, for a tonguing, grooving, and molding machine, did not anticipate the invention of Gear.

15. The court ought to be fully convinced, by a clear preponderance of evidence, before declaring a patent void, on the ground of prior knowledge and use.

[Cited in Gear v. Fitch, Case No. 5,290.]

In equity. Final hearing on pleadings and proofs. Suit on letters patent [No. 10,204] "for a machine for turning and cutting irregular forms," granted Nathaniel Gear, November 8, 1853, and extended seven years; brought by complainants [Alonzo S. Gear and others] as assignees of the same [against Jonathan P. Grosvenor and others].

B. R. Curtis and T. L. Livermore, for complainants.

B. F. Butler and Marshall & Rice, for defendants.

SHEPLEY, Circuit Judge. This is a bill for an injunction and account based upon letters patent granted to Nathaniel Gear, November 8, 1853, for a machine for turning and cutting irregular forms, and extended for the additional term of seven years, from November 8, 1867. The answers of the defendants allege, that the extension of the letters patent was procured by fraud, misrepresentation, and in violation of law.

It is well settled that a patent from the government can not, in a collateral proceeding, be impeached for fraud in procuring its issue; this can only be done in a direct proceeding to set it aside. Eureka Co. v. Bailey Co., 11 Wall. [78 U. S.] 489; Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 796.

Defendants, however, claim, that while they are precluded from relying upon any fraud or misrepresentation made to the commissioner of patents, while in the lawful exercise of his functions in judicially determining upon a matter in which he had acquired jurisdiction, they have a right to aver and prove the nullity of his decision, for want of jurisdiction of the question upon which it is made. As a matter of fact, they contend that the notice, required by law to be published sixty days previous to a hearing before the commissioner of patents on an application for extension of letters patent, was fraudulently suppressed, and never published in the manner required by law.

Defendants also claim, that even if the order and notice in the proceedings for obtaining the extension were published in compliance with the terms of the order of the commissioner, the publication was not made as required by the terms of the law then in force. The order of the commissioner was as follows: "Ordered that this notice be published in the Republican and the Intelligencer, Washington, D. C., and in the Washington County News, Marietta, Ohio, once a week for three successive weeks; the first of said publications to be at least sixty days previous to the day of hearing." Defendants claim this was not a publication "for at least sixty days," required by the act of 1861 [12 Stat. 246]. For this reason, as well as by reason of the alleged suppression of the publication of the notice as ordered, it is contended that the commissioner of patents never acquired jurisdiction of the subject-matter, and that the extension was granted without authority of law.

If the defense, of want of validity of the extension by reason of informality in the order of notice, or fraudulent suppression of publication of the notice ordered, be one which is open to the defendants in a suit brought for alleged infringement of the extended patent, it may well be doubted whether the allegation in the answer in this case is sufficient to let in the defenses set up. The allegation, that "the same was procured by fraud, misrepresentation, and in violation of law," is simply an allegation of a conclusion of law from facts, which facts are not pleaded. There is nothing in the allegation in the answer which would take the defense out of the scope of the decisions of the supreme court, that the act of the commissioner can not be impeached for fraud.

But if the defense were well pleaded in the answer, and the facts were alleged, which are relied upon to establish the fraud and the absence of jurisdiction, I do not think they would avail the defendants in this proceeding. The act of 1836, c. 357, § 18 [5 Stat. 117], made it the duty of the commissioner of patents, whenever a patentee made application in writing to the commissioner for an extension of his patent beyond the term of its limitation, to cause to be published in one or more of the principal newspapers in the city of Washington, and in such other paper or papers as he may deem proper, published in the section of country most interested adversely to the extension of the patent, a notice of such application, and of the time and place when and where the same will be considered, that any person may appear and show cause why the extension should not be granted. The act of 1848, c. 47, § 1 [9 Stat. 231], vested in the commissioner of patents, solely, the power to extend patents, previously vested in a board composed of the secretary of state, commissioner of patents, and solicitor of the treasury, and provided for a reference of the case to the principal examiner having charge of the class of inventions to which the case belongs, after application made to the commissioner, "and sixty days' notice given thereof." The law of 1861, c. 88, § 12, required all applications for the extensions of patents to be filed at least ninety days before the expiration thereof, "and notice of the day set for the hearing of the case shall be published, as now required by law, for at least sixty days."

As has been previously stated, the commissioner, in the case of this application, ordered the notice to be published "for three successive weeks, the first of said publications to be at least sixty days previous to the day of hearing,"—and the claim is, that the publication should have been made for sixty days successively before the hearing, and not having been so ordered or made, the commissioner had no jurisdiction.

It should here be noted, that it appears that the construction put upon the act of 1861 by the commissioner in this case, in ordering the notice, was in accordance with the invariable practice of the office, no change having been made, after the passage of that act, in the forms of the orders of notice as issued, since the passage of the act of 1848. The construction given to a statute by the officers appointed to execute it, and acted upon by them for a long term of years, though not conclusive, is entitled to great consideration by the court. Union Ins. Co. v. Hoge, 21 How. [62 U. S.] 35-66; Edwards' Lessee v. Darby, 12 Wheat. [25 U. S.] 210.

But it is not necessary to place the decision on this ground. The jurisdiction of the commissioner over the subject-matter commences with the filing of the petition, which makes it his duty to exercise that jurisdiction by causing a proper notice to be published. Before such order is issued, he must, in the exercise of that jurisdiction, have determined whether the publication should be in one or more of the principal newspapers in Washington; what newspapers in Washington were "principal newspapers" in the sense of the statute; what "other paper or papers he may deem proper" for the publication, in the particular case before him; and what "section of country is most interested adversely to the extension of the patent." It is plain from this examination of the statute, that the filing by a patentee of the petition for extension, and the payment of the required sum for expenses, confers the jurisdiction. The subsequent acts—of selecting the papers in which publication shall be ordered, and the number and locality of the papers, and issuing the order, and adjudicating upon the question whether that publication has been made according to law—are all in the exercise of the jurisdiction previously acquired.

It is insisted that the certificate of the commissioner granting the extension, shows upon its face a want of jurisdiction, and that the notices were not given as required by the act of 1861. The certificate of the commissioner is, that, in accordance with the provisions of the act of 1836 and the act of 1848, he "did, on this 30th day of September, 1867, decide that said patent ought to be extended." It contains no recitals respecting the notices issued, or the mode of their publication. Such recitals in a patent, whether original, reissued, or extended, are unnecessary. Where, as in this case, an act is to be done, or a patent granted upon proofs to be laid before a public officer, upon which he is to decide, the fact that he has done the act, or granted the patent, is prima facie evidence that the proofs have been regularly made, and were satisfactory. No other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs, if laid before him, when the law has made such officer the proper judge of their com-

petency and sufficiency. It is not necessary that the patent should contain any recitals that the prerequisites to the grant of it have been duly complied with, for the law makes the presumption, and if, indeed, it were otherwise, the recitals would not help the case without the auxiliary proof that these prerequisites had been, in fact, complied with. Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 458; Seymour v. Osborne, 11 Wall. [78 U. S.] 543; Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 797; Stimpson v. West Chester R. Co., 4 How. [45 U. S.] 384.

The answers of defendants deny the title of the complainants to the extension of the patent.

The deed of Nathaniel Gear, the patentee, to Alonzo S. Gear, one of complainants, is dated July 10, 1867. It recites the granting of the original patent; that application has been made for an extension, and, for a valuable consideration, assigns, sells, and transfers to Alonzo S. Gear, all the right, title, and interest which the grantor has, or may have, in and to the invention, by virtue of the granting of the said extension, followed by the usual habendum clause. The extension was granted on the 30th of September, 1867, for the term of seven years from the 8th day of November, 1867. On the 25th of November, 1867 (after the extension was granted), Alonzo S. Gear conveyed one undivided half of the patent, for the extended term, to John Gear, the other complainant.

Defendants contend that the assignment of N. Gear to Alonzo S. Gear was delivered before the extension was granted, and that Alonzo S. Gear did not take thereby a vested legal title, but only an equitable interest, capable of being perfected by a court of equity, in event of a refusal by N. Gear to perfect it by a subsequent conveyance. In Railroad Co. v. Trimble, 10 Wall. [77 U. S.] 380, the supreme court held that a conveyance, made before a grant of extension, became operative upon the right as soon as the extension had been granted, and that, by force of such a conveyance, the legal title in that case, under the extended as well as under the original patent, passed to the grantee.

The act of congress authorizing extensions of patents, undoubtedly contemplated a benefit to the patentee, not yet sufficiently rewarded by the receipts from his patent. The policy of the law would seem to require, that the patentee applying for the extension should himself have an interest. An equitable interest is sufficient for this purpose, the court having decided that he may convey the legal interest. Such an interest the patentee in this case had, by virtue of the stipulations between himself and his grantee, that he should be interested to the extent of one-half of the proceeds from sales, or use of the patented invention.

Defendants aver that complainants never had the exclusive ownership of the territory of New York and Massachusetts for the extended term of the patent. It is clear that complainants have no title to the extended term for the state of New York. Nathaniel Gear, before the conveyance to A. S. Gear, had conveyed his interest in the extension to the New York Circular Molding Company, by a deed, in terms embracing all extensions that might be granted of the rights in the patent conveyed.

The rights of the complainants in Massachusetts depend upon a state of facts entirely different. Nathaniel Gear, by his assignment, dated April 24, 1854, conveyed to John M. Buell, as follows: "All the right, title, and interest I have in said letters patent in the following territory, and in no other place or places, to wit, the state of Massachusetts; the same to be held and enjoyed by the said John M. Buell, his heirs and assigns, for his own use and behoof, and for the use and behoof of his legal representatives, to the full end of the term for which said letters patent are, or may be granted, as fully and entirely as the same would have been held and enjoyed by me, had this assignment and sale not been made." An assignment of an interest in an invention and letters patent therefor, before the expiration of the original term, does not carry with it any interest in a subsequently extended term, unless the assignment contains a specific provision to that effect. Wilson v. Rousseau, 4 How. [45 U. S.] 646; Bloomer v. McQuewan, 14 How. [55 U. S.] 539; Clum v. Brewer [Case No. 2,909]. The assignment to Buell does not contain any stipulation for an interest in any extended term that might be acquired by the patentee under the acts of congress. The words in the granting clause are, "All the right, title, and interest I have in said letters patent," etc. Referring to the previous recitals in the deed to find the meaning of "said letters patent," we find the recital to be that, "Whereas, Nathaniel Gear, of Zanesville, Ohio, did obtain letters patent of the United States for a machine for turning or cutting irregular forms, which letters patent bear date November 8, 1853. And whereas, John M. Buell is desirous of purchasing from me an interest therein." Thus far, in the granting part of the deed, or in the previous recitals, there is nothing which can, with any show of reason, be claimed to apply to anything but the term of the patent for fourteen years from November 8, 1853. The grantor's interest in this patent for the state of Massachusetts was the subject-matter of the grant. Unless certain words in the habendum clause can be construed as extending the contract to a subject-matter not before embraced, or referred to in the recitals or granting portions of the deed, there can be no doubt as to the intention of the parties. The habendum is to Buell and his assigns "to the full end of the term for which said letters patent are or may be granted, as fully and entirely as the same

would have been held and enjoyed by me, had this assignment and sale not been made." The claim, that the interest in the extended term, either legal or equitable, passed by the deed, is based upon these words in the habendum clause alone. If the thing granted be only in the habendum, and not in the premises of the deed, the deed will not pass it; and therefore if a man grant black acre only, in the premises of a deed, habendum black acre and white acre, white acre will not pass by this deed. Shep. Touch. 76.

The words "may be granted," must be construed with reference to what precedes them. If not loosely used without any reflection, they may refer to reissues of the patent. As the reissued letters which might be granted, would be for the same term as "the said letters patent," such might be referred to by the words, "to the full end of the term for which said letters patent are or may be granted," as the letters patent which had been, and the reissues which might be granted, would be for the same term, and that the term described in the previous parts of the deed. An assignment, very similar in form to this one, has been construed not to carry the interest in the extended term, in a very carefully considered opinion of Judge Sawyer, in the case of Jenkins v. Nicolson Pavement Co. [Case No. 7,273], in the circuit court for the district of California.

Defendants also claim that complainants have licensed and authorized the defendant, Grosvenor, to make and vend the invention of Nathaniel Gear in the territory of Massachusetts and New York, and have openly encouraged and silently acquiesced in the construction and sale of his machines in those states by both respondents, by printing and circulating handbills and documents signed by them, setting forth that he had the right to construct and vend said invention in those states.

The right in the extended patent for the state of New York is not owned by these complainants. So much of the evidence in the case as relates to alleged infringements in the state of New York, may be laid out of the case.

It appears that at one time Grosvenor, having obtained an interest under the Massachusetts Molding, Wood-Cutting and Turning Company, in the original patent for the state of Massachusetts, supposed that he had thereby acquired an interest in the extended term. The complainants so far acquiesced at one time in this construction of the conveyances as to issue certain circulars, which are introduced in evidence, and which do so far admit that compainants have not the exclusive right for Massachusetts, that they would, in the judgment of this court, estop the complainants from prosecuting as infringers any person who, with knowledge of those circulars, and acting upon the admissions therein made, had, upon the faith of those admissions, placed themselves in a condition to be injured, by allowing those admissions to be disproved. This would be a defense to a purchaser in Massachusetts under Grosvenor, who purchased and used a machine, acting and relying upon the admission of the complainants. Whether it would avail the defendants, would depend upon the question whether the acts, relied upon to prove infringements by them at any given time, were after, and in consequence of, these admissions, and also in reliance upon them, and before they had notice that they were recalled and withdrawn. The defendants were certainly aware, in 1869, that complainants claimed the entire interest and title in the extended term for the state of Massachusetts. The letters of Grosvenor of March 28, and of Lawrence of September 17, 1869, preclude any presumption that they were then acting under any supposed license, encouragement, or acquiescence of the complainants.

The answer alleges that Nathaniel Gear was not the first and original inventor of the thing patented. Defendants rely upon alleged prior knowledge and use by Hazard Knowles, as described in his letters patent, granted April 17, 1849, and prior knowledge and use by J. M. Doe, at Cambridge, Massachusetts; by Levi Haywood, at Erving and at Gardner, Massachusetts, and also prior knowledge and use at Princeton, Massachusetts.

Careful examination of the evidence has satisfied me that J. M. Stuart, who testifies to the use of Exhibit I at Princeton, is mistaken as to time, and that this cutter-head could not have been used at the time he supposes, nor in fact at any time prior to the date of N. Gear's patent.

The invention described in the letters patent to Levy, assignee of Hazard Knowles, for a tonguing, grooving, and molding machine, clearly did not anticipate the invention of Gear. The round cutter-heads in the Knowles machine had no use, except to support the cutters, and did not, like the cutter-head in the Gear machine, serve as a guide or direction to the form or pattern carrying the material to be dressed.

There is much more difficulty and doubt attending the decision on the question of novelty, as affected by the evidence in relation to the alleged prior use by J. M. Doe and Levi Haywood.

In relation to the prior use of cutter-heads, substantially like those claimed in the Gear patent by Doe and Haywood, there is, especially in Haywood's case, a vast mass of contradictory and irreconcilable testimony. Long, and patient, and careful examination of this evidence, shows the utter impossibility of reconciling the conflicting statements, or of avoiding the conclusion that, on one side or the other, the witnesses were testifying to matters not within their knowledge or recollection. It would be useless to spread upon the pages of this opinion an analysis which I

have carefully made of the many hundred pages in the record devoted to this portion of the evidence. Upon this point I need only state the conclusion to which I have come, not without some hesitation and some regret, that, in a case like this of conflicting and contradictory statements from the respective witnesses, the judgment of the court could not have been aided by actual presence before the court of the witnesses on the stand. The complainants are entitled to the benefit of the presumption, arising not only from the grant itself, but its unimpaired existence during the original term and its subsequent extension; the burden is upon those seeking to overthrow it for want of novelty, to satisfy the court upon that issue, especially in a case like this, where the parties have exercised rights under the patent, and claimed interests in it, in the original as well as the extended term, and now rely upon evidence as to transactions occurring seventeen or eighteen years before the giving of the testimony, to impeach the patent. Under these circumstances, the court ought to be fully convinced, by a clear preponderance of evidence, before declaring a patent void, on the ground of prior knowledge and use. The evidence fails to produce a conviction in my mind, that, prior to the date of N. Gear's patent, there was either in the shop of Doe, at Cambridge, or of Haywood, at Erving or Gardner, or elsewhere, any cutter-head in use, embracing the invention described in the claim of that patent.

Decree for an injunction and an account.

NOTE. On rehearing, after decision of Nicolson Pavement Co. v. Jenkins, 14 Wall. [81 U. S.] 452, this decree was revoked and the bill dismissed; it appearing by an assignment in evidence, but not referred to at the first hearing, that the patentee, Gear, had, before patent granted, conveyed to one Scott, who still held the same, all his right, title, and interest in the invention for the state of Massachusetts, habendum to the full end of term for which "letters patent are or may be granted"; and there being no evidence of infringement by the defendants, except in the state of Massachusetts.

[For other cases involving this patent, see note to Gear v. Holmes, Case No. 5,292.]

Case No. 5,292.

GEAR v. HOLMES et al.

[6 Fish. Pat. Cas. 595.] [1]

Circuit Court, D. Massachusetts. Dec., 1873.

PATENTS—CONSTRUCTION—GROUNDS FOR PRELIMINARY INJUNCTION.

1. Effect of words "to be held to the full end of the term for which said letters patent are or may be granted," when used in the habendum of the deed, reconsidered.

2. Where the assignor, from whom complainant derived title, had never done anything with the patent, in the state where the suit is pending, during its extended term, and defendants bought their machines in ignorance of his rights, and the existence of the machines now set up as prior to the patent was the subject of different issues from those in the former suit on the patent, in which its validity was sustained: *Held*, that the court would not, upon preliminary motion, enjoin the defendants from using the machines, but that the court would have acted differently if it had appeared that the defendants were not responsible.

3. If the court were sitting in any other state, it would grant an injunction against users of the machines there, as the assignor's neglect would not affect complainant's rights in a state where complainant's title was not derived through him.

In equity. Motion for provisional injunction. Suit brought upon letters patent [No. 10,204], for "a machine for turning and cutting irregular forms," granted Nathaniel Gear, November 8, 1853, and extended seven years from the expiration of the original term. The same patent was sued upon in the case of Gear v. Grosvenor [Case No. 5,291]. The complainants in that suit had received an assignment from Nathaniel Gear, the patentee, in 1867, of all his right in the extension of the patent. Subsequently to the decision above referred to, the decision of the supreme court in the late case of Nicolson Pavement Co. v. Jenkins [14 Wall. (81 U. S.) 452] was brought to the attention of this court, and inasmuch as the supreme court there held that the conveyance by an inventor of all his right in the invention to be held "to the full end of the term for which said letters patent are or may be granted," carried the extension to his assignee, this court, upon a rehearing of the case, held that a conveyance made by Nathaniel Gear, of his right in the invention in Massachusetts, to one T. D. Scott, in 1853, carried the extension of his patent to him, and that therefore the former decision for the plaintiffs should be reversed, and from this decree plaintiffs appealed to the supreme court. In the suits now before the court, the plaintiff [Alonzo L. Gear] showed that he had bought the title of T. D. Scott, and that the patent had been sustained by a decision of the United States circuit court in Virginia. The defendants [F. M. Holmes and others] introduced affidavits of various persons to prove four defenses: (1) That Nathaniel Gear was not the inventor, but fraudulently took the invention from one Ball, who did work for him on machines; (2) that a similar machine was in use in Cincinnati in 1852, which was made by Steptoe & McFarlan, manufacturers of machinery there; (3) that a similar machine was in use in Connecticut in 1852; (4) that a similar machine was in use in Zanesville, Ohio, between 1848 and 1851. The defendants had also filed twelve affidavits in former suits, to the effect that a similar machine was in use in a certain building in Philadelphia, by Hart, Ware & Co., in 1851, but this defense was abandoned when the complainant showed that they did not occupy that building until 1852. The defendants further showed

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

that the complainant had sold a large number of these machines in Massachusetts before he acquired Scott's title, which the complainant showed that he did, supposing he owned the title under N. Gear's assignment to him in 1867. The defendants further showed that Scott had never exercised any rights under the extension of the patent in Massachusetts, and that they had bought their machines in ignorance of the existence of the patent.

T. L. Livermore, for complainant.

Chauncey Smith and D. H. Rice, for defendants.

SHEPLEY, Circuit Judge, said that he never before had had any evidence, other than the patent itself, that Nathaniel Gear invented the patented machine; but that the affidavit of Ball and others satisfied him now that Nathaniel Gear did invent it, notwithstanding anything he himself might now say; but that whether he was the first inventor, he did not now decide. Upon this point, he said that he did not believe that the Cincinnati machine existed, for the reason that the evidence was that, in 1859, the owners of the patent had exhibited the patented machine in Cincinnati, and invited the wood-workers there to buy it; that at this time Steptoe & McFarlan exhibited a machine of their manufacture, of another kind, for the same work, and that the two machines were run in competition beside each other, in the presence of a large number of furniture manufacturers and wood-workers of Cincinnati, and that the result of it was that they all purchased the patented machine; and that he did not believe that Steptoe & McFarlan would have permitted themselves to be thus outsold in their own market if they, in fact, had made a machine like the patented one, before Nathaniel Gear got the patent for it.

The affidavits had raised fair issues in his mind as to whether the Zanesville and Connecticut machines did really exist before the patent was granted, and that he thought these were issues which required a full investigation on a final hearing. He further said that in the former case of Gear v. Grosvenor [supra] believing that the law should be construed as designing that extensions of patents were to inure to the benefit of the inventor, and not his assignees, and that therefore his assignments, made during the original term of the patent, ought to be construed with all the strictness applicable to the construction of deeds, so as, if possible, to exclude the extension from the subject-matter conveyed, he had held that the conveyances of Nathaniel Gear, during the original term of the patent relied upon by the defendants, did not carry the extension in Massachusetts, and that, therefore, it remained his, and was conveyed by him to the plaintiff in 1867; but that, subsequently, the case of the Nicolson Pavement Co. v. Jenkins [14 Wall. (81 U. S.) 452] had been brought to his notice by the defendants, and that the supreme court had chosen in that case to take the ground, that assignments of inventions by inventors should be construed in the loosest way, and, disregarding what it termed the technicalities applicable to the construction of deeds, had held that such assignments were to be construed in the same way as common contracts, and that the use of the word "invention," in conjunction with the habendum, "to be held to the full end of the term for which said letters patent are or may be granted," would carry the extension; that he was bound to follow this decision. And that inasmuch as the assignment of Nathaniel Gear to Scott, in 1853, which, though in the record, had not been so brought to his notice as to receive his consideration, was now brought to his notice, he was obliged to hold that the use of the word "invention" in it carried the extension of the patent in Massachusetts to Scott; that the plaintiff now relied upon the title which he had obtained from Scott's administrator among others, and for the purposes of this hearing must be held to rely on Scott's title, and therefore was subject to all the equities that might have been set up against Scott himself, if he were plaintiff; that upon this state of the law, inasmuch as Scott had never done anything with the patent in Massachusetts during its extended term, and these defendants had bought their machines in ignorance of his rights, through his neglect to make them known, and the existence of the machines, now set up as prior to the patent, was the subject of different issues from those in the former suit on the patent, where other machines were set up as prior to the patent, and its validity was sustained, the court would not enjoin these defendants from using the machines before the issues raised had been tried on a final hearing; that the court would have acted differently, if it had been shown that these defendants were not responsible, and able to pay damages which plaintiff might recover against them on the final hearing; but that as it was not suggested that they were not responsible, no irreparable injury would result to the plaintiff by the use of the machines during the pendency of the suit. But that if the court were sitting in any other state, it would grant injunctions against users of the machines there, because Scott's neglect would not affect the plaintiff's rights in states in which the title was not derived from him; and further, that the court would grant injunctions against any manufacturers of the machines, in this or other states, in suits by this plaintiff against them.

[For other cases involving this patent, see Gear v. Fitch, Case No. 5,290; Gear v. Grosvenor, Id. 5,291.]

GEAR (UNITED STATES v.). See Case No. 15,195.

Case No. 5,293.

Ex parte GEARY.

[2 Biss. 485; [1] 3 Chi. Leg. News, 209.]

Circuit Court, N. D. Illinois. March Term, 1871.

WHEN COURT MAY PRESCRIBE PLACE OF PUNISHMENT—HARD LABOR IN PENITENTIARY—OFFENDER CANNOT OBJECT THAT STATE IS NOT AUTHORIZED TO RECEIVE HIM—TERM MAY BE DIVIDED.

1. Unless the law of congress prescribes in what particular place the punishment of an offense shall be executed, the district court has the power to designate any place within its jurisdiction, and, subject to this qualification, the acts of congress of March 3, 1825 [4 Stat. 118], June 30, 1834 [4 Stat. 739], and March 3, 1865 [13 Stat. 500], so far as they refer to the place of imprisonment, are merely declaratory.

2. As by the laws of Illinois the prisoners in the state penitentiary are subject to hard labor, unless it is otherwise directed in their sentence, and the act of June 30, 1834, provides that criminals sentenced by the United States courts shall be subject to the same discipline and treatment as convicts sentenced by the state courts, it follows as a conclusion of law that the former are subject to hard labor as a part of the imprisonment. It is not necessary, in order to clothe the court with authority to imprison in the penitentiary, that a part of the punishment, by the terms of the sentence, should be hard labor.

[Cited in U. S. v. Tod, 25 Fed. 816.]

3. The state would have the right to refuse the use of its penitentiary to the prisoners of the United States, but where for more than thirty years prisoners convicted in the courts of the United States have been sentenced to the penitentiary, and have been there received and kept, with the knowledge and acquiescence of the state authorities, and their expenses paid by the United States, it is not competent for an offender sentenced to the penitentiary by the federal court, to object that there is no express legislation by the state authorizing such prisoners to be there confined; such objection could only be made by the state.

[Cited in Ex parte Brooks, 29 Fed. 85; Erwin v. U. S., 37 Fed. 485.]

4. The district court does not exceed its power in fixing a part of the term of imprisonment in the county jail, and the remainder in the penitentiary.

5. The usual practice on conviction is for the court to direct the marshal to take the prisoner to the penitentiary within a certain number of days, a sentence which, when the prisoner is already in jail, is essentially the same.

6. The fact that the prisoner is retained for a time either before or after sentence, in the county jail, does not, in either case, authorize a writ of habeas corpus.

James Geary was convicted in the district court of the United States for this district on the 28th of February, 1871, of the crime of "conspiracy to defraud the United States," under the thirtieth section of the act of March 2, 1867 (14 Stat. 484). The sentence of the court was that he be imprisoned in the jail of Cook county for twenty days, and that after the expiration of that time he be imprisoned in the state penitentiary at Joliet, in this district, for one year, and that he be fined $1,000 and pay costs, and that he stand committed until the fine and costs be paid; and the marshal was ordered to execute the sentence of the court upon the prisoner by placing him in the jail, and afterwards in the penitentiary. At the expiration of the twenty days he was taken by the marshal from the jail in Cook county to the penitentiary at Joliet, where he was held by the warden. This was an application by the prisoner for a writ of habeas corpus, the petition alleging that his imprisonment was illegal on three grounds: (1) Under the third section of the act of congress of March 3, 1865, the court had no authority to direct his imprisonment to be in the penitentiary, because the term for which he was imprisoned did not exceed one year. (2) The penitentiary is not allowed by the legislature of the state as a place of imprisonment for persons convicted and sentenced in the courts of the United States, and, therefore, it is not within the terms of the act of congress. (3) The court could not divide the punishment, making it part in the county jail and part in the penitentiary.

Robert Hervey, Jas. R. Doolittle, and R. H. Forrester, for petitioner.

J. O. Glover, U. S. Dist. Atty., and L. H. Boutell, Asst. Dist. Atty., for the United States.

DRUMMOND, Circuit Judge. The only question proper to be considered on this application is, whether the court can see that the issuing of the writ would be of no avail, the rule being that it should issue unless it would be useless.

The fifteenth section of the act of March 3, 1825 (4 Stat. 118), declares "where any criminal, convicted of any offense against the United States, shall be sentenced to imprisonment and confinement to hard labor, it shall be lawful for the court by which the sentence is passed, to order the same to be executed in any state prison or penitentiary within the district where such court is holden, the use of which prison or penitentiary may be allowed or granted by the legislature of such state for such purpose." The third section of the act of March 3, 1865 (13 Stat. 500), provides "In every case where any person convicted of any offense against the United States, shall be sentenced to imprisonment for a period longer than one year, it shall be lawful for the court by which the sentence is passed, to order the same to be executed in any state prison or penitentiary within the district or state where such court is held, the use of which prison or penitentiary is allowed by the legislature of such state for such purpose." The act of June 30, 1834 (4 Stat. 739), declared that any criminal imprisoned in a penitentiary, should be subject to the same discipline and treatment as the state convicts. The only material difference between the act of 1825 and that of 1865 is, that the

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

former speaks of confinement to hard labor, and is without limitation as to the time of imprisonment, and declares that the imprisonment is to be in the penitentiary or state prison in the district where the court is held. The act of 1865 does not mention hard labor, but only imprisonment, and for a period longer than one year, and it may be executed in any penitentiary or state prison in the district or state where the court is held.

The legislation of congress has been by no means uniform as to making hard labor a part of the penalty of imprisonment. The crimes act of 1790 [1 Stat. 112], parts of which are still in force, seems not to have mentioned it at all as connected with imprisonment. In some of the acts passed between that time and the act of 1825, it is referred to, and not in others. The general act of 1825, in specifying imprisonment, in most cases adds "confinement to hard labor." In the various criminal laws which have been passed since, it is sometimes mentioned and sometimes omitted. In some cases the law, after imposing the penalty of imprisonment, to be adjudged by the court, declares separately that the prisoner shall be kept at hard labor, thus, apparently, making it an injunction upon the person who has the custody of the prisoner. The two sections which have been already cited from the act of 1825 and from that of 1865, are striking illustrations of this peculiarity. In the one, hard labor is mentioned; in the other, omitted. There would seem to be no good reason for this, unless it be that the act of 1825 apparently discriminates, and subsequent legislation does not.

In our state the law provides that the court, in the case of the confinement of a criminal in the penitentiary, shall designate what part of the punishment shall be solitary confinement, and what part shall be hard labor, and there are various statutes which provide for and regulate the hard labor by convicts in the penitentiary, and it is clear that all who are not by the order of the court in solitary confinement are subject to hard labor, and therefore it follows, as a conclusion of law, that when a person is sentenced by a court of the United States to the penitentiary of this state, he is subject to hard labor as a part of the imprisonment, because the act of 1834, as already stated, provides that the prisoners of the United States shall be subject to the same discipline and treatment as the prisoners of a state.

The only question that can arise upon this part of the case is, whether, under the language of the act of 1825, it is necessary, in order to clothe the court with the authority to imprison a convict in a penitentiary, that a part of the punishment, by the terms of the law, should be hard labor. The language of the statute, it will be recollected, is, "shall be sentenced to imprisonment and confinement to hard labor." The statute is without limit as to the time of the imprisonment. The act of 1865 omits the words "confinement to hard labor," and declares that there shall be authority in the court to impose this punishment, provided it is for a term exceeding one year. It may be that the true meaning of this law is that the imprisonment in the penitentiary should be for a period longer than one year, and that the punishment cannot be divided so that a part of it shall be in one place and a part of it in another, and thus bring it within the law, provided the term of imprisonment in both places together is more than one year. There would be no doubt upon the subject, provided it were a part of the penalty attached to this offense that the offender should be confined to hard labor, because whenever he is confined in the penitentiary, by the very terms of the law he becomes subject to hard labor, and both the statutes can stand, that of 1865 not necessarily repealing that of 1825.

In 1789 the first congress recommended to the legislatures of the several states that they should make laws requiring the keepers of jails to receive and keep prisoners committed under the authority of the United States. The implication arising from this resolution is, that the jails in the states respectively were proper places in which to imprison persons convicted under the laws of the United States, and that those who kept such jails might take charge of the prisoners thus convicted and sentenced; but, inasmuch as there might be cases where they would not, this resolution was passed, recommending to the legislatures to make it imperative on the keepers of jails to receive and keep them.

In 1791 another resolution was passed, which declared that, where a state had not complied with the recommendation, the marshal, under the direction of the judge, might be authorized to hire a convenient place to serve as a jail. Then, by a resolution of 1821, this provision was extended to all cases where the states had complied with the recommendation originally, and had afterward refused the use of their jails. It will be seen that during all this time there is nothing in the legislation of congress, except what is contained in these various resolutions, as to the place where persons convicted under the laws of the United States, should be imprisoned. The inference seems to be, throughout, that the jails of the respective states were proper places, and that the states ought to provide by law that the keepers of those jails should be obliged to receive and detain prisoners of the United States. And, in some instances, we know that there was, and still is, this legislation of the states. This being so, the question arises as to the authority of a court of the United States to imprison a person convicted of an offense, in any jail or prison in the district, authorized by the state to receive prisoners, even though the case might not be literally within the act of 1825 or 1865. And my opinion is, that the power is incidental to the court; that it follows necessarily from the legislation of congress, and from the authority

given to the court to imprison. The effect of that legislation is, that when the court sentences a party to imprisonment, it can be executed in any place where, by the authority or permission of the state, the prisoner can be received and detained.

What is a penitentiary of a state, but a prison in which a person convicted of an offense may be confined? In what respect is the penitentiary at Joliet different, so far as the power of this court is concerned, from the jail of this county? The court has the same power over the prisoner in the one case as in the other; can direct its officer as well to go to Joliet as to the jail of this county. The prisoner is just as much within the control and jurisdiction of the court in the one case as in the other, and I think, unless the law of congress prescribes in what particular place the punishment of an offense shall be executed, that the court has the power to declare that the imprisonment may be either in the jail of Cook county, or in the penitentiary at Joliet. When the question is as to the power of the court to direct imprisonment outside of its jurisdiction, then an act of congress is necessary, as in the law of 1865. The court, without some such provision, could not sentence a man beyond its jurisdiction, because the court would have no control over the prisoner. It was conceded in the argument that there is no law of congress which expressly directs that the imprisonment of any party shall be in a county jail, all of which it was admitted that the state had given, by legislation, for that purpose.

It is to be observed, and I think it throws great light upon this subject, that there are various acts of congress which declare that where a party has committed a particular offense, the penalty shall consist of fine or imprisonment, or fine and imprisonment in a penitentiary, thus limiting it to the penitentiary; as under the fourth section of the act of February 26, 1853 (10 Stat. 170). The penalty for the offense is, "on conviction in any court of the United States having jurisdiction thereof, shall pay a fine not exceeding $2,000 or suffer imprisonment in a penitentiary." The fifth section of the same act is, "shall pay a fine not exceeding $2,000, or suffer imprisonment in a penitentiary not exceeding three years." The sixth section of the same act is, "and shall upon conviction thereof be fined not exceeding three times the amount so offered, promised or given, and imprisoned in a penitentiary not exceeding three years." Of course there can be no doubt, that, when the law prescribes where the place of imprisonment shall be, it is the duty of the court to follow it, and the inference is that where the place is not prescribed, as is true of most offenses under acts of congress, the court has power to designate any prison within the jurisdiction of the court. There might be some argument in favor of the position taken by the counsel for the prisoner in this case, arising from the fact that the law under which this party was convicted declares it to be a misdemeanor; but the various laws of congress have, in a great measure, done away with the distinction that existed at common law between a felony and a misdemeanor; and, it is certain, for a mere misdemeanor a party may be imprisoned in the penitentiary. Suppose the only place of imprisonment in a state is a penitentiary—there are, or may be, such cases—what is the court of the United States to do? If all the prisoners within the limits of a state were confined to the state penitentiary, or prison, and there were no regular county jails, what would be done in such case with the prisoners of the United States? The view that I take, then, of these statutes is that they are declaratory acts, and nothing more; that they were passed for the purpose of removing doubts which might have existed in relation to the authority of the court, but that the court had authority, independent of those statutes. At common law the court of king's bench had power to sentence a convict to any prison in England. 1 Bish. Cr. Proc. 985, 985, and notes and authorities cited.

The next question is, whether the court had authority to imprison the defendant in the penitentiary, without some express legislation on the part of the state of Illinois, giving the right to the court there to imprison him.

The language of these statutes, it will be seen, and such, it is claimed, is the implication from the resolutions which have been referred to, is that the court has authority to imprison a convict in a state prison or jail, only where there is an express legislative permission given, and the instance is cited of such authority by an act of the legislature of this state in relation to county jails, passed shortly after the state was admitted into the Union, and which has existed ever since. There is no doubt that a state has the right to refuse the use of its jails or penitentiary to prisoners of the United States. They are all mere state buildings and institutions erected at the expense of the states, and under the authority of their laws. The government of the United States has no control over them, except with the consent of the states. Undoubtedly the United States could erect jails or penitentiaries within the limits of the several states, for the confinement of prisoners of the United States. That has not been done in this state. There is here, therefore, no jail or penitentiary, or building, erected by the United States, except, perhaps, it may be rooms intended for the temporary accommodation of prisoners of the United States.

The question is, whether, in the first place, there has been any legislation on this subject, and, secondly, whether it is absolutely necessary that there should be.

The counsel for the petitioner have stated, and so also have the counsel for the gov-

ernment, that they have been unable to find any act of the legislature, or any resolution, which expressly authorizes the federal court to direct a person convicted of crime to be imprisoned within the penitentiary of the state. I have not been able to find any in the limited time I have had to examine this subject. Whether there is any or not I am unable to say; but what are the facts in relation to the confinement of prisoners in the penitentiaries of this state? The penitentiary at Alton has been finished for the reception of prisoners nearly forty years. It is over thirty years since parties convicted in the federal courts of this state have been sentenced to imprisonment in the penitentiary, sometimes with hard labor expressed in the sentence of the court, and sometimes without. The first case that has been found by the district attorney is one in 1838—thirty-three years ago—and from that time to the present, numerous persons have been sentenced to imprisonment in the penitentiary of this state. The act in relation to the penitentiary at Joliet provides that the same laws, rules and regulations shall exist as to it as to the penitentiary at Alton. The question presented in this petition has never been made before in this state. For more than thirty years prisoners have been constantly sent to the penitentiary, and received without question by the authorities of the state, and bills for the use of the penitentiary, and for the keeping of prisoners, presented by the state and paid by the government.

One of two things, I think, is true from this state of facts: either that there was authority given by the legislature, and omitted in the various compilations of the laws and resolutions, or that there was some general law—like that of 1831, for example—which was construed as giving this authority to the court, which might be doubtful in its construction, and which might seem to apply simply to prisoners of the state. Whichever view be taken, it seems to me that the conclusion necessarily follows that it is not competent for the petitioner, under this state of facts, to make this objection. It is one that can only come from the state. If it be true that there was legislative authority given, of course that is an end of the question. If the authority was understood to exist from a general law so decided at the time, and that has been acquiesced in for more than thirty years by the authorities of the state, how much stronger would it be if there was an express declaration of the legislature of the state?

What is the object of a grant by the legislature of a state to authorize the courts of the United States to imprison convicts in the penitentiaries? It is nothing more than an indication of the will of the state, and I am not prepared to say that will may not be shown in some other way than by an act of the legislature, or a resolution.

Perhaps there might have been further inquiry whether or not an express grant by the legislature of the state had been made, but as I have no serious doubt upon the general question, I hardly thought it worth while to postpone the decision in order to obtain that information. It would be too serious a matter, after a practice so long continued as this, to allow a defendant to raise a question of this kind, the principle being, as I contend, that he can be confined, unless the act of congress expressly designates a particular place, in any prison within the jurisdiction of the court, the use of which is permitted by the state.

There is another question remaining. It is insisted that the court erred in fixing the imprisonment in two places, one in the county jail, the other in the penitentiary. Perhaps there is something objectionable in form, but it is a question of power on the part of the court. The point is, whether there is anything in the laws of congress which restricts the authority of the court as to the place of imprisonment in this case. I think there is not.

Practically, the same result follows in all cases of a party convicted in this court. When he is in the county jail, for example, the universal practice of the court is, if he is sent to the penitentiary, that the marshal be directed within a certain time to remove him there. Where the defendant is a'ready imprisond in the jail of the county, because the marshal has a given time in which to remove the prisoner to the penitentiary of the state, does that authorize the defendant to apply for a writ of habeas corpus, and be released? When the verdict is rendered against a defendant he is in custody of the marshal, who in practice places him in the county jail, where he remains till removed to the penitentiary. It is a reasonable exercise of power on the part of the court and indispensable to the due execution of its mandate, and this sentence I take to be nothing more than this, except in form. If the marshal had been ordered, in this case, within twenty days to take the prisoner to the penitentiary, he being already in the jail, he would have to stay there until the marshal could remove him. The judge of the circuit court has no knowledge of the particular circumstances which induced the judge of the district court to divide the punishment in this case. It may have been some such object as that. While exception may be taken to this form of punishment, there can be none as a question of power or authority. On the contrary, the construction that has been given to this subject by this court for over twenty years, has been that all this legislation in relation to the place of imprisonment, except where the law particularly describes the place, is discretionary with the court, and that the acts of congress are only permissive. For example, can there be any question that, notwithstanding the acts of 1825 and 1865, the court would have the pow-

er to imprison a party subject to confinement in the penitentiary, in any jail within the district where the court is sitting? Certainly not. The power of the court is undoubted, and these acts are simply permissive; "it shall be lawful," not that it is compulsory; it is lawful if it is done, not that the court is obliged to do it. Writ refused.

GEARY (UNION BANK OF GEORGETOWN v.). See Case No. 5,241a.

Case No. 5,294.

In re GEBHARDT.

[3 N. B. R. 268 (Quarto, 63).] [1]

District Court, E. D. Missouri, 1869.

BANKRUPTCY—PRACTICE.

Answer need not be verified. If debtor, in cases of involuntary bankruptcy, do not appear on return-day of rule, he cannot demand a trial of issues by a jury.

A rule was issued directing the defendant to show cause on the 31st of August why he should not be adjudged bankrupt. An answer to the rule was lodged with the clerk by the attorney on the 18th of September, after the expiration of the rule. The answer was not verified. The petitioning creditors applied to have judgment by default, and the defendant applied for leave to file answer.

PER CURIAM. The defendant not having filed his answer on the return-day of the rule, cannot demand that the issues shall be tried by a jury. But, under the circumstances, leave will be given to file an answer, the issues to be tried by the court. The statute does not require the answer to the rule to be verified by affiant.

GEDNEY (KING v.). See Case No. 7,795.

Case No. 5,294a.

GEDNEY et al. v. L'AMISTAD.

[Betts' Scr. Bk. 121.]

District Court, D. Connecticut. Jan. 7, 1840.

ADMIRALTY—HIGH SEAS—JURISDICTION—SALVAGE SERVICE—COMPENSATION—SPANISH TREATY—FOREIGN VESSELS.

[1. A vessel lying, when seized, a half mile from shore off Colloden Point, Long Island, though in Long Island Sound, is on the high seas, and the court into whose district she is first carried has jurisdiction.]

[2. The fact that persons from a ship lying in the open sea, a half mile from shore, were on shore when she was seized, will not prevent the court of another district into which the ship was first carried taking jurisdiction of them, where it appears that they were only temporarily on shore to get provisions.]

[3. The seizure and bringing into port of a vessel in distress in command of African negroes totally ignorant of the science of navigation, who shipped as slaves, had killed the commanding officers, imprisoned their owners, and assumed command, is a salvage service.]

[4. The court awarded one third the appraised value of vessel and cargo as salvage compensation, but refused salvage as to the slaves, they having no value as such in the district (Connecticut), and there being no law under which they could be sold.]

[5. The provision in the treaty of 1795 with Spain, requiring the contracting parties to furnish vessels of one, that put into the ports of the other in distress, necessities at reasonable rates, and to cause to be restored vessels and effects taken from the owners within their jurisdiction, does not prevent an award for salvage in seizing and bringing into port, by a United States naval vessel, a Spanish ship in distress, in command of African negroes who shipped as slaves, had killed the commanding officers, imprisoned their owners, and assumed command.]

[6. A custom of a foreign country cannot be set up in opposition to its written laws by one claiming as a citizen of such country.]

[7. Negroes imported into Cuba in violation of the Spanish law, which declares such negroes to be free, were sold at Havana, to Spanish citizens, and shipped, under a false pass, as Ladinos, on board a Spanish coasting vessel for another port of Cuba. After a few days out, they killed the master and cook, imprisoned their owners, and assumed command of the vessel, and after many days were found in distress, seized, and taken into port by a United States naval vessel. *Held*, that as, under the Spanish law, there could be no title to such negroes, they should not be delivered up as property of Spanish subjects, although the custom in Cuba is opposed to the law; but that such negroes, under the act of March 3, 1819 (3 Stat. 532), should be ordered delivered up to the president of the United States to be transported to Africa.]

[This was a libel in rem by Lieut. Thomas R. Gedney and others against the schooner L'Amistad for salvage.]

JUDSON, District Judge. On the 26th of August, 1839, Lieut. Gedney, commanding the brig Washington of the United States navy, seized and brought into the port of New London, in this district, the schooner L'Amistad, with a cargo of goods and 49 Africans, then claimed as slaves by Don Pedro Montez and Don Jose Ruez, subjects to her Catholic majesty the queen of Spain—the said Montez and Ruez also being on board the schooner. On the arrival of the schooner within this district, New London being the first port into which the schooner was brought after her seizure, a libel was filed here by Lieut. Gedney, the officers and crew of the brig Washington, claiming salvage. At a special district court, held on the 19th of September, other libels were also filed in the following order: That of Jose Ruez; that of Pedro Montez; that of Henry Green and Peletiah Fordham; a libel in behalf of the United States by the district attorney, first, claiming that the vessel, cargo, and slaves be restored to the owners, being Spanish subjects, and secondly, demanding that the negroes be delivered up to the pres-

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ident to be transported to Africa; that of the Spanish consul claiming Antonio. And on the 19th day of November another libel was also filed, by the district attorney, in favor of the United States, alleging that the Spanish minister had, in pursuance of the treaty between the United States and Spain, demanded of the government of the United States, the restoration of the schooner L'Amistad, her cargo, and the slaves on board for the owners thereof, being subjects of Spain. The ordinary process of attachment issued, and the schooner, goods, and Africans so alleged to be slaves were taken into custody by the marshal of this district, for adjudication upon these various libels and claims. At the district court in November, a part of these Africans, by their counsel, filed a plea to the jurisdiction of this court, alleging that they were born in Africa, that they were free, and that they were seized within the territorial jurisdiction of the state of New York, claiming to be set at liberty. This plea is now withdrawn, and an answer is filed alleging, substantially, as follows: That Cinquez, Banna 1st, Damma, Fawni 1st, Phumah, Connoma, Choday, Bunnah 2d, Baah, Cebba, Pooma, Kimbo, Peeah, Bangyah, Saah, Coelee, Parte Mona, Nahquoi, Jesse, Con, Fawni 2d, Kenna, Laummee, Fajana, Jebboy, Fauguanah, Bewnu, Cherkenall, Gubbo, Curre, Seme, Kene, Majera, are all Africans, entitled to their freedom; that the said schooner was at anchor near Colloden Point, within the territorial jurisdiction of the state of New York, and that part of said Africans, as named in said plea and answer, were on shore on Long Island, within the jurisdictional limits of the state of New York; whereupon they say that this court hath no jurisdiction over their persons, praying to be discharged. Lieut. Gedney now appears and pursues his claim for salvage. Henry Green and Mr. Fordham appear and pursue their claims for salvage. The district attorney of Connecticut pursues the libels filed by him in behalf of the government of the United States, and in behalf of the minister of Spain, for a restoration of the ship, cargo and slaves, under the treaty between Spain and the United States.

In the discussion of this case have been involved numerous questions, of great importance, requiring, as we have seen, industrious examination and patient deliberation. It has been my endeavor to afford time for this investigation; and the ability with which these questions have been discussed at the bar must satisfy all, that everything which talent and learning could accomplish has been done. It devolved upon the court to dispose of these various and complicated questions, in such manner as will seem to be demanded by the laws of the land, and of this the responsibility rests on me. That responsibility will be met, and when discharged according to the dictates of my own conscience, I shall be relieved from its further perplexities. It will be a satisfaction, while doing this, that neither party or claimant can be prejudiced by my determination, because the laws secure an appeal to the highest tribunal in this country, where my decision may be reviewed, and if wrong corrected. It is then of little importance to the persons in interest, what may be the determination of this court, for a case like this will not and should not rest upon a single trial, without review before the supreme court, in whose decisions all would be satisfied. The case is not only important to those immediately interested, but there are involved principles important to the nation and the world. If a few months have elapsed since this cause has been pending, it has been owing to circumstances beyond my control, but this surely has produced no inconvenience or suffering to those in custody. They have all been humanely treated; liberally fed and clothed by the government, into whose hands they have been providentially cast. Whatever may be the final result of this case, so far it may be safely said that not one step has been taken which could have been avoided. I do not stop to say that it is my wish to escape the responsibilities which devolve upon me; neither would it be just to myself to say that I have not been deeply anxious to investigate this case, and decide it according to its true merits.

The first question to which my attention is called, is that of jurisdiction. Although the first plea has been withdrawn, yet the allegations in the present answer require an examination of the evidence with that view. If, indeed, the evidence does not show a case, of which the court has cognizance by law, it will be my duty still to dismiss it. In point of fact where was the L'Amistad seized? It will be recollected that at a former district court, the attorney for the United States was directed to examine this place, in company with the counsel on the other side: this has been done, and on a careful examination of the evidence, I find as a matter of fact, that the schooner lay in 3½ fathoms of water, where the tide ebbs and flows, not less than half a mile from the shore, off Colloden Point, five or six miles from Montauk; about 25 miles from Sag Harbor; 18 miles from New London,—not in any known harbor, bay, river or port.

The jurisdiction of the district court is wholly regulated by statute. By the laws of congress, each district court has exclusive jurisdiction over all seizures made within that district. A vessel seized in one district, cannot be carried into another for adjudication. Another branch of the statute provides that where the seizure is made on the high seas, the vessel seized may be carried into any district in the United States, and must be tried where first carried in. Was the schooner L'Amistad seized on the high seas? The answer to the question de-

pends on the legal signification of the term "high seas," as used in the judiciary act of 1789. Here I have no path to mark out for others, but only to adopt the language of learned jurists who have gone before, and yield my assent to determinations already made. To the former I can listen with respect, but by the latter I am bound to yield obedience, as to the settled law of the land. Perhaps a more conclusive argument cannot be found, than that of Mr. Webster, before the supreme court, in the case of U. S. v. Cevins, 3 Wheat. [16 U. S.] 336. This is the language: "The common and obvious meaning of the expression 'high seas' is also the true legal meaning. The expression describes the open ocean, where the dominion of the winds and the waves prevail, without check or control. Ports and havens, on the contrary, are places of refuge, in which protection and shelter are sought, from this turbulent dominion, within the enclosures and projections of the land. The high seas and havens, instead of being of similar import, are always terms of opposition. The high seas imports the uninclosed and open ocean, without the fauces terrae. Ports and havens are not parts of the high seas; they are within the bodies of the counties." This lucid exposition of the term "high seas" accords with all the learned commentators, ancient and modern. It may be added, that the place must be where the tide ebbs and flows, and the high seas extend to low water mark, but do not extend to harbors, ports or rivers.

In this case the seizure was not made in any harbor, port, bay or river. There is scarcely an indentation of the coast between Montauk and Colloden Point. Had the schooner been seized within a port or harbor like Sag Harbor, Black Rock or Gardner's Bay, the aspect of the case would have been changed. But this was in fact many miles from any known port or harbor. The place of seizure was therefore in the open ocean, "where the dominion of the winds and the waves prevail without check or control." That it was near Montauk, that it was less than one mile from the shore, does not vary the legal result. The well known position of Montauk adds conclusiveness to the argument. We all understand from childhood, that Montauk is a point of land projecting into the sea. The waters of the open ocean have been beating there for ages past, and must continue during all time to come. The waves of the Atlantic roll all over, in constant succession, the spot where the L'Amistad lay, when seized by the Washington. This proposition does not rest on mere argument. It has the sanction of high judicial authority. Judge Story, eminent here, and elsewhere, as a jurist, puts an end to all doubt and cavil, and compels me to hold cognizance of this case. The Abby [Case No. 14] was determined by the circuit court in the First circuit, and from that case I quote the opinion of Judge Story, as follows: "I agree (says the learned judge) that the court below had no cognizance of the cause, if the seizure, on which the libel was founded, was in the port of Portland, for the judiciary act of 1789, c. 20, § 9 [1 Stat. 73], gives exclusive jurisdiction of all seizures, made within any district, to the district court of such district. Concurrent jurisdiction exists in the district courts of other districts, only where the seizure is on the high seas. But the objection here fails in point of fact. The seizure (of the Abby) was first made about 5 miles off Cape Elizabeth, and was therefore on the high seas, since all waters below the line of low water mark on the sea coast are comprehended within that description; and when the tide flows, the waters to high water mark are also properly the high seas."

Will it be seriously urged, that because the L'Amistad had passed Montauk light, that she was not on the high seas? Suppose she had actually been 25 miles further to the northwest in Long Island Sound, with Long Island on the south, Connecticut on the north, Gardner's Island, Fisher's Island, Plumb Island and Block Island to the east, would she have been, even then, within the body of any county? For all purposes of admiralty, Long Island Sound is to be considered high seas.. In the case of The Elizabeth [Case No. 4,352], it was held that Long Island Sound does not belong to either Connecticut or New York, nor to any district in either of those states. Surely, then, the waters upon either side of Montauk cannot be deemed within the exclusive jurisdiction of the district court of New York. Whether she was within the territorial jurisdiction, in another sense, is not important to this question. The question is, was she within the exclusive jurisdiction of the district court of that state? She was not. To say otherwise would be a perversion of the plain provisions of the act of congress and an utter defiance of all authority. This cannot be done. It is the business of this court to pronounce what the law is. These principles being settled, and applied to the facts of this case, the consequence follows, that the seizure of the L'Amistad was made on the high seas, and having been first brought into the district of Connecticut, the jurisdiction of this court attaches to the whole subject matter.

This opinion does not conflict with the opinion of the circuit court, as pronounced in September last. I refer now to that part of the case which was before the grand jury, relating to the murder of Capt. Ferrer. That case turned upon the national character of the vessel. The L'Amistad was owned by a Spanish subject, she sailed under a Spanish flag, was commanded by a subject of the queen of Spain, and the homicide was committed by Africans, on board this foreign vessel. No court in the United States could hold jurisdiction of that case. The laws of Spain alone could reach the act. In the ad-

ministration of criminal law, the offence must be punished where committed. It is an universal rule. A crime committed in England cannot be tried here. A crime committed in one state is no offence against the laws of another state. A crime committed in one county cannot be tried in another county. Had this schooner been an American vessel, the court would have held cognizance of that case.

It has been urged as a matter of law, that the Africans on shore at the time the vessel was seized cannot be subject to the admiralty power of the Connecticut district, nor any other admiralty jurisdiction. The only reply which need be given to this claim is, that those on shore were there for a specific and temporary object, to furnish the vessel with water and provisions for the continuance of their voyage to Sierra Leone. They were still attached to the schooner, in the same manner as those who continued on board. The case seems not to require any distinction of this sort, and none can be recognized. Kent, Comm. 379. If the admiralty has cognizance of the principal thing, it has also of the incident, though that incident would not, of itself, and if it stood for a principal thing, be within the admiralty jurisdiction. Bl. Comm. 108; 1 Com. Dig. 396, tit. F. 6. The libel of Thomas R. Gedney and others is properly filed here.

Having disposed of the question of jurisdiction, I proceed to the consideration of the merits of the cause. The facts involved may be stated in a few words; and about these facts there is little diversity of thought. A Spanish vessel owned in Cuba, proceeded from thence to the coast of Africa, and having procured a cargo of native Africans, returned and landed them near Havana, where they were put into a slave mart for sale. Within fifteen days from the time of landing, Jose Ruez and Pedro Montez, subjects to the queen of Spain, and residents of Guanaja, in the province of Puerto Principe, on the island of Cuba, being at Havana, purchased fifty-four of these Africans. The schooner L'Amistad, then lying in the port of Havana, possessing rightfully the national character of a Spanish vessel, owned and commanded by one Raymond Ferrer, master, and regularly and lawfully licensed in the coasting trade, between the ports of Havana and Guanaja, and being laden with Spanish goods for the latter port, the said Ruez and Montez put on board thereof the said fifty-four Africans with permits from the governor of the island of Cuba, to be transported as freight to the said port of Guanaja; and the said Ruez and Montez took passage in said schooner. All grounds of suspicion that the L'Amistad had been in any wise connected with the original importation of these Africans, are wholly excluded from the case. Three days from Havana the negroes rose up on the vessel and killed the master and cook, and by force took command, and after being 63 days upon the ocean, she came into the waters of the United States, in a condition perilous to the vessel and the lives of Ruez and Montez and all others on board. Being found as heretofore stated, the schooner and all belonging to her were seized by the brig Washington, and from thence were brought into the port of New London, within the district of Connecticut; and the schooner, cargo, and Africans now claimed as slaves, are here libelled for salvage by Lieut. Gedney, &c. Having stated these various claims, and the circumstances of the seizure, I will now proceed to the consideration of each claim, somewhat in the order in which they stand upon the record.

1. The claim of the officers of the brig Washington. In considering and disposing of this claim, it may not be improper to divide it into two parts: 1st. The vessel and goods. 2d. The Africans alleged to have been the slaves of Messrs. Ruez and Montez.

1st. The claim to salvage for the vessel and goods stands upon grounds almost beyond question. The services rendered by Lieut. Gedney were not only meritorious, but highly praiseworthy. They were such as would entitle the seizor to his proper allowance. The vessel was at the mercy of the winds and waves. She was in the possession and under the command of these negroes, who were utterly ignorant of the science of navigation, without law or order, without commission of any lawful authority, guided alone by their ignorance and caprice, just on the point of sailing for the coast of Africa, and yet without the possibility of conducting the vessel in safety for a single day. The seizure under such circumstances was meritorious, and will entitle the seizors to an adequate compensation, unless something shall be found in the case to oust them of this right. In opposition to this claim, Pedro Montez and Jose Ruez allege that they each of them own a part of these goods, and the minister of her Catholic majesty, in behalf of the owners of the schooner and the residue of the goods on board, alleges that the whole were owned by the subjects of the queen of Spain, and that, under the treaty between Spain and the United States, a restoration, entire, should be decreed. Here it may be remarked, that Montez and Ruez have ceased to prosecute their claims in person, and the Spanish minister comes in the name of his government, basing himself on the treaty of 1795, which has some bearing on this question and reads as follows: Article 8: "In case the subjects and inhabitants of either party, with their shipping, whether public and of war, or private and of merchants, be forced through stress of weather, pursuit of pirates or enemies, or any other urgent necessity, for taking of shelter and harbor, to retreat and enter into any of the rivers, bays, roads or ports, belonging to the other party, they shall be received and treated with all humanity, and enjoy all favor,

protection and help, and they shall be permitted to refresh and provide themselves, at reasonable rates, with victuals and all things needful for the subsistences of their persons or reparation of their ship and prosecution of their voyage; and they shall in no ways be hindered from returning out of the said ports or roads, but may remove and depart, when and whither they please, without any let or hindrance." Article 6: "Each party shall endeavor, by all means in their power, to protect and defend all vessels, and other effects belonging to the citizens or subjects of the other, which shall be within the extent of their jurisdiction by sea or by land, and shall use all their efforts to recover, and cause to be restored to the right owners, their vessels and effects, which may have been taken from them within the extent of their said jurisdiction, whether they are at war or not with the power whose subjects have taken possession of said effects."

A treaty is binding upon the two nations making it, and the same becomes a part of the laws of each country. It is to be expounded by the same rules of construction as are applied to other laws; and it becomes the duty of the judicial department, as well as the executive of each country, to carry them into effect. The fair and liberal construction of these two articles must be applied to the schooner L'Amistad and the goods, for those are the effects of the subjects of Spain. And by effects I understand their lawful property. It is the duty of Lieut. Gedney, by all means in his power, to protect and defend this vessel, and use all his efforts to recover and cause to be restored to their rightful owners the schooner and her effects, because, by an urgent necessity, provided for in the eighth article, she had taken shelter in our waters, and now, at reasonable rates, this vessel and her effects must be restored to their rightful owners. But it can not be supposed that in a case of a demand for a restoration a liberal construction should be given to this treaty. Suppose the hull of a vessel coming in like this had been so far damaged that without immediate repairs she could not be kept above water, and these repairs were made, can now the material men (as they are called) libel the vessel in a court of admiralty here and recover these repairs? Certainly. It must be, as the treaty provides, "at a reasonable rate." So in this case, the services in saving of this vessel must be compensated, "at a reasonable rate." The manner of doing this will be shown hereafter. It results, then, that the seizors are entitled to salvage. This lien is placed upon the vessel and her effects by the laws of all nations. It is founded on the broad principles of justice acknowledged by all, and the treaty stipulation is entered into with this lien, which cannot be considered as inconsistent with the treaty. The decree will be, that the schooner and her effects be delivered up to the Spanish government upon the payment, at a reasonable rate, for the services in saving this property from entire loss. An appraisement will be ordered, and one third of that amount and costs will be deemed just and reasonable.

The next question is, can salvage be allowed upon the slaves? There are insuperable objections to this portion of the claim. There is no foundation here laid for a decree in personam. The decree, if at all, must operate in rem. That is, the salvage must be considered as a lien upon the slaves themselves, and the amount to be decreed must be raised out of them, as out of other property. Here, then, I find the claim hedged about by fixed and known laws, over which it would be impossible for me to leap. I have heretofore decided, in the very outset of this case, that these alleged slaves cannot be sold. There is no law of the United States nor of the state of Connecticut by which the title can be given to them under any decree of this court. I am still confirmed in that opinion. It is impossible. Can a decree be predicated upon a supposed valuation to be ascertained by an appraisal? There is no authority in this court to cause such an appraisal. Who can appoint the appraisers? Who can administer to them an oath? And above all, by what rule could their estimate be formed? Are they to be estimated by their value in the district of Connecticut? That is not one cent. The laws which I am bound to administer can recognize no value on them. Can the appraisers travel into other states or countries to seek their value? Surely not. If a decree should be framed, it would be wholly nugatory, inoperative and void. This the court is never called upon to do. When a decree is made, it always presupposes that the court making it, possesses the power of enforcing it. This part of the claim, therefore, will be passed over.

Next comes the libel of Green and Fordham. This claim is rested upon the idea that they had taken possession of the vessel. The facts proved, will not sustain this claim. It appears in evidence, that these claimants found part of the Africans on shore, getting water and provisions. They traded with them and sold them two dogs, for a doubloon each, and then agreed to be there the next morning and take the vessel to their place. This was the understanding of Capt. Green, but as the evidence now appears, it was not the understanding of the negroes. Their hearts were set on Sierra Leone, and nothing short of sailing towards the sun would serve their purpose. They had killed the captain and cook, to go to Sierra Leone. They had periled their own lives for Sierra Leone, and still Sierra Leone was on the lips of Cinquez. I think the actions of the white men on the beach, evinced that they so understood this determination at the time. Otherwise they would not have had occasion to whistle off their dogs, when they had received for them the doubloons in hand. The result of the best examination which I have been able to

bestow on this part of the case is that the libels of Messrs. Green and Fordham be dismissed.

The two great questions still remain to be settled. Shall these Africans, by a decree of this court, be delivered over to the government of Spain, upon the demand of her minister, as the property of Don Pedro Montez and Don Jose Ruez? But if not, what ultimate disposition shall the government of the United States make of them? The other questions, in importance, cannot be compared with these. Here we have her majesty, the queen of Spain, by her resident minister, at the court of the United States, unequivocally demanding for her subjects these Africans, as their property in the fulfillment, as he says, of treaty stipulations, solemnly entered into by this nation. These Africans come in person, as our law permits them to do, denying this right. They say, that they are not the slaves of Spanish subjects, and are not amenable to Spanish laws. We have also the humanity of our own laws, ready to embrace them, provided we are not compelled by these treaty stipulations to deliver them up. Upon the first of these questions, all absorbing as it is, I am called upon to pronounce an opinion. And what I have now to say applies to Cinquez and others, who have filed their answer to the claim on record, not including Antonio. Shall these Africans be decreed to the Spanish government? What is the object of the demand made upon the president by the Spanish minister? Not to have them transported to Cuba for punishment, but because they are the property of Spanish subjects—their effects or merchandise—their property. I begin here by finding certain facts, which necessarily must be part of my decree, and upon which it must be based.

These are the facts that I find proved in this case: In Cuba there are three classes of negroes, well known and distinguished: Creoles, who were born within Spanish dominion; Ladinos, who have been long domiciliated on the island, or sufficiently so that the laws of Spain operate upon them, or, in other words, embracing those who owe Spain their allegiance; and, lastly, Bozals, embracing all such as have but recently been imported from Africa. The negroes now in question were all born in Africa; they were imported to Cuba, by the slave traffic, about which Montez and Ruez had nothing to do; they were put into a barracoon near Havana, and after remaining there not exceeding 15 days, Montez and Ruez brought them to the schooner L'Amistad as their slaves, and put them on board for Guanaja. Consequently I find these negroes to be Bozals; they were so at the time of the shipment. The demand of the Spanish government is, for these Bozals to be restored to them, that Montez and Ruez may have them as their property. To justify this demand, and require this government to restore them under the treaty, these negroes must not only be property, but Spanish subjects must have a title to that property. In other words, Spanish subjects must own them—must come lawfully by them—they must have lawful right to hold them as their own. Suppose a slave should be demanded of us, by the Portuguese government, and it should appear in evidence that the slave in fact belonged to a citizen of South Carolina, we could not give him up to Portugal. Although he may be a slave, the Portuguese have no title in him. They cannot demand nor we surrender. The right of demand and the necessity of surrender rests on the title to the property. Property and title both are to be made out. In all cases where property and title are proved to be in Spanish subjects, the treaty is imperative, and at all hazards it must be surrendered. The obligations are solemn, and war might be the consequence of a breach of this duty on our part. I go up to the letter and spirit of the treaty both, but I do not step over it, merely because the demand is made by a high contracting power. The demand must be lawful. The minister has demanded the schooner, and suppose in point of fact it should turn out that the schooner belonged to a subject of France, instead of Spain, can we deliver it to Spain? Surely not. How stands the case here? The government of Spain demand of us, under their treaty, a restoration of these negroes, and we ask them for their title. It is a very well settled principle, here and elsewhere, that the party demanding restoration must show his title. The onus probandi lies on him. Aware of this rule of law, the Spanish claimants send to me their evidence of title. And what is that document,—a deed, a bill of sale, a transfer? No. It is a permit, a license, a pass, signed by the governor general of Cuba for Don Pedro Montez and Don Jose Ruez to transport 54 Ladinos to Guanaja, and this is all. This embraces the whole evidence of property and title both. In point of fact these are not Ladinos. They might be lawfully sold and carried to Guanaja. These negroes are Bozals and not Ladinos. Here, then, is the point—the point upon which this great controversy must turn. To show that it is so, I shall be obliged to recur to the laws of Spain, as the same are here proven, because these laws make a part of the case itself. They are to be proved in the courts of the United States as a matter of fact. This has been done on this inquiry, and this court is just as competent to judge of the effect of a foreign law, when thus proved, as of a law of the United States.

I find, then, as a matter of fact, that in the month of June, 1839, the law of Spain did prohibit, under severe penalty, the importation into Cuba of negroes from Africa. These negroes were imported in violation of that law, and be it remembered that, by the same law of Spain, such imported negroes are declared to be free in Spain. This ac-

counts for the declaration of the Spanish consul, "that if these negroes should be returned to Cuba, some of the leaders might be punished, but none of them could be made slaves." This declaration is in exact conformity with the law of Spain, so far as the matter of slavery is concerned. They could not be slaves there, because the law declares them free. They were Bozals and not slaves. This declaration is from a government functionary of Spain. Why, then, should the law be doubted by me? I do not doubt it. I do expressly find it to be such. If there had been any doubt as to what the law of Spain is, I ask, would not the Spanish minister resident at Washington have communicated that law to this government, so that it might have been sent here? We are bound to believe, that the minister of every foreign country brings with him the laws of his sovereign, and is able, on the shortest notice, to make those laws known to us when questions may arise. Between nations, it is not required that every matter of form should be strictly complied with. In the intercourse of friendly nations, the substance is all that is required. Why has not the Spanish minister told us that a law exists, by which Bozal negroes are slaves in Cuba? Why has he not sent us that law, with his claim? Ample time has been afforded. He knows that the burden of proof lies with him, and still withholds the law, if it does exist. How can he expect an American court to decree that these negroes are property, while he omits to produce the evidence which makes them such? In reply it may be said they were in possession of Spanish subjects. But possession is only one indicium of property, and that has been rebutted by the proof that these are Bozal negroes, and cannot be made property, by any machinery of sale or transportation.

This brings me to the question of title in Montez and Ruez, who now claim them through their government. Though they do not come into court in person, yet they do come in the majesty of their sovereign. They need not come in person, and if they do, they must stand aside and put forward the shield of regal authority, as they do in this case. But this establishes no title to property. Suppose I admit that slaves are property, yet Montez and Ruez must possess the title in themselves. "They have furnished no proof of payment; they have shewn no bill of sale; no witness has sworn that he was present when these negroes were sold. They have not shewn us from whom they derive their title. It is the naked possession on which they rely. When the right is disputed this is not enough. Suppose a gentleman in Mississippi hires a slave of his neighbor for one year, as a traveling servant, and while in Kentucky sells him? He had the possession, too, but he conveys no title, for it is the law of every country in the civilized world that a man must have a title before he can grant to another. Were a gentleman of New Haven to rent me his house and give me the possession, and another person from Havana should come here and take a deed of that house from me, he would gain nothing by the grant, for the simple reason that I had no right to grant. This is so plain that the feeblest intellect cannot but see it. How does the Spanish minister fill up this chasm in the evidence? How does he link together this chain of the title? By nothing else except the governor general's passo, and this has before been commented upon. Now that official document is to serve the double purpose of proving property and title both; and yet when we look on it again, and apply it to our judicial test, if the expression may be allowed, we find that instrument still is for Ladinos and not Bozals. It contains, on its face, an untruth. The governor general has not given a passo for these negroes, and, consequently, these Bozals stand on the deck of the L'Amistad without any passo whatever. For a familiar illustration of this legal result, take, if you please, a bale of goods, for we will now call them goods, and have it shipped and invoiced at Liverpool, as cotton prints. They are entered here as cotton prints or smuggled in, and then sold to an innocent purchaser, when it is discovered for the first time that broadcloths compose the package. These broadcloths may be taken from this innocent purchaser, libelled and forfeited. Where is the remedy? The purchaser goes back to the seller, and he must take care of himself. Who sold those Bozals to Don Jose Ruez and took his twenty thousand dollars from him? I know not, but, if he does, there is his remedy. It is the sale of the article of goods to which he, the seller, had no title. And suppose this seller has absconded, or refuses to refund the money; it may be a hard case for Mr. Ruez, and yet "caveat emptor" is the well known maxim, and he must sit down by the loss, as many others are obliged to do. The purchaser must be vigilant in the investigation of the property he buys.

If there had been vigilance in this case, Ruez and Montez might have saved all their property, and the imminent hazard of life; and this court might have been relieved from this heavy responsibility, which has been pressing it down for these four months. Why did they not ascertain that these negroes were Bozals. This has been the source of all their complicated sufferings, the tale of which, will make the stoutest heart bleed. Why did they not ascertain that the law of Spain had declared these objects of their purchase not slaves? The secret is told in a word. In Cuba it is the custom to buy such negroes, and ship them as Ladinos or Creoles; and there respectable men have grown up under the influence of this custom—this practice against law. The subjects of a foreign government are presumed, however, to

know what their own laws are, and when broken, they cannot come here and ask us to invade the rights of others, in justification of the breach of their own laws. This would not be done, even there. Hence the Spanish consul says this mode of "bona fide" selling is carried on without notice from the local authorities. Not that the act is lawful, in itself, but only because the act is passed over. There is wealth and power on one side, and ignorance and weakness on the other. The law is the same there, as I pronounce it here. That it is not well executed is no evidence that the law does not exist. Let a case be presented to the courts in Spain, and the proof be made as it is here; and the result must inevitably be the same. This may be too obvious to require illustration. No one can set up, in a court of justice, an illegal custom, against positive law. One prime requisite of a custom is, that it should be lawful. The press gang system in England is against positive law! Every British subject, by law, is secured in his liberty. It is their boast; yet when the minister wants a thousand men for the navy, the press gang are put in motion. They seize and confine men, and tear them away from their wives and children, by force, and put them into service, against their will! Oppress and confine! And who will deny that these press gangs are actually paid by British gold, for their illegal depredations upon the sanctuary of home and liberty, and that, too, from the treasury of the nation? It is a custom, and has been for an hundred years; yet who will say it is legal? Let the "king's bench" pass upon this question, and it will be adjudged against law. It may be winked at in parliament, and stifled in public opinion, while they send their emissaries here, to teach us what liberty is, yet that is slavery! degrading slavery! and can never, no never, legalize the custom.

Shall these Bozals be given up under the treaty? and, if so, for what purpose? To have the question tried there, whether they are slaves by the laws of Spain? The Spanish law declares they are not slaves; it would be utterly useless, then, to send them back to Cuba. It would only be a work of supererogation. If, by their own laws, they cannot enslave them, then it follows, of necessity, they cannot be demanded. When these facts are known by the Spanish minister, he cannot but discover that the subjects of his queen have acquired no rights in these men. They are not the property of Spain. His demand must be withdrawn. The very essence of his demand consists in the supposed Spanish right of property in the thing demanded. That being removed, by his own law there can no longer be cause for complaint. At all events, this cannot be expected at my hands, because the supreme court have already refused to surrender property, unless there was proof of title in the claimants. The same rule applies equally to foreign and domestic claimants. Title must be shown in the property claimed, as belonging to the claimant, or it cannot be surrendered. The positions I have laid down here are fully recognized in The Antelope, 10 Wheat. [23 U. S.] 66. The argument of the attorney general in that case, sanctioned, as it is, by the able opinion of the chief justice, affords me full confidence that I am right. The strongest case which can possibly be adduced for the surrender is U. S. v. La Jeune Eugenie [Case No. 15,551]. There a French ship, engaged in the slave trade, was brought into the Massachusetts district and libelled. The French minister made a demand of the vessel, and she was surrendered by Judge Story. But in that case the property was admitted to be in French citizens. They, themselves, were claimants against their own government, and both sides agreed that it was French property. The judge did right in surrendering it. But there is a great distinction between the two cases. Here the right of property is not only the principal contest, but I find clearly that the right of property is not in any Spanish subject whatever. The cases then are dissimilar in principle. Had this case, as in that, found the right of property in the claimants, I should have gone the whole length and breadth of that decision, and restored the property. This case is ample authority to that extent: and to show that I abide by the treaty, and that authority, I take another branch of this case. Antonio is demanded, and the proof from him is that he is a Creole, born, as he believes, in Spain. He was, at the time his master was murdered by Cinquez, a slave, so recognized and known by the laws of Spain. The property in him was in Raymond Ferrer, a Spanish subject, at the time of his death on board the schooner, and now is in his legal heirs. Here is both right and property in Spanish subjects. I shall decree a restoration of this slave, under the treaty of 1795. For this, likewise, I find authority in the cases adjudged by the supreme court, from which I have neither power nor inclination to depart.

The question remains: What disposition shall be made of these negroes by the government of the United States? There is a law of congress, passed the 3d of March, 1819 [3 Stat. 532], which renders it essential that all such Africans as these should be transported, under the direction of the president of the United States, to Africa. The humane and excellent provisions of this act, characterize the period when it was adopted. Among the prominent provisions of congress to ameliorate the condition of Africans brought away from their homes in this traffic, which is spoken of and believed to be odious, is this act of 1819. Considering the object embraced within these provisions, the statute itself must receive the most liberal and generous

construction. The technicalities of construction, which pertain to another class of acts, do not belong to this act. Those rules which govern courts in deciding on penal acts, are to find no place by the side of this statute. They must govern no mind employed in carrying out the noble intentions of the framers of this law. What is the spirit of that act? It is to return to the land of their nativity all such Africans as may have been brought from thence wrongfully. This being the spirit of that act, I stop not in the mere forms of legislation. I do not want to consider whether every letter and syllable of that act has been followed by the officers of the law. When the spirit of goodness is hovering over us, just descending to bless, it is immaterial in what garments we are clad to receive the blessing. I do not maintain this construction upon my own mere suggestion, but I shall be able to show, by a recent determination of the supreme court of the United States, that the door has already been opened, and the passage already provided, to send these men back to their own Africa. That if the aspirations of these unfortunate beings have been heard to rise for Sierra Leone, the law of that country into which they have been cast has provided the means, and already the supreme court have, in their profoundest wisdom, given a construction to that law which bids them God-speed. The second section of the act of March 3, 1819, is as follows: "That the president of the United States be and is hereby authorized to make such regulations and arrangements as he may deem expedient, for the safe keeping, support, and removal beyond the limits of the United States, of all such negroes, mulattoes, or persons of color, as may be delivered and brought within the jurisdiction; and to appoint a proper person or persons, residing upon the coast of Africa, as agent or agents for receiving the negroes," &c. &c. The first section of the law of 1818 is left still in force, by the repealing clause of this act. Hence we must go to the law of 1818, and connecting it with the act of 1819, ascertain whether these Africans are within the spirit of this supervising care. This act of 1819, provides "that from and after its passage, it shall not be lawful to import or bring in any manner whatever, into the United States or territories thereof, from any foreign kingdom, place or country, any negro, mulatto, or person of color, with intent to hold any such negro as a slave or to hold to service or labor any such person."

We find these negroes here under circumstances most peculiar and complicated. It becomes necessary to go back to the period of their leaving Cuba, to ascertain whether they were brought in with an intent to hold to service, or to hold as slaves. How was the fact when they were put on board the L'Amistad? Was it not the intention of Don Montez to hold his four as slaves—to hold them to service? Was that the same with Don Jose Ruez? Surely they both intended to hold these negroes as slaves. We are to presume that intention continued after leaving Cuba, down to the time the captain was murdered. When did it change? It might have been suspended during the suspension of their power over the negroes, but we do learn from the evidence, that as soon as Lieut. Mead and the brig Washington appeared, their intentions were still the same. And the records of this court show that they have ever claimed to hold these slaves. It is doing them no injustice to say, that they still intend to hold them as their slaves. From whence were they brought? From a foreign country. Surely it cannot be necessary, that the slaves should have been brought direct from Africa. Their landing at Havana, for a few days, can make no difference, as to the grand objects of this act. I have before shown that Montez and Ruez never had any lawful authority, even to put their Bozal negroes on the deck of the L'Amistad. The first step was illegal, and of necessity every subsequent step was equally so. The original shipment under a false passport was illegal, and that same illegality continues with them over the waters of the Atlantic, and when they come into the port of New London the same intentions are continued by legal construction.

My attention is again turned to the phraseology of the act of [April 20] 1818 [3 Stat. 450]. "It shall not be lawful to import, or bring in any manner whatever, into the United States from any foreign country, any negro, with intent to hold him as a slave." No language more unqualified could have been adopted. Bring into the United States, in any manner whatever, any negro to hold to service. The next section confines the acts there made unlawful, to the citizens, vessels and places of the United States. Not so in the first section. The bringing in here with the intention to hold to service, anywhere, and in any place, is the broad language of the act. It is by no means to be limited and confined by strict construction, when we are seeking the objects of the bounty and humanity of the government. Far different would it be, I admit, if we were going on for a trial for the penalties imposed by this act. Then, indeed, we would be hedged about by the unbending rules of strict construction. Penal statutes must be construed strictly, but when there is, in the body of the same act, a bestowment of bounty, of protections, of guardianship, we reject with disdain these narrow rules. We rise above the technicalities and criticisms, which belong to punishment, and the criminal code, and adopt that construction which is more congenial with the objects of the law.

It is humbly conceived that these prin-

ciples governed the supreme court of this Union in the case of U. S. v. Preston, 3 Pet. [28 U. S.] 57. The marginal note [syllabus] of that case gives us the great principle of construction there adopted by the unanimous voice of the court: "The final condemnation of the persons on board the Josefa Segunda, took place in this case, on the 13th of March, 1820, after congress had passed the act of the 3d of March, 1819, entitled, 'An act in addition to an act prohibiting the slave trade,' by the provisions of which persons of color brought in under any of the acts prohibiting traffic in slaves, were to be delivered to the president of the United States, to be sent to Africa." That vessel was seized in the waters of the United States by the collector of the port of New Orleans. The seizure was never made by any one of our government vessels, under the commission of the president. The act of 1819, strictly construed, would seem to limit the action of the president to seizures made by armed vessels, under a special commission. But here, this vessel, the Josefa Segunda, came into our waters under the plea of distress; she was never seized or touched by one of our armed vessels, but the collector of New Orleans put his foot on board, and had her libelled, and the supreme court decreed the Africans back to their own country. In that case there never was a descriptive list made out, as the act of 1819 would seem to require, yet the Africans on board were given over to the president. There never was any complaint made up, as that act prescribes, yet all this is considered mere matter of form, and it is made to yield to the benevolent provisions contained in the act of 1819. In truth this act of 1819 was not in being, it was not passed, when the Josefa Segunda was seized; yet these negroes were found in the custody of the court by that act, and the protection of the government is thrown around them. The humane provisions and principles of the act of 1819 are thrown over them. They are made to participate in the benefits of that act, and the arm of the president conducts them safely to the shores of Africa. The Josefa Segunda was a Spanish vessel. She came into the Mississippi, and was seized by the collector of New Orleans, and libelled under the law of 1807, for condemnation, as having been engaged in the slave trade. Her plea was, that she came into our waters in distress. She was captured on the 11th of February, 1818, more than a year before the passage of the act of congress of March 3, 1819. The case underwent a variety of trials, and at last was determined in January term, 1830, by the supreme court. 3 Pet. [28 U. S.] 57. Justice Johnson gives the opinion of the court, a part of which I quote in this place:

"The case of the Josefa Segunda has been twice already before this court: The first time upon the question of condemnation; the second upon the application of several claimants to be preferred in the distribution of the proceeds. It now comes up upon a claim to the proceeds of the persons of color found on board at the time of the seizure, interposed by the law officer of the state of Louisiana. The vessel was condemned under the seventh section of the act of 1807 [2 Stat. 426], passed to abolish the slave trade. By the fourth section of the act, the state of Louisiana was empowered to pass laws for disposing of such persons of color as should be imported or brought into that state, in violation of that law. The offence under the seventh section, on which this condemnation was founded, is not that of importing or bringing into the United States, but that of hovering on the coast with intent to bring in, persons of color to be disposed of as slaves, in violation of law; and although it forfeits the vessel and any goods or effects found on board, it is silent as to disposing of the colored persons found on board, any farther than to impose a duty upon officers of armed vessels, who may capture them, to keep them safely, to be delivered to the overseers of the poor, or the governor of the state, or persons appointed by the respective states to receive the same. The state of Louisiana passed an act on the 13th of March, 1818 [Laws, p. 68], which recites the provisions of the fourth and seventh sections of the acts of congress, and authorizes and requires the sheriff of New Orleans to receive any colored persons designated under either of those sections, and the same to keep, until the district or circuit court of the United States shall pronounce a decree upon the charge of illegal importation. The second section makes a provision for selling them, and receiving a certificate of such decision, and enjoins a distribution of the proceeds; one-half to the commanding officer of the capturing vessel, the other to the treasurer of the charity hospital of New Orleans. In pursuance of the law of the state, it appears, that after the decree of condemnation below, but pending the appeal in this court, the sheriff went on to sell, with the consent, it is said of all parties; and $65,000, the sum now in controversy, was deposited in the registry of the court below to await the final disposal of the law. On the 20th of April, 1818 [3 Stat. 450], congress passed another act on this subject, by the tenth section of which, the six first sections of the act of 1807 are repealed; but their provisions are re-enacted with a little more amplitude; and the fifth section of this act, which professes to reserve to the states the powers given in the former act, as well as the language of the repealing clause, in the saving which it contains as to offences, still confines all their provisions to the case of illegal importation; thus leaving the seventh section in force, but without any express power to dispose of the colored persons, otherwise than to appoint some one to receive them. The final condemnation in this court

took place in this court March 13, 1820; but previous to that time was passed the act of March 3, 1819, entitled 'An act in addition to an act prohibiting the slave trade;' by which a new arrangement is made as to the disposal of persons of color seized and brought in under any acts prohibiting the traffic in slaves. By the latter act, they are deliverable to the orders of the president; not of the states. And the repealing clause repeals all acts and parts of acts which may be repugnant to this act. So that if in the disposal of persons of color brought into the United States, the provisions of this act embrace the cause of such persons when brought in under the seventh section of the act of 1807, the power to deliver them to the order of the states was taken away before the final decree of this court. Such, in the opinion of the court, is the effect of the act of 1819. And then the question is, how does it affect the present controversy? Ever since the case of Yeaton v. U. S., 5 Cranch [9 U. S.] 281, the court has uniformly acted under the rule established in that case; to wit, that in admiralty causes a decree was not final while it was depending here. And any statute which governs the case, must be an existing, valid statute, at the time of affirming the decree below. Whatever was the extent of the legal power of the state over the Africans, it is clear that such power could not be exercised finally over them at any time previous to the final decree of this court. We must therefore consider, whether, if they had been specifically before the court at the date of that decree, they must have been delivered up to the state, or the United States, clearly to the United States."

One of the questions discussed in The Antelope, 10 Wheat. [23 U. S.] 66, was as to the title of the claimants, and who should produce the proof of title. The decision of that case establishes, beyond question, that the claimant must prove title in himself. It is the same here. There, those who established their title, received their property, and in that case, as in this, those negroes to whom title was not made out, were decreed to the United States. Cinquez and Grabeau shall not sigh for Africa in vain. Bloody as may be their hands, they shall yet embrace their kindred. I shall put in form a decree of this court, that these Africans, excepting Antonio, be delivered to the president of the United States to be transported to Africa, there to be delivered to the agent, appointed to receive and conduct them home. To do it, we have ample authority, and ample means. What American can object to this decree? No one surely, when the case is correctly understood. It will indeed require the executive arm to carry out this decree. This may well be anticipated, because the facts which I have found and shall put upon record, will carry conviction to every mind. Antonio, falling clearly within the other principle, and in the presence of the court, expressing a strong wish to be returned, will be decreed to the government of Spain, with the vessel and goods, the vessel and goods being alone subject to the lien which necessity of the case has thrown upon them, for the salvage service and the cost.

GEE (UNITED STATES v.). See Case No. 15,196.

Case No. 5,295.

GEEKIE v. KIRBY CARPENTER CO.

[11 Chi. Leg. News, 400; 9 Reporter, 37.[1]]

Circuit Court, E. D. Wisconsin. April, 1879.[2]

TAX DEED—ACKNOWLEDGMENT—RECITALS—VALIDITY OF SALE.

1. In determining whether an acknowledgment of a deed is sufficient, it is competent for the court to consider the various parts of the body of the deed in connection with the acknowledgment, in order to ascertain whether the grantor of the deed did acknowledge it to be his before the proper officer.

[See note at end of case.]

2. It was objected that the deed offered in evidence did not recite the sum of dollars and cents in the whole of taxes for the non-payment of which the land was sold. *Held*, that the language of the statute is not that the deed shall be precisely in the form given in it, but only that it shall be substantially so, and a deed which recited various certificates, giving at the end of each certificate a description of the land sold, and the words "sold for two dollars and forty-three cents," is a sufficient compliance with the statute. In construing that clause of the statute the whole deed may be taken together.

[See note at end of case.]

3. Where it appears that there was included in the amount for which the land was sold a sum which was not a tax, the sale is void. So where there was added to the tax assessed against the land the sum of five cents, the price of the stamp for the certificate which was to be given by the officer, *held*, that as this sum, in addition to the taxes due, was added, the officer had no right to sell, and the deed under such sale was void.

[See note at end of case.]

4. The fact that the deed in this case has run unchallenged for three years after being recorded, that being the time limited by statute, in which the owner of lands may bring his action to contest the deed, will not bring this case within the statute of limitation. The true construction of this statutory limitation is to give it application in cases where there have been irregularities or defects in the sale, but not to cases like the present, where it appears that there existed no authority in the officer to sell in the first instance.

[At law. Suit by Peter W. Geekie, sheriff of Oconto county, Wis., against the Kirby Carpenter Company.]

Tracy & Hastings, for plaintiff.

Dixon & Brown, for defendant.

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

[1] [9 Reporter, 37, contains only a partial report.]

[2] [Reversed in 106 U. S. 379, 1 Sup. Ct. 315.]

DRUMMOND, Circuit Judge. This was an action to recover damages for the conversion of some saw-logs, and the facts were submitted to a jury, and a motion is made by both parties for judgment on the verdict of the jury, it being in the nature of a special verdict. And the controversy turns exclusively upon the ownership of the lands upon which the saw-logs were cut. If a tax deed which was offered in evidence is valid, then the judgment must be for the plaintiff; if invalid, the judgment will be for the defendant. There were three objections taken to the tax deed. The first was that the land was sold for that which was not a tax, and for which, consequently, the officer had no authority to make the sale. The second objection was because the deed did not recite the sum of dollars and cents, in the whole, of taxes for the nonpayment of which the land was sold. The third objection was because the deed was not properly acknowledged by the officer executing the same, so as to authorize the deed to be recorded in the office of the register of deeds.

We will reverse the order of the objections and take up the last first. Was this deed properly acknowledged? We think it was. We have to take the deed altogether. It may be that the acknowledgment, taken by itself, and independently of other parts of the deed, is objectionable; but we have to connect the acknowledgment with the rest of the deed, and see whether the law as to the acknowledgment has been substantially complied with; whether, in other words, it appears from the deed and acknowledgment, taken altogether, that the grantor of the deed did acknowledge it before an officer, as required by the statute. This purports to be the deed of Bernard G. Grunert, clerk of the county board of supervisors of Oconto county, in this state. It is in that way he signs the deed. And the testimonial part of the deed is as follows: "In testimony whereof, I, Bernard G. Grunert, the clerk of the county board of supervisors of the county of Oconto, have executed this deed, pursuant to, and in virtue of the authority in me vested by the statute of the state of Wisconsin, and for, and on behalf of the said state, and of the county of Oconto aforesaid." Now when we couple that "testimony" contained in the body of the deed with the signature of the deed, and the acknowledgment, it is an irresistible inference, I think, that the deed was acknowledged by the person who executed it, and who purported to sign it, and it is an admission and acknowledgment on his part that he did execute the deed. The language of the acknowledgment is: "Be it remembered on this 27th day of April, A. D. 1867, on behalf of Oconto county and the state of Wisconsin, personally came befor me, Bernard G. Grunert," (he came before the officer taking the acknowledgment personally), clerk of the county board of supervisors, to me known to be the person so described in the foregoing instrument, and acknowledged that the same was executed freely and voluntarily, for the uses and purposes therein mentioned." He does not say, "and acknowledged that he executed the deed;" but no other inference can be drawn from the deed and acknowledgment, taken together, than that he who appears to have executed, and who stated in the body of the deed that he did execute it, acknowledged it before the officer. And we think that it is competent for the court to take the various parts of the body of the deed in connection with the acknowledgment, in order to ascertain whether the grantor of the deed did acknowledge it to be his, before the proper officer. We think that clearly appears, so that objection will be overruled.

Another objection is that the deed does not recite the sum of dollars and cents in the whole of taxes, for the non-payment of which the land was sold. A form of the deed required is contained in the 166th section of the first volume of Taylor's Statutes, p. 437. One form in the clause of the deed there given, is, that the land was sold for the non-payment of taxes, by the proper officer "at public auction, at ——, in the county of ——, on the —— day of ——, in the year of our Lord, 18—, to the said —— for the sum of —— dollars and —— cents, in the whole." And the objection is, that it does not state that the land which was sold here, was for the amount named in the whole. This deed names various certificates of different tracts of land, and the certificates are numbered, and a description of the land is given opposite each number, and at the end of the certificate in each case, and of the description of land, are these words: "Sold for two dollars and forty-eight cents." "Sold for two dollars and forty-three cents." "Sold for two dollars and forty-three cents." "Sold for two dollars and forty-three cents." "Sold for two dollars and forty-three cents."

There being five certificates, and five different tracts of land sold, included in the deed. After giving the number of the certificates, and the description of the land, and stating for what amount each tract was sold, the deed proceeds as follows: "For the non-payment of taxes sold by R. L. Hall, treasurer of said county, at public auction, at the village of Oconto, in the county of Oconto, on the 12th day of May, in the year of our Lord 1863, to the said Oconto county, and by its treasurer assigned to S. A. Coleman for the sum of $12.20 in the whole." But does it not clearly enough appear, for what sum in dollars and cents the land was sold in the whole, as required by the statute? It is to be recollected that the language of the statute is not that the deed shall be precisely as the form given in it, but only that it shall be substantially, "in the following or equivalent form," clearly

giving some degree of latitude to the form of the deed named in the statute. It was said in the argument, and we have no disposition to controvert the rule mentioned, that it has been decided by the supreme court of the state that a deed must contain every statement named in the statute. And does not this deed contain the statement of the amount in dollars and cents for which the land was sold? We think it does. It was objected that the court could not add up the amounts for which these various tracts of land were sold, and ascertain from that what was the sum in dollars and cents in the whole for which it was sold. Conceding that to be true, and that the deed must itself state for what sum in dollars and cents, in the whole the land was sold, we think it does appear for what sum in the whole it was sold, for we can take the whole deed together in order to construe that clause, and determine whether or not it does state for what amount of dollars and cents it was sold in the whole. It was argued that there was an ambiguity in consequence of the word "assigned," used here: "Sold by R. L. Hall, for the non-payment of taxes, in the year of our Lord 1863, to said Oconto county, and by its treasurer assigned to S. A. Coleman for the sum of $12.20 in the whole." It is said it may have been that the sale and the assignment both together were for $12.20 in the whole. But is that a natural and fair construction of the deed taking it altogether? We think not; we think, coupling this statement with what precedes in the beginning of the deed, where the amount for which each tract was sold is stated, that it is, as in the case of the acknowledgment, an irresistible inference that this was the amount for which the land was sold in the whole, for the non-payment of taxes, and it includes no part of any consideration given for the assignment if any was given. That objection is also overruled. We have stated our views upon these questions, because it seemed to be the desire of the counsel we should do so, as it was said there was a large number of deeds given which were in this form, both as to acknowledgment and otherwise.

The other objection is that the land was sold for that which was not a tax. This objection we sustain (I must say with a good deal of hesitation on my own part). The facts in relation to that objection are these: There was a certain amount assessed against each tract of land for the tax due upon it, less than the amount for which it was sold. It was a small sum added (only five cents), but it clearly appears that under no circumstances could this sum be added under any law of the state, to the taxes, and included within the amount for which the land was sold. And we hold that circumstance rendered the sale void, as there was included in the amount, something for which the officer had not the right to sell the land. It is true, each tract was sold for the non-payment of the taxes, but for something more than the amount due for taxes: Namely, the price of the stamp for the certificate that was to be given, which the officers thought they had a right to include as a part of the expense of the sale, but which it is clear, and so admitted on the argument, they had not the right to do. It was not controverted, but that if this deed had not been recorded for three years, that the owner of the land would have had the right by any proper proceeding to render it inoperative. But it was claimed as the deed had been recorded more than three years, that under the statute of limitations, it had run the full time required, and it was not competent for the owner of the land to contest the validity of the deed after that time. The statute is the 173d section, 1 Tayl. St. p. 144: "No action shall be commenced by the former owner, or owners of land, or by any person claiming under him or them to recover possession of land which has been sold and conveyed for the non-payment of taxes, or to avoid such deed, unless such action shall be commenced within three years next after the recording of such deed."

Section 174: "The limitation for bringing actions prescribed in the last preceding section, shall not apply to any person who shall be a minor at the time the right of such action shall accrue, but such minor may bring such action or actions after the time limited, at any time during his minority, and within one year thereafter, nor shall such limitation apply where the taxes for the non-payment of which, the land was sold and the tax deed executed, were paid prior to the sale, or where the land was redeemed from the operation of such sale, as provided by law, nor where the land was not liable to taxation."

This case does not come, literally, perhaps, within the meaning of the 174th section, for it is not such a case in all respects, as is there specially indicated. But still, we think it is within the spirit of the section. It is to be observed that this is not a limitation which ripens into a perfect title growing out of the possession of land held adversely by the person who has the tax title; but this is a title which may be acquired to vacant and unoccupied land, as was the case here; and it is a case, therefore, of acquisition of title, if at all, against the true owner by a tax deed, which has been recorded for three years where the proceedings have not been instituted by the owner of the land to destroy it or impair its effect. And it seems as though there ought to more rigour exercised in the construction of the statute where a party acquires title, or seeks to acquire title in this way, than in case of the possession, and cultivation and improvement of the land. But I believe, that the supreme court of this state has held that if the tax deed is a valid deed, and has run unchallenged for three years after being recorded, it vests in the holder a good title, and divests the real owner of his title. I think that is the effect of the construction given to the statute by

the supreme court. But the supreme court has also held that a tax deed void on its face, does not divest the owner of his title to the land, although it has been recorded more than three years. And the courts have also held, as I understand, that if it appears that the officer had no authority to sell the land, that the sale and deed are void. And the court in several cases, one of which may be referred to,—Kimball v. Ballard, 19 Wis. 601, where the county treasurer had added to the taxes 5 per cent. upon the amount without any authority so to do,—decided that the sale was absolutely void. And it seemed to distinguish, which courts do not always do, between the terms "void" and "voidable." Sometimes the word "void" is used when the word "voidable" is meant. But in this case the attention of the court was drawn to the distinction between the two terms "void" and "voidable." In principle, that case is like this, although it was not a question that arose after the tax deed had been made and recorded three years. The language of the court is, and various authorities are cited to sustain it, that it rendered the sale "absolutely void." That is, there was a want of power in the officer to sell the land for the non-payment of the tax.

Perhaps I ought to advert to what is often considered as having an important bearing upon the question arising in this part of the case, viz. the right of the owner to redeem the land from the sale. In all cases where there has been that included which under no circumstances the officer had the right to include, of course the land cannot be redeemed from sale, unless the whole amount for which the land is sold is paid, and here there would be necessarily an exaction from the owner of an illegal sum, although the amount was small. The main difficulty in the case consists in what is the true distinction and its effect between a case where application is made by the owner, within three years after the record of the deed, to relieve the land from the deed, and where the deed has been recorded the whole term of three years, and nothing done. Undoubtedly there are many cases where the statute closes all proceedings on the part of the real owner. If there has been a mere irregularity in the sale, or an act done unauthorized, if you choose, on the part of the officer, an act not going to the foundation of the right to sell, the lapse of time forecloses the owner, and he is precluded from any action to avoid the deed; but where there is a want of power on the part of the officer, where there is included in the amount of the sale that for which the land could not be sold, and which is entirely unauthorized, we can say, although there is included a tax, there is also an element in the case which deprives the officer of the power to sell. The case of Oconto Co. v. Jerrard [46 Wis. 317, 50 N. W. 591] was commented and relied on by the counsel for both parties. It does not very clearly appear what were the errors or defects in the sale in that case. The court states that there could be no question that the respondent impeached the tax proceedings which culminated in the deed under which the appellants claimed, so as to bring it within the rule of Marsh v. Supervisors, 42 Wis. 502, and other cases; that there could be no question that the respondent might have enjoined the execution of the deed, or have successfully impeached it in any action involving validity, before the statute had run upon it, but the court said, in that case the statute had run, and whatever the defects were, they were of a character to foreclose the party from objecting to the deed, after a lapse of three years from the time of the recording. The court cites various cases, and among others, the opinion of the chief justice in the case of Knox v. Cleveland, 13 Wis. 245, from which he infers that there must be, in such a case, a want of authority ab initio of the taxing officer, to put the taxing power in motion. And this language is quoted from the opinion in 13 Wis.: "The general authority of the taxing officer, and the liability of the land to taxation being conceded, all other questions are at an end. If either of them were wanting, another question would be presented. It might then be urged that there was a defect of jurisdiction; and that the sale was altogether unauthorized and void, and passed no title, nor color of title, and furnished nothing upon which the statutory bar could operate."

We have to hold, in order to bring this case within that rule, that there was something in this which deprived the officer of the power to sell the land. This we do. It is true this amount was small, but the principle is the same, whether the amount was small or large. Five cents only were included in this case, but if it had been five dollars, or fifty or five hundred, the principle would be the same, so far as we can see. As I have stated, we think that under the decisions of the supreme court, admitting as I do, that the question is not free from difficulty, the sale was unauthorized and void, and consequently the tax deed given under it was also void, and the holder of the tax deed could obtain no title to the land under it. Therefore the defendant is entitled to judgment.

[NOTE. On writ of error, this cause was afterwards heard by the supreme court, and the judgment reversed, with costs. The case was remanded to the circuit court, with directions to enter a judgment for the plaintiffs for $6,731.56, with lawful interest on $6,241.42 from April 24, 1876.

[The opinion was by Mr. Justice Blatchford, the learned justice also preparing the following syllabus of the decision:

[1. Under section 5 of chapter 138 of the General Laws of Wisconsin of 1861, providing that "no action shall be commenced by the former owner or owners of any lands, or by any person claiming under him or them, to recover possession of land which has been sold and conveyed by deed for nonpayment of taxes, or to

avoid such deed, unless such action shall be commenced within three years next after the recording of such deed," land is to be regarded as having been sold for nonpayment of taxes although the sum to raise which it was sold included five cents for a United States revenue stamp, to be put, and which was put, on the certificate issued to the purchaser on the sale.

[2. A deed on a tax sale recited that "S. A. Coleman, assignee of Oconto county," had deposited certificates of sale showing that five parcels, each of which sold for so much, were sold "to the said Oconto county, and by its treasurer assigned to S. A. Coleman," for so much "in the whole"; the total being the sum of the five several sums. The statute (chapter 50, § 22, Gen. Laws Wis. 1859) prescribed a form of deed, and provided that it should be "substantially" in that or "other equivalent form," showing that the land was sold for a sum named "in the whole." *Held*, that the deed followed the form substantially.

[3. A sheriff having possession of property under a writ of attachment is not bound by a judgment in a replevin suit to which he was not a party, and in which he was not served with process, and did not appear, and which he did not defend, although his under sheriff, as an individual, was a party to the replevin suit.

[4. Quaere, are the waters of the Menominee river, which is the boundary between Michigan and Wisconsin, within the concurrent jurisdiction of both Wisconsin and Michigan?

[5. Although there was no general verdict of a jury in this case, and no special verdict in any form known to the common law, and no waiver in writing of a jury trial, and no such finding of the court below upon the facts as is provided for by section 649 of the Revised Statutes, this court, on a written stipulation filed in this court by the parties, agreeing upon the facts, reviewed the case on a writ of error, and reversed a judgment below for the defendant, and directed a judgment for the plaintiff, in an action of trover. 106 U. S. 379, 1 Sup. Ct. 315.]

Case No. 5,296.

The GEFLA.

[1 Mason, 88.] [1]

Circuit Court, D. Massachusetts. May Term, 1816.

PRIZE—CLAIM INTERPOSED BY UNITED STATES.

If a claim be interposed by the United States in a prize proceeding upon a seizure for a forfeiture under the non-importation acts, and the title of the captors and the claimants be defeated; the property will be condemned to the United States, subject to distribution according to the provisions of the act of 2d March, 1799, c. 128, § 91 [1 Story's Laws, 655; 1 Stat. 697, c. 22.]

This was an allegation of prize against the brig Gefla and cargo [Wilte, master], upon an asserted capture by the privateer Mary, Pritchard commander. At the trial in the district court of Maine [case unreported], a claim was interposed by the United States claiming the vessel and cargo as forfeited for a violation of the importation act of the 1st of March, 1809, c. 91 [2 Story's Laws, 1114; 2 Stat. 550, c. 9], as revised and enforced by the act of 1st of May, 1810, c. 56 [2 Story's Laws, 1169; 2 Stat. 605, c. 39], and the act of 2d March, 1811, c. 96 [2 Story's Laws, 1187; 2 Stat. 651, c. 29]. The claim alleged, that the goods, being prohibited goods, were taken on board in August, 1813, at Bermuda, a colony or dependency of Great Britain with the knowledge of the master, and with intent to import them into the United States; and that afterwards on the 16th of November, 1813, the brig with the same goods arrived within the waters of the United States and the district of Portland and Falmouth; and after her arrival was, on the same day, captured in said district by the privateer Mary; and was afterwards, on the same day, seized, as forfeited, by the collector of said district. At the hearing, the vessel and cargo were condemned to the United States; and from this decree an appeal was interposed to the circuit court of Massachusetts; but the appeal was afterwards abandoned, and, at the October term, 1814 [case unreported], the decree of the court below was by the consent of parties, affirmed, reserving the question of distribution.—And now at this term G. Blake, for the United States, and for the collector of said district, prayed for a decree of distribution, as in case of a proceeding upon a mere seizure for a municipal forfeiture.

STORY, Circuit Justice. The question as to the distribution of the forfeiture was reserved, not from any doubt entertained by the court, but from an expectation that the same question would be finally settled by the supreme court in the cases of the Janstoff and Bothnea. [1 Wheat. (14 U. S.) 408]. It is now uncertain, however, whether the point will be decided in either of those cases. If this were an information in rem for the alleged breach of the non-importation act, it is clear, that the property forfeited must be distributed according to the 91st section of the collection act of the 2d of March, 1799, c. 128 [chapter 22]. The question is, whether the right of the collector and other officers of the customs to a distributive share is ousted by the forfeiture being asserted by way of claim in a prize proceeding, instead of an original suit. When property is libelled as prize, the United States cannot seize it, as forfeited under a municipal law, so as thereby to defeat the prize jurisdiction. The only proper mode of proceeding is to interpose a claim in the prize court upon a seizure for the forfeiture; and this claim is in the nature of an information. If upon the hearing, the title of prize is defeated, and the claim of the owners of the property is rejected on account of any illegal conduct, condemnation must be to the United States. But whether the forfeiture shall be to the United States generally, or to the United States to be distributed, depends not at all upon the mode of proceeding, but upon the fact, whether there be seizing officers or others, who in the given case have entitled themselves to share in the forfeiture. Cases may arise, in which the forfeiture will wholly accrue to the government, as in The Walsingham Packet, 2 Rob. Adm. 77, and the claim of Lenox and Maitland in The Venus,

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

8 Cranch [12 U. S.], 253. But in those cases no seizure had been made by any officer entitled to share in the forfeiture; and the proceeding was on the part of the government only to vindicate its own rights.

In the present case a seizure was made by the officers of the customs for a breach of the non-importation acts; and it is admitted by all parties, that the facts completely sustain the seizure. It is also admitted, that neither the captors nor the claimants have any legal title, upon which they can stand before the court. The rights, therefore, acquired by the seizure remain untouched by any adverse claim; and although the forfeiture be inflicted in a prize proceeding; yet the court are as much bound to recognise the rights so acquired, as if the cause were before us upon an information on the instance side of the court. A decree must be entered, that the proceeds of the vessel and cargo be distributed between the United States and the officers of the customs according to the provisions of the 91st section of the act of 2d March, 1799, c. 128 [chapter 22].

Case No. 5,297.

GEIB v. ENTERPRISE CO.

[1 Dill. 449, note.] [1]

Circuit Court, D. Minnesota. June, 1870.

INSURANCE—CONCEALMENT OF MATERIAL FACT—WAIVER.

[1. Where property insured is sold under a mortgage, but by virtue of a state law the title remains in the former owner, with power of redemption, for the period of one year, it is the duty of such owner, upon applying for insurance, to disclose the state of the title to the insurance company, as, if not redeemed, the title would be lost to the assured before the expiration of the policy.]

[2. The facts to constitute a waiver of such disclosure may consist of acts of the company's agent showing knowledge, the fact that he filled in the blanks, that plaintiff could not read English and the application was not read to him, and that no questions were asked of him concerning incumbrances.]

[This was an action on an insurance policy]. The main defence was an alleged concealment by the assured at the time of effecting the insurance, of a previous sale of the property insured, under a mortgage.

Respecting the necessity of a disclosure by the applicant of the existence of such a fact, and what acts on the part of the local agents of the company would amount to a waiver of the necessity of making such disclosure, the jury was directed as follows.

Before NELSON, Circuit Justice, and DILLON, Circuit Judge.

DILLON, Circuit Judge. The principal defence relied on is that the plaintiff in effecting the insurance concealed the fact that there was an incumbrance on the lot and building to the amount of about $3,000, at the time the policy in suit was issued. It is not denied that in point of fact there was a mortgage of this amount upon the property. There is no proof that the defendant or its agent knew of the existence of this incumbrance when the policy was delivered to the plaintiff.

In the application (which is made part of the policy and a warranty on the part of the plaintiff) the question as to mortgages or incumbrances is not answered. In the application there is printed over the signature of the plaintiff the following, to-wit: "The applicant (the plaintiff) hereby covenants and agrees with the said company that the foregoing is a just and true exposition of the facts and circumstances in regard to the condition, situation, and value of the property insured, so far as the same are known to the applicant, and material to the risk." In the policy there is this provision, to-wit: "If the assured conceals any fact material to the risk in the application or otherwise," this will avoid the policy.

It is admitted that on September 24, 1867 (prior to the date of the policy in suit), the property was sold on the mortgage before mentioned by virtue of a power of sale contained therein, and purchased by a third party. But under the statute of Minnesota, the purchaser at such sale did not acquire a title to the property; the title still remained in the plaintiff, and no title would pass to the purchaser unless the plaintiff failed for one year to redeem the property; in other words, notwithstanding the sale, the mortgage was still nothing but an incumbrance at the date of the policy sued on,—October 1, 1867.

It was the duty of the owner of property, the title to which was in this condition, on applying to have it insured, to disclose to the company the facts relating to the state of the title as, if not redeemed, the title would be lost to the assured before the expiration of the policy. In contracts of insurance, good faith and fair dealing are required from both parties; such good faith and fair dealing would ordinarily require the party proposing to get the property insured to disclose the state of the title, if it was in the condition above mentioned.

The question in the case at bar is whether the necessity of such disclosure was waived by the company. If you find from the evidence that the plaintiff's property had been insured before in companies represented by the defendant's local agent; that such insurance being about to expire, the defendant's local agent applied to the plaintiff to keep the property insured and to allow such agent to insure it in the defendant's company; that the plaintiff consented; that the agent of the defendant made out, or caused the application to be made out, in the office, and in the absence of the plaintiff; that when made out, it and the policy already filled up and signed were taken to the plaintiff's store; that the application was not read

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

to the plaintiff, and that he could not read it, being a German, and that it was not read or explained to him by the agent; that the agent said it was all right and the plaintiff signed it without being apprised of its contents; and if you further find that at no time were any inquiries made of the plaintiff respecting incumbrances,—the court instructs you (if you find these to be the facts), that they amount in law to a waiver on the part of the defendant of the duty on the part of the plaintiff to disclose the existence of the mortgage or incumbrance on the property. If these are not the facts, substantially, then you will find that it was the duty of the plaintiff to have disclosed the state of the title, and failing to do which he cannot recover."

NOTE. Respecting the waiver of conditions in policies, and the power of local agents in this respect, the case of Viele v. Germania Ins. Co., 26 Iowa, 9, and the note, may be usefully consulted. North American Fire Ins. Co. v. Throop (Mich. Sup. Ct. 1871) [22 Mich. 146]; Miner v. Phoenix Ins. Co. [27 Wis. 693]. Agent in filling up blank applications may be the agent of the company. Rowley v. Empire Ins. Co., 36 N. Y. 550; Miller v. Mutual Ben. Ins. Co., 31 Iowa, 216. The principle laid down in the foregoing charge as to knowledge of an agent acquired in other transactions has since been approved by the supreme court of the United States. The Distilled Spirits, 11 Wall. [78 U. S.] 356. Fraudulent representations by assured avoid policy of insurance. Followed, Wilkinson v. Union Mut. Fire Ins. Co. [Case No. 17,676]; Shaw v. Scottish Con. Ins. Co., 1 Fed. 765.

[In the original report in 1 Dill. 449, this case is published as a note to Geib v. International Ins. Co., Case No. 5,298.]

Case No. 5,298.

GEIB v. INTERNATIONAL INS. CO.

[1 Dill. 443;[1] 2 Chi. Leg. News, 325; 3 Amer. Law T. Rep. U. S. Cts. 143.]

Circuit Court, D. Minnesota. 1870.

EVIDENCE—FRAUDULENT OVERVALUATION—FRAUD—POWER OF AGENTS—WAIVER—ESTOPPEL.

1. If the plaintiff on the trial of an action on a policy of fire insurance, produces the policy, and shows the loss, the delivery of the preliminary proofs, and the value of the property destroyed by the fire, he makes out a prima facie case.

2. Fraudulent over-valuation of the property in the preliminary proofs *held* to be a "fraud" "or attempt at fraud," within the terms of the policy, and to defeat any right to recover thereunder.

[Cited in Shaw v. Scottish Com. Ins. Co., 1 Fed. 765.]

3. False statements by the assured in the application respecting the existence of a mortgage on the property insured, *held* to avoid the policy.

4. What acts and conduct on the part of the local agent of the company, who wrote out the application and issued the policy, will estop the company to set up the existence of the mortgage to defeat the action.

[Cited in Wilkinson v. Union Mut. Ins. Co., Case No. 17,676.]

5. Subsequent insurance by the assured in other companies in contravention of the terms of a policy will, if it so provides, avoid the same.

6. Certain circumstances *held* to amount in law to a waiver by the company of the condition of the policy respecting the amount allowed to be insured in other companies.

[Cited in Robinson v. St. Louis Mut. Life Ins. Co., Case No. 11,964.]

[Cited in Pelkington v. Nat. Ins. Co., 55 Mo. 173.]

[7. Cited in Wimer v. Smith (Or.) 30 Pac. 421, to the point that circumstances of mere suspicion will not warrant the conclusion of fraud.]

Action on insurance policy. The answer sets up three defences: 1. Fraudulent overvaluation of the property insured. 2. False statements respecting the existence of a mortgage on the insured property. 3. Over-insurance in contravention of the terms of the policy in suit. By the practice of the court, adopting the state practice, no replication was filed, but the answer is to be deemed controverted, and the plaintiff may meet the defence, either by a denial or by matter in avoidance.

The defendant's company was represented at the city of St. Paul by Messrs. Etheridge & Powell, who had the power to issue and cancel policies, and to change or consent to the change of the terms and conditions thereof. The application on which the policy in suit was issued, was filled up by the said local agents of the defendant, and was signed by the plaintiff, at the time the policy was delivered to him by the agents of the company. The plaintiff's testimony and that of the agent who acted for the company (Mr. Etheridge) was in conflict as to whether the agent at the time when the application was signed, asked the plaintiff the question, Whether there was any mortgage on the property, and as to whether the plaintiff answered it. The other facts relating to this point sufficiently appear in the opinion of the court.

The firm of Etheridge & Powell were not only the local agents of the defendant, but also of the Home Company which, through the said firm, issued a policy to the plaintiff, on the same property and at the same time the policy in suit was issued; and they were also the local agents of the Enterprise Company, and acting for it, soon afterwards issued the policy to the plaintiff which is now set up by the defendant as constituting an over-insurance, contrary to the terms of the policy in suit. The other facts in respect to this subject, are stated in the charge of the court.

Allis, Gilfillan & Williams, for plaintiff.

Messrs. Lampreys, for defendant.

Before NELSON, Circuit Justice, and DILLON, Circuit Judge.

DILLON, Circuit Judge (summing up to the jury). I. This is an action on an insurance policy issued by the defendant to the plaintiff, dated August 1, 1867, by the terms of

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

which the insurance company agreed to insure the plaintiff "on his two story frame building," in St. Paul, in the sum of $1,000 against loss or damage by fire for the period of one year.

On the trial the plaintiff has shown the policy; the loss of the property by fire on the 9th day of January, 1868; the proofs of loss as required by the policy, and has also offered evidence to show the value of the building insured.

Therefore the plaintiff is entitled to recover, unless the defendant has established by the fair weight of evidence, one or more of the three defences relied on to defeat the recovery.

To these defences the court will now direct your attention, and these you will consider separately and in their order.

II. The policy, which is the contract between the parties, contains this agreement on the part of the plaintiff, to wit: "Any fraud or attempt at fraud or false swearing by the assured shall make this policy void."

If you find from the evidence that the plaintiff in the proofs of loss knowingly and falsely made a fraudulent over-valuation of the property with a view to deceive the insurance company, and to induce them to pay more than the value of the building, then he cannot recover, and you will, if you so find the facts to be, return a verdict for the defendant.

If you decide this issue for the defendant this ends the case, and you need inquire no further. But if you determine this issue against the insurance company, then you will consider whether it has established its other defences or either of them.

III. The policy contains this condition, viz: "If any concealment or any erroneous representation, written or verbal, be made by the plaintiff concerning the risk," * * * "it shall make the policy null and void."

The application signed by the plaintiff and introduced in evidence contains this question, to wit: "What incumbrances, liens and mortgages are upon the property?" and said question appears on the face of the application to be answered, "None."

It is an admitted fact in the case that there was at the date of the policy, a subsisting mortgage on the property for the sum of $3,000.

This is a complete defence to the action, and defeats the plaintiff's right to recover, unless the plaintiff shows (and on this point the burden of the proof is on the plaintiff) that the company is estopped to make this defence, or has waived the necessity on the part of the plaintiff, to make a disclosure of the existence of the mortgage.

The plaintiff does not claim, and has not testified that he informed the defendant's agent of the existence of the mortgage, and the agent who issued the policy distinctly testifies that he was not informed of the existence of the mortgage, and did not have any knowledge of the fact at the time he issued the policy. Having signed a paper which stated that there was no mortgage on the property, the law devolves on the plaintiff the necessity to make clear and satisfactory proof that this paper is not binding upon him.

If you believe from the evidence that Etheridge, the agent, before the application was signed, asked the plaintiff the question, "whether there was any mortgage on the property," that the plaintiff understood the question, and answered "no," then (under the admitted facts of the case), the plaintiff's right to recover is defeated, and you will find a verdict for the defendant.

The plaintiff's name appearing to the application, he is concluded thereby, unless the same is not binding, because the agent of the company deceived the plaintiff as to the nature and character of the paper which the plaintiff signed, or caused the plaintiff to sign it in ignorance of its contents, and upon his assurance that it was all right.

The plaintiff's claim respecting the application and statement about mortgages is, that the facts are these, viz: That the agent of the company filled up the application in the absence of the plaintiff, and without his knowledge or authority; that the application together with the policy, was brought to the plaintiff by the agent; that the plaintiff is a German, and cannot read English print or writing; that it was not read by or to the plaintiff; that the agent assured the plaintiff that all was right; that plaintiff relied on this assurance; that plaintiff signed it without knowing or being apprised of its nature or contents, and supposing it was a receipt or paper obligating the plaintiff to pay the premium for which the agent had agreed to give a credit; that no inquiries were made by the agent of the plaintiff about incumbrances, and that the plaintiff did not purposely conceal or mislead the agent as to the mortgage, but was misled by the agent's acts or statements so that he did not know what he was signing: Now, if these facts are proved, the company is affected by the said acts and conduct of the agent, and the statements in the application in relation to the mortgage cannot be set up by the company to defeat a recovery on the policy.

The law presumes that the plaintiff understood the nature of the paper he signed, and does not presume that a fraud was practiced upon the plaintiff in respect to the application, and hence the facts relied on by the plaintiff to avoid the application and the statements therein contained as to mortgages, must be clearly and satisfactorily established by the plaintiff.

If you decide the preceding defences against the defendant, you will proceed to consider the next defence, viz: an over-insurance contrary to the terms of the policy.

III. The policy in suit is for $1,000, issued by the International Insurance Company, dated August 1, 1867. At the same time it is admitted that the plaintiff procured an insurance on the same building in the Home Insurance Company for $500.

In the policy in suit the plaintiff was allowed to make $500 additional insurance; and it also contains the following condition, viz: "If the assured shall have, during the continuance of this policy, any other contract of insurance on the property not consented to by this company, and indorsed on the policy, * * * the policy shall be null and void."

It is an undisputed fact in the case that on the 1st day of October, 1867, the plaintiff obtained, on the property in suit, in the Enterprise Insurance Company, of Cincinnati, a further insurance of $500. By this last-named policy, "$1,500 additional insurance was allowed" on the building, which was the amount insured by existing policies in the defendant's company (the International) and in the Home Company.

Thus the defendant had in all insured on the building $2,000. This is $500 in excess of the amount allowed by the policy sued on, and this avoids the policy and defeats the plaintiff's right to recover if the company has not waived, or is not estopped to make this defence.

It is an admitted fact that the policy in suit, also the Home policy issued at the same time, and also the Enterprise policy, were issued by the firm of Etheridge & Powell, local agents of these companies. It is also stated by Etheridge, as a witness on the stand, and not contradicted or disputed, that he was at the date of the policy in suit, and at the date of the Enterprise policy, and still is the local agent of the defendant, (the International Company), and that as such agent he has power to issue and to cancel policies and to change the terms and conditions thereof.

If, under these circumstances, you find the fact to be that the said Etheridge, or Etheridge & Powell, the local agents of the defendant, at the time they issued the Enterprise policy, knew of, and had in mind the policy in suit, and also the Home policy, and the conditions thereof as to the amount allowed therein to be insured by the plaintiff on the property, these circumstances will, in my opinion, amount in law to a waiver of the condition of the policy in suit as to over-insurance, at all events they will estop the defendant to make this defence of over-insurance. Viele v. Germania Ins. Co., 26 Iowa, 10; Rowley v. Empire Ins. Co., 36 N. Y. 550; Bartholomew v. Merchants' Ins. Co., 25 Iowa, 507.

It will be for the jury to say whether the words in the Enterprise Insurance Company's policy "$1,500 additional insurance allowed on the same building," had reference to the policy issued by the defendant for $1,000, and to the policy issued at the same time by the Home Company for $500—making the sum of $1,500. If these words referred to these policies, it is almost needless to observe to you that the agent who inserted them, both knew of and had in mind those policies and their conditions as to the amount the plaintiff was allowed to insure.

Foreign insurance companies are from necessity compelled to act by agents; those who do business with them must necessarily deal with agents; sound public policy, protection to the citizen, require that these companies be bound by the acts and conduct of their agents done within the scope of their apparent powers, when the assured knows of no limitations on such powers. As the local agent might by contract indorsed on the policy, have waived the condition as to amount to be insured, he may by acts and by course of dealing, do that which amounts to such a waiver—may dispense with this condition and with the requirement that such waiver or dispensation shall be in writing indorsed on the policy.

Do not, gentlemen, infer that the court intends any disparaging allusion to the defendant or the acts of its agents in this case. Indulge or entertain no prejudice against the defendant, because it is an insurance company or a foreign corporation. It has the same rights and should receive the same measure of justice as if a citizen of this state or one of your neighbors were the defendant. It would be a reproach to the law and to the trial by jury, if it should be true that the verdict depends not upon the law and the evidence, but upon the character of the parties.

[One question of fact which the jury will have to consider is, whether, in point of fact, the local agent (Mr. Etheridge) asked the plaintiff the question, "Are there any mortgages on the property?" If he did it was the duty of the plaintiff, if he understood the question, to answer it truly; and it was not necessary for the agent to state to him that a failure to answer truly, or that a mistake in answering it, would be fatal to the insurance; nor is it necessary that the agent should have communicated to the plaintiff or that the plaintiff should have understood the legal effect of a false or mistaken answer to the question about mortgages. On the point whether this question was put, the evidence is conflicting. The plaintiff testifies that it was not asked him at all, and that he did not answer it. The local agent testifies that he asked the question; that plaintiff answered it, and that he took down the answer at the time just as it appears on the application. Who is right in this and who is wrong, the jury must determine from the evidence and all the circumstances, including the nature of the answer "No" appearing on the application, and the reasonableness or otherwise of the explanation which the plaintiff has given as to what he supposed

the application to be. It is on the plaintiff to satisfy the jury that the question was not put to him and that he did not answer it; if the evidence fails to satisfy you of this, then the plaintiff has failed to show that the application and statements therein contained, are not binding upon him. The plaintiff's claim set up to avoid the application, and its binding effect on the plaintiff are referred to in the charge. If these facts are established then the plaintiff is not bound by the application. But if it is uncertain whether these facts are established. and you cannot find them to be true from the evidence, then it would be your duty to find that the application and its statements as to mortgages, are binding upon the plaintiff, and hence that he cannot recover in this action.] [2]

The jury found for the defendant upon the defence of the non-disclosure of the mortgage.

Case No. 5,299.

GEIER v. GOETINGER.

[1 Ban. & A. 553; [1] 7 O. G. 563.]

Circuit Court, S. D. Ohio. Oct. Term, 1874.

PATENTS—PRESUMPTION AS TO VALIDITY—CONSTRUCTION—NOVELTY.

1. The presumptions of the law are in favor of the patent and the utility of the invention.

[Cited in Allis v. Buckstaff, 13 Fed. 891.]

2. The patentee, in his specification, described his invention as consisting in rendering wooden bungs impervious to the passage of gases, or beer, or other liquor through the pores of the wood, by means of any suitable substance: and having pointed out the particular material which he regards as the most suitable for the purpose, his claim was for "a wooden bung, rendered impervious to the passage of fluids through the pores of the wood, by means of the described or other suitable substance:" *Held*, that the invention of the patentee consisted in a wooden bung, rendered impervious to the passage of gases, or beer, or other liquids.

3. Testimony of witnesses examined in a case as to alleged prior use by parties of whom no notice was given in the answer, can only be considered by the court, for the purpose of showing the state of the art at the time of the patentee's invention.

4. The same rule applies to printed publications, by which it is sought to anticipate the invention.

5. If it should appear that such testimony clearly established the invalidity of the patent, the court might grant the respondent leave to amend.

6. Letters patent granted to Philip Geier, February 23, 1869, for "improved method of rendering wooden bungs impervious to liquids and gases," *held* valid.

[This was a bill in equity by Philip Geier against August Goetinger for the alleged infringement of letters patent No. 87,163, granted to plaintiff February 23, 1869.]

Dunham & Foraker, for complainant.

Shouter & Smith, for defendant.

SWING, District Judge. In construing a patent, the court should look to the patent, specifications and drawings, to ascertain what is the thing claimed and patented. Pitts v. Whitman [Case No. 11,196]; Davoll v. Brown [Id. 3,662]; Hogg v. Emerson, 11 How. [52 U. S.] 606; Goodyear v. Railroad [Case No. 5,563]; Bell v. Daniels [Id. 1,-247].

Applying this rule, what is the thing claimed and patented? The patent recites that Philip Geier alleges, that he has invented a "new and useful improved mode of rendering wooden bungs impervious to liquids and gases." In the schedule, the patentee says, he has invented a "new and useful improvement in wooden bungs," and says: "My invention consists in rendering wooden bungs impervious to the passage of gases, or beer or other liquor, through the pores of the wood, by means of any suitable substance." The drawing shows a bung with a coat of the impervious material. Then, the substance used, is described, as also its manner of application. The claim is, "a wooden bung rendered impervious to the passage of fluids through the pores of the wood, by means of the described or other suitable substance."

I think, from the patent, specifications and drawings, that the invention of the patentee consisted in a wooden bung rendered impervious to the passage of gases, or beer, or other liquids. This is the thing he has produced. This is the end he has accomplished, and a fair interpretation and application of the language used, cannot well bear any other construction. The patentee points out the method by which his invention is produced, and the material used, to wit, by the application of impervious material to the end of the wooden bung. He also describes the particular material, which he regards as most suitable, but claims the use of any suitable substance for accomplishing the result. The presumptions of the law are in favor of the patent and the utility of the invention; but, aside from that, the testimony establishes clearly the utility of the invention. The testimony shows, that many experiments had been made, prior to the complainant's invention, to produce such a thing; but they had failed to produce one adapted to the use for which they were designed. So far as the prior use of the respondent is concerned, the testimony does not show that his experiments were more successful than many others, for it shows that the bungs, which he manufactured, did not answer the purpose, and the use thereof was abandoned.

It is attempted to be shown in the testimony, however, that the invention had been used by other parties than those set up in answer; and it is also attempted to be

[2] [From 3 Am. Law T. Rep. U. S. Cts. 143.]

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

shown, that the invention had been described in printed publications. If the testimony clearly established either of these propositions, we might, perhaps, grant the respondent leave to amend; but they do not so clearly establish either point, as to warrant the court to permit such an amendment at the hearing of the case. Such testimony cannot, therefore, be considered by the court, except for the purpose of showing the state of the art at the time of complainant's invention, and such knowledge would in nowise affect the construction which I have given to the patent. If the pleadings properly raised the issue, I should not think the patent void, by reason of the claim being too broad.

The respondent, having admitted the manufacture of the invention of the complainant, by the use of substances which are within complainant's patent, is, therefore, guilty of an infringement; and, as no reference is desired, and the damage shown is but fifteen cents, a decree for an injunction will be granted, without costs.

GEIGER v. The ELIZA MALLORY. See Case No. 4,365.

GEIGER (JANNEY v.). See Case No. 7,212.

GEIGER v. MONSERAT. See Case No. 9,740.

GEIGER (MUIR v.). See Case No. 9,902.

Case No. 5,300.

GEIGER v. The WILLIAM TABER.

[Nowhere reported; opinion not now accessible.]

GEIGER (WISE v.). See Case No. 17,908.

GEIS, In re. See Case No. 5,407.

GEISS (BRADFORD v.). See Case No. 1,768.

Case No. 5,301.

GELL et al. v. JACOBS.

[Cited in Ogden v. Saunders, 12 Wheat. (25 U. S.) 286. See Case No. 5,426.]

Case No. 5,302.

GELSTON v. ADAMS.

[2 Cranch, C. C. 440.] [1]

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

BILLS AND NOTES—ASSIGNMENT AFTER DISHONOR—SUIT BY ASSIGNEE.

If the payee of a promissory note, after it has been dishonored, assigns it to a debtor of the maker, and then gives the maker a release upon his surrendering all his effects to a trustee for the benefit of his creditors, the assignee cannot recover upon the note in an action against the maker, who had no notice of the assignment until after the deed of trust and release had been executed.

This was an action by the assignee of a promissory note for $436.31, made by the defendants [A. and A. H. Adams] to Jonathan Janney, and due on the 25th of July, 1822, when it was protested. Janney assigned it to the plaintiff on the 1st of August, 1822. On the 14th of August, 1822, Janney, then being a creditor of the defendants to the amount of $66, upon an open account, attended a meeting of the creditors of the defendants, who laid before them a list of their debts, and stating Janney to be a creditor for the amount of the note, as well as of the open account. Janney did not inform the defendants of the assignment of the note, but signed the release, and accepted the satisfaction given by the defendants, which was an assignment of all their effects to a trustee for the benefit of their creditors.

THE COURT (THRUSTON, Circuit Judge, absent), on the prayer of Mr. Taylor, for defendants, instructed the jury that if, from the evidence, they believed the facts to be as above stated, the plaintiff could not recover, although they might be satisfied by the evidence that the plaintiff was debtor to the defendants to the amount of $288.90, until and at the time of the transfer of the note.

GELSTON (BREWSTER v.). See Case No. 1,853.

Case No. 5,303.

The GEM.

[Brown, Adm. 37.] [1]

District Court, D. Michigan. March, 1858.

WHARFAGE—THE 12TH RULE.

1. Wharfage is the use of a wharf by a vessel for the loading or unloading of goods or passengers. Mere anchorage at a wharf is not wharfage.

2. The use of a wharf is not "material" for a ship, within the meaning of the 12th rule, nor is a wharfinger a material-man.

[Cited in The Hercules, 28 Fed. 476.]

3. The maritime law does not give a lien for wharfage.

Three libels brought to recover for the use and occupation (1) of a wharf at the foot of Woodward avenue, Detroit; (2) of a private wharf fronting certain lots of libellant, in Detroit; (3) of a wharf on the opposite shore of Detroit river, in Canada.

Alfred Russell, for libellant.

John S. Newberry, for claimant.

WILKINS, District Judge. At the commencement of the argument of this case, the proctor for the libellant abandoned all claim

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

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

for the use of the Canadian wharf; and so far as the use of the wharf at the foot of Woodward avenue is concerned, the case was settled by that of Russel v. The Empire State [Case No. 12,145]. The only matter left for the action of the court on these libels is the claim for the use of the private wharf of libellant, by the Gem, for certain days in the years 1856 and 1857.

Wharfage may be claimed either upon an express or an implied contract: express, when a price is agreed upon for the use of the wharf, and implied, when used without such agreement. Strictly speaking, it is money due, or money actually paid for the privilege of landing goods upon, or loading a vessel while moored, from a wharf. The occupation, by anchorage or otherwise, of a navigable river open to all, in the vicinage of a wharf, implies no contract of wharfage, because it is no use of the wharf for either the landing or the reception of passengers or merchandise. Without determining the preponderance of the testimony as to the controverted fact, whether this wharf was or was not used by the Gem, I am necessarily compelled to adhere to the opinion given by this court in the case of Russel v. The Asa R. Swift [Case No. 12,144], which, until reversed by the appellate court, must govern. The law of that case has not been reversed. An appeal was taken from the decree of the district court, and a stipulation filed, by which two legal propositions, embracing the merits of the case, were submitted to the circuit judge. The first was as to the extent of the lien conferred by the local law, and its enforcement in rem against a domestic vessel. The second, whether the fact that the steamboat had left the wharf with no effort on the part of the wharfinger to detain her, and with full knowledge on his part, precluded a recovery in rem. The case was argued on these propositions, at the session of the circuit court, in June, and held under advisement until the 5th of August, when the clerk of the circuit was directed, by letter, to enter a decree reversing that of the district court, without stating upon what ground, or wherein, the district court had erred. This is no reversal of the law as pronounced by the district court, nor is it possible to ascertain on which proposition the reversal is based.

In Russel v. The Asa R. Swift [supra] it was held that the 12th rule of the supreme court, having the force of a statutory provision, directed that "proceedings in rem shall only apply to cases of domestic ships where, by the local law, a lien is given to material-men for supplies, repairs or other necessaries."

The statute of Michigan gives a lien for wharfage, but the statute of the United States inhibits the proceeding in this court, limiting the same to domestic vessels where, by the local law, a lien is given to material-men for supplies, &c., and to none others. The district court held: 1st. That the use of a wharf was not "material" for the ship. 2d. That a wharfinger was not a material-man. Neither of these propositions is denied by the circuit court. 3d. That the 12th rule was obligatory as to the jurisdiction of this court in such cases. This proposition is not overruled by the circuit judge in such clear terms as to warrant the application of such reversal to the facts of this case. 4th. Material-men are such as supply the materials for the construction or repair of vessels. A wharfinger cannot be so considered. He is only a lessor for the time being of a part of his real estate, to be used for moorage. He supplies the convenience of dockage and the facility of discharging passengers and freight, but no material for the use of the ship, within the spirit and intent of the statute. The appellate court does not declare otherwise.

All we are able to learn from the brief minute of the circuit judge to the clerk is, that the decree is reversed, but no construction is given either to the local law or the statute of the United States. It is a reasonable presumption, that the appellate court, ascertaining that the local law gave a lien for wharfage, at once applied it, without reference to the provision of the 12th rule, as declaratory of the enforcement of such lien.

This court will be guided by the decisions of the appellate court; but, in order to apply those decisions to other cases, we must be satisfied that the law has been determined by the appellate power, as we cannot safely direct judicial action on mere conjecture.

The Gem was a domestic vessel, and therefore governed by the 12th rule—the court holding that the use of a wharf is not material supplied to a vessel, and that a wharfinger is not a material-man. The facts, as viewed by the court, would not have warranted a decree for the libellant, but I prefer placing the dismissal of the libel on the ground stated. Libel dismissed.

NOTE. I think the weight of more recent decisions is to the effect that wharfage is a maritime contract, and that a lien exists therefor, irrespective of the 12th rule. This was probably the view taken by the circuit court in the reversal of Russel v. The Asa R. Swift [Case unreported]. See The Kate Tremaine [Case No. 7,622]; Ex parte Lewis [Id. 8,310]; The Phebe [Id. 11,065]; Johnson v. The McDonough [Id. 7,395]. But see Delaware River Storage Co. v. The Thomas [Id. 3,769]; U. S. Hydraulic Cotton-Press Co. v. The Alexander McNeil [Id. 14,404].

Case No. 5,304.

The GEM.

[1 Lowell, 180.] [1]

District Court D. Massachusetts. Dec., 1867.

SHIPPING ARTICLES — DEFINITENESS — CONSTRUCTION — DEVIATION — RIGHT OF SEAMAN TO LEAVE VESSEL — SUBSTITUTE.

1. Whether shipping articles which describe the voyage to be from the port of Salem, Mass., to Goree and a market and back to a final port of discharge in the United States, are sufficiently definite in the absence of evidence of usage to put some further limit to the voyage, quaere?

2. How far usage could be invoked in aid of shipping articles, quaere?

3. If such articles are valid, it must be by confining the voyage to Goree and neighboring ports, or ports usually visited in the same trade.

4. Limiting it thus, and holding the articles to be valid, they refer only to a market for selling the outward and procuring a homeward cargo, and do not authorize an intermediate trading voyage among the islands and on the coast of Africa.

5. When a seaman, shipped under such articles, has served until the outward cargo is disposed of, and a new intermediate trading voyage has been undertaken, and has well-grounded apprehensions of danger to his health, he may leave the vessel at a port where a substitute can be procured, without forfeiting the wages already earned; because there is a deviation, and one which, so far as he is concerned, is a substantial one.

In admiralty.

W. J. Forsaith, for libellant.

G. Wheatland, for claimant.

LOWELL, District Judge. Antonio Joseph brings his libel for wages against the bark; and it is admitted that he shipped at Salem as ordinary seaman on a voyage to the coast of Africa, and was with the vessel for six months and twenty days; that while well, he was faithful and obedient; that he was ill for some three weeks; and that he left the vessel at Brava, one of the Cape de Verd islands. The questions at issue are, whether the wages agreed on were twenty dollars a month or twenty-five dollars; whether his leaving the vessel was justifiable, and if not, what penalty he should suffer in reduction or loss of wages, partial or total.

This man, who says he is able to write, was shipped under a false name and signed with his mark, at the request, as he says, of the shipping master, and it seems that all or most of the crew were shipped by names that they never were known by since, and probably not before. Hence the confusion as to the rate of wages. The libellant says he appears as Smith on the shipping articles, while the owner shows another name as that which libellant is understood to have used. For whatever reason this mode of shipment was adopted, it is to be reprehended; and if there were any doubt of this man's identity, and the doubt were caused by the action of the shipping master, I should hold the owner to the higher rate; but the evidence is clear that the libellant could have had but twenty dollars, because that is the only price given to ordinary seamen by these articles, and the advance that he received of twenty-three dollars (not twenty-five as he was inclined to say) is explained by its including three dollars which he was to pay the shipping master.

Coming to the other point: it seems that the libellant was ill of a fever for a considerable time, and was nervous and dispirited; that he was afraid to go back to the coast of Africa, where his illness had been contracted, and, the master having refused to discharge him, he left the vessel, with no intention of returning, and his place was filled by the shipment of another man. This is not such a desertion as would authorize me to forfeit all his wages. There is no evidence that any entry was made in the log-book, and no statute desertion is set up. It is a peculiar case, and one that might require careful scrutiny to see how far the act was reasonable, and to what extent the owners had suffered by it. But upon another ground, I am of opinion that the master could not hold the libellant to further service.

The voyage described in the articles is, "From the port of Salem, Mass., to Goree and a market, and back to a final port of discharge in the United States." The vessel went to Goree and several ports on the west coast of Africa, in what order does not appear, disposed of her outward cargo, took passengers to one of the Cape de Verd islands, went to a second island for provisions, and was about to proceed to a third for a cargo of salt, with which to return again to the coast, and by trade or barter obtain a homeward cargo. At the second of these islands the libellant left the vessel.

Was there a sufficient description of the voyage in the articles, and if so, had there been a deviation? The articles must set out in clear terms the voyage or voyages to be undertaken, or the term or terms of time to be occupied; and if this statute requisition is not followed, the seamen may leave the vessel at any port where no special inconvenience will thereby be caused to the owners. Wope v. Hemmenway [Case No. 18,042]; affirmed, Snow v. Wope [Id. 13,149]; The Crusader [Id. 3,456]. In construing the articles, we are aided by analogous cases in the law of insurance. From New York to Barbadoes and a market, and thence to New York, construed by the light of a usage of trade, was held to mean to any island in the West Indies, until a market was found for the outward cargo; though it was doubted whether this construction would be given to a policy in any other trade. Maxwell v. Robinson, 1 Johns. 333. In two cases in Massachusetts, the market was limited in terms to Jamaica in one, and to the West Indies in

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

another. Houston v. Northeastern Ins. Co., 5 Pick. 89; Deblois v. Ocean Ins. Co., 16 Pick. 303. If the general words, "Goree and a market," are to be limited by construction, how, and to what extent, are they to be limited? Where shall the court find the limit? There was some slight evidence, but not enough to show a general course of trade, that voyages to the west coast of Africa are commonly voyages of trade and barter along the coast and among the islands; both coast and islands were visited in this case. I confess I find great difficulty in construing these articles, independently of usage, as describing a voyage or voyages as fully and clearly as the seamen are entitled to have them defined. What is to prevent the master's going to Europe if he find no market in Africa or the islands?

The analogy of policies of insurance ceases here, because there is no rule of law avoiding policies which do not describe the voyage with clearness. Underwriters are supposed to be able to take care of themselves; they make such contract as they please; and a policy would not be held void for uncertainty, excepting as any other contract might be, which the court found itself wholly unable to construe. I am not aware that such a case has ever passed into judgment; but there are many where shipping articles have been so avoided. Again, if underwriters enter into an insurance agreement of indefinite duration, it may be a rule of law that they intend to contract for a reasonable time; and a question of fact whether such reasonable time had elapsed before the loss. The seaman is under the special protection of the statute law, and the duty is placed distinctly and solely upon the other party to the contract to see that it is properly expressed; and a reasonable time is not a term of time within the statute. If, therefore, this contract, independently of usage, means that the ship may seek a market anywhere, it is void, as not fixing the scope of the voyage with sufficient accuracy; or if the market means a number of markets, not only for the disposal of the outward cargo, but for indefinite intermediate trading, even within definite limits of space, it would be void for not fixing the limits of time.

But granting that the limits of this voyage can be fairly made out, by a consideration of the nature of the cargo, or otherwise, so as to comprehend only what is known as an African voyage; and that the market means a port or ports for the disposal of the outward and the procurement of a homeward cargo; then it would be a deviation to go on an intermediate voyage, such as the ship was prosecuting in this case. Her cargo had been sold, and if she could make a distinct voyage to get another cargo for trade on the coast, I see not why she could not make any number of such voyages. The ports she was bound to were not on the way to any port which was, or could be, a market for outward or homeward cargo, but were visited for the express purpose of an independent trading transaction. This was a deviation; because, from the market, the voyage described in the articles is to a port of final discharge in the United States; and even if the market includes ports for receiving homeward cargo separate and distinct from the ports of delivery of the outward cargo, the voyage now being prosecuted was to neither. It was a substantial deviation, and a most material one; because the very objection of the libellant, whether well or ill founded, to a further prosecution of the enterprise was, that it would oblige him to return again to the coast of Africa, which, if the voyage described had been adhered to, would not have been the case.

I may sum up my views of this case by saying that, while the construction of all maritime contracts concerning voyages, and the obligations of the master in prosecuting them, are founded on the same general principles, the law is more stringent in relation to ships' articles than in any other case, and rests the burden of making a proper agreement upon only one party to it. On the other hand it may be a little less stringent in the matter of deviation. There may be deviations which would discharge underwriters or charge carriers, that would not relieve seamen from their engagement. Into this consideration, however, it is not necessary to enter, because the change here was an important and onerous one, in view of the libellant's state of health. Nor do I now consider when and how far usages of trade can be relied on to explain the shipping articles. Decree for the libellant.

Case No. 5,305.

Ex parte GENERAL ASSIGNEE.

In re ALLEN et al.

[5 Law Rep. 362; 1 N. Y. Leg. Obs. 115.]

District Court, N. D. New York. Sept. 28, 1842.

BANKRUPTCY—EFFECT OF DECREE—"LIEN"—SUIT BY CREDITOR'S BILL.

1. A decree of bankruptcy and the title of the assignee, acquired under it, relate back to the time of filing the petition, and embrace all the property the petitioners then had.

[See Ex parte Bennet, Case No. 1,309.]

2. The word "lien," in the second section of the bankrupt act [of 1841 (5 Stat. 442)], embraces equitable as well as legal liens, and is not used in any precise and definite sense, but the meaning and application of the term are to be ascertained by the law of the several states, whenever they may come in question.

[Cited in Perego v. Bonesteel, Case No. 10,976; Johnson v. Rogers, Id. 7,408.]

3. A suit commenced by a creditor's bill, in the court of chancery of New York, gives to the complainant such a lien or security, from the time of the commencement of the suit, by the filing of the bill and the service of a subpoena, as is within the saving clause of the second section of the bankrupt act; and when such

suit is instituted, and prosecuted without collusion with the bankrupt, and in good faith, the lien thus acquired will prevail against a decree of bankruptcy, on a petition filed subsequent to the commencement of the suit by the creditor in the court of chancery.

4. Aliter, where the decree of bankruptcy is founded on a petition filed before the commencement of such suit.

In each of the above cases [of Abner H. Allen, Henry Hunt, Archibald Campbell, Levi Thayer, and Joel Thayer], application had been made to the court by or in behalf of the assignee for an injunction to restrain certain creditors of the bankrupt from the further prosecution of a suit against him by creditor's bill in the court of chancery of this state.

The suits had all been commenced, apparently in good faith, before the presentation of the original petition in bankruptcy. The first case had been submitted on briefs by Thomas Y. How, Jr., in behalf of Grant & Allen, for the assignee, and by Mr. Myers in behalf of Stryker & Comstock, for the prosecuting creditors. The other cases had been argued by Mr. Myers for the assignee, and Bronson, Wright & Clark for the creditors.

CONKLING, District Judge. In the case of Hezekiah Thayer (reported in the Cayuga Patriot of June 22, 1842) it was decided that no lien can be acquired by the institution of a suit by creditors bill in the court of chancery of this state, which will prevail against the title of an assignee of the estate and effects of the defendant under a decree of bankruptcy founded on a petition filed in this court before the commencement of such suit. With that decision I am entirely satisfied; and as far as I have been informed, it has generally been acquiesced in as sound. It is clear, that the property and rights of property of the bankrupt which it is declared by the third section of the bankrupt act shall, by force of the decree of bankruptcy, be divested out of the bankrupt, and vested in the assignee, are such property and rights of property as he had at the time of the filing of his petition. But the important question remains to be decided, at what stage of the proceeding, when instituted in good faith and without collusion with the bankrupt, before the filing of the petition in bankruptcy, it becomes effectual in favor of the complainant as against the assignee under a decree of bankruptcy made in pursuance of a petition subsequently filed. Is it from the time of the commencement of suit by filing the bill and service of process? or, from the entry of the order for the appointment of a receiver? or, not until an actual assignment by the defendant to the receiver? This I have found to be a question of no little difficulty and embarrassment.

On the one hand, it is the duty of the court to protect the general creditors against all claims of individual creditors inconsistent with the objects and policy of the act; and on the other hand it is no less the duty of the court to abstain from interfering with claims falling within the just scope of the last proviso of the second section of the bankrupt act. The proviso is in these words: "Provided, that nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the second and fifth sections of this act." In giving a construction to the terms "liens" and "securities" in this enactment, I can perceive no ground on which the courts would be warranted in limiting them to claims recognised and enforced in courts of law, as contradistinguished from those recognised only in equity. Reliance was placed, at the argument, on the definition of the term "lien" usually given in the English books, namely, "a right to possess and retain a thing until some charge upon it is paid or removed." This is the definition of a lien at law. It is defective when used in reference to the jurisprudence of this state, and of most of the other states of the Union, in not aptly describing one of the most common and important liens under our laws—that of a judgment creditor on the lands of his debtor; which consists in a right to sell the lands at once under a fieri facias, and not, as in England, to receive the rents and profits of a moiety of them under an elegit. In respect to personal estate, this definition is strictly true, because the lien upon personal property is recognised at law to exist only in connection with the possession or right to possess the thing itself, and ceases when the possession is voluntarily given up. A familiar illustration of a lien of this description is that which exists in favor of artisans and others who have bestowed labor and services upon the property, in its repair, improvement and preservation. Liens at law generally arise, either by express agreement of the parties, or by the usage of trade, which amounts to an implied agreement, or by mere operation of law. See 1 Story, Eq. Jur. § 506, and 2 Story, Eq. Jur. § 1216. "But," says Mr. Justice Story (2 Eq. Jur. § 1217), "there are liens recognised in equity, whose existence is not known or obligation enforced at law, and in respect to which courts of equity exercise a very large and salutary jurisdiction." In regard to these liens, it may be generally stated, that they arise from constructive trusts. They are, therefore, wholly independent of the possession of the thing to which they are attached, as a charge or incumbrance; and they can be enforced only in courts of equity. The usual mode of enforcing a lien in equity, if not discharged, is by a sale of the property to

which it is attached. Among the liens of this description, enumerated by the learned author, is that which the vendor of land has on the land for the amount of the purchase money, not only against the vendee himself, and his heirs, and other privies in estate, but also against all subsequent purchasers, having notice that the purchase money remains unpaid. And with regard to this equitable lien, at least, it seems to be settled in England that the assignees of a bankrupt are bound by it—because, as the master of the rolls said in the case of Mitford v. Mitford, 9 Ves. 100, the assignment by the commissioners, like any other assignment by operation of law, passes the rights of a bankrupt precisely in the same plight and condition as he possessed them. See Sugd. Vend. (3d Lond. Ed.) c. 12, p. 406; 2 Story, Eq. Jur. § 1228; [Bayley v. Greenleaf] 7 Wheat. [20 U. S.] 46; and the authorities there cited. This shows that no distinction is made in this respect under the English bankrupt laws between liens in equity and at law; and the reason assigned, it will be seen, is equally applicable to all liens. The principle is, that the assignee of a bankrupt is deemed to take not as a purchaser for a valuable consideration without notice, but as a mere volunteer. Now, it is worthy of remark, that the third section of our act, under which the assignee acquires his title, if it does not expressly recognise this principle, is at least in perfect harmony with it. It declares, that the assignee, in virtue of the decree of bankruptcy, shall become invested with all the property and rights of property of the bankrupt, and "shall be vested with all the rights, titles, powers, and authorities, to sell, manage, and dispose of the same, and to sue for and defend the same, subject to the orders and directions of such court, as fully, to all intents and purposes, as if the same were vested in, or might be exercised by, such bankrupt before or at the time of his bankruptcy declared as aforesaid; and all suits in law or in equity, then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion, in the same way, and with the same effect as they might have been by such bankrupt." It is to be observed, also, that the terms "liens, mortgages or other securities," are used in the proviso in question without any other express limitation than that imported by the reference in the last clause of the proviso to the second and third sections of the act. The reference to the second section is clearly for the purpose of guarding against any construction of the saving which would give effect to liens, &c., created or given in contravention of the provisions of that section, but which independently of it would be valid by the laws of the state; such for example, as a bond and warrant of attorney, or a mortgage executed by a debtor in contemplation of bankruptcy and for the purpose of giving a preference to one or more of his creditors over the general creditors. The reference to the fifth section is for the purpose of more fully ensuring a compliance with its provisions designed to secure equality among all the creditors "coming in and proving their debts under the bankruptcy;" it being by that section, among other things, declared, that "no creditor or other person, coming in and proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby." There is nothing therefore in this limitation to exclude equitable liens from the operation of the proviso. It is clear, moreover, that it was not intended to use the words "liens" in the proviso, in any precise definite sense, because the laws of the state in which the question arises in any case, are expressly referred to and adopted as the test by which the question is to be determined. Thus by the Revised Statutes of New York, a lien is expressly given on ships and vessels on account of work done and materials furnished in their building and repair. And if I mistake not, a similar lien is also given by a later act in favor of house builders: and in Massachusetts what is called the "mechanics' lien" is given by the local law. These liens may or may not be given by the laws of other states. But where they are given, there can be no doubt of their being embraced in the saving of the bankrupt act. Nor can I discover any good reason founded in abstract justice or in the policy of the bankrupt act, for making a distinction in this respect between equitable and legal liens. Liens in equity are as meritorious as those at law, and it would be as unjust to disregard the one as the other. And to give effect to either as against the general creditors of a bankrupt would equally conflict with the policy of the bankrupt act.

The proceedings in the court of chancery of this state by what is familiarly known as a "creditor's bill," is a highly stringent remedy in favor of judgment creditors given (or recognized), and regulated by statute; and its operation and effect are to be determined by reference to the decisions of the state courts, so far as they furnish an intelligible guide. It is limited to judgment creditors, and can be resorted to by them only after they have exhausted their remedy at law, by a fruitless effort to obtain satisfaction by a writ of fieri facias. Its especial object is to discover and reach the property of the judgment debtor, not subject to execution at law. No one doubts, that at some stage of it, the prosecuting creditor acquires an exclusive right to satisfaction out of the property of the defendant when it is

not bound by any prior lien. This right can be nothing less than a lien valid by the laws of the state; and the only question is at what stage of the proceedings does it attach. And upon this point the decisions of the courts appear to me to leave no room for doubt. It has been repeatedly decided that such lien is acquired at the commencement of the suit; that is to say, by the filing of the bill and the service of a subpoena. It is sometimes called a "preference," sometimes a "priority," sometimes simply a "lien," and sometimes a "specific lien;" and it has uniformly been held to prevail over any subsequent voluntary assignment by the debtor; and, what is still more pertinent, and, as it seems to me, ought of itself to be nearly decisive of the question in this court, over a subsequent assignment under the insolvent acts. 2 Paige, 333; Id. 567; 20 Johns. 554; 4 Johns. Ch. 687; Hayden v. Bucklin [9 Paige, 512], recently decided by the chancellor, in which it is decided that the lien is not created by the mere filing of the bill alone, but that the service of a subpoena is also necessary. The only case I have met with, which seems to militate at all against this doctrine, is that of Lansing v. Easton, 7 Paige, 364. In that case it is said that a judgment creditor may levy on the property of the defendant which is the proper subject of a levy and sale on execution, notwithstanding the pendency of a suit against him by creditor's bill brought by another judgment creditor, at any time "before the title of the defendant in such property is equally divested, by an order for a sequestration thereof, or for the appointment of a receiver." But there is nothing in this case, properly understood, which conflicts with the other cases to which I have referred. The remark I have mentioned is, in fact, but a repetition of the language of one of the general rules framed and promulgated by Chancellor Walworth several years before, under a comprehensive power given to him by statute for that purpose. I am not fully apprised of the policy which dictated this rule. But the particular and more appropriate design of a creditor's bill is to enable the creditor to appropriate such property of the debtor as is not liable to seizure by fieri facias; and as the practice is to require the defendant to assign to the receiver all his property, whether subject to execution or not, it was probably thought but just to other creditors to take care that no unnecessary impediment should be thrown in the way of their ordinary legal remedy. The right thus reserved of levying on the property of the defendant after the commencement of the suit, is, therefore, but a particular exception, which tends the more clearly to establish the general rule.

My conclusion then is, that by the institution, and diligent prosecution, of a suit by a creditor's bill, without collusion with the defendant, and in good faith, the complainant acquires a lien on the property of the defendant which is not divested by a decree of bankruptcy entered upon a petition filed by or against the defendant, subsequently to the full commencement of the suit. I am not called upon now to trace out this doctrine to all its legal consequences. The bankrupt act is now the law of the land, and is alike obligatory upon the state and the national courts. I understand it to be a settled rule of procedure in equity that when, pendente lite, the defendant's interest in the subject matter of the litigation becomes vested by operation of law in another, as by an assignment in bankruptcy, the complainant is bound to make such other person a party to the suit. Sedgwick v. Cleveland, 7 Paige, 287. This rule and the authority given to the assignee by the third section of the act to prosecute and defend all pending suits in which the bankrupt is a party, will secure justice to the general creditors of bankrupts against attempts by individual creditors to obtain undue advantages by resorting to the state court of chancery, and leaves to this court the less apology for the exercise of questionable powers. It being a settled principle in this court and, as far as I am informed, in all the national courts, that a decree of bankruptcy, when granted, and the title of the assignee acquired under it, relate back to the time of filing the petition, and embrace all the property the petitioner then had,—it follows, I imagine, that all steps taken by the complainant between the time of filing the petition and the entry of the decree, (if indeed he ought to be allowed during the interim to proceed at all,) are to be considered as taken at his peril, and are not to be deemed binding on the assignee. If the complainant, after filing his bill and obtaining an injunction, fails to prosecute his suit with proper diligence and to obtain the appointment of a receiver, the case of Osborn v. Heyer, 2 Paige, 342, is an authority for saying that his injunction will be dissolved, and his lien superseded. See, also, 4 Paige, 574. If the suit shall appear to have been commenced at the instance of the bankrupt—or by collusion with him, in contemplation of his bankruptcy, for the purpose of securing a preference to the complainant, it would be a fraud upon the bankrupt act, and could not be sustained. And if it should appear to have been resorted to by the complainant after being informed that the defendant was about to apply for the benefit of the bankrupt act, or after notice of a prior act of bankruptcy, committed by him, and of the intention of another creditor to petition to have him declared a bankrupt, it would deserve grave consideration whether such a proceeding ought to be upheld.

It is proper to add, in conclusion, that I do not consider this decision as at all conflicting with that of the circuit court for the Massachusetts district, in Ex parte Foster [Case No. 4,960], which has so justly been regarded as of very high authority, and on which so

much reliance has been placed in the cases now before the court. The copious learning by which Mr. Justice Story has illustrated the subject and fortified his conclusion upon the particular case before him, has naturally enough led to a misapprehension of the scope of the decision. If, for example, the question before that court had been whether a levy by writ of fieri facias on the property of the petitioner, made before the filing of his petition, was to be held valid and effectual against the proceeding in bankruptcy, the case in my judgment, is far from warranting the inference that the decision would have been adverse to the judgment creditor. The claim set up by the creditor in the case of Foster was founded on an attachment upon mesne process, and could give at most but an inchoate conditional lien. No judgment had been obtained, and the attaching creditor might never be able to prove that he was entitled to a judgment. The court considered it entirely clear that if the defendant should obtain his discharge pending the suit and before judgment, he or the assignee would be entitled to plead such discharge in bar of the suit. Upon this ground it was held, and as it seems to me correctly held, that the plaintiff had not obtained such a lien as it was the intention of the act to protect; and that it was the duty of the district court, as a court of equity, sitting in bankruptcy, so far to restrain him in his race of diligence, while the bankrupt proceedings were in progress, as to prevent him from obtaining a judgment which would overreach and defeat the just rights of other creditors, and the right of the bankrupt, if entitled to a discharge, to plead it in bar of the suit. This was a very different case from that of a suit by creditor's bill, in which the complainant is seeking, not for the first time, a claim against the defendant, but rather to obtain satisfaction of a claim already established. It is a resort to the court for the discovery and application of the defendant's property in conformity with the judgment of a court of law already pronounced, and of which it would have already given the complainant the truth if it had possessed the power.

The several cases pending before the court differ in respect to the stages that have been reached in the proceedings in chancery when the petitions in bankruptcy were filed. But they all agree in having been fully commenced before the petition, and therefore under this decision fall within the same category. The petition in each case must be dismissed.

Case No. 5,306.

Ex parte GENERAL ASSIGNEE.

[1 N. Y. Leg. Obs. 131.]

District Court, S. D. New York. 1842.

BANKRUPTCY—ASSETS—VAULT IN CEMETERY.

A bankrupt was possessed of one-half of a vault held by him by virtue of a certificate from the New York Marble Cemetery Company. By the 2d section of the state statute, passed 26th April, 1832 [Laws N. Y. 1832, p. 551], incorporating the company, it is enacted: "That the said cemetery shall and may at all times hereafter be used and appropriated for the interment of the dead, and for no other use or purpose whatever. The said vaults shall be deemed personal property, and shall not in case where not more than one of them is owned by the same person or persons, be liable to taxation or sale on execution, or to be inventoried as assets applicable to the payment of debts." *Held*, that the act of the state sanctioned the dedication of a corporate franchise to a pious use: that the bankrupt's interest in the vault could not be reached by creditors, and, therefore, that it did not pass to the general assignee.

This was a case submitted to the court on the report of the assignee [in the matter of Abner S. Ely, a bankrupt].

BETTS, District Judge. The general assignee files his report stating that the bankrupt refuses to deliver up to the assignee a certificate of title to one-half a burying vault owned by him. The bankrupt, on Schedule B, describes his interest in this vault as follows: "The undivided one-half part of vault No. 72, in the New York City Marble Cemetery, an incorporated institution by law, under a certificate in my possession dated the first day of January, 1835, to John and Abner S. Ely, under the seal of the said corporation, signed, &c. for the consideration of $250, one-half of which was paid by me, and the other by said John Ely. Some of the relations of the petitioner are buried in said vault." The assignee moves the court for an order that the petitioner deliver up that evidence of his title to the property. The motion is opposed on the part of the bankrupt.

The legislature of the state of New York, by an act passed April 26, 1832 [Laws N. Y. 1832, p. 551], granted the incorporation referred to. The first section declares: "That the owners and proprietors of vaults in that cemetery shall be a body corporate and politic," &c. &c. The second section is: "That the said cemetery shall and may at all times hereafter be used and appropriated for the interment of the dead, and for no other use or purpose whatever. The said vaults shall be deemed personal property, and shall not, in case where not more than one of them is owned by the same person or persons, be liable to taxation or sale on execution, or to be inventoried as assets applicable to the payment of debts, but every such vault may be bequeathed by last will and testament; and in case of intestacy, shall belong to the next of kin of the deceased," &c. The residue of the section has no bearing upon the question before the court. The third section of the bankrupt act [of 1841 (5 Stat. 442)] vests in the assignee "all the property and rights of property of every name and nature," and whether real, personal or mixed, "of the bankrupt," and such broad assignment of

the estate, it is supposed, overrides all limitations or privileges created by the local law which may be connected with the enjoyment of property. That point, however, is not, in my opinion, necessarily raised in this case. If it be conceded that a fixed legal or equitable interest of a bankrupt in any species of property must pass to his assignee, by force of the act of congress, notwithstanding any immunity or qualification attached to the ownership or use of such property, by a state law, still that rule would be restricted to particulars which are valuable in themselves, and the right to which may be communicated or assigned to others. It may well be that the bankrupt law operates over and beyond state laws of exemption or personal privilege, so that property not liable to assessment, execution or distress within a state, may vest in the assignee of a bankrupt, but that is because there is an interest or estate of the bankrupt created or produced by the state law, but having its existence by common right, and under the general rules of property. As, for instance, a state law declaring that any part of a man's real estate which he shall set apart and appropriate for a burial place for his own family or relatives, shall be held exempt from execution, or clear from his creditors forever thereafter, might not secure it to a bankrupt against his assignee, or impede the application of the law of congress, because both laws operating upon a right and interest existing independent of either, the state law should not control the action of the United States statute over the subject.

It appears to me a clear distinction lies in respect to interests or rights created and conferred by express law; and that in such case the interest is nothing more than such law generates or declares. If there may be embarrassment in framing a general rule explicit enough to mark with clearness those classes of interests which are properly of this dependent and imperfect character, yet there can be little or none in determining that the one now under consideration is of that quality. The act of the state sanctions the dedication of a corporate franchise to a pious and touching use, and applies to it the denomination of "personal property," but in imparting existence to this franchise, the law withheld from it those attributes essential to characterize it "property." It can only be enjoyed for the interment of the dead; it cannot be reached by private creditors nor for public dues. It is then no more than a license to the petitioner to hold personally the privilege of sepulchre for his friends, and to bequeath such privilege on his own decease, and if he fails making a will, to have it still continue to his family, in a single vault; and as the language and spirit of the statute giving existence to this right, denote beyond all doubt the purpose to be to separate this acquisition from the estate or property of the holder, or to regard it as dedicated to a humane and pious purpose, one which public sentiment and policy, harmonizing with every feeling of private sympathy, sustain and consecrate, I shall therefore decide, that the interest of the bankrupt in this vault does not pass to the assignee, and the motion to deliver over the evidence of title is accordingly denied.

GENERAL CADWALADER, The (HEPPARD v.). See Case No. 6,390.

Case No. 5,307.

The GENERAL CASS.

[Brown, Adm. 334;[1] 5 Am. Law T. Rep. 12; 4 Chi. Leg. News, 89.]

District Court, E. D. Michigan. June, 1871.

JURISDICTION—NAVIGABLE WATERS — CHARACTER OF VESSEL—LIGHTERS—LIEN FOR TOWAGE IN HOME PORT.

1. Saginaw river, though wholly within the state of Michigan, is a public navigable stream, and within the admiralty jurisdiction.

[Cited in The Illinois, Case No. 7,004; McMarren v. Kean, Id. 8,801; Murray v. Ferry Boat, 2 Fed. 89.]

2. If the business or employment of a vessel appertain to travel, or trade and commerce on the water, it is subject to the admiralty jurisdiction, whatever may be its size, form, capacity, or means of propulsion.

[Cited in Raft of Cypress Logs, Case No. 11,527; The Ella B., 24 Fed. 508; The F. & P. M. No. 2, 33 Fed. 512; Seabrook v. Ratt of Railroad Cross-Ties, 40 Fed. 598; The City of Pittsburg, 45 Fed. 701; The Paradox, 61 Fed. 861.]

3. Such jurisdiction extends to lighters employed in carrying lumber out to vessels lying in deep water.

[Cited in Salvor Wrecking Co. v. Sectional Dock Co., Case No. 12,273; Seabrook v. Raft of Railroad Cross-Ties, 40 Fed. 597; The Starbuck, 61 Fed. 503.]

[See The Ann Arbor, Case No. 407.]

4. The fact that these lighters are not enrolled or licensed does not affect the question of jurisdiction.

5. A lien attaches for towage services rendered in the home port.

Libel for towage, by George P. Felcher, owner of the tugs Challenge and Kate Felcher.

The third article of the answer of William Mitchell, claimant and owner of the scow, alleged, "That the said scow is a mere float or lighter, has no means of propelling, neither sails, anchors nor chains; has never been enrolled or licensed, and is employed solely in the navigation of the Saginaw river to float lumber thereon over the bar and shallows, in tow of tugs and steamers;" and the jurisdiction of the court was therefore denied. Libellants excepted to the said third article and moved to expunge the same. Hearing upon the exception and motion.

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

H. B. Brown, for libellant.
Wm. A. Moore, for respondent.

LONGYEAR, District Judge. The question of jurisdiction raised by the third article of the answer, is:

1. As to the waters upon which the service was rendered, the Saginaw river being wholly within a state, and a tributary merely, emptying into the lakes but constituting no part of them, or of their connecting waters.

2. As to the character of the craft, the same being a mere float or lighter, with no means of propulsion of its own, etc.

3. As to the necessity of enrollment and license in order to bring a vessel under the admiralty jurisdiction of this court.

First. Since tide water has been ignored as the test of admiralty jurisdiction under the constitution and the judiciary act of 1789 [1 Stat. 73], the act of 1845 [5 Stat. 726], purporting to extend a limited jurisdiction in admiralty over the lakes and their connecting waters, no longer has any influence in determining the extent of admiralty jurisdiction over the northern and northwestern lakes and rivers. The test of such jurisdiction as to the waters over which it extends, now is, that they are public navigable waters. The Genesee Chief, 12 How. [53 U. S.] 443; The Eagle, 8 Wall. [75 U. S.] 25. Those waters are navigable in law which are navigable in fact, and those are public navigable waters which are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. The Daniel Ball, 10 Wall. [77 U. S.] 557.

That Saginaw river, from Saginaw City to its mouth, upon which the towage services are claimed to have been rendered, fully answers the description above given, there is and can be no dispute. It is therefore public navigable water, and is clearly within the admiralty jurisdiction of this court.

Second. The true criterion by which to determine whether any water craft, or vessel, is subject to admiralty jurisdiction, is the business or employment for which it is intended, or is susceptible of being used, or in which it is actually engaged, rather than its size, form, capacity, or means of propulsion. The Kate Tremaine [Case No. 7,622]; 1 Conk. Adm. 27-30; Ben. Adm. §§ 217-221.

A test is to be applied here similar to that above applied in determining the extent of admiralty jurisdiction over the waters upon which vessels are used. If the business or employment of vessels appertain to travel, or trade and commerce on public navigable water, it is sufficient, and the jurisdiction attaches. This test is based upon principle, while any test based upon size, form, capacity or means of propulsion must, from the nature of the case, be entirely arbitrary. The former is also certain and reasonably well defined, and hence, if generally adopted must have the same application everywhere, while the latter admits of no well defined line of distinction, and, being arbitrary in its application, would be subject to the mere caprice of the different judges by whom it is applied.

The lumber of the Saginaw valley, as an article of commerce, passing down and out of the Saginaw river, on its way to the lumber marts of other states and countries, constitutes one of the greatest interests of its kind in the world, and in its transportation employs vessels of all sizes, forms and capacities, and all kinds of propelling power, from the insignificant scow, like the one here in question, to the largest sized vessels and steamers that float the lakes. The business and employment of each, irrespective of the accidents of size, form, capacity or propelling power, appertains equally to trade and commerce, and all are therefore equally subject to the jurisdiction of this court.

Large sized vessels cannot pass out of Saginaw river with full loads on account of a bar or shoal at the mouth, where it empties into Saginaw Bay. Such vessels, consequently, after taking on part of a cargo in the river, pass out over the bar, and then complete their loading from scows or lighters, upon which it is brought to them. These lighters seldom belong to the vessels, but generally to either the lumber dealers upon the river, or—which is more often the case, and is understood to be the case here—to persons who own neither vessel nor lumber, but who make this species of transportation their principal or sole business. They have no propelling power of their own, but depend entirely upon being towed to and fro by tugs and steamers. The business and employment, therefore, of these scows consisting, as it does, in the transportation of lumber, an article of commerce, a part of the way on its road to market, by water, clearly appertains to trade and commerce, and thus far, at least, they are clearly within the jurisdiction. But it is said that because they have no propelling power of their own, they are not themselves engaged in navigation, and are therefore not within the jurisdiction. I do not think this proposition a sound one, for various reasons.

The application of steam to navigation has upset many of the old theories upon which admiralty jurisdiction was based, and materially modified others. Before this event, commerce upon the water depended almost exclusively upon the utilization of the wind, by means of masts and sails. When steam power made its advent upon the water, it was as a stranger thrust in upon the maritime family, and the admiralty courts looked at it askant, and hardly knew where to place it, or whether to recognize it at all. But so rapidly did it gain in favor, and so soon did it obtain a commanding position in the commerce of the world, that it was speedily taken in and domesticated in the admiralty fold, without further question, let or hin-

drance, on account of its not being graced with the traditional masts and sails, or of its being the mere invention of man, to take the place of the free winds of heaven.

The use of steam upon the water soon wrought other innovations upon ancient usage, among which was the use of vessels commonly called barges, with no propelling power of their own—neither the traditional masts and sails, nor steam—having capacity merely, and none of the means of navigation except the ordinary steering apparatus, depending for locomotion upon steam power, it is true, but applied by means entirely outside themselves. Commerce upon the lakes and rivers of this country is now largely carried on in this class of vessels; and it is perhaps safe to assume that nearly one-half the vast carrying trade in iron, copper, grain and lumber, upon the great lakes and their tributaries, is now carried on in them; and they are rapidly increasing in numbers and capacity.

This character of craft was also a stranger in the maritime family, and at first was also looked upon with distrust by the admiralty courts. But so prominent a place do these vessels now occupy, that like their progenitor, the steamboat, of which they are in fact, a mere excrescence, they too must be, as they already in fact have been, taken in and domesticated in the admiralty fold. And this jurisdiction is maintainable on principle, as well as from necessity. There is certainly no reason why it is not navigation, all the same whether a vessel is propelled by a steam engine placed within her hull, or by the same engine by means of a tow line. It is, in fact, one of the revolutions wrought by the use of steam, that it has abolished all distinctions as to propelling power in determining admiralty jurisdiction.

But these barges and the scows upon Saginaw river, of which the one here in question is a sample, are equally engaged in a business or employment appertaining to commerce, and each is equally dependent upon the same means of locomotion. The service rendered by each does not differ one iota in kind, but only in degree or extent. The service being maritime, as we have seen, no criterion of jurisdiction founded upon the mere accident of the degree or extent of it, can be recognized. No such line can be drawn without legislation, however desirable it may be to rid the court of cases involving small amounts, and concerning petty crafts. Hence, if jurisdiction is denied as to the scows, it must be as to the barges, and being recognized as to the latter, as we have seen it is, it must be as to the former.

Another consideration upon which some emphasis may be laid, arises out of the fact that water crafts of the description here under consideration, are recognized, by necessary implication, as vessels, by, and as such subject to, the navigation laws of congress.

By the act of July 20, 1846 (9 Stat. 38), "canal boats without masts or steam power," are expressly exempted from payment of the hospital tax required of registered, or enrolled and licensed vessels, and also from liability to attachment for seamen's wages. If such boats, "without masts or steam power," were not included in the general provisions of law requiring the tax, or of the maritime law making them subject to attachment, what was the necessity of the exemption?

By section 1 of the act of March 2, 1831 (4 Stat. 487), "any raft, flat, boat or vessel of the United States, entering otherwise than by sea, at any port of the United States on the rivers and lakes on the northern, northeastern, and northwestern frontiers," are expressly exempted from levy of custom house fees from and after a certain then future date. If such craft were not subject to such levy under the general laws in relation to vessels, then certainly there was no necessity for the exemption, or, at all events, there would have been no sense in postponing such exemption to a future day.

So, too, by a provision at the end of the liability limitation act of March 3, 1851 (9 Stat. 636), it is enacted that "this act shall not apply to the owner or owners of any canal-boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation." Now, the general terms used throughout the act are, "ship or vessel." Here is a clear implication, therefore, that congress understood "ship or vessel" to include the craft named in the proviso.

See, also, section 47 of the act of February 28, 1871, "to provide for the better security of life on board of vessels," &c. (16 Stat. 454), in the provisions of which water craft of the kind here under consideration are expressly included. See, also, Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1; The Kate Tremaine, above cited; Ben. Adm. §§ 219, 220.

I am aware that there has been some wavering on the part of some of the courts upon this question of jurisdiction in such cases; and the court was cited to several decisions, especially in the cases of Jones v. Coal Barges [Case No. 7,458], and Thackarey v. The Farmer of Salem [Id. 13,852], seeming to bear against the conclusions above arrived at. In the Case of the Coal Barges, it is to be observed that the things which were called "barges" were mere temporary boxes, in which coal was to be transported to its destination, and were then to be broken up and sold for lumber. They were, to all intents and purposes, like the bales or boxes in which goods, wares, and merchandise are ordinarily transported, the only difference being in the mode in which the boxes were carried, being towed through the water by the vessel, instead of

being placed upon it—a very different case from the present. And in the case of Thackarey v. The Farmer of Salem [supra] it appears that the learned judge had announced his decision before he wrote his opinion, and from his acknowledged inability to draw a line upon which to base his decision, and from the dissatisfaction expressed by him as to his conclusions, one can hardly read the opinion without coming to the conclusion that if the opinion had been written first, the decision would have been the reverse of what it was. See 1 Conk. Adm. 28, 29.

Numerous cases might be cited in which the jurisdiction has been maintained in cases in many respects similar to this one. See especially The D. C. Salisbury [Case No. 3,694]; The Flora [Id. 4,878]; The Canton [Id. 2,388]. I think the weight of argument is entirely with this latter class of cases.

Third. Admiralty jurisdiction exists and is exercised in the United States, under and by virtue of the constitution and the judiciary act of 1789, and independently of the navigation laws of congress. It therefore has no regard to registry, or enrollment and license. The notion that upon the lakes and rivers the jurisdiction depended upon registry or enrollment and license, was derived entirely from the provisions of the act of 1845, by which the jurisdiction was expressly limited to vessels of that character, and the clause of section 9 of the act of 1789 relating to "seizures under the laws of impost, navigation and trade of the United States," both of which—the said act of 1845 and the said seizure clause—are now obsolete. The Genesee Chief, 12 How. [53 U. S.] 443; Jones v. The Coal Barges [supra]; The Flora [supra]; The Eagle, 8 Wall. [75 U. S.] 15. It is, therefore, a matter of indifference whether the scow in this case was enrolled and licensed or not, so far as the question of the jurisdiction here invoked is concerned.

Another question was raised and discussed at the hearing, which, although not involved in the exceptions and motion, yet for the purpose of disposing of all preliminary questions, will now be considered. The learned advocate for the respondent contends that the towage services having been rendered in the home port, no lien attaches, and that, therefore, this court has no jurisdiction in rem.

I do not consider the position a sound one. So complete seems to have been the acquiescence of the bar in the doctrine that a lien for towage does attach under such circumstances, that the question does not appear to have been raised, or, if raised, that the decision of it does not seem to have been considered of sufficient importance to be reported. It has been assumed, however, by high authority, that such lien does attach. See 1 Conk. Adm. 28, note; The Sarah Jane [Case No. 12,349]; The Kate Tremaine [Id. 7,622].

The inclination of the courts is not to circumscribe the class of maritime contracts on account of which a lien shall be held to attach, but rather to enlarge it. It is now well settled that a lien attaches for contracts, in the home port, of affreightment, for pilotage, for seamen's wages, and for wharfage, and why not for towage? It has the same elements as the others, and the same tests are applicable to it—it is to be performed on maritime waters, and in relation to a business appertaining to trade and commerce. The Canton [supra]; De Lovio v. Boit [Case No. 3,776]; The Belfast, 7 Wall. [74 U. S.] 624, 637; New England Ins. Co. v. Dunham, 11 Wall. [78 U. S.] 1.

But, it is said, no lien attaches by the maritime law to contracts for supplies and repairs furnished in the home port, and it is asked why should it attach to the contract for towage made in the home port? The question is a pertinent one; but it may be asked as well in regard to the contracts of affreightment, for pilotage, and for seamen's wages. The answer to the question must be that there is no reason for the discrimination. But I think that answer furnishes an argument rather in favor of abolishing that unjust discrimination against contracts for supplies and repairs, than for extending it to other subjects; and I expect, at no distant day, to see it wiped out by act of congress or otherwise.

It is also said the amount involved is small, and the vessel is a petty craft, and if this jurisdiction is entertained, it will bring upon the court a flood of petty cases. I do not apprehend any serious embarrassment from this source. Nevertheless, the full and complete answer to the suggestion is, as has been already intimated, that no line can be drawn defining just where jurisdiction shall begin, and just where it shall end, in respect to the matters named, without legislation.

The exception to the third article of the answer is sustained, and the motion to expunge the same is granted. Motion granted.

Case No. 5,308.

The GENERAL C. C. PINCKNEY.

[Blatchf. Pr. Cas. 278.] [1]

District Court, S. D. New York. Dec. 18, 1862.[2]

PRIZE — BLOCKADE — PURCHASE OF PROPERTY IN ENEMY COUNTRY BY LOYAL CITIZEN.

1. Vessel and cargo condemned as enemy property and for a violation of the blockade.

2. The master and owner of the vessel, a resident of Charleston, S. C., purchased her there during the war, and loaded her with the produce of the country, and brought her through

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

[2] [Reversed in Case No. 5,309.]

the blockade of that port, she having papers issued to her by the enemy: *Held*, that she and her cargo must be condemned, and that a claim by the master that he had always been a loyal citizen of the United States, and had purchased the vessel and cargo as an investment, in order to withdraw himself and his family and property from the enemy country, could not be considered in this court.

3. A loyal citizen of the United States is disqualified from appearing in a prize court to question the legality of the seizure of his property acquired during war in an enemy country by trade with the enemy.

In admiralty.

BETTS, District Judge. This vessel, laden with 94 bales of cotton and 10 barrels of rosin, came out of the port of Charleston under the rebel flag, and was captured about 50 miles from Charleston bar, May 6, 1862, by the United States steamer Ottawa, and sent to this port for adjudication. The papers and proofs and pleadings, consisting of a libel, filed June 4, and a claim and representation by the master and owner, filed June 24, 1862, were submitted to this court for decision, November 26, 1862, with an argument or importunate remonstrance on the part of the owner of the vessel and cargo, by his counsel. The vessel was registered to Herman Koppel, a citizen of the Confederate States, April 18, 1862, having been conveyed to him in Charleston by a bill of sale, by the former owner, a citizen and resident of that place, on the 7th day of April, 1862. These papers, and the crew list for the present voyage, and the appointment of the said Koppel as master of the vessel, were authenticated by documents received by the purchaser from the rebel government at Charleston, and delivered up on the capture of the vessel. No fact impeaching the foregoing character of the transaction, that the vessel was purchased during the war and the blockade, from an enemy owner, in the enemy country, and was laden with the produce of the enemy, is in evidence in the case. But the claimant of the vessel and cargo, he being also master of the vessel, suggests and claims, through his counsel, as matter of protection against the arrest, that his fealty to the Confederate States was simulated and illusive; that he never was a subject of that government, nor willingly associated with it; that he is a native of Prussia, and loyal, in sentiments, to the United States government; and that the vessel and cargo were purchased by him, with the proceeds of his own industry, with intent solely to rescue such proceeds from the rebel government, and withdraw himself and his family and property from that confederacy.

This court can deal with the matter solely upon the principles of prize law, applicable to a state of facts of this similitude. If any relief exists anywhere in behalf of the claimant, it must be obtained from the United States government, the party injured by his misconduct, and the claim, on the foundation assumed for him, cannot be considered in this tribunal. 1st. His own written acts, supported by his oath, prove the vessel and cargo to be property of the enemy state. 2d. He withdrew it covertly from a blockaded port in time of open war. 3d. He was, at the time of procuring the property, and had been for several preceding years, a resident in the enemy country, in solidarity with its industry and interest. 4th. He assumed allegiance to that government by covering his property with the protection of the Confederate flag, and of ship's documents from the enemy government—acts which disqualify him from appearing in this court to contest the legality of the capture. 5th. Even if he could justly maintain the assertion that he was, in sentiment, a loyal subject of the United States, he would stand disqualified from appearing in a prize court to question the legality of the seizure of his property acquired during the war, in an enemy country by trade with the enemy. 12 Stat. 319. The law upon most of the foregoing points has been so repeatedly cited and relied upon in this court, in suits recently heard and decided, that the grounds on which it is supported need not now be further recapitulated. Decree of condemnation and forfeiture.

This decree was reversed, on appeal, by the circuit court. [Case No. 5,309.]

Case No. 5,309.

The GENERAL C. C. PINCKNEY.

[Blatchf. Pr. Cas. 668.] [1]

Circuit Court, S. D. New York. Dec. 3, 1863.[2]

PRIZE — BLOCKADE — WITHDRAWAL FROM ENEMY COUNTRY BY LOYAL CITIZEN WITH HIS PROPERTY.

1. Decree of the district court [Case No. 5,308], condemning the vessel and cargo as enemy property, reversed.

2. The claimant left the enemy port with the intent to withdraw from the enemy's country with his effects, and had for that purpose converted his property into the vessel and cargo, and intended to give himself up to the blockading squadron.

3. The withdrawal of the property under the circumstances did not subject it to capture as enemy property.

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

In admiralty.

NELSON, Circuit Justice. The schooner in this case was captured at the entrance of the harbor of Charleston, South Carolina, on the morning of the 6th of May, 1862, while on her way to Nassau, N. P. She was of some thirty-eight tons burden, and had on board ninety-four bales of cotton and some ten barrels of rosin, the effects of the claimant, who was a tailor in Charleston, and had

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

[2] [Reversing Case No. 5,308.]

invested his property in the vessel and cargo, with the intent of escaping from the Confederate States and going to New York. He had previously sent his wife to Nassau, his family consisting of himself and wife. He left Charleston with a full knowledge of the blockade of the port, and with the intent of giving himself up to the blockading squadron, as the only mode of escape from the city. This intent was made known to several persons, some of whom were on board of the vessel.

The further proofs in the case in this court place the fact beyond all reasonable doubt that the claimant left Charleston with the intent to withdraw from the enemy's country with his effects, and that he had, for this purpose, converted his property into the vessel and the articles constituting the cargo on board. He was obliged to make Nassau his port of destination, or he would not have been permitted to leave the enemy's port.

I think that the case is brought fairly within the rule which has been applied in several cases, that the withdrawal of the property, under the circumstances stated, does not subject it to capture as enemy property. Decree below reversed.

Case No. 5,310.

The GENERAL CHAMBERLAIN.

[1 Hask. 432.] [1]

District Court, D. Maine. Aug., 1872.

SEAMEN'S WAGES—LOSS OF VESSEL—PORT OF DISCHARGE—SHIPPING ARTICLES FOR SPECIFIED TERM—WHEN WAGES DUE.

1. A ship reached her port of destination on arriving at Falmouth with cargo, being there destined for orders, and earned freight so as to entitle the crew to wages.

2. If the ship after sailing thence in obedience to orders is lost before arriving at her port of discharge, the crew are entitled to wages up to the ship's arrival and during one half her stay at Falmouth.

3. A crew shipped for a specified term on a general freighting voyage are entitled to their wages upon the completion in safety of each voyage during the term of their employment, in the absence of agreements to the contrary.

4. No private contract between the ship-owner and shipper in regard to freight can affect the seamen's right to wages.

5. A stipulation in articles, that seamen shall not demand wages until the arrival of the vessel at her final port of destination, does not bar the seamen of their wages in case the vessel is lost before arriving at that port.

In admiralty. Libel in personam against the ship-owners by the crew for wages earned before the ship's loss.

Washington Gilbert, for libellants.
Charles Larrabee, for respondents.

FOX, District Judge. The shipping articles signed by the libellants at New York, describe the voyage as from New York to Callao and Etan and from thence on a general freighting voyage to such ports or places as the master may direct for a term of twenty-four calendar months, ending in the United States. The ship with the libellants as her crew went to Callao and Etan, there discharged her outward cargo and made freight, then returned to Callao, and thence sailed to Guanape where she took on board a cargo of guano under a charter party which required her to proceed "to Falmouth, Eng. for orders to any safe port in Great Britain or the continent between Hamburg and Nantes inclusive." She arrived at Falmouth Nov. 27, 1871, remained there till the 5th of December, and having been ordered to Hamburg, arrived off the mouth of the Elbe Dec. 11; not being able to go up the river on account of ice, she turned back for New Dieppe, and on the night of Dec. 17th was wrecked on the Hague Sands. The pilot and four of her crew perished and everything on board was lost including books and ship's papers. The crew have instituted this libel against the owners, claiming to be paid full wages to the time of the ship's arrival at Falmouth and for half the time she was detained at that port. The respondents offer to pay their wages up to the time their ship's sailing from Guanape, but deny their liability beyond that date, as they claim that no freight was carried on the voyage from Guanape, the ship, as they say, having been lost before completing that voyage and delivering her cargo; and that under the circumstances of this case, Falmouth cannot be deemed a port of destination an arrival at which would entitle the crew to their wages.

The maxim that freight is the mother of wages may be true to this extent, that in all cases where freight is earned and received by the ship-owner, the crew are entitled to their wages for the voyage; but at the present day, the converse of the maxim, that if no freight is earned the crew are not entitled to their wages, does not invariably hold good, as in many instances seamen are entitled to their wages when the ship-owner has no valid claim for freight. If the voyage or freight be lost by the negligence, fraud or misconduct of the owner or master, or voluntarily abandoned by them, if the owner has contracted for freight upon terms or contingencies differing from the general rules of the maritime law, or if he has chartered his ship to receive a freight at a foreign port and none is to be carried on the outward voyage, in all these cases the mariner is entitled to wages, notwithstanding no freight has accrued. Curt. Merch. Seam. 272.

In Pitnam v. Hooper [Case No. 11,186], Judge Story says, "It would be more correct to say that the general rule, though not the universal rule, is that the seamen are entitled to wages for the full period of their

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

employment in the ship's service for any particular voyage in which freight is or might be earned by the owner, * * * and that no private contract between the owner and shipper can affect the right to wages."

The courts were formerly in the habit of dividing the round voyage into an outward and homeward voyage, and if the ship was lost on the homeward voyage of allowing the seamen their wages for the time employed in the outward voyage, and for half the time of the ship's stay at the foreign port; but the question soon arose as to the right of the crew to their wages where the vessel made an intermediate voyage in ballast without carrying any freight, and in such a case the rule, that the carrying of freight was necessary to entitle the seamen to their wages, was so far departed from as to allow the crew their wages for such intermediate voyage, and to determine that the return voyage commenced at the port of departure where her return cargo was received. In the case of The Two Catherines [Id. 14,288], Judge Story sustained this construction of the law, and when a ship sailed from Newport to Gibraltar with a cargo, and went from Gibraltar to Ivica in ballast, and there received on board a return cargo of salt for Providence, and was lost in Narragansett Bay, he allowed the crew their wages up to half the time the ship was detained at Ivica.

If the ship-owner, instead of letting his ship to hire, sees fit to take on board and transport cargo belonging to himself, and the adventure should prove unprofitable, and the owner should not realize its original invoice cost, he would still be liable to the crew for their wages on the voyage, and his liability would in no way be diminished by the unprofitableness of the enterprise.

So if a ship sails on a "seeking voyage," as it is sometimes termed, visiting different ports in search of business and finding none, at length returns to her original port of departure not having earned a dollar for her owners, having gone in ballast to the different ports, the owners are notwithstanding their ill success still liable to the crew for their wages during the whole time they have remained on board, and for the reason that they have performed their part of the contract and safely navigated the ship for the contemplated voyage, and it is wholly immaterial as respects the validity of their claim for wages whether the voyage in its result has or not proved profitable to their employers, the ship-owners.

In the present instance, when this ship sailed from Guanape, her port of destination was Falmouth, and no one on board was certainly aware whether she would discharge her cargo at that port, or would sail from thence to some other port to be determined by the charterers after the ship's arrival at Falmouth without consultation with the master or ship-owner, and in respect to which they had no control or authority. Under this charter party it is quite certain that the voyage might possibly terminate at Falmouth by the charterers there receiving their cargo, as they had a right to require its delivery to them at that port if they saw fit to receive it, and although it is quite unusual to land a large cargo of guano at Falmouth, yet it was not impossible, and circumstances might have arisen in the prosecution of the voyage which would have rendered it advisable for the owners of the cargo to have actually received it at that port, and if it had been thus delivered to them, the seamen would of course have been entitled to their wages.

Many cases are to be found in the reports which hold if the vessel is lost on her return voyage, the seamen are not entitled to their wages for that voyage; and recognizing this as the law of the case, the question arises what was the voyage on which the ship and cargo were lost? Was she lost on a voyage from Guanape, or on one from Falmouth? I am inclined to hold that when the ship sailed from Guanape she was on a voyage to Falmouth, and on her arrival at that port she had completed that voyage, and afterwards in pursuance of the orders given to her at that port, and which she was not to receive before her arrival at that port, she sailed from thence on a new voyage to Hamburg, and was lost in prosecuting her voyage from Falmouth to Hamburg, and not on a voyage from Guanape to Falmouth.

Throughout the voyage from Guanape, what other destination had the ship than Falmouth? None certainly known to any one on board. It was uncertain whether she should proceed beyond Falmouth, and if it is urged that in all reasonable probability she would be ordered thence to another port, her charterers alone could say what port it should be, whether in Great Britain or on the continent between Hamburg and Nantes; and can it with strict accuracy be said that she was destined to either one of such ports before the election had been made and the orders to that effect given by the charterers? Is it not much more accurate and in accordance with the spirit of the modern decisions to consider the voyage from Falmouth as a new voyage, first determined on and having its inception from Falmouth after notice of her arrival at that port, rather than a continuation of the original voyage from Guanape? The voyage on which a ship sails and for which her seamen are to be employed should be fixed and definite at the time of the ship's sailing. The place of destination should be known at that time, and when it is reached, that voyage is complete and ended, and its results should not be liable to be in any way affected by any misfortunes or contingencies of any ulterior voyage to another port afterwards.

If in this case the ship had sailed from Guanape with her crew entitled to be discharged at Falmouth and not bound to go

beyond that port, would they have been deprived of their wages if the ship had subsequently been lost in the North Seas before landing her cargo and earning her freight thereby? If they had been paid off in Falmouth and left the ship, it is quite clear that they could not have been liable to pay back to the owners the wages they had received; and I apprehend the same result would have followed, if instead of having received their wages at Falmouth they had allowed them to remain in the master's hands, and had agreed to remain and navigate the ship from that port to Hamburg; and yet in both instances the ship would have sailed from Guanape bound to Falmouth for orders, and was not entitled to her freight until she had completed her contract by carrying the cargo on to the new port of destination as directed at Falmouth.

This crew shipped for a general freighting voyage of twenty-four months, no places or ports being designated for the prosecution of their duties, and it seems to me that the court is justified in allowing them their wages on every voyage completed by them in safety, whether in ballast or with a cargo on board, and that it should make no difference if there happens to be a cargo which they are required to transport to another port in compliance with the orders received after their arrival at the port first contemplated. If the ship had been in ballast and gone from Guanape to Falmouth and then received orders to proceed on to Hamburg and been lost on the voyage to Hamburg, it is certain that they would have been allowed their wages by Mr. Justice Story, as the case would have been exactly similar to that of The Two Catherines [supra], and I can see no reason why the fact of her having a cargo on board should vary the result.

If the objection is urged to this view that no freight was carried from Guanape, the vessel and cargo having been lost, the answer is that Falmouth is to be deemed the port of original destination, and the ship-owners could have contracted for the payment of a stipulated freight on the safe arrival at that port, and for additional compensation if any was proper according to the risks attending the new voyage to the destination in Great Britain or the continent; and the fact that the charter-party does not provide for such payment on the arrival at Falmouth, but makes the freight dependent on the successful termination of the further voyage, does not exonerate the owners from their liability to the crew for wages, as in accordance with the language of Judge Story, "freight might be earned on such a voyage, and no private contract between the owner and shipper with regard to freight can affect the right to wages."

The stipulation found in the shipping articles, that no seaman shall demand or be entitled to his wages or any part thereof until the arrival of the vessel at her final port of discharge and her cargo delivered, was more than seventy years ago, in the case of Johnson v. Sims [Case No. 7,413], decided not to have the effect of depriving the seaman of his wages in case of non-arrival at her final port of discharge, but as only regulating the time and place of payment, and in case of loss, the seaman on his return could recover the wages to which he was entitled; and this decision has ever since been acted upon and recognized by the courts. The fact that the owners obtained insurance upon the freight can not in any way affect the rights of the crew to their wages; it was a contract to which they were not parties, and it can not enure to their benefit.

I have made a careful examination of all the decisions at my command which in any manner bear upon this question, and whilst I admit that I have met with none directly in point, it is very manifest that the spirit of the modern decisions is favorable to the claims of seamen for their wages; that the harsh restrictions and limitations which for a long time prevailed have been broken down by the courts of admiralty, and at last by acts of parliament and of congress approved June 7, 1872 [17 Stat. 269, § 33], allowing the seaman his wages up to the time of the loss of his ship, in case of proper exertions on his part at the time of loss; and I think I am fully justified in recognizing the manifest equity of their demand. I decree them wages up to the ship's arrival at Falmouth, and for half their stay there.

Case No. 5,311.

The GENERAL FRANZ SIGEL

[6 Ben. 550.] [1]

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

COLLISION IN EAST RIVER—STEAMBOATS CROSSING—CHANGE OF COURSE—NEARNESS TO PIERS.

1. A ferry-boat was crossing the East river from New York to Brooklyn. The tide being strong ebb, she went above her slip, to drop down with the tide. Her pilot saw a steamboat, heavily loaded, coming slowly up the river on his starboard hand, close in to the Brooklyn piers. He blew two whistles, indicating that he intended to go ahead of the other boat, although her position was such that he could not do so unless she changed her course. The whistles were not heard, and the steamboat kept on. Thereupon the ferry-boat stopped her engine, but did not reverse it, till the steamboat had proceeded so far as to strike a cross tide, which set her out from the piers. The pilot of the ferry-boat then reversed the engine, but too late, and the vessels came together. The pilot of the steamboat made no change in her helm, and stopped and reversed her engine as soon as he saw there was danger of collision: *Held*, that the ferry-boat having the steamboat on her starboard side, was bound to keep out of her way, and the steamboat was bound to keep her course.

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

[2] [Affirmed in Case No. 5,062.]

2. The swinging out of the steamboat, when she met the cross tide, was not a change of her course.

3. As the pilot of each vessel saw the other in time to execute all manoeuvres incumbent to avoid a collision, the question of lookout had nothing to do with the collision.

[Cited in The George Murray, 22 Fed. 122; The Coe F. Young, 1 C. C. A. 219, 49 Fed. 168.]

4. The closeness of the steamboat to the piers did not contribute to the collision.

5. The pilot of the ferry-boat should have taken the measures to avoid the steamboat, which were necessary, under the circumstances, and that the ferry-boat was solely in fault.

In admiralty.

C. Donohue, for libellants.

E. H. Owen, for claimants.

BLATCHFORD, District Judge. This is a libel to recover the damages sustained by the libellants in consequence of injuries sustained by the steam ferry-boat George Washington, through a collision which took place between her and the steamboat Gen. Franz Sigel, in the East river, on the 19th of July, 1871, in the day time. The ferry-boat was a side-wheel steamboat running on a ferry between Oliver street slip, New York, and the foot of Bridge street, Brooklyn, and was, at the time, on a trip from New York to Brooklyn. The Sigel was a propeller, and was deeply laden with a cargo of hogsheads of sugar, which she was taking from Prentice's stores, in Brooklyn, below Bridge street, to the foot of Gold street, Brooklyn, above Bridge street. The tide was strong ebb, and the wind was blowing fresh down the river and with the tide.

The libel alleges, that, as the ferry-boat was proceeding on her trip, the Sigel was observed going up the East river, in violation of law, close on to the docks on the Brooklyn shore; that, when the ferry-boat had headed for Brooklyn, to head for her slip, the Sigel still keeping unlawfully close to the docks, the ferry-boat was stopped; that the Sigel continued on until near the line of the heading of the ferry-boat, when she suddenly sheered out on to the ferry-boat, without any notice; that, although the ferry-boat was backed, and all in the power of those on board was done to avoid the collision, the Sigel hit the ferry-boat, damaging her badly; that the collision happened wholly by the fault of those on the Sigel, in violating the law by not keeping a lookout, in not in time taking proper steps to avoid a collision, and in sheering out on to the ferry-boat; and that the collision happened without the fault of those on the ferry-boat, and could not have been prevented by them.

The answer denies these allegations of the libel, and avers, that, when the Sigel was a little below the ferry slip at the foot of Bridge street, Brooklyn, and more than three hundred feet from the docks on the Brooklyn shore, the ferry-boat, which, owing to the wind and tide, and in order to make the slip at the foot of Bridge street, had proceeded up the river a considerable distance above the slip, and was floating down with her broadside to the wind and current, was carried by the force of the wind and tide below the said slip, and drifted upon the Sigel; that the pilot on the Sigel, as soon as he saw there was any danger of a collision, stopped the Sigel, and reversed her engine, and did all in his power to avoid it; that, the Sigel being heavily laden, and deep in the water, while the ferry-boat was light, and high out of the water, and had her broadside to the wind and current, no effort on the part of the pilot of the Sigel availed to prevent the ferry-boat from coming upon the Sigel; that the collision happened without the fault of those in command of the Sigel, and could not have been avoided by any skill or care on their part; that it happened wholly through the fault, want of skill and mismanagement of those in charge of the ferry-boat, in their permitting her to drift with the wind and tide in the manner they did, and in not taking any steps whatever to avoid the collision; and that the collision could have been avoided by the ferry-boat, had she either gone ahead in proper time and entered the slip, or had she backed when it was found she was drifting below the slip.

The libel sets up three faults on the part of the Sigel as causing the collision—violating the law by not keeping a lookout—not in time taking proper steps to avoid a collision—sheering out on to the ferry-boat.

As to a lookout, the question of a lookout on either vessel had, according to the evidence, nothing to do with the collision. The pilot of each vessel saw the other vessel in abundant season to execute all manoeuvres incumbent to avoid a collision.

As to the taking of steps by the Sigel to avoid a collision, it was not her duty to do so, in the first instance. The vessels were crossing, so as to involve risk of collision. The ferry-boat had the Sigel on her own starboard side, and therefore, by rule 14, was bound to keep out of the way of the Sigel, and the Sigel, by rule 18, was bound to keep her course.

As to the sheering out of the Sigel on to the ferry-boat, the setting up, in the libel, of the fact of such sheering, recognizes the duty of the ferry-boat to keep out of the way of the Sigel. No excuse is alleged, in the libel, why the ferry-boat did not keep out of the way of the Sigel, except that the Sigel sheered on to the ferry-boat, without any notice. This implies a voluntary sheering of the Sigel, a sheering which was unexpected to the ferry-boat, which the ferry-boat had no notice of and no reason to expect would occur, a sheering which the Sigel had an election to make or not to make, and which the ferry-boat could have no knowledge would occur unless pre-

viously notified by the Sigel that it would occur. But, the evidence of the pilot of the ferry-boat is, that when he was on the New York side of the river, he saw the Sigel going up close, as he thought, to the Brooklyn docks, and not more, as he thought, than ten or fifteen feet from the ends of such docks. The evidence also is, that, in the then state of the tide, a vessel going up at that distance from the docks must, when she reaches the place where the Sigel is said to have sheered, be struck on her starboard bow by a cross tide from above setting out from the Brooklyn shore. It is also the weight of the evidence, that, whatever distance off from the Brooklyn shore the Sigel was in her passage up, when she was first seen by the pilot of the ferry-boat, she continued the same distance off, neither approaching to nor receding from the Brooklyn shore until she began to take the alleged sheer; that whatever sheer she took was wholly caused by the cross tide referred to; that her pilot did not starboard his helm, or take a sheer in any voluntary or active sense, but ported his helm, against the cross tide; that he stopped and reversed his engine as soon as he saw there was danger of a collision; that his boat was a slow boat, heavily loaded and loaded by the head; that she was a well known boat in the waters she was in, being constantly engaged in carrying like cargoes between the two points between which she was then plying; that her condition as to quantity of cargo and the manner of her loading were plainly visible to the pilot of the ferry-boat; and that her speed all the way up, and before she struck the cross tide, was very low, making it evident that the effect of the cross tide upon her would be serious. In view of all this, I can see no fault on the part of the Sigel contributing to the collision. On the contrary, the ferry-boat, with a knowledge actual or imputable, on the part of her pilot, of the state and action of the tides, and of the predicament, position, and capabilities of the Sigel, and with a duty, incumbent on the ferry-boat, to avoid the Sigel, undertook, when the Sigel was two or three piers below the slip which the ferry-boat was intending to enter, to compel the Sigel to get out of the way of the ferry-boat. For that purpose, the ferry-boat gave a signal of two blasts of her steam whistle, indicating that she intended to pass into her slip ahead of the Sigel, a thing which she could not do unless the Sigel should change her course. This signal was not heard on board of the Sigel, and, of course, was not answered by the Sigel. Thereupon, the ferry-boat stopped her engine, but she did not reverse it, and she continued to have upon her such headway as was due to her former impetus. During this time, her pilot says he saw the Sigel proceed up without changing her course, and without slackening her speed, until she passed across and beyond the mouth of the ferry-slip, the ferry-boat being, at the time, still further up the river, with a view, as was usual and proper, of having the ebb tide carry her down, so she could enter her slip. Then the cross tide struck the Sigel. As soon as the pilot of the ferry-boat saw the effect of the cross tide on the Sigel, he backed his boat. But he should have backed sooner, or he should not have allowed his boat to get so near to the Sigel. The onward movement left to his boat, when he stopped, concurring with the wind and tide on his port broadside, carried his boat against the Sigel faster than it was possible for the Sigel to recede. I can see no fault in the Sigel.

The libel does not specify as a fault causing or contributing to the collision the Sigel's proximity to the Brooklyn docks. It alleges that the Sigel violated the law by her closeness to the docks. But the closeness of the Sigel to the docks was not, on the facts of this case, a fault contributing to the collision, if it was a fault at all, or a violation of law. The pilot of the ferry-boat saw just where the Sigel was and what she was, and was bound to know, on his own idea of her position, that she would do, when she struck the cross tide, just what it is shown she did do, and it would have been very easy for him to have kept farther off from her, and then have passed under her stern. The Sigel did not change her course, in any proper sense of the term, but kept it, and the ferry-boat, by proceeding on too far, drifted, by the action of the wind and tide, down upon the Sigel.

The libel must be dismissed, with costs.

[This decision was subsequently affirmed by the circuit court. Case No. 5,062.]

Case No. 5,312.

The GENERAL GEO. G. MEADE.

[8 Ben. 481.] [1]

District Court, E. D. New York. June, 1876.

TUG AND TOW—DAMAGE BY STRIKING PIER—SEAWORTHINESS.

1. Where a canal boat which had been in tow by a tug was allowed to get adrift and to strike the end of a pier, but no damage resulting was then discovered, and the tow proceeded, and soon after the boat was found to be sinking, but her captain refused to be towed to a place of safety and insisted on going on to his place of destination, and the canal boat thereafter sunk: *Held*, that such refusal relieved the tug from responsibility for the sinking of the boat.

[Cited in The Syracuse, 18 Fed. 831.]

2. That the tug could not be held liable for the striking of the pier by the canal boat, although it could have been prevented by diligence on the part of the tug, it appearing that the boat had not strength enough to bear the ordinary contacts and blows inseparable from navigation in the harbor.

[Cited in Mould v. The New York, 40 Fed. 902.]

In admiralty.

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

Starr, Hooker & Hastings, for libellants.
Beebe, Wilcox & Hobbs, for claimants.

BENEDICT, District Judge. The evidence shows that after the libellants' boat had been taken in tow by the Meade, during the operation of shifting the hawser, she was allowed to get adrift, and to strike against the pier at 42nd street. There is little doubt that the occurrence could have been prevented by the exercise of diligence on the part of the tug. But it does not follow that the subsequent sinking of the boat is to be held to be the result of the negligence which permitted the canal boat to get against the pier. For the evidence shows that the contact with the pier was not violent, and involved no more strain than is to be anticipated in the ordinary contacts of boats, with the piers and vessels in a harbor like this. All vessels must be prepared to endure this sort of contact; and it seems plain that no damage would have resulted to the libellants' boat from her contact with the pier if she had not been too weak and rotten. The subsequent fate of the boat discloses her rotten condition and indicates the real cause of her loss. The accident did not at the time lead the master of the boat to suppose that any injury had been sustained by his boat; nor was there anything to lead the tug to suppose that the occurrence had rendered it dangerous to proceed or to require any extraordinary care or precaution in the towing. No negligence therefore can be imputed to the tug by reason of her continuing her prosecution of the voyage. When afterwards the sinking condition of the boat became apparent, it was at once discovered by the tug, and the master of the tug promptly offered to take the boat to a place of safety.

The refusal of that offer by the master of the canal boat and his determination to proceed to her original place of destination relieves the tug of all responsibility for the subsequent sinking of the boat, it appearing that after the condition of the boat was known, all due care was exercised on the part of the tug, and all proper effort made to reach the destination selected by the master of the boat. The libel must accordingly be dismissed with costs.

Case No. 5,312a.

The GENERAL GREEN.

[Blatchf. Pr. Cas. 40.] [1]

District Court, S. D. New York. Aug. 1861.[2]

PRIZE—ENEMY PROPERTY.

1. Vessel condemned as enemy property.

2. Cargo restored, but without costs or damages, there being probable cause for the capture, it being laden in an enemy bottom during the war.

In admiralty.

BETTS, District Judge. The bark General Green and cargo were captured on the 4th of June, 1861, on the high seas off Cape Henry, by the United States steamship Quaker City, under command of Captain Carr, and are libelled by the United States and captors on the charge that the bark was at the time owned by insurgents, traitors, public enemies, and persons engaged in actual hostilities against the government of the United States, and is liable to condemnation. Benjamin Atwell, on behalf of W. Oppenheim, interposed a claim to the bark, and alleged that at the time in the libel and claim mentioned she belonged solely to the said Oppenheim, then and still a citizen of the United States of America, residing at Charleston, South Carolina, and if restored will belong to him; that she was sailed under his direction as her master, and was engaged at the time of seizure to take a cargo on freight from Sagua la Grande, in Cuba, to be delivered at Baltimore, Philadelphia, or New York, as the consignee should direct, and was directed to proceed to Baltimore, in the prosecution of which voyage she was captured, as charged in the libel. The claimant denies that the bark was liable to seizure and excepts generally to the sufficiency of the libel, and avers particularly the matters in substance before set up in the cases of the Hiawatha, Pioneer, Crenshaw, &c. Claims of Grinnel, Minturn & Co. were interposed to the cargo, but the United States attorney relinquished the charges against the cargo, because it was shipped by loyal citizens before notice of the war.

The only question upon the issue is whether the vessel, being owned at the time of seizure —June 4, 1861—by the claimant Oppenheim, and having been his on the 24th of April, 1861, the time of her sailing from Cuba on her home voyage, was just prize of war to a government vessel. In consonance with the rules adopted by the court in the suits before referred to, it is held that the vessel, her tackle and furniture, are enemy's property, the citizens of South Carolina being at the time in a state of civil war against the United States; and it is accordingly adjudged, that the bark General Green, her tackle, apparel, and furniture, be condemned to the libellants as prize of war, with costs to be taxed and assessed, and that the cargo laden on board the bark be restored to the claimants, but without costs or damages to the claimants, there being probable cause for the capture, it having been laden on an enemy's bottom, and exported after the existence of a state of war by South Carolina against the United States.

The decree in this case was affirmed by the circuit court on appeal [Case No. 5,313.]

[1] [Reported by Samuel Blatchford, Esq.]
[2] [Affirmed in Case No. 5,313.]

GENERAL GREEN, The. See Cases Nos. 6,451 and 6,452.

Case No. 5,313.

The GENERAL GREENE.

[Blatchf. Pr. Cas. 654.] [1]

Circuit Court, S. D. New York. July 17, 1863.[2]

PRIZE—ENEMY AND NEUTRAL PROPERTY.

Decree of the district court [Case No. 5,312a] condemning the vessel as enemy property, and restoring the cargo as belonging to neutral owners, affirmed.

NELSON, Circuit Justice. This vessel was captured, by the Quaker City, off Cape Henry, June 4, 1861. The vessel belonged to H. Oppenheim, a citizen of South Carolina and a resident of Charleston. The cargo belonged to neutral owners. The vessel was condemned and the cargo restored. The decree below is affirmed.

GENERAL INTEREST INSURANCE CO. (RUGGLES v.). See Case No. 12,119.

GENERAL ISAAC DAVIS, The (SARCHET v.). See Case No. 12,357.

Case No. 5,314.

The GENERAL JACKSON.

[1 Spr. 554;[3] 17 Law Rep. 324; 32 Hunt, Mer. Mag. 80.]

District Court, D. Massachusetts. Aug., 1854.

SHIPPING—LIEN FOR SUPPLIES—WAIVER BY DELAY TO ENFORCE.

1. A lien for supplies to a foreign vessel, must, as against bona fide purchasers, be enforced with due diligence. Generally, it must be soon after the termination of the first voyage.

[Cited in The D. M. French, Case No. 3,938; The Artisan, Id. 567; The Bristol, 11 Fed. 162; The Rapid Transit, Id. 335.]

2. An assignment of his claim by the creditor, is not a waiver of the lien.

[Cited in The Champion, Case No. 2,583; The Sarah J. Weed, Id. 12,350; The R. W. Skillinger, Id. 12,181.]

This was a libel for supplies furnished to the schooner General Jackson, in the port of Boston, at various times, while the vessel was owned by residents and citizens of Maine. The last item in the libellant's account was for articles furnished September 24, 1852. It was agreed that the vessel was purchased by the claimant [S. C. Hunt] in May, 1854, of her former owners, in ignorance of the present claim; that said claim had been assigned by the libellant [Isaac Bass] as collateral security for a debt, which debt had been paid, and that the claim now belonged to the libellant. This libel was not filed until after the purchase by the claimant. It was contended by the claimant: (1) That the libellant, after a delay of nearly two years, could not enforce this lien against a bona fide purchaser, without notice; and (2) that the assignment of the claim operated as a waiver of the lien.

Benjamin Pond, for libellant.
H. C. Hutchins, for claimant.

SPRAGUE, District Judge. In regard to the first point the rule is that the lien shall be enforced within a reasonable time, and what constitutes a reasonable time depends upon the circumstances of each case. It is generally held, that a lien of this character should be enforced as soon as the expiration of the first voyage after supplies or materials furnished, and it is only under peculiar circumstances that the lien is extended beyond such time. These liens are created for the benefit of commerce. Foreign vessels being in ports without their owners, or any responsible parties connected with them, often require repairs and supplies. To enable the master to obtain these this extraordinary lien is given. It is founded in the necessities of commerce. But it is to be remembered that these liens are secret, and there is no place where other parties may inquire and learn their existence or extent. Therefore it is fit and proper that they should be promptly enforced and extinguished.

To apply these principles to the present case, it appears that the last item of supplies furnished this vessel was in 1852, about eighteen months before the filing of the libel, and during all that period the vessel was plying between this port and the ports of Maine, as often as once a month, giving the libellant ample opportunity to enforce his claim, had he seen fit, long before the sale of the vessel to the present claimant. It must therefore be held that the libellant has waived his lien.

As to the second point, the assignment of the claim as security for a debt which had since been paid would not of itself be a waiver of the lien.

Libel dismissed, with costs for the claimant.

Case No. 5,315.

The GENERAL KNOX.

[Nowhere reported; opinion not now accessible.]

GENERAL KNOX, The. See Case No. 2,898.

Case No. 5,316.

The GENERAL McCULLOM.

[Affirming Case No. 5,318. Nowhere reported; opinion not now accessible.]

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

[2] [Affirming Case No. 5,312a.]

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

Case No. 5,317.

The GENERAL McCULLUM.

[8 Ben. 437.] [1]

District Court. E. D. New York. May, 1876.

COLLISION AT PIER—STEAMBOAT AND CANAL-BOAT—PLEADINGS AND PROOF.

1. Where a steamboat in coming into her berth at a pier, backed against the canal-boat B. that had just swung her stern out from the pier, holding on by a line at her bow; and, although warned from the canal-boat, pushed her against the stern of another boat, the R. the rudder of which had become unshipped, and a projecting iron thus left exposed pierced the side of the B.: *Held*, that the steamboat was liable for the damages so caused to the canal-boat, the manoeuvre being needless and against warning, and such as the canal-boat was not bound to anticipate and provide against.

2. The defences urged by the steamboat of negligence on the part of the canal-boat were not set up in the answer nor sustained by the proofs.

3. The canal-boat was not in fault for not interposing a fender between her side and the stern of the other canal-boat.

In admiralty.

Beebe, Wilcox & Hobbs, for libellants.

R. D. Benedict and Shipman, Barlow, Laroque & McFarland, for claimants.

BENEDICT, District Judge. This action is brought by the owner of the canal-boat John F. Barker, to recover of the steamboat General McCullum for damages to the canal-boat and her cargo of grain caused by the sinking of the canal-boat on April 13, 1875.

The Barker had been lying at the south side of a pier at the foot of Thirty-Fourth street in the North river, where the steamboat General McCullum was accustomed to lie. Upon the arrival of the General McCullum, on the afternoon of the 13th of April, 1875, the canal-boat swung out from the pier and had placed herself with her bow to the pier and stern out. Another canal-boat, the Roanoke, was then lying parallel with the pier, outside a boat lying alongside the pier and at the inner berth of the pier, some 10 or 20 feet from the starboard side of the Barker.

While the Barker was thus placed, having a line from her bow to the pier and in the act of getting out, the General McCullum was backing into her berth by the action of her propellers, one moving ahead and the other back, having lines out to the pier. As the steamboat thus worked up towards the pier, her stern was placed in contact with the port side of the Barker, and the Barker was pushed towards the bulkhead and against the stern of the canal-boat Roanoke, then lying between her and the bulkhead as before stated, and so injured her that she sank. The immediate cause of the injury to the Barker was the "scag iron" of the Roanoke, which, the rudder having been unshipped, was by the pressure of the steamboat driven through the side of the Barker. The answer filed on behalf of the General McCullum denies that the Barker was in contact with the McCullum, and avers that the accident arose from the casting off a line which had been run from the canal-boat to the stern of the McCullum, by which casting off of the line the canal-boat was permitted to be driven by the wind and tide upon the stern of the Roanoke. This is the only fault charged upon the canal-boat in the answer, and it is claimed by the answer to have been the sole cause of the accident.

In respect to this defence it is sufficient to say that it is wholly disproved by the claimants' own witness. No casting off of a line had anything to do with the accident, but the same was caused by the act of the General McCullum in pushing the canal-boat upon the stern of the Roanoke.

It has been argued that the canal-boat was in fault for being in the berth belonging to the McCullum, but no such fault is set up in the answer, nor is such fault proved. It has also been contended that the canal-boat was in fault for omitting to keep herself off from the Roanoke by using a fender. This is not stated in the answer as a fault; nor was it a fault which can charge the canal-boat with the loss. The fact is that the steamboat, in spite of warning and without necessity, placed her stern in contact with the side of the Barker and pushed her over to and upon the Roanoke. The master of the canal-boat was not bound to anticipate such a manoeuvre, nor in fault for not being ready to insert a fender between his boat and a boat at some distance on the other side of him. He had a right to presume that the steamboat would at least stop backing when she struck his boat. This is not the case of an injury resulting from an ordinary contact between vessels such as might occur at any time in the crowded slips of New York, but a case of pushing of the canal-boat over and against the other boat, needless on the part of the steamboat, and persisted in after warning given. I think it clear, therefore, that the responsibility for this loss rests upon the steamboat, and a decree will accordingly be entered against her.

[See Case No. 5,318.]

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

Case No. 5,318.

The GENERAL McCULLUM.

[9 Ben. 31.] [1]

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

CARRIER—BILL OF LADING—ABANDONMENT—PRIVATE SALE OF DAMAGED CARGO—EVIDENCE.

1. A cargo of barley on a canal-boat was wet in consequence of a collision, and suit for dam-

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

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

ages for the collision being brought by the master and recovery had therefor, exceptions were taken to the report of the commissioner fixing the damage to the cargo at $1000: *Held*, that the evidence showed an abandonment of the cargo to the insurers; that the taking of the grain by the original purchasers at the contract price less the sum paid by the insurance company to the shipper was in legal effect a private sale of the cargo as damaged: that there being no opportunity to obtain a sale at auction under the circumstances, such a private sale, with the testimony of the experts as to the amount of damage, was sufficient to warrant the finding of the commissioner.

2. The liability of a carrier is not diminished by the absence of a bill of lading, and his right to recover for damage to cargo depends upon his possession as a carrier at the time of the accident.

[This was a libel by the owner of the canal-boat John F. Barker against the steamboat General McCullum to recover for damages caused by the sinking of the canal-boat. A decree was entered in favor of the libellant, and the cause referred to a commissioner to ascertain the damages. Case No. 5,317.]

Beebe, Wilcox & Hobbs, for libellant.

R. D. Benedict and Shipman, Barlow, Laroque & McFarland, for claimant.

BENEDICT, District Judge. In this case it has been contended, upon exceptions taken to a commissioner's report of the amount of damage sustained by the sinking of a boat loaded with barley, that the evidence fails to sustain the right of the master of the boat to recover for the injuries to his cargo, because there is no evidence of the existence of any bill of lading or that any one has made a claim against the master or his vessel by reason of the damage to the cargo. The answer to this objection, if it can be taken at all at this stage of the proceedings, after interlocutory decree in favor of the master, is that the evidence shows the libellant's possession of the grain as a carrier. The liability of the carrier is not diminished by the absence of a bill of lading, and his right to recover depends upon the fact of his possession as a carrier at the time of the accident.

It is next objected that there is no proof of the amount of injury caused to the grain by the sinking in question.

The evidence is not so definite and full as it might have been, but it can be gathered from it that this cargo had been shipped on the libellant's boat by Franklin Edson & Co., to be transported and delivered on their account to J. S. & W. Brown; that the cargo was insured in the Mercantile Mutual Insurance Company; that when the boat sunk and before the cargo was received by J. S. & W. Brown, it was abandoned to the insurers, who accepted the abandonment and thereafter made an arrangement with J. S. & W. Brown, by which Brown agreed to take the cargo, to pay to Franklin Edson & Co. the price at which they had before agreed to take the grain if delivered in good order, less the sum of $1000. This latter sum the insurer paid to the shipper of the grain, and thus the loss to the shipper was fully made up. This arrangement was in legal effect a private sale of the grain in its damaged condition by the insurers to J. S. & W. Brown at $1000 less than the price fixed on by the parties as a sound price. There is no evidence to cast doubt upon the entire good faith of the transaction, and the circumstance that the arrangement was such as to make the amount of the depreciation in value agreed to by the insurer the measure of the liability of the insurer upon his policy, tends strongly to confirm the sale as affording a proof of the value of the property in its damaged condition. Moreover the grain was wet and in danger of total destruction in case of any delay. There was therefore no opportunity to obtain such a sale by auction as would afford a fair test of value; and Brown, who is proved to have been an expert, testifies that he examined the grain so as to determine the injury, and he confirms by his oath the correctness of the terms of the sale as an indication of the value of the property. The testimony of the agent of the insurer is to the same effect. I am therefore of the opinion that the evidence was sufficient to warrant the finding that the injury to the grain was $1000.

It should be added that the evidence, in addition to showing an abandonment of this cargo to the insurers, also shows a knowledge on their part of this action brought in the name of the master, and acquiescence therein. Their agent was also a witness to prove the damage. The case appears therefore to come within the principle of Madden v. The Tillie, decided in this district upon appeal [Case No. 14,049], where these circumstances were held sufficient to support a libellant's right to recover. The exceptions are therefore overruled and the report confirmed.

Affirmed by the circuit court on appeal, June 11, 1877. [Case not reported.]

GENERAL McDONALD, The. See Case No. 11,238.

GENERAL MUT. LIFE INS. CO. (SHERWOOD v.). See Case No. 12,776.

GENERAL PARKHILL, The. See Case No. 10,755a.

Case No. 5,319.

The GENERAL SHERIDAN.

[2 Ben. 294.] [1]

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

BREACH OF CHARTER—LIEN ON VESSEL—CHARTER NOT BEGUN.

1. Where a vessel was chartered in New York, for a voyage from ports in Florida to

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

New York, and did not go to any of the ports of loading named, but returned to New York without having entered on the performance of the charter, the charter party containing a clause whereby the parties bound the vessel and the merchandise to be laden on board, each to the other, for the faithful performance of the covenants therein contained: *Held*, that an action in rem against the vessel, to recover the damages occasioned to the charterer by this breach of the charter, would not lie, and that the libel must be dismissed.

[Cited in The Williams, Case No. 17,710. Distinguished in The James McMahon, Id. 7,197. Cited in Scott v. The Ira Chaffee, 2 Fed. 406; The Monte A., 12 Fed. 332; The Missouri, 30 Fed. 384; The Caroline Miller, 53 Fed. 137.]

2. Under such a charter, any duty that may be violated by the owner or master before the cargo is put on board, is not a duty of the vessel, or one for the breach of which a lien on the vessel is created or can be enforced.

[Cited in The William Fletcher, Case No. 17,692; The Guiding Star, 53 Fed. 943.]

On the 19th of March, 1867, the schooner General Sheridan was chartered to Eberhard Faber, by a written charter party entered into at New York. The vessel was then at sea, and the charter was for a voyage from one or more of several named places of loading on the west coast of Florida to New York. Faber afterward filed his libel against the vessel in rem, alleging a breach of the charter, in that the vessel did not, as she was required to do by the charter party, proceed to any of the ports of loading therein mentioned, or give notice of her readiness to receive cargo, or take any cargo, but returned to New York without having fulfilled any of the stipulations of the charter party. He claimed damages for such breach to the amount of $5,000, and alleged, that, by a clause in the charter, it was agreed by the parties that the vessel should be bound for the faithful performance of the charter. The claimants excepted to the libel, on the ground that the facts set forth in it did not constitute any lien on the vessel, and were not within the jurisdiction of this court, or enforceable in admiralty.

G. De Forest Lord, for libellant.

Beebe, Dean & Donohue, for claimants.

BLATCHFORD, District Judge. Authority can be found for maintaining the libel in this case. Thus, in the case of The Pacific [Case No. 10,643], decided in 1850, Mr. Justice Nelson, in the circuit court for this district, says, that it is not necessary, in order to give jurisdiction to the admiralty in rem, in the case of a contract, maritime in its nature and object, that the vessel should have entered upon the performance, and that the breach should have occurred in the course of the voyage; and that, if the vessel refuses to receive the cargo on board, when it is at her side ready to be delivered, she is bound, and the party aggrieved is not obliged to look exclusively to the master or owner. But later cases have overruled this view. In the case of The Freeman v. Buckingham, 18 How. [59 U. S.] 182, decided by the supreme court at the December term, 1855, Mr. Justice Curtis, delivering the opinion of the court, says: "Under the maritime law of the United States, the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment. But the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it." In the case of Vandewater v. Mills, 19 How. [60 U. S.] 82, decided by the supreme court at the December term, 1856, Mr. Justice Grier, delivering the opinion of the court, says: "If the master or owner refuses to perform his contract, or, for any other reason, the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages, as in other cases." This view was applied by this court in July, 1857, in the case of Reed v. The Telos [Case No. 11,653]; and in May, 1860, in the case of Torrices v. The Winged Racer [Id. 14,102]. It is true that, in Vandewater v. Mills [supra], the court says that it was no part of the written agreement sued on in that case, that the vessel libelled in rem therein should be hypothecated as security for the performance of the agreement; and, it is urged on the part of the libellant in this case, that the doctrine laid down in Vandewater v. Mills is not applicable to this case, for the reason that by the charter party in this case, there is an express hypothecation of the vessel. The libel avers that "the parties to the said charter party did also therein and thereby bind themselves, their executors, administrators, and assigns, and the said vessel, freight, tackle, and appurtenances, and the merchandise to be laden on board, each to the other, for the true and faithful performance of all the covenants and agreements therein contained, in the penal sum of the estimated amount of the said charter." This is the usual penal clause inserted in charter parties. Maclachlan, Merch. Shipp. c. 8, p. 334. It is founded on the rule of maritime law stated by Cleirac (597): "Le batel est obligée à la marchandise et la marchandise au batel"; and by Valin (1 Valin, Ord. de Mar. bk. 3, tit. 1, art. 11): "The ship, with her tackle, the freight, and the cargo, are respectively bound by the covenants of the charter party." The express covenant in this charter party binding the vessel to the merchandise to be laden on board, and the merchandise to be laden on board to the vessel, must be construed conformably to the principles of the maritime law, and imports nothing more than would have been held, according to those principles, to be a part of the contract, if the express covenant had not been contained in the instrument. The obligations of the vessel to the merchandise to be laden on board, and of the merchandise to be laden

on board to the vessel, are mutual and reciprocal. Under the covenant, the duty of the vessel, to the performance of which the hypothecation binds her, is to deliver the cargo that may be put on board at the time and place stipulated for such delivery. Any duty that may be violated by the owner or master, before the cargo is put on board, is not a duty of the vessel, or one for the breach of which a lien on the vessel is created or can be enforced. So, too, under the covenant, if the cargo is not laden on board, it is not bound to the vessel, and, therefore, the vessel cannot be in default, though the master or owner may be, for the nondelivery of the cargo. To hold that the vessel was bound to the merchandise to be laden on board, when there was no merchandise laden on board, would be to depart from the express terms of the covenant, and to destroy the mutual and reciprocal character of the obligations of the covenant.

This view of the covenant in the charter party is sustained by the opinion of the circuit court for this district, in the case of The Hermitage [Case No. 6,410]. The charter party in that case contained a clause, whereby, for the fulfilment of the several stipulations of the charter party, each party bound himself to the other—the one, the vessel, freight, and tackle; the other, the merchandise to be laden on board. The charterers put some cargo on board, and then a dispute arose as to some of the provisions of the charter party, whereupon the charterers commenced taking out the cargo, and refused to go on with the charter party. The libellant filed a libel in rem against the cargo, to recover freight, according to the charter party, for the time the vessel was used by the charterers, and damages for the nonfulfillment by them of the charter party. The district court, on exceptions filed to the libel, dismissed it, on the ground that the suit in rem would not lie. On appeal by the libellant, the circuit court (Mr. Justice Nelson) reversed the decree of the district court, and sustained the libel, on the express ground that the cargo had been put on board, and the voyage had, in fact, commenced according to the terms of the charter party, and that the lien on the cargo attached as soon as it was laden on board; and that, so far as the form of remedy was concerned, the case stood in the same position as if the voyage had been broken up by the charterers at any other point in the course of it. And he added: "This case does not fall within that class of cases where nothing has been done under the charter of the vessel, that is, where no goods have been placed on board, and the voyage has not been entered upon; in which cases there can be no lien upon the vessel or cargo under the charter party. In such cases, whether the breach of the agreement is on the part of the owner or of the charterer, there can be no proceeding in rem against the vessel or the cargo, as no lien has attached for the benefit of either party." These views are decisive as to the present case. They indicate that the doctrine of the case of The Pacific must have been considered by Mr. Justice Nelson himself as unsound, probably in view of the opinion of the supreme court in the case of Vandewater v. Mills.

The exceptions are allowed, and the libel is dismissed, with costs.

GENERAL SHERIDAN, The. See Case No. 5,078.

Case No. 5,320.

The GENERAL U. S. GRANT.

[6 Ben. 465.] [1]

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

COLLISION IN NEW YORK HARBOR—STEAMER AND SAILING VESSEL— CHANGE OF COURSE BY THE LATTER—APPREHENSION OF COLLISION.

1. A lighter bound from the East river to Jersey City, with the wind free, saw a tug coming down the North river, with a canal-boat alongside. The captain of the lighter, apprehending danger of collision, as he saw no movement on the part of the tug to avoid the lighter, kept away two points. A collision ensued, the canal-boat alongside of the tug striking the lighter on her starboard side, aft of amidships, and causing her to sink: *Held*, that the lighter was in fault for changing her course, and was responsible for the collision.

2. When a change of course is admitted or established on the part of a vessel which is under obligation to keep her course as against another vessel which is bound to avoid the former vessel, a very close scrutiny of the conduct of the former vessel is necessary.

3. The excuse for a change of course by such a vessel, that the other vessel was taking no steps to get out of the way, is not to be favored.

4. It is the actual danger of collision which determines the duties of both vessels, and not the apprehension merely.

[Cited in The Britannia, 34 Fed. 553; The Allianca, 39 Fed. 479.]

This was a libel filed by the owners of the lighter Gem, to recover the damages occasioned by her being sunk, in a collision with a canal-boat towed alongside of the steamtug General U. S. Grant. The lighter was bound from pier 3 East river to Jersey City, the wind being northeast. Arriving near Castle Garden, she saw the tug coming down the North river, towing a canal-boat, which was fastened to her starboard side, with her bow projecting beyond the bow of the tug. It was alleged, on behalf of the lighter, that the tug kept on, without taking any means to avoid her, and that, as soon as a collision was apprehended, the lighter was kept away two points, in order to avoid it, but she was struck by the canal-boat, nearly amidships, and sunk. On behalf of the tug, this change of course on the part of the lighter was charged to have been the sole cause of the collision.

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

Benedict, Taft & Benedict, for libellants.
Beebe, Donohue & Cooke, for claimants.

BLATCHFORD, District Judge. It being incumbent on the tug to avoid the lighter, or to show a sufficient excuse for her failure to do so, she has assumed the burden of showing that the lighter did not fulfil her obligation of keeping her course, and that the change of course of the lighter was the absolute and direct cause of the collision. The lighter, while admitting a change of course, insists, that such change did not cause or contribute to the collision; that she made the change with a view of avoiding a collision which seemed certain; that, at the time she made it, the tug had made no movement to avoid her, and was coming on a course which was certain to bring the two vessels into collision, unless the one or the other of them made a change; that the change by the lighter was made at so short an interval of space and time before the collision as to make the movement substantially one in the extremity of peril; and, that such change is not to be regarded as a causative or contributory fault.

When a change of course is admitted or established, on the part of a vessel which is under obligation to keep her course, as against another vessel which is bound to avoid the former vessel, a very close scrutiny of the conduct of the former vessel is necessary. She has violated an express rule of navigation. Whenever such a change of course has taken place, it is always set up, that the other vessel was taking no step to get out of the way. Such an excuse for a change of course is easily made, but it is not to be favored; because, while it tends to hold rigidly the one vessel to her duty of getting out of the way, it tends to relax the obligation on the other to keep her course. Both duties are correlative, and of equal force. The libel in this case avers, that the lighter, "as soon as a collision was apprehended, was kept away some two points." A vessel whose duty it is to keep her course has no right to change it as soon as she apprehends a collision. In this case, the duty of the tug to keep out of the way of the lighter arose only when the two vessels were proceeding in such directions as to involve risk of collision; and it was under those same circumstances that the duty arose, on the part of the lighter, to keep her course. Therefore, under the statute requiring the lighter to keep her course, her apprehension of a collision could not justify her changing her course. Moreover, it is the actual risk or danger of collision that determines the duties of both vessels, and not the apprehension merely. The rule was made, and is administered, for the very purpose of preventing the vessel charged with the duty of avoiding the other, from being embarrassed by a change of course on the part of the other into danger, on the apprehension that such duty of avoidance will not be fulfilled.

It is alleged, on the part of the tug, that, if both vessels had kept their courses, there would have been no collision, and that the change of course on the part of the lighter caused the collision. It is a rather violent presumption to suppose, as is contended by the lighter, that the tug, in the daytime, and with the lighter in full view, and with the knowledge of her duty to avoid the lighter, was on a course which, if maintained, would bring her into collision with the lighter, and had kept up such course to a point too near to the lighter to enable the tug, by any affirmative movement, to avoid the lighter. It is a more reasonable presumption, if the tug was keeping her course, and was making no affirmative movement because of the lighter, that, in fact, there was no risk of collision, and that the apprehensions, on the part of the lighter, which induced her change of course, were unfounded. In this view, the change of course was not in the moment of peril, because there was no peril. The change was the result of apprehension of danger, but groundless apprehension. It would be a very unsafe principle to adopt, that, where there is no danger, and the vessel on which rests the duty of avoidance sees and apprehends no danger, the other vessel may, without ground, apprehend danger, and change her course, and cause a collision, and then claim, that, because the change was made at a very short distance off, and at a very short time before the collision, it was made in the extremity of peril.

In the present case, I am impelled to the conclusion, on all the evidence, that there would have been no collision if the lighter had not changed her course. It is also deserving of remark, that the master of the lighter states, that he put his helm up and kept off, in order to keep clear of the tug. It was not a purposeless change, nor was it one made without reference to the tug. It was deliberate, and in knowing violation of his duty, with reference to the tug, to keep his course.

The conclusion sought to be drawn from the fact that the persons on board of the lighter always saw the tug on the starboard side of the mast of the lighter, namely, that the vessels were on such courses that a collision must have ensued if such courses were not changed, by no means follows. The fact referred to may show that the courses of the vessels could not have been parallel, but it does not show that the lines of such courses would not have intersected at a safe distance astern of the tug, nor does it show that the starboarding of the lighter did not bring her directly across the course of the tug.

On the whole case, I must dismiss the libel, with costs.

Case No. 5,321.

The GENERAL WILLIAM McCANDLESS.

[6 Ben. 223.] [1]

District Court, S. D. New York. Nov., 1872.

COLLISION IN EAST RIVER — STEAMBOAT FOLLOWING ANOTHER.

1. Two steamtugs, the U. and the McC., were going down the East river, the U. being ahead. The McC. gained on the U., so as to lap her starboard side. A ferry-boat coming up behind them passed to the starboard of both tugs, and, as she was passing, the port bow or stem of the McC. came in contact with the starboard quarter of the U., and she shot off to starboard, across the bows of the McC., and struck the port side of the ferry-boat, receiving injuries, to recover for which a libel was filed, in her behalf, against the McC. No fault was charged by either party against the ferry-boat: *Held*, that the case was one to which articles 17 and 18 of the act of April 29, 1864 (13 Stat. 61), apply. It was the duty of the McC. to keep out of the way of the U., and the duty of the U. to keep her course.

2. As the evidence showed that the U. kept her course, it followed that the McC. was in fault.

3. The U., having the right of way, and having no reason to suppose that the McC. would hit her, was not bound to slow, on the approach of the ferry-boat.

4. Whatever mistake the U. made in not stopping and backing, was, at most, an error of judgment, under circumstances of danger brought about by the McC., and was not, therefore, to be imputed to the U. as a fault.

In admiralty.

Beebe, Donohue & Cooke, for libellants.

Wilcox & Hobbs, for claimants.

BLATCHFORD, District Judge. This libel is filed to recover against the steamtug General William McCandless the damages sustained by the libellants, as owners of the steamtug Unit, in consequence of a collision which took place on the 3d of May, 1871, in the East river, between the Unit and the ferry-boat Commodore Perry, by which the Unit was damaged. The Unit started from North Fourth street, Williamsburgh, bound to the vicinity of pier 12, East river, in a strong flood tide, between five and six o'clock in the afternoon. She ran over to the New York shore, and down in an eddy there, and then crossed over to the Brooklyn shore, from the point of Corlaer's Hook, reaching the Brooklyn shore about the lower end of the Navy Yard, and from there ran down along the Brooklyn shore for half a mile, to about off Adams street, Brooklyn, where the collision occurred. The McCandless went down along the New York shore astern of the Unit, and started to cross to the Brooklyn shore astern of the Unit, but held a more westerly course across than the Unit did, and so gained on the Unit as to lap her starboard side a short distance below where the Unit reached the Brooklyn shore. The ferry-boat was on a trip from South Seventh street, Williamsburgh, to Roosevelt street, New York. She was behind both of the tugboats, and overtook them, and passed to the starboard of both of them. As she was passing, the port bow or stem of the McCandless came in contact with the starboard quarter of the Unit, and the Unit shot off to starboard across the bows of the McCandless, and struck the port side of the ferry-boat, under the guard of the ferry-boat, abaft her wheel. The ferry-boat was a side-wheel steamboat, and the tugs were both of them screw propellers. The Unit was seriously injured.

The libel alleges, that the course of the Unit was along the Brooklyn shore, and about one boat's length from the end of the piers; that, when the McCandless, with her stem, lapped the starboard quarter of the Unit, she was so close as to be within the suction of the Unit; that the McCandless gradually gained on the Unit, until they were nearly abreast, side by side, the McCandless still keeping close to the Unit and within her suction; that, when the bows of the ferry-boat had arrived at a point a little ahead of the Unit, the McCandless suddenly dropped back, so that her stem came alongside of the starboard quarter of the Unit, and her bow suddenly turned, either by the action of her wheel, or the suction of the Unit, against the starboard quarter of the Unit, pressing the bows of the Unit around against the port side of the ferry-boat; that the headway of the McCandless was not stopped until after the Unit had struck the ferry-boat; and that the collision was caused by the carelessness and negligence of those navigating the McCandless, in not keeping further away from the Unit, in keeping within her suction, in dropping back, and either sheering her stem on the starboard quarter of the Unit, or permitting the same to be so sheered, in shoving the stern of the Unit around so as to throw her stem against the ferry-boat, and in not stopping and backing before the Unit struck the ferry-boat.

The answer avers, that the Unit headed down the river along the Brooklyn piers before the McCandless did so; that, after both vessels had headed down, they ran about side by side, always lapping each other, the McCandless preserving a uniform course of about 150 feet from the Brooklyn side, and the Unit making a zigzag course in and out and near the end of the piers; that when the ferry-boat's stem had commenced to lap the starboard quarter of the McCandless, the McCandless was immediately slowed; that thereupon the Unit took a sudden sheer to the right; that then the helm of the McCandless was ported and she was immediately backed; that, before the McCandless could fall back, the helm of the Unit was put hard a-starboard, throwing her stern around so that it hit the port bow of the McCandless. and the course of the Unit was, in consequence, changed towards the course of the

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

ferry-boat, so that she collided with the ferry-boat; that the collision was caused solely by the improper and unskilful navigation of the Unit, in not preserving a uniform course down the river, in not slowing on the approach of the ferry-boat, in not stopping and backing when it was discovered that the ferry-boat was approaching and might close in upon them, in not having the pilot or a competent person at the wheel, she being piloted by an incompetent and inexperienced deck hand, and in starboarding her helm and thus throwing her stern around and against the port bow of the McCandless; that the McCandless slowed as soon as it was found that the ferry-boat would pass the two tugs to the starboard; that, as soon as it was ascertained that the Unit, from her change of course, was closing in on the ferry-boat, the McCandless fell back, which was the only proper course; that, in doing so, she would not have touched the Unit, but for the sudden starboarding of the Unit's wheel; and that those directing and controlling the McCandless did everything in their power to avoid the collision, and it was in no way the fault of the McCandless or of those controlling her.

This is clearly a case to which articles 17 and 18 of the act of April 29, 1864 (13 Stat. 61), apply. The McCandless was overtaking the Unit, and it was her duty to keep out of the way of the Unit. It was equally the duty of the Unit to keep her course. The McCandless did not keep out of the way of the Unit. She does not set up in the answer that what happened was due to any improper management or action on the part of the ferry-boat. Her excuse is based on alleged improper conduct on the part of the Unit. The evidence shows, however, that the Unit kept her course, and did not make a zigzag course, and did not starboard her helm, as alleged in the answer. It follows, that the McCandless was in fault.

But, in addition to this, the evidence shows positive fault on the part of the McCandless. She ought to have kept farther away from the Unit, and not have got within her suction, and she ought to have stopped and backed sooner than she did.

The only question is, as to whether the Unit neglected any precaution required by the special circumstances of the case. It is alleged that she ought to have slowed on the approach of the ferry-boat, and ought afterwards to have stopped and backed. But she had the right of way, and had no reason to suppose that the McCandless would hit her, or would not stop and back in season to avoid all danger. Whatever omission the Unit made, in not slowing, stopping and backing, was, at most, an error of judgment, under circumstances of danger brought about wholly by the fault of the McCandless, and is, therefore, not to be imputed as a fault, as between her and the McCandless. If the ferry-boat had been damaged and were suing the Unit, a different rule might prevail.

There must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellants.

Case No. 5,322.

The GENERAL WILLIAM McCANDLESS.

[10 Ben. 453.] [1]

(District Court, E. D. New York. May, 1879.)

TUG AND TOW—NEGLIGENCE.

A tug and tow was lying at the long dock at Piermont on the Hudson river. There was a large cake of ice in the river below, which had been blown over to the east shore, leaving a clear passage for the tug and tow along the west shore. The tug thereupon started from the dock. While she was passing the ice, a corner of it caught on the east shore so that when the ebb tide made, the cake of ice was turned in the river so as to close in on the tug and tow, and force her ashore before it was possible to escape. Libels being filed by each boat of the tow against the tug, for damages occasioned: *Held*, that the master of the tug was not negligent in starting from the dock, and that the tug was not liable for the damage to the tow.

In admiralty.

T. C. Campbell, for libellants.

A. S. Diossy, for claimants.

BENEDICT, District Judge. The decision of these cases turns upon the question whether it was negligence on the part of the tug-boat to start out from the long dock at Piermont when she did in view of the then condition of the ice in the river. Upon this question my opinion is that the master of the tug was not guilty of negligence in this respect. When the tug started from the dock the wind had blown the cake of ice over to the eastern shore of the river and left a clear passage down along the west side abundant for the passage of the tow in safety. The tug would have passed down without accident had it not been for the fact, that after she started from the dock and when passing the ice to westward, a corner of the ice caught over on the east shore, so that when the ebb tide made, the mass of ice was turned in the river in such a manner as to close in upon the tug and force her ashore before it was possible to escape it. I am unable to say that any one would have reason to expect such a movement on the part of the ice against the wind, or to anticipate that the ice would catch as it did over on the east shore. The case differs in this respect from the case of The U. S. Grant [Case No. 16,804], where it was held to be negligence on the part of a tug to attempt to pass through Hell Gate at the same time with a mass of ice. In that case the danger was obvious when the tug passed Astoria,

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

where she could have waited until the ice had passed the Gate. Here, when the tug left the dock there was no reason to apprehend danger from the ice, and when the ice did turn it was impossible to escape being pushed on the flats.

As to the small damage sustained by one of the boats in starting from New York, it is sufficient to say that the evidence does not satisfy me that it was caused by neglect on the part of the tug.

The libels must be dismissed, with costs.

GENESEE, The (FREREZ v.). See Case No. 5,108.

GENEVA BOXER, The (SHECKLER v.). See Case No. 12,735.

GENNEY (EMERSON v.). See Case No. 4,438.

Case No. 5,323.

The GENTLEMAN.

[1 Blatchf. 196.] [1]

Circuit Court, S. D. New York. Oct. Term, 1846.[2]

SHIPPING—SAILING WITH INCOMPETENT CREW—DAMAGE TO CARGO—EVIDENCE.

1. Where the master of a vessel is charged with having sailed on a voyage from the coast of Africa with a sick and incompetent crew, whereby delay was caused, and damage ensued to the cargo and a loss of price in selling it, the question is what were the facts on which he was called to exercise his best judgment at the time he sailed; not what actually happened afterwards.

2. Where, in such a case, the evidence of the crew as to their own health can be had, it must control, in opposition to the testimony of persons experienced in the trade of the African coast, as to the effect of the given sickness upon the crew and the propriety of the master's leaving as he did.

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

This was a libel in rem, filed in the district court, by McCracken and Livingston, against the barque Gentleman. The libel charged that the vessel sailed from New-York on a voyage to the western coast of Africa, on the 13th of June, 1842, under a charter party to the libellants, for a voyage from the port of New-York to one or more ports in the Cape de Verd Islands, and thence to one or more ports on the west coast of Africa, and back to New-York direct or via the Cape de Verd Islands; that she arrived at Gambia on the 22d of August, after touching at Bona Vista, St. Jago and Goree; that she sailed from Gambia on the 25th of August, visited some other ports on the African coast, and returned to Gambia on or about the 25th of September; that she remained there till the 2d of October, when she set sail upon her homeward passage, having taken in about 64,000 pounds of hides, belonging and consigned to the libellants; that on the arrival of the vessel at Gambia, nearly all the crew were extremely sick, in consequence whereof the master placed them in the hospital; that at the time of sailing on the 2d of October, the master, in violation of his duty, and unmindful of the rights of the libellants, took his crew out of the hospital in their sick and infirm condition, and placed them on board the vessel, and set sail from Gambia; that the crew were all sick, except one man, and were insufficient and incompetent to the working of the vessel, having been taken out of the hospital for the purpose of departing, although in no better health than when they entered it; that the master was warned by the attending physician at Gambia, that the men would grow worse at sea, as it was the season of rains, and they would necessarily be exposed to wet; but that the master insisted upon sailing and did sail with the same crew, although it was easy and practicable to have obtained a proper and sufficient crew at Gambia, if not of whites, certainly of natives; that the vessel after being out eleven days reached Bona Vista on the 13th of October, and put in there, whereas she ought to have reached there in three days; but that she could carry scarcely any sail, owing to the weakness and uselessness of the crew, and the little labor they performed was extorted from them only by violence and abuse; that there was no necessity for the vessel to put in at Bona Vista, except from the feebleness of the crew; that she lay at Bona Vista from the 13th of October till the 18th of November, for no other purpose than to wait for the recovery of the crew, who were sick in the hospital on shore, till about the 17th of November, when they went on board, being still sick; that, during the period of that detention, five seamen from a vessel which had been wrecked, offered to ship on board, but the master refused to employ them; that, the vessel arrived at St. Jago on the 19th of November, and remained there till the 23rd; that the U. S. consul there sent three men home in the vessel, but the master refused to give them any wages, in consequence of which they were sulky and worked with reluctance, and the crew, with this addition, was still incompetent to the proper sailing of the vessel; that, in consequence of the various detentions of the vessel, she came upon the North American coast at a very unfavorable season; that, by reason of the insufficiency of the crew and the difficulty of working the vessel properly, the master kept her in the trade winds several days longer than he ought to have done, and did not arrive off the port of New-York till the 4th of January, 1843; that she was then driven off again, after having taken a pilot, and was obliged to put in at Newport and did not finally reach New-York till the 18th of January; that the cargo of hides shipped on board at Gambia, suffered great deterioration and damage from worms and otherwise, in consequence of the said unreasonable and improper detention of the vessel, and that the libellants had suffered

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

[2] [Reversing Case No. 5,324.]

loss and damage by reason thereof to the amount of $3,380; and also that at the time when the vessel, if properly fitted and manned upon her departure from New-York on her outward passage, and on her departure from Gambia on her return voyage, and if properly navigated outward and homeward, would, in the ordinary course, have arrived at New-York, say in October, the market for hides was materially better than when she actually did arrive, by reason whereof the libellants suffered further damage.

It will not be material to refer particularly to the answer of the claimants. It was such as to put the libellants to their proof in order to establish their claim for damages.

The district court pronounced in favor of the libellants [Case No. 5,324], and the claimants appealed to this court.

John Anthon and William Emerson, for libellants.

Daniel Lord, for claimants.

NELSON, Circuit Justice. The proofs, in this case, have satisfactorily disposed of the claim for damages founded upon that part of the controversy which respects the manning and fitting out of the vessel at the port of New-York, her outward voyage to the coast of Africa, her trading along or upon that coast, and her homeward voyage after she left the port of St. Jago. The allegations in the libel impeaching the conduct of the master and owners in respect to these several matters, are abundantly disproved, or remain without proof, and were substantially given up on the hearing.

The matters, therefore, which are open to observation and dispute, and upon which the decision must necessarily rest, are brought within narrow limits; to wit, the conduct of the master after his vessel arrived the second time at Gambia, on the 25th of September, as stated in the libel, but, in fact, as is apparent by the proof, about the 8th or 10th of that month, and until he finally left the port of St. Jago. The case is brought, confessedly, within these limits; as there can be no reasonable doubt or dispute concerning any other part of the voyage, according to the evidence, either as it respects the ship, or the conduct of the master. And, in my judgment, we may go further, and say that the matter in controversy must be confined to still narrower limits; to wit, the conduct of the master at the port of Gambia, where he took in his cargo, and whence he sailed on his homeward voyage. For, if he was guilty of no violation of duty there, it is quite clear that he is not chargeable with the detention of the vessel at the Cape de Verd Islands. That was the result of causes, over which, in my judgment, he had no control, unavoidable and overwhelming, so as to preclude any possible reparation for the delay while there.

The ground of complaint in the libel in respect to the conduct of the master at Gambia is, that in violation of his duty, and unmindful of the rights of the libellants, he took his crew out of the hospital while sick and infirm, and placed them on board the vessel and set sail on his homeward voyage; that the crew were insufficient and incompetent to the proper working of the ship; that he was advised by the attending physician that the hands would be subject to a relapse at sea, by reason of exposure during the rainy season; that the master insisted upon sailing with the same crew and without any additional hands, although it was easy and practicable to have obtained a sufficient and competent crew of the natives of that region; and that, in consequence thereof, the vessel was insufficiently manned and delayed on her voyage.

The facts as proved are, that the vessel arrived at Gambia about the 8th or 10th of September, for the purpose of taking in her homeward cargo, her crew all in good health and condition; that on the 15th three of the hands were taken down with the coast fever, and placed in the hospital, on the 20th two others, the first and second mates, and two more on the 23rd and 24th of the month; that the loading of the ship with her cargo was going on in the meantime, by the natives, who are usually employed for this purpose, the crew having at no time been subject to that labor, as it is customary to save them from exposure and fatigue by making use of the natives; that on the 27th and 28th of the month the three who were first sent to the hospital left it, and came on board the vessel, having been there two of them twelve and one thirteen days; that on the 27th the first and second mates left, having been seven days in the hospital; that on the 29th the two remaining hands left; and that on the 2d of October the vessel sailed.

The degree or intensity of the fever is left upon the evidence somewhat vague, as the hospital physician has no recollection on the subject, and the account given by the hands is contradictory. But the weight of it is, that the attack was not accompanied with any great acuteness or severity, as may also be inferred from the periods of confinement to the hospital. All the evidence agrees that the hands, though considerably debilitated by the sickness, and less capable of performing their duty, were anxious to go on board and man the ship for home, showing not only their willingness but their ability; and nearly all the witnesses agree, that the physician concurred in the opinion that they had better go on board, take charge of the ship, and leave the coast, and that, by taking care of themselves, they would, probably, be in a better condition than to remain longer; though the recollection of the physician himself is somewhat different, or rather there is an absence of recollection in this respect on his part, and he thinks it would have been more prudent if the cap-

tain had delayed the vessel a few days longer, to have enabled the crew to recover their strength. He does not say or intimate, however, that he expressed this opinion to the captain at the time.

This is substantially the state of facts, according to the evidence, in respect to the condition of the crew at the port of Gambia, and upon which the master was called to exercise his best judgment at the time of his departure on his homeward voyage; and, undoubtedly, were we to judge of the soundness or propriety of its exercise from the result, or from what actually happened afterwards to the crew, there could be no great difficulty in arriving at the conclusion that he had mistaken his duty. The crew were again taken down with the fever before the vessel reached Bona Vista, and that, with the sickness of the captain himself, occasioned the great detention at that place. But the question is, whether under the circumstances as stated, and as existed at Gambia at the time of his departure, the master was guilty of such a gross error in judgment and violation of duty, in leaving the coast as he did, without additional hands to man the ship, as should visit upon him all the consequences which subsequently happened from the return of the disease. I am compelled to say, after a very deliberate consideration of the case, that he was not; and that, laying out of view the recurrence of the sickness in the course of the voyage, which I think constitutes no part of the circumstances to be taken into account in passing upon the fitness and propriety of his conduct, the question is clear of any great difficulty.

The weight of the evidence of the hands themselves is, that they had recovered from their sickness, and were competent to man and sail the vessel, at the time of their departure, and the mate states, that they left with the advice and concurrence of the physician, who said he did not think they would be likely to have a relapse, and that if they got wet, they might have a chill, but nothing more, and that he settled with the physician, and asked his opinion at the time.

Very little weight can be given to the testimony of several gentlemen, experienced in the trade of the African coast, as it respects the effect of the fever upon the crew, and the propriety of the master's leaving the coast without additional hands. The opinion expressed must of course depend upon the extent and degree of the disease; and of that they knew nothing. The hands themselves are the best witnesses for this purpose; the physician has no recollection upon the subject; and taking the evidence of the crew, in respect to their own health and condition at the time, as controlling, I think the preponderance is decidedly with the claimants, and that the facts proved afford a justification of the master.

In the view thus taken of the case, it is important to enquire whether or not it was practicable to procure at the time additional hands at Gambia. It is conceded that there were no white seamen there; and it is, to say the least, a matter of great doubt, upon the evidence, if natives could have been obtained for a voyage to the United States at that season of the year. But, if the case turned upon this question, I should be inclined in favor of the libellants. There is no evidence that the master took any steps to procure an additional crew. He should, at least, have made the effort, and the failure to procure it would have been the best evidence of the impracticability.

Neither is it important to enquire whether proper measures were taken, in the course of the voyage, to beat the hides for the purpose of preventing the injurious effect of worms. There is no allegation in the libel of a breach of duty on the part of the master in this respect. The gravamen of the complaint is the unreasonable and improper detention of the vessel, attributable to his negligence and misconduct. The damage resulting from the injury to the hides is consequential. If the ground of the complaint falls, the consequential damages of course fall with it.

The voyage was an unfortunate one; but I am satisfied, upon the evidence, that it is to be attributed to the misfortune, rather than the fault of the master, and that it would be unjust to hold him responsible for the consequences. I must, therefore, reverse the decree below, with costs.

Case No. 5,324.

The GENTLEMAN.

[Olcott, 110.] [1]

District Court, S. D. New York. April, 1845.[2]

SHIPPING—DAMAGE TO PERISHABLE CARGO—SKILL AND COMPETENCY OF CREW—DELAYS—UNSEAWORTHINESS.

1. A ship is not answerable for damages to a perishable cargo occasioned by an unusually protracted voyage, unless the delay is owing to the fault of the master or owner.

2. That a voyage between particular ports is usually performed within a specified period of time, is not a circumstance which of itself imports culpable negligence, or want of skill, or competency in the crew of a vessel which occupies double that time in making it.

3. The fact that a cargo of raw hides, shipped in good order on the west coast of Africa the 2d of October, and transported to New-York in the hold of the vessel, unexposed to the atmosphere, arrived there the 18th of January following, injured by heat and worms, is competent evidence to prove the damage was caused by the long continuance of the voyage.

4. It is a breach of the warranty of seaworthiness for a vessel to leave her port of lading abroad, or any intermediate return port, with a crew inadequate to man or sail her.

5. The act is not justified if it be exceedingly difficult or even impossible to procure compe-

[1] [Reported by Edward R. Olcott, Esq.]

[2] [Reversed in Case No. 5,323.]

tent hands to man her. The obligation to supply a sufficient crew is absolute on the owner and master, and continues during the voyage.

[Cited in The Ethel, Case No. 4,540.]

6. An unusual procrastination of a voyage is not, in itself, evidence of incompetency in the crew to navigate the vessel, but it is admissible in corroboration of the opinion and judgment of witnesses that the crew was insufficient for the service.

7. The testimony of a crew to their own good health and bodily ability when they left port, is adequately rebutted by proof that they had been in the hospital sick with a malignant fever, and shortly after rejoining the ship had a relapse at sea, and became totally disabled to sail the vessel.

8. A cargo of raw hides is liable to speedy deterioration from worms and the confined heat of the vessel in a hot climate, but can be essentially protected from such injuries by being beaten or ventilated.

9. When a vessel so laden put into Cape de Verd Islands because of unseaworthiness, and was there detained thirty days for that cause, it was culpable negligence in the master not to use, during such detention, proper means for the preservation of her cargo.

[Cited in Speyer v. The Mary Belle Roberts, Case No. 13,240.]

10. When parties fix no time for the delivery of a cargo, the court will not adopt any supposed one as the proper time, nor, if the value of the cargo is found greater at such period than at that of its actual delivery, award the difference as damages to the shippers.

11. Quere, whether an action in rem will lie by shippers against a vessel to recover back an overpayment of freight made by them to the master.

This was an action in rem to recover damages for breach of a charter-party given in this port May 13, 1842, for one-half the vessel. The voyage agreed upon was "from the port of New-York to one or more ports on the west coast of Africa, and back to New-York direct, or via the Cape de Verd Islands." The vessel was to take out and bring back cargo, and be paid $400 per month for the voyage. The charter-party contained the usual stipulations that the owners should man and find the vessel, keep her in repair, &c. It is unnecessary, in considering the points in dispute in the cause, to detail minutely the course and incidents of the voyage. A succinct summary of facts will bring out all that is material to be stated. The libel makes numerous allegations, and the parties on both sides went into a wide range of proofs, neither of which are important to an understanding of the questions decided by the court. The vessel sailed from this port under this charter, June 13, 1842, with cargo belonging to the libellants on board, to be sold from the vessel. She touched at ports in the Cape de Verd Islands, where she disposed of part of her cargo. The remainder of it was sold on the coast of Africa, and she reached Gambia about the first week in September, ready to receive the home cargo. There was laden on board her, at that port, over 60,000 lbs. of hides, consigned to the libellants; and she made sail for this port with the cargo, October 2, 1842. She put into Buena Vista, in the Cape de Verd Islands, on the 13th of October, on account of sickness of the crew, and their insufficiency to navigate the vessel, and for no other necessity of the ship or voyage. She remained there, for the same reason, until November 18th, when she left for New-York, but stopped the 19th at St. Jago, to obtain more hands, where one hand was procured from a Portuguese vessel; and the consul put on board her three to be taken home. So manned, she departed again for New-York, and arrived off this port January 4th, but was blown off by stress of weather, obtained a pilot, and put into Newport for shelter, and did not get into New-York until January 18th. The hides shipped at Gambia were greatly deteriorated by long confinement on board in a close hold, and by worms and otherwise. It appears, from the evidence, that a few days after the arrival of the vessel at Gambia, the crew were taken sick with the coast fever, and between the 15th and 24th of the month, all the men and both mates were removed from the vessel to the hospital. They left the hospital, and returned on board the 27th, 28th and 29th of September. They were very importunate to get back to the vessel, and were permitted to return against the opinion and advice of the physician. They were exceedingly reduced and enfeebled by the effects of the fever and confinement. There is testimony that the physician was of opinion they would experience a relapse of the disease if they attempted to work the ship. In the judgment of other witnesses, they were wholly unfit for the service. But the men themselves testify they were able to do duty, and it was also in evidence that the physician said the men had better go on board, and leave the coast, and that by proper care of themselves they might be in a better condition than to continue at Gambia. The cargo was put on board by natives of the coast, the crew being in the hospital, and disabled by sickness from assisting. One or two of the men experienced a return of the fever soon after leaving the coast, and all the crew were again attacked with it at sea, and became so exhausted and feeble that they were incapable of continuing the voyage. The master being taken sick, also, the vessel put into Buena Vista, because of the unfitness of the crew for service, and for that cause alone. It was proved that raw hides shipped from the coast usually begin to suffer injury from worms and close stowage in thirty days after laden on board; but if opportunity is afforded for doing it, they may be, in a good measure, preserved from serious damage, by opening the hold, and exposing them to the atmosphere, or by beating them. It was in evidence that the master opened the hold in Buena Vista, and became aware of the perishing condition of the hides. It was also proved that forty days was a customary and reasonable period for a voyage from the west coast of Africa to this port, at that season of the year, and in vessels of that class.

John Anthon and W. Emerson, for libellants.
D. Lord, Jr., for claimant.

BETTS, District Judge. The libellants place their claim to damages in this action, substantially, upon two grounds: First, the procrastination of the voyage, by which the arrival of the vessel at her port of destination was retarded to the season notoriously sickly upon the coast, and beyond the proper period for shipping hides for this market, thereby exposing the crew and cargo to perils they would not have incurred had the run out been made within a reasonable time, and also delaying the arrival of the cargo in this port until the market for its sale had gone by; and, secondly, the taking of the cargo on board at Gambia, and leaving port with the vessel not in a seaworthy condition. In my opinion the first proposition does not, in the whole or any of its parts, rest upon a legal basis. It must be merely matter of hypothesis and conjecture whether the prolongation of a voyage is owing to the want of seamanship, diligence or judicious conduct in the officers or crew. So many natural causes control the event of voyages, that no law giving them proper directions can be deduced from experience, analogy or the intrinsic character of the employment. To render shipmasters or owners responsible for a matter in its nature so fortuitous, there must be connected with it some culpable act of omission or commission on their part. There has been no evidence produced in this case showing negligence or misconduct in the fitment or management of the vessel on her outward voyage, and it must, therefore, be regarded matter of chance whether the run was made in forty, or occupied seventy days, and was terminated at a healthy period best adapted to the business of the vessel, or extended to the known sickly season of the coast, and one most unfavorable to the objects of the voyage. The same observations apply to the passage of sixty days from Buena Vista to the port of discharge, with the consideration in favor of the last, that two men were lost at sea after leaving St. Jago. It is a common incident of navigation that vessels commencing voyages under circumstances equally favorable, in equipment and capacities of crew and vessels, at the same time vary in their despatch in proportion as large as the difference between forty days and the period of the outward or homeward run on this voyage; and in respect to the outward voyage in this case, there is no evidence of unusual delay with the vessel after reaching the Cape de Verd Islands, as she was then occupied in selling the cargo there and along the coast.

It appears to me that the libellants have established the responsibility of the ship for damages upon the other ground of complaint, both for the want of seaworthiness in the vessel, and culpable negligence of the master in keeping the cargo of hides confined below deck, whilst the vessel was lying at Buena Vista, from the 13th of October to the 18th of November, without ventilating or beating them, or using any precautions for preserving them from the perils of the climate, and those to which they were specially liable in their then condition. The owner was bound to keep his vessel seaworthy during the voyage, and it is a cardinal requisite to the fulfilment of the obligation, that she shall be furnished with an adequate number of persons of competent skill and ability to navigate her. Abb. Shipp. (Ed. 1829) 222; 3 Kent, Comm. 203–205, 287; Silva v. Low, 1 Johns. Cas. 184; M'Lanahan v. Universal Ins. Co., 1 Pet. [26 U. S.] 183; Taylor v. Lowell, 3 Mass. 331; Merchants' Ins. Co. v. Clapp, 11 Pick. 56. This responsibility does not apply to casualties occurring from sickness or accidents at sea which disable the crew; but it includes the condition of the ship when she leaves a foreign port, and especially her port of lading and departure with a home cargo, equally with that with which she enters upon the voyage. Putnam v. Wood, 3 Mass. 481; Kimball v. Tucker, 10 Mass. 192. The obligation is not discharged because it is found difficult or even impossible to procure a competent crew at the place. The ship assumes that risk abroad as well as at home. She would accordingly be chargeable to the same extent with a violation of her warranty, by sailing insufficiently manned homeward from a foreign port, as in entering upon a voyage at her home port, unseaworthy in that respect.

The evidence seems to me to leave no room for question that the vessel sailed from Gambia with a crew wholly inadequate to her safe navigation. The testimony of the men themselves, who manifest the most marked solicitude to prove their own good health and competency, leaves little room to doubt that they were at the time scarcely more than convalescing from the dangerous illness which they had endured, and were disqualified for undertaking the charge of the vessel at sea; and I consider it credibly proved, that the physician there gave the master to understand that as his opinion. The opinion of other witnesses that the crew were incompetent to man and sail the ship is corroborated by the immediate result of their undertaking to do it. Some of the men were taken down again with the fever four days after leaving Gambia river, and the whole crew went into Buena Vista, after being out thirteen days, sick and enfeebled to such a degree as to be unable to continue the voyage. The run from Gambia to the Cape de Verd Islands, with a crew sufficient to man and work her, would, it appears, ordinarily be made in three days. The ship was thirteen days in performing it, and although that fact, as before suggested, is not sufficient to charge the owners with dam-

ages alleged to be consequential to the delay and prolongation of the voyage, still it is a circumstance conducing to support the evidence to the incompetency of the crew to work the vessel at the time she sailed from Gambia. The ship having come into the Cape de Verd Islands from necessity, because of her unseaworthiness, the burden of proof is cast upon the owner to show that deficiency was removed when she departed, in continuation of her home voyage. In my opinion that fact is not satisfactorily established. It is quite evident, upon the proofs, that the whole thirty-three or thirty-four days detention at Buena Vista was required to restore the crew to a state fitting them to enter upon the voyage again, and that then they were inadequate to navigate the vessel alone. She stopped the next day at St. Jago to procure more hands, and the evidence no way clearly shows that the three consul's men, as they are called, obtained there, supplied the ship a competent crew for the voyage. Two months were consumed in getting her into this port, and six weeks in bringing her to the mouth of the harbor. But this additional retardation of the voyage is of less force as evidence of the insufficiency of the crew, because, in the course of it, two men were accidentally lost at sea; and the owner is not responsible for consequential damages arising from that event. In view of all the facts in evidence, however, I am of opinion that they establish a breach of the obligation of the owner to keep the ship seaworthy on her voyage. But I am not prepared to say he is, for that cause alone, chargeable with all the injuries sustained by the cargo. But I think the testimony fixes culpable negligence on the master in not taking proper measures at Buena Vista in ventilating the cargo at least, if not also having the hides beaten, to prevent the injurious action of the worms upon them. He was bound by law to take all possible care of the cargo during the course of the voyage (3 Kent, Comm. 213; Curt. Merch. Seam. 216; Abb. Shipp., Ed. 1829, 90, 132); and knowing his cargo was of a perishable nature, and had begun to deteriorate, it was incumbent on him to take proper precautions for its preservation, during the delay of the vessel at that port, especially as her detention was owing to his fault in failing to furnish her an adequate crew. It was suggested, on the argument, that the libel claimed no special damages because of a breach of the duty of the master in this respect. I do not remember that any exception was taken to the admission of evidence on that subject, and if it was, I am inclined to think the allegations of the libel are broad enough to comprehend all acts of non-feasance or misfeasance on the part of the master or owner in conducting the voyage, which tended directly to produce the injuries complained of. A portion of the hides received were damaged. That damage is at the risk of the shippers or underwriters, and is not to be regarded in this action. There is a difficulty in discriminating that damage clearly from the injuries caused by worms. But, in my judgment, the fair effect of the proofs is, that at least 25 per cent. of the loss is ascribable to the latter cause. I shall, accordingly, fix that as the rate of allowance to the libellants, and order a reference to ascertain the value upon which it is to be computed, disconnecting this injury from that by sea-damage.

The claim for compensation, because of the depressed state of the market when the hides were delivered, compared with its condition when it is supposed they ought to have arrived, rests upon inquiries and dates too speculative and vague to be made safely a ground for adjudging damages. No time was stipulated between the parties for the delivery of the cargo; and the period at which the market price is to be determined must, therefore, be fixed upon mere hypothesis and conjecture. A variation of a week or even a day as to the period to be the criterion of market value, might make most essential difference in the result. That demand is accordingly rejected. The libellants also claim a repayment of freight money alleged to have been overpaid to the vessel. This demand is not made a point of contestation in the pleadings, and it is at least doubtful whether, if clearly proved, such payment could be a lien upon the vessel, or that any remedy could be afforded the libellants in this action. I shall, therefore, reject that claim.

A decree will be entered for the libellants, and a reference be made to the clerk to compute the amount, upon the principles of this decision.

[Subsequently, on appeal to the circuit court, this decree was reversed. Case No. 5,323.]

Case No. 5,325.

In re GEORGE et al.

[1 Lowell, 409.] [1]

District Court, D. Massachusetts. 1869.

BANKRUPTCY—OBJECTIONS TO DISCHARGE—PREFERENCES—BOOKS OF ACCOUNT.

1. When objections are filed to the discharge of partners who are bankrupts, the trial may be joint, but the verdicts and decrees must be several.

[Cited in Re Holst, 11 Fed. 857.]

2. A preference is committed when a trader, knowing or suspecting that he is insolvent and must stop payment, pays or secures one creditor or a few creditors in full, thus giving him or them an intended advantage over the rest.

[Cited in Alderdice v. State Bank of Virginia, Case No. 154.]

3. The failure to keep proper books of account will prevent the discharge of both part-

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

ners, though the fault may be wholly that of one of them.

[Cited in Re Frey, 9 Fed. 384; Re Graves, 24 Fed. 554.]

[Cited in Re Howard, 59 Vt. 595, 10 Atl. 716.]

4. Any of the acts which are made misdemeanors by section 44 of the bankrupt law [of 1867 (14 Stat. 539)] may be set up and proved in opposition to the discharge of a bankrupt, though he has never been tried criminally for the misdemeanor.

[In bankruptcy. In the matter of J. H. George and G. G. Proctor.]

Issues of fact tried by jury on objections to the bankrupts' discharge.

F. J. Lippitt, for objecting creditors.

E. Avery & G. M. Hobbs, for bankrupts.

LOWELL, District Judge (charging jury). The bankrupt law has two prominent features. 1. That the property of insolvent persons should be distributed proportionally among all their creditors, with the exception of a few debts of a privileged character, such as taxes, and wages to a reasonable amount. 2. That a debtor who has behaved fairly by all his creditors should be forever discharged from his obligations. These bankrupts were partners in trade, and their case, therefore, passes through the bankrupt court as one case, much to the convenience of all persons interested; but when it arrives at this stage, it becomes, in reality, two cases, and you are to consider the petition of each partner for a discharge and the objections made to it, severally. Each bankrupt must stand or fall by his own acts; those of his co-partner, committed without his knowledge, will not affect him, excepting that a neglect to do what the law positively requires, such as keeping proper books, will affect both, though it should actually be the neglect of one only.

These bankrupts, having submitted themselves to examination, and having complied with all the forms of the law, apply now for their discharge. Any creditor who has a provable debt is entitled to oppose the application, and is bound to specify the grounds of his opposition. When these creditors, representing, as it appears, a considerable number, and in truth, necessarily representing all the creditors, have made such specific charges, issues of fact and law are thereby made, and the court has power—and I usually exercise it on the seasonable request of either party—to order the questions of fact to be tried by a jury. In such a trial the creditors stand like plaintiffs in an action, and are bound to make out the specific charges, or some one of them, by the preponderance of the evidence, a burden which is perhaps sufficiently compensated by the right to open and close the case. For convenience I shall call these creditors plaintiffs and the bankrupts defendants. You will therefore consider these specifications in their separate application to each defendant, and, by the consent of the parties, you will also make separate findings on the several specifications.

The charges numbered one and two—the third having been waived—relate to preferences said to have been given by the defendants to a pre-existing creditor. These charges do not, perhaps, contain any imputation of moral turpitude. It has been the usage in many well-ordered mercantile communities for persons in failing circumstances to pay such of their creditors in full as they chose to pay, and neither the common law nor any statute or rule in equity has forbidden it. In this commonwealth such conduct has been illegal ever since our insolvent law was passed in 1838 [Insolvent Laws Mass. p. 13, c. 163]; and it has come to be a part of our mercantile morality that such advantages should not be given to favored creditors; but the practice has been different in many other parts of the country. A preference is now made a statute fraud throughout the United States, and a fraudulent preference is a bar to the discharge of the debtor. A debtor gives a preference when, knowing, believing, or suspecting that he cannot pay all his creditors in full, he chooses to pay or secure one, and thus to give him an intended advantage over the rest. The first inquiry, then, is, whether the payments here alleged were made; if so, whether the defendants were insolvent at the time; and, lastly, whether they made the payments with the intent charged. If you find the knowledge of insolvency, and an expectation or fear of stopping payment, you must infer the intent, because every sane person is presumed to intend the well-known consequences of his acts, just as you infer, if a person passes a counterfeit coin as good, knowing it to be counterfeit, that he intended to defraud the person to whom he passed it. The intent with which an act is done is not, ordinarily, a matter of direct evidence, but of inference from the act and the surrounding circumstances. If you see a person eating, you infer that he is hungry; and so throughout the whole domain of human conduct. The plaintiffs argue to you that the actual insolvency of the defendants, at the dates of the payments charged, is clearly shown by their books of account. They say that there were, at that very time, considerable debts overdue, so that the defendants had in fact stopped payment a day or two before; and further, that the acts of the defendants, and the state of their affairs as shown by the schedule prepared by one of them two days after the last alleged preference, clearly prove not only the fact, but also their own knowledge of the state of their affairs; and you will recollect what was urged on the other side. One remark only is necessary on this point. It has been zealously insisted, on the one side, that the payments were made out of the usual course of business; that one of the debts was not due, and that the others were not called for,—being loans on call. All these matters of fact you will decide; but one argument seemed to as-

sume that a payment in the ordinary course of business could not be a preference; and the other, that one not so made must be a preference. Neither is absolutely true as a proposition of law. The fact may be, and no doubt usually is, very important in the view of the jury; but it is only as evidence of intent. Some payments might be preferences, though made in what seemed to be the ordinary course, and others might not be, though made out of it. It is a question of intent in each case. Under a part of section 35 of the statute, relating to certain frauds other than preferences, and not relied on in this case, the fact that a conveyance was made out of the ordinary course of business of the bankrupt is declared to be prima facie evidence of fraud. Even under that clause it would still be a question for the jury whether the intent of the conveyance was fraudulent. In this case all the circumstances are for the consideration of the jury on the question of intent.

The next two specifications are founded on section 44 of the statute, and for the purposes of the trial I rule that if the acts and intents therein alleged are proved, the defendants cannot be discharged, although the same acts are by the law made a misdemeanor, and these defendants have never been tried criminally for the misdemeanor. The fourth specification is that the defendants, being insolvent, did, under the false color and pretence of carrying on their trade, obtain certain goods on credit, with intent to defraud their creditors by selling the goods at once for cash, in order to raise funds for making certain preferences, being the same preferences before set forth; and the fifth is, that they disposed of, otherwise than by bona fide transactions in the ordinary way of their trade, certain goods which they had bought on credit, &c. The goods are fully described in each case, and both frauds are said to have been committed within three months before the petition in bankruptcy was filed. No objection was taken that these specifications do not allege the acts to have been done in contemplation of bankruptcy, which I am inclined to think is a necessary allegation, because congress has no criminal jurisdiction of acts or dealings between debtor and creditor, generally speaking, but only as relating to some matter like bankruptcy, or a patent-right, &c., which is put under their control by the constitution. As this point was not taken, and as the defect might be readily amended, you will consider these specifications on their merits. Under the fourth, it must be proved that some false statement of the kind alleged was made, either by word or act; and under the fifth, that the sales were made out of the ordinary course of the trade of the defendants, besides the other facts of preference necessary to be shown under the first and second specifications, and which are alleged in the fourth and fifth as part of the intent.

The sixth and last specification must be decided for or against both defendants alike, because the fact and not the intent, is the essential thing. The allegation is that the defendants did not keep proper books of account. This is a most important part of the law, because it is that which is intended to provide the assignee representing the creditors with the means of tracing out all the dealings of the debtors, to ascertain what has become of their property, what are the causes of their failure, and whether they have dealt fairly and equally with their creditors. However harshly the law may sometimes operate with some small traders, whose affairs seem hardly worthy of the trouble of recording them, it is a most reasonable and salutary rule in its application to merchants dealing with large sums and contracting large debts, and in a position to know and to be able to carry out the law. It is a question of fact whether the books are such as will give to a competent person examining them knowledge of the true state of the merchant's affairs. There is no positive rule of law requiring the entries to be made daily (though they ought to be at or near the time of the transactions), or the balances to be made at any fixed periods, or the books to be kept in any particular mode. The question is addressed to the good sense and knowledge of the jury, aided by such explanations as may be offered by experts or other competent witnesses, whether the books before them are sufficient and properly kept. You will recall the particulars in which the plaintiffs say these books are deficient, and the evidence and arguments upon these points on either side, and I need not repeat them. If the books were imperfectly or improperly kept in any of these particulars, both bankrupts must lose their discharge, because it is a condition annexed by congress to such a discharge in the case of merchants that their books shall have been properly kept, subsequently to the passage of this act, and no excuse however true, and no innocence of intention will avail to supply the deficiency.

The jury found both bankrupts guilty of charges 1, 2, and 6, and not guilty of the others. Discharge refused.

[See Case No. 5,326.]

Case No. 5,326.

In re GEORGE et al.

[1 Lowell, 494.] [1]

District Court, D. Massachusetts. 1870.

BANKRUPTCY—COSTS.

1. The court will not usually award costs to the prevailing party on the issue of the bankrupt's discharge.

2. Semble, if the objections were frivolous or vexatious, or if, on the other hand, the bankrupt were shown to have the means of paying costs, a different order might be taken in this respect.

[Cited in Re Holgate, Case No. 6,601.]

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

[In bankruptcy. In the matter of J. H. George and G. G. Proctor.]

F. J. Lippitt, for creditors.
E. Avery, for bankrupts.

LOWELL, District Judge. Certain creditors objected to the discharge of these bankrupts, and the questions of fact arising thereon were submitted to a jury, who found some of the specifications to be true. [Case No. 5,325]. The creditors now move for costs. I have not found any reference in the statute or the general orders to the costs of either party in what is often the vital and most closely contested issue in the cause, unless it be in section 28, where it is provided that all the costs of suits and the several proceedings in bankruptcy shall be a first lien on the assets. The costs here mentioned include all the usual and proper fees, whether in the ordinary conduct of the proceedings, or in suits which the assignee has properly brought or defended in the administration of his trust. But I have not held them to cover the costs of opposing the debtor's discharge, for this reason: The statute makes it no part of the assignee's duty or right to oppose the discharge of the bankrupt, but carefully regulates that matter as being one between such creditors as choose to act in the premises, and the debtor himself. The assignee cannot interfere unless he happens to be a creditor, and then only as creditor. It would seem, therefore, that for some reason, congress thought best to treat this question as one of private rather than general concern. Perhaps it was thought that some creditors might choose to give the bankrupt his certificate, notwithstanding any conduct by which he might have forfeited the right to it, and that they ought not to be charged with the expenses of an opposition which they do not wish to make. This view is quite consistent with that part of the law which gives any one or more of the creditors the right to oppose the discharge for cause, although a majority in number and value may have assented to its being granted. If, then, this is a sort of private suit between the debtors and those creditors who choose to object, should the prevailing party recover costs? I have found no statute of the United States which gives an absolute right to costs in a case of this kind; and I take it to be clear that the district court, sitting in bankruptcy, has the discretion, like other courts of equitable jurisdiction, to give or withhold costs, in whole or in part, as it may deem just, in all proceedings not specially regulated by statute. Such appears to have been the practice under the statute of 1841 [5 Stat. 440]. In re Guild [Case No. 5,860]. Under the act of 1867 [14 Stat. 517], I have seen reports of cases in which the objections appear to have been overruled with costs, but I recall no case in which the point has been at all discussed, or in which costs have been given against the bankrupt. It seems to me that a sound judicial discretion prescribes that costs should not, in general, be given in these cases. The bankrupt is presumed to be poor, and in most cases would probably be unable to pay costs; and, on the other hand, as there ought to be mutuality in these things, I should not usually give costs against the objecting creditors. The exceptions, perhaps, should be where, on the one side, frivolous, unfounded, or clearly insufficient objections were made, which might justly be deemed vexatious; or, on the other, where the debtor appeared to be clearly in the wrong, and to have the means to pay the charge. Applying these rules to the present case we find that the specifications which were sustained by the jury are those which charge a preference to one creditor, and a failure to keep proper books of account. There was nothing to show actual fraud or concealment of property, and no reason to suppose that the defendants could now respond to the execution. Under these circumstances the creditors must be content with holding the original debt and interest good against the debtors. It will not be difficult for creditors to combine in such way that the expense to each will be comparatively slight. The greater hardship is when an honest debtor entitled to his certificate is opposed by his creditors. But even in that case I should not feel at liberty to vary the rule, excepting in such instances as I have suggested. He must come prepared to prove his right to relief, and to meet any objection that may be made in good faith and with probable cause. The contest would be too unequal if the parties were not to stand on a like footing in this respect. This case does not necessarily involve the point whether, under any circumstances, the costs, or any part of them, might, in the discretion of the court, be allowed out of the fund, though not within section 28; because here the fund is said to be insufficient. Motion denied.

GEORGE, In re. See Case No. 14,169.

Case No. 5,327.

The GEORGE.

[2 Gall. 249.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1814.[2]

PRIZE—COLLUSIVE CAPTURE — DELIVERY ON BAIL. —FURTHER PROOF.

1. A case of collusive capture. Regularly no delivery on bail of prize property ought to be made, either to the captors or the claimant, until after a hearing of the cause. In most cases a sale is preferable to an appraisement, when the value is to be ascertained for the purpose of a delivery on bail.

[See The Bothnea, Case No. 1,686.]

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[1] [Reported by John Gallison, Esq.]

[2] [Affirmed in 2 Wheat. (15 U. S.) 278.]

2. Under what circumstances further proof is admissible in cases of an asserted collusive capture. Further proof in prize causes is never admitted by way of oral testimony; but always by written evidence and depositions.

See The Bothnea [Case No. 1,686], and The Betsy [Id. 1,364].

In admiralty. This was a prize cause brought by appeal from the district court of Maine.

Dexter & Kinsman, for captors.

G. Blake and Mr. Preble, for the United States.

STORY, Circuit Justice. The schooner George, of the burthen of one hundred and thirteen tons, with her cargo, was captured, on or about the 13th day of January, 1814, by the private armed schooner Fly, of Portland, owned by Henry L. Dekoven, master, and William S. Sebor, lieutenant of the same vessel. The privateer is described in her commission as of the tonnage of thirty-nine tons and twenty-eight ninety-fifths, mounting four swivels and one carriage gun, and navigated by twenty men. In point of fact, there were only fifteen persons composing the crew, including the master and lieutenant, and prize master, who were the only officers on board; and the whole crew were hired on wages, and were to have no share whatsoever of prizes. At the time of the capture, the George was lying at anchor in Long Island harbor, in the island of Grand Manan, a British possession in Passamaquoddy Bay, ostensibly bound to Havanna, in the island of Cuba. The cargo on board, with the exception of thirteen hogsheads of fish, and three hundred boxes of herrings, consisted entirely of British manufactures of great value, and ostensibly owned by British subjects resident in the British dominions. The George was in fact navigated by five persons, according to the allegation in her certificate of clearance and list of men, viz. by a master, a mate, two seamen and a cook, and the three last were of different nations, one a Portuguese, one a Greek, and one a Spaniard. There was also on board a supercargo. Immediately upon the capture, which was made without the slightest resistance, the whole crew, except the master, were sent on shore, and the prize was brought into the port of Ellsworth, where she was seized by the collector. It seems, that the cargo of the George was originally brought from Halifax to St. Johns, and that from the latter place the vessel sailed, on or about the 8th day of January, 1814, having on board convoy instructions to rendezvous at Etang harbor, whence she was to sail on her voyage. It is worthy, however, of remark, as it connects itself with the last deposition of O. Thomas, that the place of rendezvous in the original convoy instructions is written "Halifax," which is erased, and "Etang Harbor" substituted. It is also worthy of remark, that the same privateer, but a few days before, captured a valuable vessel bound ostensibly from St. Andrews to Halifax. A prize allegation was filed in the district court of Maine by the master of the Fly, and upon the return of the usual monition, the United States intervened, and claimed condemnation of the George and cargo, upon the ground, that the capture was collusive, and a fraud upon the laws of the United States. Upon this claim the district court admitted the parties to further proof, and that having come in, after a full hearing, the vessel and cargo were condemned to the United States. From this decree the captors have appealed to this court, and the cause has here been elaborately argued.

Before I proceed to the consideration of the principal questions in this case, I shall take occasion to examine some collateral points, to which our attention has been directed, and which, with a view of settling the practice in prize causes, are very proper for judicial deliberation. And it is a source of painful consideration, that notwithstanding the many instances, in which this court has had occasion to express its disapprobation of the indiscriminate delivery of prize property on bail, contrary to the regular course of prize courts, to whomsoever shall choose to make himself a claimant, however weak, or fraudulent, or illegal, his title may be, that practice still continues. In the present case, after the United States had seized the property, and interposed a claim, on the ground of fraud, and before a hearing of that claim, a delivery on bail of the whole prize property was allowed to the captors after an appraisement. It is notorious, that such appraisements, when made with good faith, are extremely unsatisfactory; and in many instances it is equally notorious, that in appraisements the grossest impositions have been practiced upon the court. Why, in all cases of prize property, a sale, instead of a delivery on bail, should not be made, pending the prize proceedings, where the goods are really destined for sale in this country, it is not easy to answer. It would at least have this good effect, that it would at once suppress fraudulent claims by taking away the temptation to iniquitous practices, and it would repel from the public tribunals much of that reproach, which has been undeservedly cast upon them. In making these remarks, I wish to be understood, as not meaning to convey the slightest imputation upon the venerable judge of the district court of Maine. The evils are not attributable to himself; but to those irregularities of practice, as well in respect to delivery on bail, as other incidental proceedings, which have so much embarrassed the appellate court in revising the decisions from the district of Maine. The principal point, however, which has called for the attention of the court, is the practice, which is to govern in this novel proceeding on the part of the United States. There can be no doubt, that the United States

may well intervene in prize causes to secure and enforce their rights, whether growing out of the breach of municipal regulations, or of the laws of war. In the present case, such an intervention was peculiarly fit, for without doubt the property either belonged to the enemy, or to American citizens, who in this transaction must be deemed enemies. The question then occurs, whether the United States or the captors are entitled to introduce further proof, to sustain their relative rights, after all questions as to the character of the property itself have been settled. As to the United States, if they choose to rest their claim upon the facts apparent upon the record growing out of the prize proceedings, there is no reason in general for the admission of further proof. But if the fraud of the captors, or of the captured, is to be made out by evidence aliunde, it seems to me not only competent, but the indispensable duty of the court, to direct such further proof, and to issue commissions for this purpose. And where such further proof is admissible, it should in general be open to both parties, and always be by depositions and written evidence. Mere oral testimony is inadmissible in prize proceedings. There are exceptions, however, to the admission of further proof on behalf of the asserted captors; for if they have acted with gross ill faith, or gross negligence, the attendant of fraud, the court ought not to trust those with an order for further proof, who have thus shown that they mean to abuse it. This rule will be a salutary check upon captors, and will materially subserve the public interests, by suppressing fraudulent connivances, destructive of public morals. The admission of the further proof in the district court of Maine was, therefore, regular and proper; although it is to be regretted, that it was not taken by commission under an order distinctly allowed for this purpose.

Let us now proceed to the merits of the controversy as between the United States and the captors, for there is no claim on behalf of the captured. And here, at the very threshhold of the cause, the court are called upon by the counsel for the captors, with an eloquence, to which it is impossible to yield too high a homage, to disentangle themselves from all prejudices and suspicions, and to believe the whole transaction a fair one, until it is proved otherwise by plenary evidence of fraud. We are emphatically reminded of the danger of trusting to appearances, as the guide of judgment, and of the extreme indiscretion of hazarding conjectures, which mislead the more as ingenuity or confidence of mind induce us to indulge them. For myself, I receive the admonition with real pleasure, and have no inclination to undervalue its real force. For persons of exalted genius and authoritative learning, it may not be unfit to adopt the boldest pursuits on the ocean of conjecture. I pretend not to the rashness, or the ambition, to hold so perilous a course. My humbler mind is content with humbler views, with judgments formed by patient inquiries, aided by the lights of authority and precedent. I content myself with plying the shore, as a more suitable task for those, who hope, by cautious diligence, to arrive at a port of safety. To drop figurative language, I may be permitted to say, that the duties of a judicial office require a constant and patient examination of evidence, which is not only sometimes irreconcilable, but often comes under circumstances, which make the task unwelcome and embarrassing. To allow ourselves to be carried away by slight suspicions, or doubts, would be to surrender our judgments, and to inflict upon suitors all the punishments attending upon the popular delusion, as to the uncertainty of the law. But, when we are called upon to weigh probabilities, to detect impositions, and unweave the web which fraud and ingenuity, in this age of contrivance, industriously spread to ensnare and to deceive us, it would be the most extravagant of errors, to shut our eyes against what is passing in the world, and would betray a visionary attachment to ideal virtue, wholly inconsistent with the sad lessons, which experience daily points out and verifies by example. A course of this nature would be a complete sacrifice of judicial functions, and, under the mockery of law, would surrender the rights of all honest men in the community. If indeed the doctrine which I now assert, need support, it will be found recognized by Sir W. Scott in The Rosalie and Betty, 2 C. Rob. Adm. 343. "In considering this case," says that able judge, "I am told that I am to set off without any prejudice against the parties from any thing, that may have appeared in former cases; that I am not to consider former circumstances, but to suppose every case a true one till the fraud is actually apparent. This is undoubtedly the duty, in a general sense, of all who are in a judicial situation; but, at the same time, they are not to shut their eyes to what is generally passing in the world; to that obvious system of covering the property of the enemy, which, as the war advances, grows notoriously more artificial; higher prices are given for this secret and dishonorable service, and greater frauds become necessary; old modes are exploded, as fast as they are found ineffectual, and new expedients are devised to protect the unsound parts better from the view of the court. Not to know these facts, as matters of frequent and not unfamiliar occurrence, would be not to know the general nature of the subject, upon which the court is to decide; not to consider them at all would not be to do justice."

On a general survey of the case now before the court, it cannot but be conceded, that it bears a considerable resemblance to that class of cases of collusive captures, which, though not new, are yet very unwelcome guests to the court. The proximity of the

district of Maine to the British territories, the numerous ports with which it is indented, and the consequent facility of communication, afford the strongest temptations to illicit traffic, whenever the prices of British manufactures are so high in the United States as to excite the cupidity of speculating and unprincipled men. The extravagant prices of British manufactures since the war have quickened this avaricious spirit, and the records of this and of the district courts pronounce how extensive have been the combinations of the enemy and of some of our own citizens, to encourage and to protect this illegitimate commerce. Circumstances of this nature, though they may not justly awaken suspicions, are not likely to lull those, which have once been fairly excited. Taken in connexion with these circumstances, the case before the court may be considered in two views, viz. upon the intrinsic evidence, and upon the positive testimony, of collusion, which it presents. I will, in the first place, advert to that view, which is apparent upon the transaction taken per se. And here it cannot be denied, that some of the circumstances, relied on by the United States, afford a very slight, if any, inference of fraud. In truth, they are just such, as might accompany an innocent transaction, though they might not be strangers to a premeditated imposition. It is hardly possible, in this age of refinement in fraud, that any transaction should wear that character upon its forehead. It would be unnatural and absurd, that every disguise should be thrown off, and an invitation given to the public to sift and detect the purposed mischief. No men in their senses, however bold or thoughtless, would fail to throw over their dishonorable projects, the grace and ease and simplicity of truth. On the other hand, a care, sedulously exercised, to repel every possible imputation of illegality, would give too artificial and studied an effect, to escape public notice. The systematic arrangement would betray its origin.

Apart, then, from these general circumstances, let us consider the conduct of the privateer and of the prize. In the first place, the armament, size and ownership, of the privateer, considering the advanced state of the war, and the diligence and force of the British navy on our coast, were not of such a nature as decisively to engage the assent of the mind in favor of the apparent intention of the parties. But connected with the extraordinary mode of hiring the crew, it is difficult to resist the impression, that something more was meant, than the ordinary employment of a cruise. This is the first instance, which has ever come before me, in which seamen have been hired on board of a privateer at monthly wages, and with an express release of all claims to the prizes captured during the cruise. The impolicy of such a stipulation is so obvious, that it seems hardly credible, that in any bona fide transaction it should find a place. It has a direct and immediate tendency to discourage all gallantry and enterprise, to sever the interests of the crew from that of the owners, and to afford temptations to plunderage and embezzlement of prizes. Men will not readily be induced to hazard their lives, where neither honor nor interest is at stake; much less will they guard with anxiety and vigilance, or defend with bravery and firmness, property, in which they have no hope of profit. I will venture to appeal to the knowledge of my learned brother in the district court, and of every gentleman of the bar, when I assert, that in the great number of prizes, which have been adjudicated in our courts since the war, not a solitary case can be found, where such a very extraordinary stipulation has existed. On the other hand, it is notorious, that high bounties, besides a full share of prize money, have been very frequently given, to induce seamen to engage in the service. So difficult has it been to secure adequate crews under all the allurements, which the enemy's commerce has afforded. And what is the inducement held forth in the present shipping articles for a release by the crew of their shares in prizes? The wages of twenty dollars per month, which the shipping articles denominate extraordinary wages. Now I will venture to appeal to the experience of all persons conversant with this business, that bounties as high as this have often been given or advanced; and that, as wages, the sum does not much, if at all, exceed the ordinary rate of hire, which has been given since the war for private services. There is but one way of solving the difficulty, which such a stipulation presents; and that is, that the voyage was intended for fraudulent purposes, and the captures were to be collusive. The service was contemplated to be short, and the wages were to be easily earned by a traffic without honor and without peril.

The conduct and equipment of the captured vessel were not less singular. She was loaded with a very valuable cargo of merchandise, all of which, with the exception of an insignificant quantity of fish and herring, which might have been thrown in by way of cover, was peculiarly fitted for the market of the United States. I will not say, that the cargo was not adapted for the Havanna market. In general, it probably was, for it is inconceivable that the parties, if they intended a fraud, should forget to make the destination at least plausible. It is sufficient for my purpose, that all the British manufactures were of a sort, which bore the highest price, and were most in demand in the United States. On the other hand, the cargo, however well adapted for sale in the Havanna, could not there, from the freedom of intercourse and the facility of trade, bear prices at all proportionate. And it is not a little extraordinary, that an

indirect trade through the British provinces should, with the accumulation of double freights and expenses, be carried on, when the direct trade from Great Britain was open to the enterprises of her merchants. The crew of the George were also wholly inadequate for such a voyage in the winter season. Two seamen and a cook, who were foreigners, composed the crew for ordinary duty; and it is inconceivable that so valuable a cargo should have been intrusted with so small a crew for any thing more, than a mere coasting voyage. And why should foreigners be selected? It is said that British seamen were scarce and liable to be impressed. But, however true this may be in the mother country, no one can doubt, that the provinces afford large numbers of seamen. The other equipments of the vessel for the voyage I do not think it necessary minutely to consider; though I must confess, that the testimony strongly impresses me with the belief, that they were not sufficient for the ostensible voyage. The vessel also had convoy instructions, and orders to rendezvous, as it is affirmed, at Etang harbor, so as to sail under the protection of convoy. Putting out of sight all question whether Halifax was not the real station for convoy, which I incline to believe, why was not the George at Etang harbor, conformably to her orders? She sailed, as it is apparent from her log-book and from the testimony in the case, with a wind fair for that port, and yet, so far from placing herself under the protection of convoy there, she voluntarily sought an open harbor in an exposed island, incapable of defence against any hostile attack, and obvious to every hostile cruiser. This extraordinary conduct is not attempted to be accounted for, and is indeed incapable of any rational explanation. It was certainly the height of madness, if the property and destination were bona fide; and I cannot but think, that there was too much method in this madness, to warrant a supposition of innocent delusion. And for what purpose was the George lying in Long Island harbor for several days? Nothing appears to justify it. The circumstances also of the capture are not a little singular. The privateer, it seems, had due notice of its destined prey while lying in an American port, and immediately sailed to obtain it, without even the benefit of an accurate pilot. The George was captured without the slightest resistance, while lying at anchor; and immediately her whole crew, except the captain, were sent on shore, and the prize manned for an American port. Now I would ask, why should the supercargo and the crew have been dismissed, to give the alarm, and increase the chance of a recapture. Why, so near an American port, should the captors have voluntarily relinquished the statutable bounty for every prisoner of war? Why should not the supercargo have been brought in, to answer on the standing interrogatories? Without pretending to answer these questions, I must say, that if the capture were collusive, there would be nothing extraordinary in these occurrences. As to the papers found on board, there is nothing in them, which is decisive either way. Nothing is more easy, than the fabrication of papers; and these are as merely formal, as any that could be devised. It is notorious upon the records of our courts, that as illicit trade has become more inviting, places have changed their names; Halifax has become St. Bartholomews; and I know not why, in a given case, by a like metamorphosis, Havanna may not have become a port in the district of Maine. These are some of the intrinsic circumstances of this transaction, which carry to my mind a pregnant presumption of collusion. They may, perhaps, have occurred in a bona fide voyage; but so rare would be the chance, and so extraordinary the coincidence, that the most sober judgment would pause, before it would incline to admit the probability.

If we turn to the positive testimony in the case, every doubt of innocence must be strengthened, and every presumption of guilt inflamed. Much of the apparent difficulty in weighing the testimony will be avoided by taking all the depositions in a chronological order, and comparing the successive depositions of the same persons together. It is said, that the testimony of some of the witnesses, as to the confessions of the Messrs. Merrits, is incredible. I profess not to feel the force of this objection. I can perceive no reason, why persons engaged in smuggling, in the tide of success, and under circumstances of almost thoroughly imagined security, from past experience, as well as present hopes, should not, among persons of their own vocation, recount their success, or avow their intentions, with all the self-complacency of regular adventurers. So far as the testimony is impeached by credible witnesses, it undoubtedly abates its force; but after every reasonable deduction on this head, I am still of opinion, that the weight is in favor of its verity. But setting all the rest aside, the testimony of James Crocker, who stands wholly unimpeached and has no interest, would be decisive as to the collusion. It is difficult to read his statements, and not to yield to the conclusion, that the capture was collusive. On the whole, I am for affirming the decree of the district court. As this opinion is concurred in by the district judge, let the decree be affirmed.

Upon an appeal to the supreme court, further proof was directed [1 Wheat. (14 U. S.) 408], and upon its coming in, the court, after full argument, affirmed the decree (2 Wheat. [15 U. S.] 278).

Case No. 5,328.

The GEORGE.

[1 Mason, 24.] [1]

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

PRIZE—JUSTIFICATION FOR CAPTURE — FALSE AND SIMULATED PAPERS—GOOD FAITH OF CAPTORS.

1. Probable cause is a sufficient justification for a capture. But such protection may be forfeited by subsequent misconduct or negligence. What constitutes probable cause.

[Cited in The La Manche, Case No. 8,004; Averill v. Smith, 17 Wall. (84 U. S.) 92.]

2. Effect of false and simulated papers.

3. Captors are bound to good faith and ordinary diligence; and are therefore liable for ordinary negligence.

4. To constitute probable cause for capture, it is not necessary that there should be prima facie evidence to condemn. It is sufficient if there be circumstances, which warrant a reasonable suspicion of illegal conduct.

[Cited in Brissac v. Lawrence, Case No. 1,888; Gala Plaid, Id. 5,183; The La Manche, Id. 8,004; The Isabel Thompson v. U. S., 3 Wall. (70 U. S.) 162.]

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

This was a case of an American ship, captured by an American cruiser, and afterwards recaptured by the British, and condemned in their courts. The owners proceeded against the captors for restitution in damages, alleging the capture to be illegal, and that the captors, by sundry irregularities, had forfeited the protection otherwise indulged them by the law.

Mr. Prescott and A. Townsend, for libellants.

Sprague & Pitman, for captors.

Mr. Townsend cited 2 Valin, Comm. 270; Azuni, c. 3, art. 4, §§ 2, 4, 5, note 193; Bynk. per Dupon. 3; Purviance v. Angus, 1 Dall. [1 U. S.] 184; Maley v. Shattuck, 3 Cranch [7 U. S.] 458–488; 1 C. Rob. Adm. 95; 3 C. Rob. Adm. 129; 6 C. Rob. Adm. 316. For the captors were cited The Maria, 4 C. Rob. Adm. 348, 350; The Anna Catharina, Id. 110, 111; The Lively [Case No. 8,403].

STORY, Circuit Justice. This is a libel for damages for an alleged illegal capture of the brig George and cargo by the private armed ship Orlando, Babson commander. The brig was captured on the 9th of February, 1815, about the latitude 39° or 39° 30″ N., and longitude 69° 30″ or 70° W., and ordered to the United States for adjudication; and afterwards, on the 16th of the same month, was recaptured by the British, and carried into Halifax, and there, together with her cargo, condemned as lawful prize. The cargo on board, at the time of the capture, consisted of cotton, rice, molasses, tar, and reeds; and the brig purported to be on a voyage from Georgetown (S. C.) to New Bedford, (Mass.) The testimony in the cause as to the conduct of the captors, as well at the time of the capture as afterwards, is very voluminous, and it is not necessary to be minutely stated. There is no controversy, that the brig and cargo were owned by the libellants, who are American citizens.

The principal questions made at the argument are: 1. Whether there was probable cause for the capture. 2. If there was, whether the protection was not forfeited by the subsequent misconduct and negligence of the captors in the navigation of the prize.

Before I proceed to the consideration of these questions, it may be proper to dispose of a preliminary objection taken to the conduct of the captors at the moment of capture. It is admitted, that a belligerent has a right to search every vessel found upon the high seas, in order to ascertain her national character and conduct; but in respect to neutrals, the search is to be conducted with as little trouble and vexation as possible. In the present case, the commander of the Orlando fired a shot in the first instance, to compel the George to round to; and ordered the master [Almy] to bring his papers on board the privateer for examination. In strictness of law it may perhaps be true, that belligerents have no right to compel neutrals to bring their papers on board of the searching ship; and that the search is to be made by the belligerent on board of the neutral; and all that the latter is obliged to do, is to act frankly and fairly in the disclosure of his papers and voyage, and to offer no resistance to a complete and thorough examination of his vessel and cargo. It may, therefore, be an irregularity to compel a neutral, under the terror of superior force, to leave his own ship, and submit to examination and search elsewhere. And perhaps, if not strictly required by the law of nations, it would comport best with the common rules of courtesy and amity between nations, not to fire a shot, until the vessel had been, by some previous signal, required to heave to, and had refused. Assuming, however, these principles to be correct, (in respect to which I do not decide,) still these are, after all, but irregularities in the exercise of a known right, and so common, and I had almost said universal, in practice, that the correct principle, if it exist, as stated, seems almost wholly lost sight of. And I do not know, that any penalty has ever been attached to such irregularities; although, perhaps, in a case of gross irregularity, attended with immediate and serious injury and damage to the parties, it might not be unfit to entertain a claim for remuneration before the proper prize tribunal.

To return to the principal questions; it is asserted by the counsel for the libellants, that to constitute a probable cause of capture, the circumstances of the case must be such, as prima facie, and standing alone,

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

would furnish a good ground of condemnation; or that, if this be not correct, the most indulgent rule is, that it should be a case of such doubt, as to call for farther proof at the least; and that, if a court of prize would restore without farther proof, it would be conclusive evidence of a defect of probable cause. In support of these positions, the cases of Murray v. The Charming Betsy, 2 Cranch [6 U. S.] 64, and Maley v. Shattuck, 3 Cranch [7 U. S.] 458, have been relied on as authorities. Upon a careful examination, these cases will not be found to warrant any such positions. Nor have I been able to find such a doctrine asserted in any elementary work or prize report. There can be no doubt, that where there is prima facie evidence to condemn, or so much question and difficulty, as to require farther proof, the captors are completely justified. But that these are the only tests of a probable cause for the capture, I am by no means prepared to admit. In Locke v. U. S., 7 Cranch [11 U. S.] 339, the supreme court held, that the terms "probable cause," according to their usual acceptation, meant less than evidence, which would justify condemnation, and in all cases of seizure, have a fixed and well known meaning; that they import a seizure made under circumstances, which warrant suspicion. In my judgment, the terms must receive the same exposition in reference to matters of prize. If, therefore, there be a reasonable suspicion of illegal traffic, or a reasonable doubt as to the proprietary interest, the national character, or the legality of the conduct, of the parties, it is proper to submit the cause for adjudication before the proper prize tribunal; and the captors will be justified, although the court should acquit without the formality of ordering farther proof. The St. Antonius, 1 Act. 113.

The circumstances relied on by the captors, to justify their conduct in the present case, are, 1. that the vessel had no log-book on board; 2. that an artificial leak was then in operation, to deceive the captors; 3. that a British license was found on board in possession of one of the charterers, which was not produced until a personal search was made on him; 4. that there were a simulated register, sea-letter and log-book, and false shipping articles on board, pointing altogether to a fictitious foreign voyage; 5. that the brig was out of her proper course for the port of New Bedford. The absence of a log-book is certainly an unusual occurrence, even in coasting voyages, in this part of the country. But it is now shown by the evidence in the case, not to be unusual in coasting voyages from New Bedford. It is an important document, and the only one, which to a visiting cruiser can truly show the nature and course of the voyage, and explain any apparent deviation from the asserted destination. However, therefore, it might be in time of peace, a prudent master would hardly choose in time of war to hazard any thing by the want of such a customary document. There was, moreover, a false log-book on board, purporting to have been kept on a foreign voyage, immediately connected with or preceding the present. This circumstance was calculated to increase the suspicion excited by the absence of a genuine log-book. However, on this circumstance alone, no great stress has been laid.

The British license was signed by Lord Sidmouth, dated on the 12th of September, 1812, and to remain in force during nine months. It authorized any vessel, not French, to import into the port of Cadiz, from any port of the United States, a cargo of grain, flour, meal, or rice, notwithstanding the vessel and cargo might belong to a citizen of the United States, and permitted the master to receive his freight, and return with his vessel and crew to any port not blockaded. Upon this license was the following indorsement: "The brig George of New Bedford, burthen one hundred and seventy-two tons, Jacob Almy master, has cleared at New York for Cadiz, with a cargo of corn and flour, this seventh day of May, 1813." The simulated sea-letter, the seal of which was in fact genuine, and the shipping articles, purported to be for the same voyage. Upon the same shipping articles there was a memorandum, dated the 13th of September, 1813, at Lisbon, and purporting that the George had arrived there in distress on her voyage from Cadiz to New Bedford, and had been condemned as unseaworthy, and that her crew had been upon that account discharged there, and this memorandum purported to be signed by the American vice consul. There was another memorandum on the same paper, which was actually signed by the crew on board of the George at the time of the capture, agreeing "to go from the port of Lisbon to Amelia island, there to be discharged," and the spurious log-book applied to this latter voyage, beginning the 6th of October, and ending the 18th of November, of 1814. There is some contrariety of evidence as to there having been a simulated register on board, though a considerable weight of testimony is in favor of the allegation. In my view of the case, it is quite immaterial, whichever way this fact is settled. There was on board, a genuine enrolment of the George for the coasting trade, granted at New Bedford, in February, 1812; and a license pursuant thereto for one year from the 11th of November, 1814; and also a manifest and clearance of the vessel and cargo at Georgetown (S. C.), in January, 1815, and sundry letters respecting the shipments. Here, then, there were false and genuine papers, mixed up together; and the question is, whether the captors were bound, at their peril, to unravel the fraud, and to trust to the explanation of the parties on

board, or had a right to submit the whole to the scrutiny and decision of a prize tribunal.

As the George was licensed for the coasting trade, it was illegal for her to engage in any foreign voyage or trade whatsoever, under the penalty of confiscation of vessel and cargo. And, if the fact of such illegal traffic were clearly established, it would not only have justified the capture, but, upon principles well settled, would have drawn after it a condemnation of vessel and cargo in the prize court. It is a well known rule, that though municipal forfeitures are not directly enforced in courts of prize; yet as no claim can be there sustained, which is tainted with illegality, they are indirectly enforced in a manner fatal to the supposed rights of the party with reference to the mere question of prize. Was there not, then, from the papers, a reasonable cause of suspicion, that the vessel had, since her enrolment, been engaged in a foreign voyage at Cadiz, and at Lisbon? Some of the papers explicitly avow the fact; and how were the captors to know, which were genuine, and which were spurious? It has been emphatically said, "that if neutrals will weave a web of fraud, a court of prize will not take the trouble of picking out the threads for them, in order to distinguish the sound from the unsound." The Eenrom, 2 C. Rob. Adm. 8. And it would be perilous indeed, if captors were bound to decide upon the integrity and genuineness of every contradictory paper submitted to them, under the penalty of responsibility in damages for a mistake.

Farther, it is argued that the British license could furnish no ground for reasonable suspicion of illegal traffic, because it appeared upon the face of it to have expired long before the period of capture. Let us examine this argument in connexion with the circumstances of the case, and the principles of law applicable to this subject. Whatever may have been the case formerly, it is very clear that the British courts now construe their licenses with great liberality, both as to time and objects. It is a general rule, that where no fraud has been meditated or committed, and the parties have been prevented from carrying the license into literal execution by a power, which they could not control, they shall be entitled to the benefit of its protection, although the terms may not have been literally and strictly fulfilled. And, therefore, it has been held, by very high authority, that if the license has expired, and the parties can show, that they have used due diligence, but have been prevented by accidents or obstacles not within their control from carrying their intentions into effect within the time limited by the license, they shall still be held within its protection. The Goede Hoop, 1 Edw. Adm. 327. With these principles in view, we shall find, that the sole object of the simulated papers was, to give a coloring to the case, that should entitle the ship-owners to avail themselves of the plea, that the non-compliance with the literal requisitions of the license arose from superior force and unavoidable accident. And if such necessity or accident had intervened, what was there incredible in the supposition, that the brig was returning from Lisbon to New Bedford, by a circuitous route, warranted by the objects of the voyage, viz. by the way of Amelia island and Georgetown? And if such voyage had been actually performed, it would have been somewhat difficult to exempt the vessel and cargo from that penalty, pronounced by the law upon all property, sailing under the passport or license of the enemy.

But it is said, that the contrivance was too inartificial, and the coloring too thin and slight, to deceive any, even the most credulous persons; and that the captors could not but have seen through the disguise. It is somewhat singular, that such a suggestion should come from the parties, who fabricated the contrivance, and gave it, for the purposes of deceit, its primitive coloring. The very explanation now offered to the court is, that it was to be used for the purpose of deceiving the enemy, on the outward voyage from New Bedford to Georgetown. And if it would have deceived British cruisers on the outward voyage, it is somewhat difficult to perceive, why it might not have equally passed for genuine with American cruisers on the homeward voyage. In any view, this suggestion does not come with a very good grace from the libellants. It somewhat resembles the case of an artisan crying down his own manufactures. It is said that all these contradictory appearances were explained, or offered to be explained, by the master to the captors. But I am not aware of any rule of law, that requires captors to rest satisfied with mere verbal explanations of gross contradictions in written documents. What security could they have, that the explanations were not a part of the concerted plan of deception? Nor was the conduct of the master, and other persons on board, at all calculated to do away with any suspicions arising from the papers. The artificial leak, the attempt to bribe, the absence of the log-book, the apparent deviation from the most usual route of the voyage, and the withholding of the British license until a compulsory search, were facts of themselves not without some significancy in deciding on the integrity of the transactions. It is also material, that the simulated papers were not produced by the master; but were found upon the person, and in the trunk, of Mr. Leslie, who called himself a passenger, and denied having any papers, but who in fact was a joint charterer of the vessel, and part owner of the cargo. Nor was a second British license, dated the 14th of April, 1814, and granted by Sir James Saumarez, ever produced or admitted to exist by the master. It was found on board by the prize master, after the vessel had been taken possession of

as prize. This license authorized an importation, in an American vessel, of wheat, grain, tar, &c., from the United States into St. Andrews and St. John's in New Brunswick, and though by its own limitation it had expired, it could not but have had a tendency to inflame every other suspicion. If it were necessary, I am not aware, that it is not now competent for the captors to avail themselves of any legal cause of suspicion or of condemnation, which is presented by the papers, although such cause might not have been known at the time of capture.

It is not, however, in my judgment, necessary to resort to this special ground. It is a clear principle of the law of nations, that a ship must, in time of war, be provided with complete and genuine papers; and if there be false or colorable papers on board, touching the voyage, the captors have a right to bring her in for adjudication. Duke of New-Castle's Letter, Coll. Jurid. 129; Wheat. Mar. Capt. Append. 317. They are not bound, at their peril, to judge of the degree of guilt or innocence of the party, nor to decide as to the truth of verbal explanations of serious difficulties by the captured crew. It is undoubtedly allowable to use stratagems to deceive the enemy; but if these stratagems may also deceive friends, it is at the peril of those, who use them, and not those, who may have been betrayed into a mistake by their existence. Supposing even, that the counsel were right in their law, (which is not admitted) that to justify a capture, the case must be of such doubt as to require farther proof, it seems to me difficult to conceive, how it could be possible for any court, consistently with principle, to dispense with the production of such proof under the circumstances of the present case. The proofs, now offered, afford a satisfactory explanation; but it should be remembered, that these proofs are such, as could not have appeared upon an original hearing as prize. In my judgment, therefore, there was probable cause for the capture; and the suspicions of illegal traffic were reasonable, so as to give the benefit of the title of a bonas fidel possession to the captors.

The next question is, whether the captors have, by their conduct, forfeited the protection afforded by that title. The law is clear, that a bonae fidei possessor is not responsible for casualties; but he may, by subsequent misconduct, forfeit the protection of his fair title, and render himself liable to be considered as a trespasser from the beginning. The Betsey, 1 C. Rob. Adm. 93. But it is not every irregularity that will produce this effect. It must be such as produces an irreparable loss, or at least the very damage, for which compensation is sought from the court. It has been said, by the counsel for the libellants, that the law exacts from captors more than ordinary diligence; that the possession by capture is against the will of the owners, and is strictissimi juris; that it does not therefore come within the general doctrine as to bailments; but the possession being by force, the party is bound to extraordinary diligence, and is punishable for slight neglect. The authority relied on (The William, 6 C. Rob. Adm. 316) certainly does not authorize any such conclusions. Sir W. Scott, in the case alluded to, was answering an objection of another sort, viz. that captors were bound for such care only, as they would take of their own property, which, with great propriety, he denies, and asserts the rule to be, that they are responsible for due diligence. And it is obvious, that by "due diligence" he understood such diligence as a prudent and discreet man would exercise about his own affairs, which is precisely the legal definition of ordinary diligence. This construction is corroborated by other decisions of the same learned judge, and particularly, by that in The Maria and Vrow Johanna, 4 C. Rob. Adm. 348. See, also, The Carolina, Id. 256; The Catherine and Anna, Id. 39. Nor am I able to distinguish the case, upon principle, from that of a bailment beneficial to both parties, where, of course, the captors would only be held responsible for ordinary neglect.

It is farther argued, that in the present case there was a want even of ordinary diligence. Various circumstances are relied on for this purpose, which I will now proceed to consider. In the first place, it is alleged, that the prize master was not a person of sufficient skill, and did not prosecute the voyage with all due diligence. I do not think, that this objection is sustained in point of fact. Independent of the natural presumption from his station, there is the direct testimony of a gentleman, perfectly conversant in affairs of this nature, in his favor. It is intimated, that he was not always temperate; but no delay or injury is shown to have arisen from this circumstance, even if its existence be completely established. From the manner too, in which the charge is made by the witnesses, I do not think, that this was a frequent or serious occurrence; and it has been very justly remarked, that in a mode of life peculiarly exposed to severe peril and exertion, something of indulgence is to be allowed, and that slight acts of this nature afford no conclusive proof of disability for general maritime employment. The Exeter, 2 C. Rob. Adm. 261.

In the next place, it is alleged, that the master and Mr. Leslie ought to have been allowed to remain on board to assist in the navigation of the vessel. Without adverting to their conduct at the time of the capture, it is a sufficient answer to this objection, that it is founded upon a misconception of the law. Captors are not permitted to take out the whole of the captured crew, and indeed ought to allow the master, or some of the principal officers, to remain on board. And the prize court will animadvert with severity upon any unnecessary deviation from this

salutary practice. But the rule has no reference to the navigation of the ship; it is adopted with a totally different view. It is to prevent embezzlements and frauds, and to bring before the prize court, to answer upon standing interrogatories, persons, who, from their stations and privity with the owners, can speak to the national character and proprietary interest of the ship and cargo. The captors are not bound to allow the captured crew to navigate the ship; nor are the latter bound to perform such duty. They may agree so to do, and in such case will be held to their agreement; but, if no such agreement be made, the captors are bound to put on board a sufficient crew to navigate the ship, and are responsible, if any damage happen from their neglect in this particular.

It is, in the next place, alleged, that there was no time-piece on board, to regulate and ascertain the course of the ship. It does not, however, appear, that any inconvenience or embarrassment arose from this omission. The vessel was so near the coast, and the soundings and course of the voyage so well known, that it is highly probable no importance was, at the time, attached to this circumstance. And it is somewhat singular, that so usual and customary an instrument as an hour-glass, was not on board belonging to the brig. It is sufficient, however, that there is no evidence, that the capture by the British was occasioned by this defect.

In the next place, it is alleged, that there was negligence in not putting on board a prize master, who was a good pilot for all the harbours on our coast; and that there was negligence in the prize master in not going into Portland or Portsmouth, instead of attempting to reach the port of Gloucester. But no such general knowledge of pilotage can surely be required or expected. For most of the important ports on the coasts, regular or occasional pilots exist, and particularly for the ports above mentioned. It is therefore sufficient, if the prize master has reasonable skill in navigation, and knowledge of the position of the coast, so as to make a good harbour, or avail himself of the proper pilot; and there is no reason to impute to the present prize master, a deficiency of this skill. Nor am I aware of any compulsive obligation upon a prize master to go into the first port, that presents itself, even if it be practicable. The laws of the United States contemplate, that captors have a right to remove prizes from one district to another, even after they have arrived at a port of safety. It would certainly be harsh to require, that a prize should be carried into the first port, which presents, however inconvenient to the parties, or remote from the scenes of their business. From the very nature of things the prize master must have a right to exercise a reasonable discretion in such cases; and if he exercise his judgment fairly, and no known and imminent danger require a different course, it seems to me the law will protect him, although in the event it may turn out, that the port selected by him was not the best, and that a loss might have been prevented by a different choice.

In the case at bar, it is not satisfactorily made out in evidence, that the prize master was guilty of delay or mismanagement in the conduct of the voyage, or in the selection of a port. He appears to have acted with good faith; and the port of destination, if not the best, was certainly a safe and proper one. These are the material circumstances, from which a want of ordinary diligence has been attempted to be inferred; and it is almost unnecessary to add, that they have failed in their purpose.

I have passed over in silence many facts and circumstances, as to which the parties have employed a minute diligence in procuring proofs, because the cause must, after all, be decided by great and general principles, and cannot rest upon the comparison of the testimony, as to unessential facts. I am aware of the importance of the cause, and the amount of property involved in the decision. The parties have now had the best judgment which I have been able to form; and if it be erroneous, it is some consolation, that a superior tribunal can award ample justice to the injured. I pronounce against the claim for damage, and affirm the decree of the district court [case unreported], and order the libel to be dismissed with costs.

Case No. 5,329.

The GEORGE.

[1 Sumn. 151.] [1]

Circuit Court, D. Massachusetts. May Term, 1832.[2]

SEAMEN'S WAGES—RIGHTS OF MATE UPON DEATH OF MASTER—RIGHT TO BE CURED.

1. A mate, succeeding to the command of the ship upon the death of the master, does not thereby lose his character as mate; but may sue in the admiralty for his wages.

[Cited in The Leonidas, Case No. 8,262; Packard v. The Louisa, Id. 10,652; The Merchant, Id. 9,434.]

[Cited in Hutchins v. Ford, 82 Me. 376; Tate v. Protection Ins. Co., 20 Conn. 483.]

2. He is also entitled to be cured at the expense of the ship, in the same manner, as a seaman. And, therefore, if he is put on shore from sickness for the convenience of the ship, his expenses for medicines, advice, attendance, and board, are to be borne by the ship-owner.

[Applied in The Forest, Case No. 4,936. Cited in Richardson v. The Juillette, Id. 11,784; The Leonidas, Id. 8,262; Ringgold v. Crocker, Id. 11,843; The Atlantic, Id. 620; Babcock v. Terry, Id. 702; The Ben Flint, Id. 1,299; Callon v. Williams, Id. 2,324; The North America, Id. 10,314; Brown v. The D. S. Cage, Id. 2,002; The

[1] [Reported by Charles Sumner, Esq.]

[2] [Affirming Case No. 8,035.]

Edward Albro, Id. 4,290; The A. Heaton, 43 Fed. 596.]

[Cited in Duncan v. Reed, 39 Me. 417; Croucher v. Oakman, 3 Allen, 189; Holt v. Cummings, 102 Pa. St. 215.]

3. It seems that the like rule applies to a master.

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

This was a libel for mariner's wages in the admiralty, originally against the vessel, and now proceeding against the owners [Joseph Wescott and others]. Upon the hearing of the cause in the district court [Case No. 8,035], it was decreed, that the libellant [William Lamson] was entitled to wages to the amount of fifty-four dollars and fifty cents and costs of suit. From this decree the owners entered an appeal to the circuit court.

Mr. Curtis, for appellants.

Mr. Nichols, for appellee.

STORY, Circuit Justice. This is a libel instituted by the libellant in the admiralty for wages due to him, as mate of the brig George, for a voyage from Boston to St. Jago, in the island of Cuba, and back to the United States. There is no dispute as to the claim for wages, the amount being admitted. But the owners bring forward a claim in the nature of a set-off for money expended for the libellant on account of his sickness on shore at St. Jago. The items of the account are for board, washing, apothecary's bill, physician's bill, and wine supplied for the libellant, amounting in the whole to $74.75. It is not denied, that the expenses have been incurred, and paid by the owners; and the sole question is, whether they are to be borne by the owners of the brig George, or by the libellant, there having been a suitable medicine chest and medical directions on board for the voyage, according to the requisitions of the act of congress. The facts are, that the master of the brig died at St. Jago, of the yellow fever, and the mate upon his death, with the consent and approbation of the consignee and the American consul, assumed the command of the vessel. The mate was at this time ill with symptoms of the same disease; and, the vessel being at that time about to proceed to another port in Cuba to take in a part of her cargo, it was deemed the most prudent step for the mate to go on shore, both for his own relief and the safety of the crew; and that the vessel should proceed to the other port under the command of the pilot. She accordingly did so proceed, and returned again to St. Jago after an absence of fourteen days. The libellant was then on the recovery, and resumed his station on board. But subsequently, when the vessel was about to depart for the United States, it was deemed most advisable by the libellant, and the consignees, that another person should be appointed master; and he was accordingly appointed, and the libellant returned to the United States in the brig, performing only the duties and functions of mate. It is not now controverted, that the conduct of the libellant in going on shore during his illness was wise and prudent, and for the interest of all concerned; nor that the subsequent appointment of another person, as master for the voyage, was not equally advisable under all the circumstances. The point of defence, or rather of set-off, rests on another ground; and that is, that as the mate was, at the time the expenses were incurred, acting as master of the vessel, he is not entitled to be cured at the expense of the ship, but at his own personal expense.

In the case of Harden v. Gordon [Case No. 6,047], the question of the liability of the owners to pay the expenses of curing seamen, who are taken sick in the course of the voyage, was largely discussed. It was there held, that, by the general maritime law, the expenses of sick seamen are to be borne by the ship; and that in these expenses are to be included, not only medicines and medical advice, but nursing, diet, and lodging, where these are necessarily incurred; that the act of congress—Act 1790, c. 29, § S [1 Stat. 134]—had not changed the maritime law, except so far as respects medicines and medical advice, where there is a proper medicine chest and medical directions on board; and that the act of congress was inapplicable to cases, where the seamen are sent on shore for the safety or convenience of the ship, and in all such cases the maritime law remained in full force. There was some peculiarity in the circumstances of the case of Harden v. Gordon [supra], which did not call for so exact and determinate an expression of the opinion of the court, as is now announced; but the whole reasoning of the court leads to this conclusion, and, indeed, cannot otherwise be maintained. I do not, therefore, go over the general doctrine, being quite content to leave it upon the arguments then adduced in its support. But I feel bound to say, that I have never, since that time, had the least inclination to withdraw from any part of that opinion. But if I had, it would rather be to enlarge, than limit the construction favorable to the seamen. I then had, and continue to have, great doubt, whether the act of congress ought to have been allowed to have any operation as an exception out of the maritime law; and whether the provision for a proper medicine chest was not merely directory, and the omission made penal upon the master personally, without the slightest intention on the part of congress to interfere with the general duties and responsibilities of the owners, created by the maritime law. Be this as it may, the present case does not call for any review of that point.

In the present case, if the mate had remained in his station as mate, and the master had been living, and with a view to his own accommodation, and the convenience of

the ship, and the safety of the crew, he had been removed on shore with the consent of the master, I should not feel the slightest difficulty in saying, that all the expenses in question must be borne by the ship. The attendance, and watching, and nursing, and preparation of suitable food, for sick seamen on board, independent of all other considerations, is a very serious interruption of the common ship's duty and business, and often imposes hardships upon other seamen, which may endanger their ability to attend fully to other duties, and often may prove injurious to their present health. And if a speedy recovery of the sick seamen, and the preservation of human life be an object, (as it ought ever to be,) to insure a prompt return to duty, and a speedy performance of the voyage, it is a matter of the highest prudence in a considerate master to take every measure calculated to produce these results. The attendance and medical advice and nursing, which can be obtained on shore, are far more regular, intelligent and beneficial, than any, which can be obtained on board of the ship amidst the hurried duties of a seafaring life. And the hiring of new seamen in foreign ports to supply the place of those, who are ill, or die, is often a most inordinate and oppressive charge upon the owners. Public policy, as well as the ordinary claims of humanity, demands, that the interests of the seamen should be in these respects linked to those of the ship; and, thus, new means are furnished to enforce Christian duties and Christian responsibilities. I confess, that with these views, I should have the utmost reluctance to do away one jot or tittle of the provisions of the maritime law, acting so wisely and beneficially on this subject. See Pard. Droit Comm. tom. 3, p. 3, tit. 3, c. 1, §§ 2, 5, p. 132; Id. p. 110; Code Comm. art. 262; Jac. Sea Laws, bk. 2, c. 2, p. 144; Harden v. Gordon [Case No. 6,047], and the authorities there cited. Is there any thing then in the present case, which takes it out of the ordinary range of the principles already stated? It is said that the allowance by the maritime law belongs to the seamen only, and cannot be claimed by the master of the ship. The latter, it is said, stands upon different grounds, both as to rights and privileges, from them; and that his own expenses for illness are to be borne exclusively by himself. No authority is cited for this position; and I am not aware, that any exists. So far as the reason and policy of the law go, I can perceive no difference between the case of the master and the case of any of the other officers, or crew of the ship. The interest of the ship-owner is equally promoted in each case by a speedy recovery and return to duty; and the benefit is even of a higher nature, both for the ship and the voyage. The superintending care and control of the master over all the ship's concerns is of the last importance to the interests of the owner. It must be a sad and narrow policy, utterly at variance with the liberal forecast of the maritime law, to make the master perpetually halt in his duty from the fear of incurring unreasonable personal expenses, and thus endanger the solid interests of the voyage. It is much wiser to leave to his discretion the proper times and occasions, in which he may from illness seek medical aid and other attendance on shore at the expense of his owner, rather than to hazard the great objects of the voyage upon his personal sacrifices out of his own purse for the interest of the whole concern. If such a rule were established in the maritime law, I should be bound to obey it. If not established, I will not be the first judge to introduce it. I doubt exceedingly, whether, as a matter of mere policy, it would be for the interest of the owner to introduce such a stipulation into the contract of the master, where the burthen would be all on one side, and the benefit all on the other. It might tax human ingenuity to invent some other means in the course of the voyage to shift the burthen, or at least to moderate the inequality.

The present, however, is not the case of a master; but of a mate, who clearly in ordinary cases is within the reach of the principle. But it is said, that, upon the death of the master he succeeded to the post of master and ceased to be mate, and therefore is to be treated altogether as if he were duly appointed master. I lay out of the case the approbation and consent of the consignee and the American consul, that the libellant should act as master. They had no authority whatsoever to change his relation to the ship. Upon the death of the master, the mate succeeded to his place virtute officii, by mere operation of law, without any approbation or consent of the consignee or consul. The law throws this duty and obligation upon him; he acts in the stead of the master in all cases, where the latter is dead or absent. He does not cease to be mate in such cases; but he has thrown upon him cumulatively the duties of master. He is still a mate acting as master; not master, but quasi master, with the same general powers and responsibilities pro hac vice. He succeeds, Lord Stowell has said, as haeres necessarius to the employment of the master in a case of necessity. We all know, that here a master is entitled to sue in the admiralty for his wages. And in England, where the master is prohibited so to sue, it is clearly established, that a mate succeeding to the master in the course of the voyage, from the death, or incapacity, or absence of the latter, may still sue for his wages, as mate, for the whole of the voyage, leaving his additional compensation, as master, to be recovered at the common law. So Lord Stowell decided in the case of The Favourite, 2 C. Rob. Adm. 232, and that learned judge thought, upon principle, the whole claim ought to be recoverable in the admiralty; but, from too scrupulous a def-

erence to authority (founded upon no solid reason), he waived exerting his jurisdiction over the whole claim. But the authority there referred to (Read v. Chapman, 2 Strange, 937) admits, in the most decided manner, that the mate, succeeding as master upon the death of the latter, does not lose his distinguishing character as mate. My opinion, therefore, is upon principle, as well as authority, that the mate did not cease to be mate by the death of the master, and succeeding to the command of the vessel; and, retaining his original character, that he is entitled to all the privileges annexed to it, one of which is the right to be cured at the expense of the ship. I make no distinction between the physician's bill and the other charges. Being expenses incurred on shore, they are all equally out of the purview of the act of congress, and all equally within the principle of the maritime law. I give no opinion, how the case would have been, if the physician's bill had been for medical advice and attendance on board of the ship. There is great force in the suggestions of the learned district judge on this subject [Case No. 8,035].

It has been suggested, that a usage has prevailed among merchants in Boston, by which expenses of this nature are made a personal charge on the master, and not on the owner, and by parity of reasoning, that the usage ought to apply to a mate succeeding as master. It is certainly sometimes useful, in order to ascertain what the law ought to be, in new cases open for future decision, to ascertain, what the customs and usages of merchants on such subjects generally are; for such customs and usages may have a material influence as to the rule which ought to be adopted. But, I think, the usages of a particular port or place can never be properly admitted for such purposes. Much less are they admissible, even when general, to control or alter the settled maritime law. The most that can ever be justly allowed to such customs and usages, is to give them effect, when, from their being generally known, and invariably used, as fixed rules, they may be said to constitute a direct and positive element of the particular contract. I have long thought, that too much deference has been allowed to loose and floating customs and usages of this sort, founded on no known principle, and arising more often from ignorance of right, and mere acquiescence, than from any intentional recognition of a fixed rule. In cases of this sort I am not disposed to set up customs and usages against principles of law; or to suffer new inroads to be made upon old doctrines. I am content to stand super antiquas vias; and to go where they lead. There is a great deal of sound sense in the remarks which fell from the court on this subject, in the case of Rankin v. American Ins. Co. of New York, 1 Hall, 619, 631, 632. Lord Eldon has expressed considerable doubts as to the propriety of admitting evidence of usage to explain contracts; and as res integra, he declares himself opposed to it. Anderson v. Pitcher, 2 Bos. & P. 164, 168. See, also, Marsh. Ins. bk. 1, p. 707, c. 16, § 5. Upon the whole, my judgment is, that the decree of the district court ought to be affirmed, with costs. Decree accordingly.

Case No. 5,330.

GEORGE v. The ARCTIC.

[Bee, 232.] [1]

District Court, D. South Carolina. 1806.

SALVAGE—COMPENSATION.

Compensation fixed by the court, upon consultation with merchants and owners of ships as to the value of service rendered.

In admiralty.

BEE, District Judge. This is a petition for compensation to [James] George, who assisted with his boat and several hands in getting off the ship Arctic, which was driven on shore in the storm of August last. It appears that the ship lay from Friday till Monday without other efforts for her safety than such as were made by her crew. On Monday Mr. George went to her assistance, received the command as soon as he went on board, and held it till she floated: Mr. Cohen, who had also gone with a boat and hands to assist, brought her up to Charleston. Cohen had been of great service by carrying with him a spare anchor, as well as by his advice and exertions. They succeeded in floating the vessel on Wednesday evening; but George and Cohen, with their people, remained on board till Saturday evening.

I have no hesitation in admitting this claim to compensation; for services to vessels in distress must be encouraged: nor will the law make a distinction between such as are voluntary, and such as are hired. The former, at least, must have their reward; and that not upon too narrow a scale, for the reason I have already given. In fixing the amount of compensation upon this occasion, I called in the persons best qualified to assist my judgment, merchants and owners of ships, acquainted, by experience, with the nature of these services. I stated the circumstances, without naming the parties. After some consultation, they named the sum of 150 dollars, as an adequate compensation for George, and his boat's crew; and as that sum accords with my own view of the case, I do order and decree, that the marshal pay that sum to Mr. George, out of the proceeds remaining in his hands from the sale of the ship. As the petitioner withdrew his first demand, and made a second, after reference of the first to the register, I direct that each party pay his own costs.

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

GEORGE, The (MUTUAL SAFETY INS. CO. v.). See Case No. 9,982.

GEORGE (UNITED STATES v.). See Cases Nos. 15,197–15,199.

GEORGE BELL, The (GUIBERT v.). See Case No. 5,856.

Case No. 5,331.

The GEORGE BURNHAM.

[1 Hask. 381.] [1]

District Court, D. Maine. Jan., 1872.

SEAMEN—GROUNDS FOR DISCHARGE AT INCEPTION OF VOYAGE — FAILURE TO PROVIDE SUITABLE CLOTHING FOR VOYAGE — WAGES — CARRYING SHEATH KNIVES.

1. Shipping articles, containing a clause prohibiting seamen from wearing sheath knives, approved, as in accord with the act of congress of July 27, 1866 [14 Stat. 304].

2. A discharge of seamen by the master at the inception of the voyage, for not providing themselves with suitable clothing and bedding for the ordinary perils and risks of the voyage, is justifiable.

3. It is an implied obligation on the part of seamen, as a part of their contract, to thus prepare themselves to perform their contract duty.

4. A discharge of seamen by the master at the inception of the voyage is justifiable, when they are quarrelsome and intend mischief.

5. Seamen, so discharged, are entitled to demand wages only for the time they have actually served.

In admiralty. Libel in rem, by three seamen, demanding wages for the entire voyage for which they had shipped, and for damages for breach of contract in being wrongfully discharged at the inception of the voyage. The claimants appeared and answered that the master discharged the seamen for sufficient cause, and tendered them their wages for the time they had actually served.

Thomas B. Reed, for libellants.

Melvin P. Frank, for claimants.

FOX, District Judge. This libel is promoted by three of the crew. They shipped on board the brig on the 12th of December, for a voyage from this port to Cuba and back to her port of discharge. The shipping articles provided that no advances should be made abroad to the crew, and that they were prohibited from wearing sheath knives. The court cannot but commend the insertion of this latter clause in the articles, and the attempt to bring home to the crew positive knowledge of the prohibition of their use of so dangerous an instrument, thereby giving effect to the provisions of the act of congress of July 27, 1866, by which the wearing of sheath knives by seamen in the merchant service is prohibited, and the master or officer in command is required to inform every person offering himself to ship of the provisions of the act, and to require his compliance with the law, under a penalty of fifty dollars for each omission. The crew came on board between two and three o'clock of the afternoon of the 27th, having been ordered to be there immediately after dinner. The brig was then at Merchant's wharf. The libellants assisted in loosing the sails and endeavoring to get the vessel under way, but she touched on the banks, and the sails were furled and all hands were allowed to go on shore till about eleven o'clock at night. They then returned, but could not succeed in hauling the brig out of the dock, as she was still aground. The crew again left and returned the next morning, at which time the master discharged the libellants, and refused to allow them to go in the brig, although they all expressed their desire to complete the voyage. At that time the master informed them that he had learned they were quarrelsome fellows, who would make trouble on board, and that they were not provided with proper clothing and bedding necessary for the voyage. This libel against the vessel was commenced the next day, demanding full wages for the entire voyage and also damages for the breach of contract.

Upon the matter of damages, the court at the hearing intimated that as the discharge if wrongful was at the home port, before the voyage had actually commenced, the libellants would not be entitled to demand full wages for the entire voyage, but would only be entitled to an indemnity in a reasonable sum for the services actually rendered, and compensation for any special damage, if any had been sustained; and such Judge Story, in Ex parte Giddings [Case No. 5,404], declares to be the settled rule in England, distinguishing between the case where the voyage is broken up, and the crew wrongfully dismissed before the voyage is begun, and the case where they are dismissed wrongfully after the voyage is begun, in which latter case only, are they by the law of England entitled to wages for the whole voyage.

By Ord. de la Mar. bk. 3, tit. 4, art. 3 (1 Valin, 686), it was provided that "if the voyage was broken up by the owners, master or merchants before the departure of the ship, the seamen hired by the voyage, by the run, shall be paid for the time by them spent in equipping the ship, and one-fourth part of the amount they would receive if the voyage had been completed; and those hired by the month shall be paid proportionately, according to the ordinary length of the voyage." Article 10 (1 Valin, 705), compelled the master, if he discharged a seaman without good cause before the voyage was begun, to pay him one-third of his wages, and the whole if discharged in the course of the voyage together with the expense of his return; and these amounts the owners were not required to refund to the master.

Definite proportions of the entire wages to be earned were allowed to the crew in case of wrongful dismissal before the voyage was begun, by various ancient ordinances and rules of the sea, but none of these have ever received the sanction or approval of courts of

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

admiralty in England or this country, so far as the court is advised; but it has been deemed more just and equitable in each case to award to the seamen a full and complete indemnity for the breach of contract.

When the libellants came on board the brig on the 27th, they brought with them a straw bed and one blanket, which were claimed by Collins as his property; neither of the other libellants had bed or bedding of any kind. A German boy, who had shipped as an ordinary seaman, came with them, and he was equally destitute. An old man, Hawkins, accompanied them, who had not shipped as one of the crew, but had been rejected by the master on account of his age. An attempt was made by the runners of the boarding house to substitute him in place of one of the crew who had shipped and absconded. Hawkins was provided with a bed, bedding, chest and clothing suitable for the voyage; neither of the libellants had any chest, and whatever clothing they possessed was stowed in their bags, each having one. On inquiry of them, as witnesses, as to their clothing, they stated they had enough, but it was impossible to obtain from either of them a full and accurate description of it; each claimed he had a pair of mittens, but whether of cotton or wool they could not tell. When interrogated as to their socks, each asserted he had some, but could not say whether they were thick or thin, or of what material, and were uncertain as to the number of pairs. Some of them had no heavy frocks, but they stated had instead woolen shirts. Their clothing was left on board the brig and was afterwards overhauled and examined by the master in the presence of police officers and others, and he describes it generally as nothing but a lot of old rags. The master having at the time assigned as a reason for not allowing these men to complete the voyage their want of clothing, bedding, &c., and having discharged them from the vessel, was he justified in so doing?

It will not probably be contended by any one, that in the month of December for such a voyage, a master is obliged to receive his crew, if they should come on board either half naked, or clothed in their summer raiment without other outfits; and if this is conceded, the case at once resolves itself into the question, were these men suitably equipped for the voyage, prepared to perform their part of the contract?

There is no direct evidence before the court to show whether the George Burnham was provided with any heating apparatus in her forecastle, but it is understood by the court, that in vessels of her description, bound on such a voyage, it is not customary to furnish them with anything of the kind, though sometimes heat is received from the cook's galley, by an aperture in the partition separating the two compartments; and the court is of the opinion, that as the case is presented, the libellants were not suitably provided and in a proper condition to discharge the duties of seamen on the contemplated voyage. They were to leave this port in the latter part of December, and by the terms of the shipping articles were to return in this brig to her port of discharge, which would probably bring them upon the coast in February, the coldest, most severe and inclement month in the year; and it must be remembered, that their contract expressly stipulated that they were not to receive any advance abroad. It was their duty therefore before sailing, to provide themselves with a suitable outfit, such as would be reasonably fit and proper for them, to protect them from cold and exposure as far forth as was practicable for men called upon to perform the duties of seamen on board such a vessel on such a voyage. A single straw bed and one blanket only for three men on board a vessel bound off this coast in December and returning in February, it needs no argument to demonstrate were wholly inadequate for their protection and health. It is not unfrequently the case in such voyages, that the crew are for weeks exposed to the severest cold, the sea breaking over them, and every thing ice bound. In such condition what would have become of these men, with no other clothing or bedding than that brought by them on board? What warmth would a single blanket and a straw bed afford to a worn and chilly seaman in a cold forecastle, with every thing about him, including his clothing, wet and stiff with ice? They must all have been inevitably terrible sufferers from their exposure and improvidence, have had their hands and feet frost bitten, and become utterly incapable to discharge their duties as seamen; and it is by no means improbable that some, if not all, would have been so badly affected, as to be made cripples for life. Every season seamen are taken to the Marine Hospital here in such condition from exposure to the cold at sea, as to require amputations; and it is but two or three years since a sailor was before this court, both of whose limbs had been amputated above the knee on account of his injuries from such exposure.

When it is remembered that these men were not provided with proper protection for either their hands or feet,—for a single pair of mittens and one or two pairs of old socks are not deemed sufficient for that purpose,—the court can but hold that the libellants had not performed their part of the contract in not suitably preparing themselves to meet the ordinary perils and risks of the voyage. To be sure, it is nowhere expressly stipulated in the shipping articles that the crew shall thus be provided, but in this, as in many other contracts, there are implied obligations on both sides. Nothing is expressly stipulated by the master as to the provisions to be furnished by him to the crew;

but it will not be questioned that the obligation was imposed upon him to provide such as are suitable and usual on such a voyage; and so likewise on the part of the seamen, the court holds without hesitation, that it is implied by their contract, that they will be provided with all needful apparel, reasonably suitable for their use and protection on the particular voyage for which they contract.

A vessel could hardly be deemed seaworthy, and great doubts are entertained whether an insurance would be binding, if a master knowingly allowed his crew to commence their voyage, so utterly destitute of necessary clothing as these libellants are shown to have been. In case they should encounter heavy severe weather, and meet with disasters on this coast at this season of the year, they necessarily must soon have become utterly incapable to discharge their duties in the management of the ship, and the vessel and all on board from this cause would have been lost, unless assistance could be obtained from some other quarter. If these men had thus suffered or perished from their own imprudence, the master would have been charged with a great want of humanity, and with grossest neglect of the comfort and safety of his crew; and the court therefore feels fully justified in deciding, that he not only had the legal right, but that it was his duty to act on this objection, taken by him at the time, to their destitute condition and want of necessary clothing, and as they did not offer to remedy the difficulty and procure what was reasonably necessary and proper, that they have no cause of complaint for his refusal to allow them to continue as a part of his crew.

It is claimed that Collins was better provided for than the other libellants; and it is true that he was possessed of a straw bed and one blanket; but it does not appear that in other respects he was any better equipped than the others; and the court therefore does not feel called upon to make any distinction or exception in his behalf.

It is argued that the want of clothing is a matter merely personal to the seamen; that if they choose to go to sea in this condition they will be the only sufferers; but such is not the case; the rest of the crew and the officers have the deepest interest in all hands being well clothed and prepared to meet exposure. If one man is incapacitated, the others, from necessity and self-preservation, are obliged to discharge his duties. Extra labor is thus thrown upon the more prudent and careful, and if many of the crew become thus disabled, the greatest exertions of the others may prove futile, and all on board perish by reason of the imprudence of their shipmates.

It may be urged that no precedent for these views is to be found in the reported decisions of the admiralty court; but questions are constantly arising, and as they are presented for its decision, it is the duty of a court of admiralty to apply to their solution the well recognized and long established principles of maritime law, sanctioned and adopted by all admiralty courts, rather than to spend a long time in searching to ascertain if the precise question involved has ever been adjudicated by any co-ordinate court, yielding of course in submission to the authority of any appellate court, which has expressly determined it.

Seamen are the wards of the court of admiralty, and that court has ever been in the habit of extending towards them a peculiar protecting favor and guardianship. Reckless, thoughtless and improvident, regarding only their present comfort and enjoyment, taking no thought or care for the future, they are when on shore easily overreached, exposed to all sorts of temptations, and under the control and authority of those, who so long as they control the seamen's wages, are ever ready to tempt and aid them in the gratification and indulgence of every desire, however detrimental and injurious it may be, pandering to their lowest appetites until their earnings are exhausted, and then thrusting them on board any kind of a vessel that can float long enough to leave the port, at the most inclement season, and in most instances in utter destitution and need of every requisite for their protection on the voyage. The court cannot therefore question, that it is as much its duty to intervene and protect seamen against their own reckless improvidence, and to require them to provide themselves with necessary raiment when they commence a voyage of danger and exposure, as it is to take care that they are not imposed upon by the superior shrewdness of the master and owners.

This construction of the law must tend to greatly promote the welfare of the seaman, as he will not only be much better protected against suffering and exposure, but when on shore will be induced to lay aside a portion of his hard earned wages to furnish him with the necessary supplies. His earnings, instead of being wasted and productive of injury rather than benefit to him, will contribute to his comfort and enjoyment; he will not be so completely under the control of his worthless associates, who care only for the plunder they can gain from him; possessing some little property, he will soon become more independent, and his own master when on shore; he will acquire habits of thrift, temperance and economy, and gradually think more of himself and his opportunities for improvement; he will abandon his bad habits and low company, will endeavor to rise in his calling above the grade of a seaman, and to educate himself for the position of an officer, and thus in every way his own welfare as well as the interest of commerce will be greatly advanced and promoted. The court well remembers, when at this port it was almost invariably the case

that every sailor possessed his sea-chest wel' filled with comfortable clothing; and the sooner this custom is revived, the better will it be for the seamen and all interested in navigation, as it is confidently believed it will do much to improve the character of our sailors, both for seamanship, and good conduct and behavior, which the court has reason to believe are much below the standard of thirty or forty years since.

Another cause for the discharge of these seamen, which was assigned at the time by the master, was that he had learned they were quarrelsome and intended mischief. It appears that the libellants are all Englishmen who shipped under the names of Edward Collins, James Smith, and Martin McDonald. They admitted, with considerable evasion and reluctance, that they were stepbrothers, and certainly from the commencement, all manifested a very strong desire to ship in this particular vessel. At the time they applied to the master to ship them, he referred them to the shipping master, but stated that he was bound to have none but quiet, peaceable men, and this requirement of the master was enjoined by him on the shipping master, and by him communicated to the libellants when they shipped. One or two of them, in disregard of the provision in the articles, came on board with their sheath knives strapped around them, and they obeyed the orders of the officers as appears with about the usual amount of grumbling and dilatoriness. The master had been advised that they were bad fellows, of bad reputation, and was not satisfied with their behavior while on board; and for this reason, as well as their want of clothing, he discharged them, offering to pay them for the time that they had been employed. The court is satisfied that the master formed a correct opinion as to the character of these men, for it now appears, although it was not at that time known to the master, that on Christmas the libellants all went on board the steamer Forest City, and without justification assaulted a number of her crew, and that Collins was especially active, flourishing his knife and cutting the clothing of one of them. The excuse assigned for their conduct is, that they accompanied a third party on board, and that he was assaulted by some of the crew of the Forest City, and the libellants thereupon interfered to keep the peace. The court cannot consider the indiscriminate slashing by Collins with his knife of whichever of the Forest City crew happened to be near him, as a judicious and laudable method to preserve the peace. Such behavior rather manifests the fighting, quarrelsome disposition, which the master had protested against, and for this cause also the court holds their discharge was justifiable. The master having offered to pay the libellants for their time whilst on board, a decree may be entered for that amount without costs.

GEORGE DARBY, The (UNITED STATES v.). See Case No. 15,200.

Case No. 5,332.

The GEORGE FARRELL.

[4 Ben. 316.] [1]

District Court, S. D. New York. Oct., 1870.

TOW-BOAT AND TOW.

1. A tow-boat took several vessels in tow to tow them through Hell Gate from New York. The tide was flood, and the weather fair. After passing through the Gate, one of the vessels struck some obstruction under water, causing her to leak, and making it necessary to run her ashore. Her owner filed a libel against the tug, claiming that the tug had taken in tow more vessels than she could manage, and that the vessel was allowed to be carried by the tide out of the channel, and to strike a rock on the shore. The tug claimed, on the other hand, that the vessel struck a sunken wreck in the channel: *Held*, that, on the evidence, the tug had taken in tow more vessels than she had power to manage.

2. The burden was upon her to prove that the object which the vessel struck was one, the presence of which the tug was not bound to have known. She had failed to show this, and was, therefore, liable for the damages.

In admiralty.

Beebe, Donohue & Cooke, for libellant.
R. D. Benedict, for claimant.

BLATCHFORD, District Judge. This is a libel filed by the owner of the schooner Niger against the steam-tug George Farrell, to recover for the damages sustained by the schooner and her cargo, while she was being towed through Hell Gate by the tug, on the morning of the 6th of August, 1869. The schooner was bound from New York to Weymouth, Massachusetts. The weather was fine, and the tide was flood. The tug had two schooners lashed alongside of her on her port side, and two on her starboard side. The Niger and another schooner called the Delaware were towed astern, a hawser from the tug running to each of them, the Niger being on the port side of the Delaware. The tug, with the six schooners, proceeded up the East river, and between Blackwell's Island and the Long Island shore, and, at or near Astoria, the tug took in tow, in addition, a sloop, which was placed on the starboard side of the Delaware, at the end of a third hawser running from the tug. The Niger, the Delaware, and the sloop were properly secured to each other. In this manner the tug and the seven vessels proceeded in safety until the Niger had reached a place nearly off the point of the sunken meadow, opposite the middle ground, and to the eastward of Ward's Island, when the Niger, in consequence of her having struck some object under water on her port side, was found to be making water fast, and to be sinking. She was cut loose and run

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

ashore, where she sank. The libel charges that the accident was due to the fault of the tug in taking in tow more vessels than she could manage. The answer avers, that, by the fault of those in charge of the Niger, or of those in charge of the sloop that was in tow, or of both of them, and not by the fault of the tug, the Niger and the sloop were allowed to sheer beyond the line of the direction of the tug; that thereby the Niger ran upon a rock or a sunken wreck or some obstruction, which was not, and could not be, known to the tug; that those in charge of the tug hailed the said vessels to sheer in and follow the course of the tug, but they failed to do so; and that the injury to the Niger was caused by negligence on the part of the said two vessels, or of one of them.

Without discussing the evidence, which is voluminous, I am satisfied that the weight of it is decidedly in favor of the conclusion that the accident happened through the fault of the tug, and not through any fault on the part of the Niger. The tug undertook to tow more vessels than she could properly manage, with the tide as it was, and with three of the vessels towed at the ends of hawsers. She lacked the power to give the vessels astern such way through the water, running, as they were, with a strong flood tide, that their helms, properly managed, could keep them from being drifted and set by the tide upon the shore where the Niger struck. The evidence is very clear, that the helms of all three vessels astern were put and kept aport, as the tide set them upon the shore on their port side, and that, notwithstanding this, the tug failed to draw them clear of that shore. What the witnesses on board of the tug call the sheering of the vessels astern, was their drifting with the set of the tide. The tug having, on this state of facts, and through negligence, suffered the Niger to strike, the burden of proof is on the tug to show that the Niger struck on some object, the presence of which ought not to have been known to the tug. The tug fails to show this. Indeed, the weight of the evidence is, that the Niger went so near to the shore as to strike a rock.

There must be a decree for the libellant, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellant.

Case No. 5,333.

The GEORGE GILCHRIST.

[1 Lowell, 234.] [1]

District Court, D. Massachusetts. March, 1868.

SALVAGE.

A brig and cargo valued at about $95,000 were saved from a position of much danger, in the daytime, by a valuable steamer which employed thirteen persons and took four hours for the service, without much danger to the steamer. The property might probably have been saved by another steamer that was in sight. $2,800 awarded as salvage.

At daylight on Saturday the fourteenth day of December, 1867, the steamer Monohansett, which is employed as a packet between New Bedford and Edgartown, was at the latter port, when her master was informed that a square-rigged vessel was lying close to the shoals about ten miles to the eastward. A very severe north-east gale and snow-storm had been blowing for two days, and the steamer's fires had been kept up in anticipation that her services might be wanted for the rescue of some vessel in distress. The storm had abated a good deal, and the weather was no longer thick. She immediately proceeded out into Vineyard Sound, and found the brig, George Gilchrist, at anchor in a very dangerous position; the brig's cables were buoyed and slipped, and she was towed into Edgartown, the whole service having occupied about four hours. The cargo was worth $72,700; the brig, $18,500; and the freight, $3,750; in all $94,950. The steamer was manned by thirteen persons, including a pilot, taken for the occasion, and was worth about $60,000. The pilot was not expressly named in the libel, but it was agreed that the decree should be for a gross sum, including his services, and that he should file a sufficient release of damages.

J. C. Stone and W. W. Crapo, for libellants.

J. C. Dodge, for claimants.

LOWELL, District Judge. The only difficulty here, and it is a considerable one in all these cases, is to ascertain the fair amount of salvage to be awarded. As bearing upon this a very large number of witnesses have been examined concerning the character of the place where the brig was lying, which was between two shoals called Long and Shovelful shoals, and her probable chances of escape without assistance. The shoals were under her lee and almost surrounding her, and she could not have got out in the direction in which she had drifted in, without a change of wind. It was discovered afterwards that one of her anchors was gone, that the other had lost its stock, and that her kedge only was uninjured. During this morning the tide was setting against the wind, and it is maintained by the libellants that she would probably have dragged, upon a turn of the tide. The wind was still from the north-east, with no immediate prospect of change, and the sea was very heavy. Whether she could have got out by the narrow passage between the two shoals to leeward, has been the subject of much controversy. Many disinterested witnesses for the libellants assert that the chart gives too much water at that point, and that there is

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

really not over ten feet, while this vessel drew eleven feet and upwards.

Upon all the evidence, I am satisfied that the brig was in a very awkward situation, much more so than her master, who was ignorant of the state of his anchors, was aware of, and that it is extremely doubtful whether she could have reached a place of safety without the aid of a steamer or a change in the wind. The aid which was rendered was prompt, efficient, and successful. On the other hand, the storm had lulled, though perhaps not ended; she had daylight, was uninjured except in her ground tackle, and might probably have been rescued, if the Monohansett had not come up, by another steamer which had seen and was coming towards her.

This is one of those cases in which a disabled vessel is opportunely and successfully taken in tow, but in such a place, that she might count with pretty strong hope on other assistance in default of that of the actual salvor. In such a case the need of succor is not so urgent as to make the amount saved the most important element of the salvage service, though it is not to be overlooked; but the point first in consequence is the risk, trouble, and expense, as well as the knowledge, skill, and seamanship which the salvors have contributed to the result. As compared with the recent case of The Acacia [Case No. 22] the value here saved is about double, and the risk from which it was saved is greater, because there the danger would not be urgent until a change of wind, while here it was imminent unless there were such a change; and the knowledge of the ground, the skill and seamanship required to go safely to the vessel, take her in tow, and get her out were greater; and there was some risk to the steamer in doing all this so near a lee shoal. On the other hand, the steamer is very much less valuable than were the steamer and her cargo in that case, and the time lost is much less. I will add that I am not sure that I gave quite enough in that case. Considering all the circumstances, I award the sum of $2,800 and costs. Decree accordingly.

This decision was affirmed by the circuit court, on an appeal by the salvors, October term, 1868. [Case not reported.]

Case No. 5,334.

The GEORGE H. PARKER.

[1 Flip. 606;[1] 23 Int. Rev. Rec. 83; 9 Chi. Leg. News, 191; 2 Cin. Law Bul. 38; 2 Mich. Lawy. 12.]

District Court, E. D. Michigan. Nov. Term, 1876.

CROSS LIBELLANT'S MOTION FOR SECURITY TO AMOUNT CLAIMED IN CROSS LIBEL—CROSS LIBELLANT—REASONABLE PROMPTNESS.

1. A tug was libeled for negligence, and purchased after the cause of action had accrued: *Held*, that the former owners might file a cross libel under the 53d rule, and have proceedings stayed until respondent in the cross libel gave security to answer the demand.

2. A cross libellant should act with promptness. A motion for security made upon the eve of trial, and after the witnesses had been summoned, and case was ready to proceed, comes too late.

In admiralty. The facts were, McLenan, the respondent, in June, 1875, filed a libel against the George H. Parker, a steam tug, in which he claimed damages for negligence in towing by the tug a raft of timber from Tawas, Michigan, to Tonawonda, New York. [On August 4th][2] Albert W. Schulenberg filed a claim and answer, in which he set forth that he became the sole owner of the tug some eight months after the cause of action arose. He denied that he had any knowledge of the facts stated in the libel, or of libellant's claim, until the libel was filed. He averred that by the terms of the purchase the former owners were liable for all claims against the tug, and prayed that they might be required to answer and defend. On the 16th of December the former owners of the tug filed a cross libel against the original libellant, averring that the tug was guilty of no negligence, and insisting on the payment for towage service at the price agreed upon in the contract.

W. A. Moore, for the motion.

Geo. W. Moore, for original libellant.

BROWN, District Judge. The cross libel was filed at the last term of this court, and upon the eve of the trial of the original case, motion was made that the respondent in the cross libel give the security now asked for, but it was denied upon the ground that the party had no right to come in, as the case was called for trial, and ask for a stay of proceedings until a bond was filed to answer the claim set up in the cross libel.

I then held the cross libellants should prosecute their claim with reasonable diligence, and had no right to put a stop to the proceedings after witnesses had been summoned and the libellant had appeared and was ready to commence the trial of the original case.

The case was, however, for some other reason, continued for the term, and the motion is now renewed under somewhat different circumstances. Rule 53 provides that: "Whenever a cross libel is filed upon any counter claim arising out of the same cause of action for which the original libel was filed, the respondents in the cross libel shall give security in the usual amount and form to respond in damages as claimed in said cross libel."

Although this may not be strictly a cross libel, inasmuch as the parties plaintiff are not parties of record in the original suit, and were not the owners of the tug at the time

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

[2] [From 23 Int. Rev. Rec. 83.]

the libel was filed; yet, as they are the parties guilty of the negligence charged in the original libel, if negligence there be, and as they are the parties who must ultimately pay the claim, if the original libel be sustained, I regard this proceeding as a cross libel within the spirit and scope of the rule. It is certainly a counter claim arising out of the same cause of action for which the original libel was filed, and the reasons which dictated the adoption of this rule apply as forcibly to this case as if the cross libellants were now owners of the tug. I do not think these cross libellants have been guilty of such laches as should disentitle them to make this motion. The original libellant was not ready for trial at the time the case was called, though it was supposed he was at the time the motion was made, and the facts were such that a continuance for the term was granted. I see no harm that can now result to the original libellant from this motion, and it is, therefore, granted.

Case No. 5,335.

The GEORGE KINGMAN.

[7 Wkly. Notes Cas. 50.]

District Court, E. D. Pennsylvania. May 2, 1879.

SEAMEN—ACTION FOR ASSAULT BY MASTER.

[A master sued for an assault, and denying the same in his answer, cannot, on proof of the assault, rely upon a justification.]

Libel for personal damage by Mayhorn against Howes, master of the barque. The libellant was hired as cook and steward of the barque on a voyage to Portugal and back to this port, which was duly performed. During the voyage he was accidentally scalded by hot water, and alleged that before his recovery the master forced him to return to work with threats and oaths. That soon afterward the master assaulted him by kicking him in the face, which resulted in a temporary scar. That upon another occasion the master again assaulted him, and knocked him down with his fist. Each of the assaults was deposed to by one other member of the crew. There was no evidence of any permanent injury to the libellant. Upon the part of the master both assaults were denied, the kicking entirely, and as to the blow with the fist, the master deposed that the libellant attempted to pass him on deck on the windward side, and that he merely removed him by a slight push; also, that he was unsatisfactory as a cook, and very insolent under reproof. The master's testimony was not corroborated by other witnesses.

E. F. Pugh, for libellant, cited Payne v. Allen [Case No. 10,855]; The Agincourt, 1 Hagg. Adm. 271; Pars. Mar. Law, 464; Abb. Shipp. 178, and notes; The Enchantress, 1 Hagg. Adm. 395.

Henry Flanders, for respondent. Irrespective of the oath of the master, this is at most a case where the master was compelled to punish an insubordinate seaman. Fuller v. Colby [Case No. 5,149]; Forbes v. Parsons [Id. 4,929].

THE COURT (BUTLER, District Judge), referring to the danger both of encouraging such suits, and of refusing parties redress in such cases, held that the assaults had been sufficiently proved, and that as the answer denied the assaults, it was not competent for the respondent to rely on a justification. Decree for libellant for one hundred dollars, with costs.

Case No. 5,336.

The GEORGE LAW.

[3 Ben. 396.] [1]

District Court, E. D. New York. Sept., 1869.

COLLISION—DANGEROUS MANOEUVRE.

Where a propeller attempted to pass close by a sloop, and just as she was passing, a puff of wind caught the sloop's sail, and her boom swung out, and the propeller struck it, receiving damage: *Held*, that the propeller, having attempted a dangerous and uncalled-for manoeuvre, must bear the consequences of it.

This was a libel by Daniel Shea, owner of the propeller U. S. Grant, to recover damages for a collision. The propeller was coming down the East river, and saw ahead of her the sloop George Law and another propeller, so close together that there was not room to pass between the propeller and the boom of the sloop, as it was swung out. As she approached, however, the sloop's boom was hauled in, whereupon she undertook to pass between them, and, while passing, the boom swung out, and injured her.

D. McMahon, for libellant.

Thomas Hooker, for claimant.

BENEDICT, District Judge. This case comes within the rule of the maritime law which imposes the risk of a dangerous and uncalled-for manoeuvre upon the party who undertakes it.

The proofs show that the propeller attempted to pass the sloop ahead, at a distance within the length of the sloop's boom, and was struck by the boom in passing.

There was nothing to require the propeller to pass at the time, or in such close proximity as she did, but, assuming the ability of the men upon the sloop to keep the boom inboard, she took the risk. As it happened, a puff of wind caught the sheet out of the hands of the men on the sloop, and the boom swung out, and into the propeller.

Such an occurrence should have been seen to be possible by those in charge of the propeller, and accident from it avoided by passing the sloop at a greater distance, as might easily have been done.

The libel is, accordingly, dismissed, with costs.

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

Case No. 5,337.

The GEORGE LAW.

The T. V. ARROWSMITH

[3 Ben. 456.] [1]

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

COLLISION IN EAST RIVER—STEAMBOATS MEETING—SPEED—STATE LAW—APPORTIONMENT OF DAMAGES—COSTS.

1. A steamboat, the A., was going up the East river, against the ebb tide. Off her port bow or side was a ferry-boat, going the same way. The pilot of the A., seeing another ferry-boat, the L., coming down the river, a little to the starboard of his course, heading about two points on his course, and apparently crossing it, blew two whistles, and starboarded his wheel, and shortly afterwards stopped and backed his boat, but she was struck on her starboard side, by the starboard bow of the L., which, after seeing the sheer of the A., had also starboarded her wheel. The L. was coming down the river, at the rate of eleven knots an hour, with the tide, and her engine was slowed, stopped, and backed, before the collision, but not soon enough to stop her headway, while the A. was, at the time of the collision, about still in the water. *Held*, that, on the evidence, the two vessels were meeting end on, or nearly so, when the two whistles of the A. were blown, and that, under the 13th article of the act of April 29, 1864 [13 Stat. 60], it was the duty of each to port her helm.

2. If, as was claimed by the A., the L. was crossing her course from the starboard side, it was the duty of the A., under article 14, to have kept out of her way, and the duty of the L. to have kept her course.

3. The A., therefore, should have stopped and backed before she blew her two whistles.

4. The A. was not excused from the duty of porting her helm, by the law of the state of New York, requiring steamboats navigating the East river to keep in the middle of it.

5. The L. was also in fault, for running at too great speed, contrary to the 1st section of the act of the state of New York, of April 12, 1848 [Laws 1848, p. 450].

6. The A. was not excused from porting, under the 19th article of the act of April 29, 1864, by reason of the presence of the other ferry-boat on her port bow, and danger of a collision between her and the L., if the L. kept on.

7. Independent of that statute, her speed was too great, and it was her duty, under article 16 of the act of 1864, to have slackened her speed sooner than she did.

8. Both vessels being in fault, the damages must be apportioned. The question of costs was reserved till after the apportionment was made.

In admiralty.

B. D. Silliman and D. McMahon, for the Arrowsmith.

Beebe, Donohue & Cooke, for the George Law.

BLATCHFORD, District Judge. These are cross libels, the first one having been filed by the owners of the steamboat T. V. Arrowsmith, against the steam ferry-boat George Law, and the second one having been filed by the owners of the latter vessel against the former, to recover for the damages sustained by the respective vessels, by a collision, which occurred between the two vessels, on the 28th of December, 1867, shortly after three o'clock in the afternoon, in the East river, between the city of New York and the city of Brooklyn, by which both vessels were injured. The Arrowsmith was on a trip from pier 24 East river, through the East river and Hell Gate, to points beyond. The George Law was on a trip on her regular ferry route, from her slip at the foot of Bridge street, in Brooklyn, to her slip between Oliver and James streets, in New York. The tide was about half ebb, and running with considerable strength at the middle of the river, which was about where the collision happened. The weather was clear, and there was scarcely any wind.

The libel by the owners of the Arrowsmith was filed on the 18th of January, 1868, and their answer to the libel filed by the owners of the George Law was filed on the 5th of October, 1868. There is some variation in the story of the Arrowsmith, as set forth in this libel, and as set forth in this answer. Both of these pleadings allege that the Arrowsmith had got out into the middle of the river, and had straightened up, and was well on her course up the middle of the river, prior to the collision, when the pilot of the Arrowsmith observed the George Law off the Arrowsmith's starboard bow, approaching down the East river, on a diagonal course, but nearly head on to the Arrowsmith. The answer says, that the George Law was then more than a quarter of a mile off. The libel says nothing on the subject of such distance. The libel says, that the pilot of the Arrowsmith, observing such course of the George Law, blew two whistles to her, in the usual manner, and at the proper distance off, as a signal for her to starboard her helm, and pass the Arrowsmith on her starboard hand, and that the pilot of the Arrowsmith put her helm to starboard. The answer says, that such two whistles were blown by the Arrowsmith when the George Law was a quarter of a mile off from her, and omits the statement that the pilot of the Arrowsmith put her helm to starboard. Both of the pleadings allege that, at the time of the blowing of such two whistles, there was, off the port bow of the Arrowsmith, straightening up the river, and not very far from the course of the Arrowsmith, one of the Hunter's Point ferry-boats, bound to Hunter's Point, which had just come out from the bulkhead at the foot of James street, New York, and to the port side of the Hunter's Point ferry-boat, was a ferry-boat, the Superior, bound down the river, whilst, between the starboard side of the Arrowsmith and the Brooklyn shore, there was no obstruction, but a clear river. The answer then contains an allegation not found in the libel, namely, that the course of the George Law was such at the time

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

the pilot of the Arrowsmith blew his two whistles, that she was attempting to cross, but would have been unable to cross, the bows of the Arrowsmith and the bows of the Hunter's Point ferry-boat, and that the Arrowsmith had slowed for the Hunter's Point ferry-boat just before blowing her two whistles, and that it was impossible for the Arrowsmith to have ported her helm, and to have gone to her own starboard in time to have avoided the Goerge Law, but that the George Law could very readily have gone in the direction called for by the two whistles of the pilot of the Arrowsmith, as the river, in that direction, was free of vessels, and the tide was favorable. Both of the pleadings allege that the whistles so blown by the pilot of the Arrowsmith were clear and distinct. The libel alleges that they were given at such a distance off from the George Law, that they could have been readily heard by those on her, if they had had a proper lookout stationed, and been attentive to their business. The answer alleges that the whistles could have been readily heard by those on the George Law, if they had had a proper lookout stationed, and been attentive to their business. Both of the pleadings allege that those on the George Law did not answer in time the signals of the pilot of the Arrowsmith, as they ought to have done. The libel alleges that the George Law persisted in her aforesaid course. The answer alleges, that she persisted in her aforesaid course, across the bows of both the Arrowsmith and the Hunter's Point ferry-boat. The libel alleges, that the pilot of the Arrowsmith immediately rang his engine bells to slow, stop, and back the Arrowsmith. The answer alleges, that the pilot of the Arrowsmith immediately rang his engine bells to stop and back the Arrowsmith, she being then slowed. Both of the pleadings allege, that these bells were answered by the engineer, and that the Arrowsmith's headway was forthwith checked, so that she was, at the time of the collision, very nearly, if not quite, dead in the water. The libel alleges, that the George Law did not slow, nor stop her headway. The answer alleges, that the George Law did not stop her headway. Both of the pleadings allege, that the George Law continued on the course she was on when the pilot of the Arrowsmith first observed her, and contrary to the signals given by the pilot of the Arrowsmith, until the George Law was about from sixty to one hundred feet off from the Arrowsmith, when the pilot of the George Law blew two whistles, in answer to the two whistles of the pilot of the Arrowsmith, and did not stop her engine. The answer adds, that the two whistles blown by the George Law were blown more than two minutes after the two whistles blown by the Arrowsmith were blown. The libel alleges, that the pilot of the Arrowsmith could not have avoided the collision in any way, as he could not port his helm, without going contrary to the signals previously given, and without attempting to cross the bows of the George Law. The answer alleges, that the pilot of the Arrowsmith could not have avoided the collision, before giving said two whistles, in any way, as she could not port her helm without going across the bows of the George Law. Both of the pleadings allege, that the Arrowsmith could not put her helm any more to starboard than she had put it, after blowing her two whistles, without being in danger of running into the Hunter's Point ferry-boat, (which bore, the libel says, off the Arrowsmith's port bow, and, the answer says, off the Arrowsmith's port side,) but that it was in the power of the pilot of the George Law to have avoided the collision, and the collision was the result of the incompetence, recklessness, and negligence of the pilot and those in charge of the George Law, in this: (1) They did not have a competent and skilful pilot in charge of the George Law, but, on the contrary, he was very much agitated at and just previous to the collision, and seemed to have lost his presence of mind, and to have, from want of a proper lookout, just discovered the Arrowsmith ahead of him at the time he blew his two whistles. (2) He had no proper or sufficient lookouts set. (3) He did not heed or follow the signal by whistles, given to him in time by the pilot of the Arrowsmith. (4) He did not check the headway of his boat in proper time. (5) He did not, in time, put his helm to starboard, by which he could have avoided the collision. The answer adds: (6) He should have taken an entirely different course in time.

The principal variations between the libel by the Arrowsmith and the answer by her are these: (1) The statement added in the answer, that the pilot of the Arrowsmith first observed the George Law when the latter was more than a quarter of a mile off. (2) The statement in the answer, that the two whistles blown by the Arrowsmith were blown when she was a quarter of a mile off from the George Law, the libel stating that such two whistles were blown at the proper distance off. (3) The omission in the answer of the statement contained in the libel, after the allegation that the Arrowsmith blew her two whistles, that her helm was put to starboard. (4) The statement added in the answer, that the course of the George Law was such, at the time the two whistles were blown by the Arrowsmith, that she was attempting to cross, but would have been unable to cross, the bows of the Arrowsmith, and the bows of the Hunter's Point ferry-boat, and that the Arrowsmith had slowed for the Hunter's Point ferry-boat just before blowing her two whistles, and that it was impossible for the Arrowsmith to have ported her helm, and to have gone to her own starboard, in time to have avoided the George Law, but that the George

Law could very readily have gone in the direction called for by the two whistles of the Arrowsmith. (5) The statement added in the answer, that, during the time between the blowing of the two whistles by the Arrowsmith, and the ringing of her engine bells, the George Law persisted in a course across the bows of both the Arrowsmith and the Hunter's Point ferry-boat, the only statement in the libel as to the course of the George Law at any time being, that it was at all times down the East river, diagonal, but nearly head on to the Arrowsmith. (6) The statement added in the answer, that the pilot of the Arrowsmith, when he observed that his signal was not answered by the George Law, and that the latter persisted in her course, rang his engine bells to stop and back the Arrowsmith, she being then slowed, the averment in the libel being, that he, at that time, rang his engine bells to slow, stop, and back his vessel. (7) The statement added in the answer, that the two whistles blown by the George Law were blown more than two minutes after the two whistles blown by the Arrowsmith were blown. (8) The statement added in the answer, that the Arrowsmith could not have avoided the collision, before giving her two whistles, as she could not port her helm without going across the bows of the George Law, there being no averment in the libel as to any inability of the Arrowsmith to avoid the collision, or port her helm, before giving her two whistles, and the averment in the libel as to the inability of the Arrowsmith to port her helm being an averment that she could not do so without going contrary to the signal previously given. The most material of these variations are, that regarding the distances between the two vessels when the George Law was first observed from the Arrowsmith, and when the two whistles were blown by the Arrowsmith; that regarding the course of the George Law, when the two whistles were blown by the Arrowsmith, and afterwards, down to the time when the two whistles were blown by the George Law; that regarding the time when the Arrowsmith was slowed; that regarding the interval that elapsed between the blowing of the two whistles by the Arrowsmith and the blowing of the two whistles by the George Law; and that regarding the inability of the Arrowsmith to port her helm, before giving her two whistles.

The libel and the answer by the George Law were both of them filed on the 28th of May, 1868. Her story in them is, that the George Law had reached a point, the libel says about one half, and the answer says about one third, of the way from the New York shore, and was heading diagonally, the libel says down and across the river, and the answer says across the river, when the Arrowsmith, the libel says at a distance off of about three lengths, and the answer does not state at what distance off, blew two whistles. The libel says, that the Arrowsmith commenced sheering towards the New York side before she blew. The answer says that she began to sheer as soon as she blew. Both of the pleadings state that the George Law, after seeing such sheer and hearing such two whistles, blew two whistles herself, and put her helm to starboard and stopped and backed, and that the Arrowsmith then blew one whistle. The answer states that the Arrowsmith did not stop or slow until the collision. Both of the pleadings state that the collision was occasioned by the fault of the Arrowsmith in these particulars: (1) In not having a lookout; (2) In not porting; (3) In not stopping and backing in time; (4) In starboarding without waiting for a response from the George Law.

The starboard side of the Arrowsmith at a point about twenty feet aft of her stem was struck by the bluff of the starboard bow of the George Law. The Arrowsmith claims $6,000 damages and the George Law claims $1,000.

It cannot fail to arrest attention, that the libel filed by the Arrowsmith states, that, when on her course up the middle of the river, her pilot observed the George Law off the starboard bow of the Arrowsmith, approaching down the river, on a diagonal course, but nearly head on to the Arrowsmith, and that it was the persistence of the George Law in such course, after the two whistles were blown by the Arrowsmith, and which course it is not alleged she changed before such two whistles were blown, that induced the pilot of the Arrowsmith to ring his engine bells to slow, stop and back. The only course stated in that libel as the course of the George Law at any time is a course down the river, and, though diagonal, nearly head on to the Arrowsmith. The answer filed by the Arrowsmith wholly departs from this statement as to the course of the George Law. Although that answer states, that the course of the George Law, when she was first observed by the pilot of the Arrowsmith, was down the East river, and, though diagonal, nearly head on to the Arrowsmith, and although it then goes on to state, that the blowing of the two whistles by the Arrowsmith was the result of the observation by her of such course of the George Law, yet it afterwards adds, what is not found in the libel filed by the Arrowsmith, that, when the two whistles were blown by the Arrowsmith, the course of the George Law was such that she was attempting to cross the bows of the Arrowsmith and the bows of the Hunter's Point ferry-boat, and that, after such two whistles were blown, the George Law persisted in her course across the bows of both the Arrowsmith and the Hunter's Point ferry-boat, and that it was such persistence of the George Law in such course that induced the pilot of the Arrowsmith to ring his engine

bells to stop and back. The testimony on the part of the Arrowsmith sustains the allegations of the libel filed by her, as to the course of the George Law, and does not sustain the allegations of the answer filed by her as to such course. Smith, the pilot of the Arrowsmith, testifies, that, when he first saw the George Law, she was very nearly head on to him, a little diagonally possibly, on his starboard bow a trifle, coming nearly at him, but not exactly at him; that she was not heading directly down but a trifle across the river; and that, if she had kept on the course she was then on, and the Arrowsmith had kept on the course she was then on, they would have hit each other. He fortifies this by saying, that, when the two whistles were blown by him, he said to his wheelsman: "If he keeps on that course he will certainly hit us;" and that, when the bells of the Arrowsmith were rung to back, the George Law was on the same course she had been on. On cross-examination, he says, that when he first saw the George Law she was heading as nearly at him as he could get at it; that, from the time the two whistles were blown by the Arrowsmith, to the time of the collision, the George Law did not sheer either way, but came as straight as she could come. Jarvis, the wheelsman of the Arrowsmith, who was in her pilot house with Smith, the pilot, testifies, that, after the George Law got headed down the river, she was coming at the Arrowsmith all the time. Merritt, a passenger on the Arrowsmith, accustomed to navigation by having followed the water, testifies, that, when the two whistles were blown by the Arrowsmith, the George Law was heading a little on the starboard bow of the Arrowsmith, nearly ahead of her; that, if neither vessel had altered her course, they would have come together; and that the George Law would have struck the starboard bow of the Arrowsmith. Tibbits, a passenger on the Arrowsmith, testifies, that he saw the George Law as soon as the two whistles of the Arrowsmith were blown; that she then seemed to be coming right at the Arrowsmith; that the two boats then seemed to him to be directly head and head, and to be in the same line; and that he noticed that the George Law did not change her course. Germain, an engineer, who has followed the water for many years and who was a passenger on the Arrowsmith, testifies, that he first noticed the George Law after the two whistles of the Arrowsmith were blown; that, at that time, the two vessels were on parallel lines; that, running on those lines, they would have come in contact; and that each would have been struck on the starboard side. This testimony on the part of the Arrowsmith, taken in connection with her pleadings, establishes, that she and the George Law were meeting end on, or nearly end on, so as to involve risk of collision, prior to and at the time the two whistles were blown by the Arrowsmith, and so as to make it incumbent on both of the vessels, under the requirement of article 13 of the act of April 29, 1864 (13 Stat. 60), to put their helms to port, so that each should pass on the port side of the other. In the case of The Nichols, 7 Wall. [74 U. S.] 656, 663, the supreme court says: "Each vessel was seen from the deck of the other about the same time, when they were some two or three miles apart, and, as they were approaching each other from nearly opposite directions, it is quite clear, under the regulations enacted by congress, that the helms of both should have been put to port, so that each might have passed on the port side of the other, unless the distance between them at that precise time, was so great as not to involve risk of collision. Rules of navigation are obligatory upon vessels approaching each other, from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remains." Vessels are meeting end on, within the meaning of article 13, when they are approaching each other from opposite directions, or on such parallel lines as involve risk of collision on account of their proximity, and when the vessels have advanced so near to each other that the necessity for precaution to prevent such a disaster begins; and they are meeting nearly end on, within the meaning of that article, when they are approaching from nearly opposite directions, or on lines of approach substantially parallel, and are so near to each other as to involve risk of collision. The Nichols, above cited. Under the requirement of article 13, it was plainly the duty of the Arrowsmith to have put her helm to port, on the case made in the libel filed by her and by the testimony on her part, that has been referred to.

If, as the answer filed by the Arrowsmith sets up, the George Law, at the time the two whistles of the Arrowsmith were blown, was on a course across the bows of both the Arrowsmith and the Hunter's Point ferry-boat, she must have been on the starboard side of the Arrowsmith, and the Arrowsmith must have been on the port side of the George Law. Under such circumstances, article 14 of the act of April 29th, 1864, made it the duty of the Arrowsmith to keep out of the way of the George Law, and article 18 of the same act made it the duty of the George Law to keep her course. Such duty was not properly discharged by the starboarding of the Arrowsmith or by the blowing of her two whistles, but the performance of it required that the Arrowsmith should, under article 16 of the said act, have stopped and reversed either with or without porting, at a period anterior to the time when she blew her two whistles. In any event, the course pursued by the Arrowsmith was faulty. She should either have ported or she should have stop-

ped and reversed before she did. Instead of porting, she starboarded, and, instead of stopping and reversing, at least as soon as she blew her two whistles, she blew those whistles, and waited for a response, and, receiving none, then stopped and reversed.

The 1st section of the act of the legislature of New York, passed April 12, 1848 (Laws 1848 [p. 450], c. 321), which requires all the steamboats passing up and down the East river, between the Battery at the southern extremity of the city of New York and Blackwell's Island, to be navigated as near as possible in the centre of the river, except in going into or out of the usual berth or landing place of such steamboat, is invoked to show that the Arrowsmith had a right to keep on a course as nearly as possible in the center of the river. But the act was no more applicable to the Arrowsmith than it was to the George Law. The E. C. Scranton [Case No. 4,273]. Each was bound to navigate as nearly as possible in the centre of the river. The act was not passed to promote collisions, but to prevent them. It was passed to prevent steamboats from navigating the East river close to the ends of the slips or piers. It must have a reasonable construction, and it cannot authorize any vessel to adhere blindly to a course in the centre of the river, without reference to other vessels. So construed, no two vessels could meet while navigating the East river, without colliding.

It is urged, on the part of the Arrowsmith, that there was not room for the George Law to go between the Arrowsmith and the Hunter's Point ferry-boat, which was where the pilot of the George Law was intending to carry his boat before the Arrowsmith starboarded or blew her two whistles; that the George Law had abundance of room to go, by starboarding, towards the Brooklyn shore; and that, therefore, the Arrowsmith was right in starboarding. It is also urged that, even if the Arrowsmith had ported instead of starboarding, there would not have been room for the George Law to go between the Arrowsmith and the Hunter's Point boat; and that the consequence of the porting of the Arrowsmith would have been, even if she had escaped colliding herself with the George Law, to throw the George Law against the Hunter's Point boat. These views are urged to excuse the Arrowsmith for not having ported. The ground taken is, that, under article 19 of the act of 1864, which provides that, in obeying and construing the rules prescribed by the act, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the said rules necessary, in order to avoid immediate danger, the Arrowsmith was bound to regard the danger to the navigation of the George Law and of the Hunter's Point boat which would have ensued from the porting of the George Law. The answer to these views is, that the Arrowsmith ought to have stopped and reversed, at least as soon as she blew her two whistles, and ought at the same time to have thrown her head to starboard. She would then have been free from fault. She saw that there was risk of a collision with the George Law, and, therefore, blew two whistles. It was because of the approach of the George Law, involving such risk, that the two whistles of the Arrowsmith were blown. Having starboarded, either then or previously, without waiting to know whether the George Law would starboard also, it became necessary that the Arrowsmith should stop and reverse at least as soon as she blew her two whistles. It being necessary that she should do so then, it was incumbent on her, by article 16 of the act, to do so then. If she had done so then, and her head had been then thrown to starboard, she would have been free from fault, and there would have been no occasion for any indulgence in conjecture as to whether she would or would not, by so doing, have collided with the George Law, or as to whether the Hunter's Point boat would not, or would in that event, have collided with the George Law. The tide was strongly ebb, which would have favored both the stopping of the headway of the Arrowsmith, as she was going against it, and the turning of her head to the starboard by porting. It is true that the Arrowsmith was nearly, if not quite, dead in the water, at the time the two vessels struck each other. But that does not meet the difficulty. If she had stopped and reversed sooner, she would have become dead in the water at a greater distance from the George Law, and her speed would have been retarded thereby, and by the action of the tide, so much sooner than it was, that the collision would probably have been entirely avoided or been very slight. Her libel and her answer allege, that she could not put her helm any more to starboard than she did put it after blowing her two whistles, without being in danger of running into the Hunter's Point ferry-boat, which bore, the libel says, off her port bow, and, the answer says, off her port side. Her pleadings no where allege, that, if she had stopped and reversed sooner, so as to have fallen behind the Hunter's Point boat, she could not, before her two whistles were blown, have starboarded to a greater extent than she did, without being in danger of running into the Hunter's Point boat, and to a sufficiently greater extent to have cleared the George Law. There would not have been, within the 19th article of the act, any danger of navigation incurred by the Arrowsmith by stopping and reversing sooner than she did, or by porting, as, on the evidence, there was no obstruction behind her or to her starboard side; and no special circumstances, within such 19th article, are shown to have existed, rendering a departure by the Arrowsmith from the 13th and 16th

articles necessary, in order to avoid immediate danger. On the contrary, all the danger of navigation incurred by the Arrowsmith was incurred by her not stopping and reversing sooner than she did, and by her not porting; and the evidence shows that an adherence by her to the 13th and 16th articles was necessary in order to avoid immediate danger. My conclusion, therefore, is, that the handling of the Arrowsmith contributed to the collision and that she was in fault.

The George Law was also in fault for violating the provision of the 1st section of the act of the legislature of New York of April 12th, 1848, (before cited,) which enacts, that steamboats passing up and down the East river between the Battery at the southern extremity of the city of New York and Blackwell's Island shall not be propelled at a greater rate of speed than ten miles an hour. By the testimony of the pilot of the George Law, she was going, from the time she got on her course down the river until her bells were rung to slow, stop and back, at a speed of eleven knots an hour with the tide. But, independently of the statutory provision, the George Law maintained too great a rate of speed under the circumstances. She was aiming to go through the contracted space between the Arrowsmith and the Hunter's Point boat, and was going with the tide, which was strong and nearly half ebb, and her success in doing so depended upon her being allowed to do so by the Arrowsmith. The pilot of the George Law says that, up to the time the four bells of the George Law were rung to slow, stop and back, which was done at a distance of 275 yards from the Arrowsmith, the George Law was heading about two points to the New York side of the line of the channel up and down, leaving the line of the channel about two points on his port bow; and that the Arrowsmith, up to the time she was 300 yards off from the George Law, was heading at the George Law, bearing two points on the port bow of the George Law, and heading two points on the port bow of the George Law. Under these circumstances, although the pilot of the George Law may have thought that the Arrowsmith would keep to the right, yet the George Law was approaching the Arrowsmith in such manner as to involve risk of collision, and to make it incumbent upon the George Law under article 16 of the act of 1864, to slacken her speed sooner than she did, and not to plunge on at the rate of eleven knots an hour until within 275 yards of the Arrowsmith. The neglect to slacken her speed sooner than she did was, also, on the part of the George Law, a neglect, under article 20 of the act, of a precaution required by the special circumstances of the case.

There must, therefore, be a decree apportioning between the two vessels the damages sustained by them both, with a reference to ascertain such damages. The question of costs is reserved until the coming in of the report of the commissioner.

GEORGE LAW, The (LEITCH v.). See Case No. 8,223.

GEORGE M. BAIN, JR., The (UNITED STATES v.). See Case No. 15,201.

Case No. 5,338.

The GEORGE M. DALLAS v. The NEW HAVEN.

[35 Hunt, Mer. Mag. 455.]

Circuit Court, S. D. New York. Sept. 13, 1856.[1]

COLLISION—LOOKOUT.

[A steamer will be *held* liable for a collision with a schooner on a dark and cloudy night, if it might have been avoided, had the steamer a lookout forward.]

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

[Libel in rem William D. Reed and others against the steamboat New Haven for a collision. The New York & Erie Railroad Company appeared as claimant. The court below found for libelants (Case No. 11,649), and claimant appealed to this court.]

NELSON, Circuit Justice. This libel was filed by the owners of the sloop to recover damages for a collision, a little below Piermont dock, on the North river, on the night of the 7th of May, 1855, in which she was run down and sunk by one of the barges of the tow of the steamboat New Haven. The night was somewhat dark and cloudy. The sloop was coming down the river, the wind about S. S. E., with a moderate breeze, the steamboat ascending, making for Piermont dock. The hands on the sloop testify that she was coming down on the west shore of the river, and that the steamboat was ascending east of her, and took a sheer to the west that led to the disaster; while the hands of the steamboat aver that she was ascending on the east shore, and that the sloop was coming down east of them, and suddenly changed her course towards the west, crossing the bows of the steamer. Judge Ingersoll, who heard and determined the case below, held the steamer was in fault in not having a competent lookout stationed in the forward part of the boat, whose duty it was to descry and report to the proper officer vessels approaching at the earliest possible moment. She had no "lookout," in the maritime sense of that term. The pilot and captain were on the pilot-house, which was some fifty feet from the stem of the vessel; at the time of the collision, the pilot was at the wheel. There seems to have been no person on board whose especial duty it was

[1] [Affirming Case No. 11,649.]

to look out for vessels ahead. We have repeatedly held, that this neglect was a fault in the navigation of a vessel that would charge her in case of the happening of a collision.

It is insisted for the respondents, that the sloop was in fault also, for not keeping her course, and that the sudden change of it led to the collision. We are not satisfied that any change of course took place on her part until the danger of a collision was impending; and further, we think, if there had been a competent and vigilant lookout on the steamer, the disaster might have been avoided. Judge Ingersoll has examined the evidence with great care, and has stated the reasons at large for his conclusion in charging the New Haven, and we fully concur in the views he has taken of the case, and the result to which he arrived. It is a matter of surprise that masters of steamboats should be found so frequently neglectful of their duty in omitting to station a lookout at a proper place on the boat, especially in dark and cloudy weather, after the necessity of the observance of it has been so repeatedly enforced by the courts, and several condemnations of vessels for the omission. The duty was most manifest, in this case, considering the weather, and the moving mass upon the river of one hundred and sixty feet width comprising the steamboat and her barges. Decree affirmed.

GEORGE NICHOLAUS, The (STURTEVANT v.). See Case No. 13,578.

Case No. 5,339.

The GEORGE PRESCOTT.

[1 Ben. 1;[1] 2 Int. Rev. Rec. 133.]

District Court, E. D. New York. Sept., 1865.

ADMIRALTY PRACTICE—DEFAULT—SETTING ASIDE A SALE—PROCEEDS OF SAILS SOLD BY THE MASTER TO BE BROUGHT INTO COURT—COSTS.

1. Several libels were filed against a vessel—one for wages due to the master and crew, one on a bottomry bond, and others for advances and supplies. Defaults were taken on all the processes, and final decrees were rendered, and the vessel was sold under a venditioni exponas to one of the libellants for a sum insufficient to pay all the claims. The next day the second libellant applied to the court to set aside the sale, and open the default taken against him in the wages case, on affidavits alleging that the wages of the crew, and the bottomry bond had been paid, and that there was nothing due to the master. He also alleged that the master and one Smith had stripped the vessel of her sails before her sale by the marshal, so that she had brought an insufficient price. On this a monition was issued to the master and Smith to show cause why they should not produce the sails, and an order was made, for all parties to show cause why the sale should not be set aside and the default opened. On the return of this monition and order, the parties appeared and furnished affidavits—that of the master alleging that before the seizure of the vessel by the marshal he took the sails and had sold them for $600, and that he had not the possession of the sails, and did not know where they were, and that he had a mortgage on the vessel under which he had a right to take them. *Held*, that as it appeared on the evidence that the vessel was sold for her full value excluding the sails, the court would not disturb the sale.

2. As it appeared that the seamen had not been paid their wages, the application to open the decree in their favor must be denied.

3. The master's right to a lien being disputed, and it not being made certain that the amount claimed by him was due, and the applicant to open the decree being free from laches, the decree in favor of the master should be opened, and the applicant allowed to contest his claim.

[Cited in Whitney v. The Mary Gratwick, Case No. 17,591.]

4. Whatever rights the master had under his mortgage, he could not be allowed to enforce them, as he had done in this case, to the detriment of others who had liens upon the mortgaged property; and as he admitted that he had sold the sails and had the proceeds in his possession, he must be required to pay them into the registry of the court to meet such claims as were valid liens on the vessel.

5. The question of costs reserved.

The schooner George Prescott (a British vessel) was libelled on the 11th day of August, 1865, by Robert Johnson, her master, and six of her crew, to recover wages for services in navigating her. Subsequently, on the same day, William H. Birchard filed his libel against the same vessel, her tackle, &c., to recover certain advances alleged to have been made for the purchase of supplies. On the 12th day of August, Benj. R. Luddington and others filed their libel to recover a bottomry debt. Subsequently, on the same day, James M. Hicks and others filed their libel for supplies furnished. On the 15th of August, Josephus F. Packer and others filed their libel for advances; and on the 30th of August, Peter McEnary, pilot, filed a petition for pilotage. On the return of the various processes, no one appearing to defend in any of the actions, an interlocutory decree was made in each cause, and a reference ordered to ascertain the amount due the respective libellants; and upon the coming in of the report a final decree was rendered in each cause, and the vessel condemned to be sold, reserving, however, the question of distribution for the further order of the court. A venditioni exponas was accordingly issued, and on the 14th day of September, the vessel was sold by the marshal to Packer, one of the libellants, who had filed the fourth libel against the vessel, for a sum insufficient to pay the various claims. On the day following the sale, application was made to the court in behalf of Birchard, who had filed the second libel, to set aside the sale and open the decrees made in favor of the master and crew, upon affidavits tending to show, among other things, that the amounts claimed by the seamen had been paid them; that no wages were due the master; that the bottomry bond had been paid

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

and discharged before suit was brought on it; that the master, Johnson, and J. Penniman Smith had removed from the vessel her sails and bedding, of considerable value, and so disposed of the same that it had not been seized by the marshal, and that the vessel had thus been sold, stripped of her sails and bedding, with intent to defraud the parties having liens, and defeat them in the enforcement of the claims made in court against the vessel, her tackle, apparel and furniture. A monition was accordingly issued, citing Johnson and Smith to appear and show cause why they should not produce the sails and bedding of the vessel, and an order made directing all parties interested to show cause why the sale should not be set aside, and the decrees in favor of the master and seamen opened, so as to allow the material man to come in and contest these claims. Upon the return of the order and monition, the master and crew and the purchaser of the vessel at the marshal's sale, appeared and submitted affidavits tending to contradict the statements made in the moving papers. By consent of all parties, the affidavits of Johnson (the master) and of Smith, were taken as their answer to the petition and monition against them.

Benedict, Burr & Benedict, for the motion.

Emerson, Goodrich & Knowlton, in opposition.

BENEDICT, District Judge. The relief demanded by Birchard upon this application is threefold. He asks, in the first instance, that the sale of the vessel made by the marshal be set aside, and the vessel remanded into custody to abide the result of his action against her. Without discussing what may be the power of the court to set aside a judicial sale of a vessel which has been sold, without her sails, to a purchaser who was one of the parties libelling, and who, with knowledge of the other claims pending against her, bought her for a sum insufficient to pay all, I am of the opinion that this part of the application must fail in this case, for the reason that it is not made to appear upon the proof that the vessel did not bring a full price. The evidence before me is, that the full value of the vessel, excluding the value of her sails, was bid, and that amount has been paid into the registry, where it now is subject to the order of the court. Upon such a state of facts I decline to disturb the sale.

The libellant Birchard, further asks that the decrees entered in favor of the master and crew be opened, and he allowed to contest these claims. This is opposed upon the ground that the claims are clearly just and due, and further that the decrees were regularly taken in presence of Birchard, with full knowledge on his part of their character, and that by omitting to apply to contest until after the final decrees were entered, he has waived all right now to dispute them.

In cases like the present, where several libels are filed against the same vessel, to pay which the proceeds turn out to be insufficient, and no owner appears, and where one of the libellants, finding the proceeds insufficient to pay his demands, asks to be allowed to show that claims otherwise liable to be paid out of the fund in preference to his own are not justly due, the application is seldom if ever denied. There is, in truth, no time before the actual sale of the vessel when any libellant can know that his interest will be prejudiced by decrees rendered in favor of other libellants, or that any adverse action on his part will be required to secure the payment of his demand; whether any one other than the owner, and if any what one, will be compelled to contest the claims seeking to be first paid, can only be known when the gross amount of the demands is ascertained, and the amount applicable to their payment known by the result of the sale. It is undoubtedly more strictly regular for each libellant in cases like the present, upon the return of the processes, to reserve before the court his right to contest the demands of the other libellants, when the result of the sale should disclose the necessity; but this is often omitted, and decrees more often rendered upon the understanding that they do not cut off any right of any libellant before the court. Here the application was made on the day subsequent to the sale, and on the same day on which the money was paid into the registry; and the position of the various actions, with the further fact admitted by the master, that he had expressed to Birchard the opinion that the vessel, if sold as she was, would bring an amount nearly if not quite equal to the amount necessary to insure the payment of Birchard's claim, clearly warrant the court in holding him free from laches, and allowing him to contest the demands of the master and seamen, if he show good ground of defence. This, however, he fails to do, so far as relates to the claims of the mate and seamen. The affidavits satisfy me that the mate and men have never been paid, and their lien cannot be questioned. The application to open the decrees made in favor of the mate and seamen must, therefore, be denied.

In regard to the demand of the master the facts are different. His right to a lien is disputed; and I am not satisfied, upon the proofs as they stand, that the amount claimed is due him, and it seems proper that the other parties interested in the fund should be allowed to contest his demand. The decree made in favor of the master is, therefore, opened, and Birchard allowed to come in and contest it.

Birchard further asks, under the provisions of the 8th admiralty rule, for an order directing the master, Johnson, and J. Penniman Smith, to produce and deliver to the marshal the sails and bedding of the vessel.

The affidavit of Johnson, by consent taken as his answer and defence to this application, sets up that before the vessel was seized by the marshal, he took her four large sails and also some bedding; that the bedding was his private property, and no part of the apparel and furniture of the vessel; that he has sold the sails for $600, and has not the possession or control of them, and is ignorant of their whereabouts; that he has a mortgage upon the vessel for $1000, and under its provisions he had the right to take and sell the sails and appropriate the proceeds. The answer omits to state how long before the seizure of the vessel the sails were removed, nor does it state when they were sold nor to whom they were delivered. Now, whatever rights in this property the master may have by virtue of his mortgage, it is evident that he cannot be permitted in this way to adjudicate for himself upon them, to the prejudice of seamen, material men, and bottomry creditors, claiming liens upon the same property as part of the vessel. If he had the right before seizure by the marshal to take possession of this property by virtue of his mortgage, still the claims of the various lien creditors attach to it in his hands as well as to the hull; and the right to have it taken, condemned and sold, and the proceeds applied under the order of the court, cannot thus be defeated. And this right of lien creditors, which attaches to the vessel herself, her tackle, apparel and furniture, and to every part thereof, in cases where the property has been sold or disposed of so that it cannot be reached in specie by the process of the court, may be enforced against the proceeds of the property, in whose hands soever it may be found, and that either by the order of the court or by its judgment and decree. Such has often been the action of courts of admiralty. The Harmonie, 1 W. Rob. Adm. 179; Coote, Adm. Pr. p. 97. See, also, Pitman v. Hooper [Cases Nos. 11,185 and 11,186], where, before Judge Story, an action in the nature of a proceeding in rem against the proceeds of a vessel was maintained some twenty-eight years after the performance of the service, and where the fund proceeded against was the sum then first awarded by a foreign government as compensation for the seizure and sale of the vessel twenty-eight years previous.

As this master then concedes that he took the property in question, has sold it, and now has the proceeds in his possession, he must be required to pay such proceeds into the registry, there to be subjected to such claims as may be held to be valid liens upon this vessel.

With regard to the proceeding, as against Smith, I think a fuller examination of the facts attending his connection with the disposition of this property is necessary before making any order against him. I shall therefore direct a reference to a commissioner, to ascertain and report as to the truth of the allegations made against him.

In thus disposing of the various applications made in behalf of the libellant Birchard, I have in no way passed upon the validity of his claim as against this fund. That claim the master may contest if so advised, and the decree made in favor of Birchard will be opened for that purpose. Neither have I passed upon the effect of evidence tending to show some understanding between Birchard and the master, that the claim of the master should be first paid. All these questions I leave to be disposed of when they arise upon the hearing of the causes, or upon the motion to determine the priorities of the various libellants.

I also reserve the questions of the costs of entering the decrees now set aside, till the final order of distribution. Let an order be entered in accordance with the views expressed in this opinion.

GEORGE S. BROWN, The. See Cases Nos. 1,889 and 1,890.

GEORGE'S CREEK, The (CREIGHTON v.). See Case No. 3,382.

GEORGE'S CREEK, The (REEDER v.). See Case No. 11,654.

GEORGE SKOLFIELD, The (BURGTHALL v.). See Case No. 2,155.

Case No. 5,340.

The GEORGE S. WRIGHT.

[Deady, 591.] [1]

District Court, D. Oregon. July 2, 1869.

PILOTAGE—STATE AND FEDERAL LICENSES—HALF PILOTAGE—REMEDY AGAINST CONSIGNEE.

1. By the act of February 25, 1867 (14 Stat. 411), a sea-going steam vessel, subject to the navigation laws of the United States, when navigating any of the waters thereof, is required to be in charge of a pilot licensed by the inspectors of steam vessels, but such act is cumulative, and does not annul or supersede a state law requiring that such pilot when piloting such vessel within the limits of the state, should also be licensed by the pilot commissioners of the state.

[Cited in The Alzena, 14 Fed. 175.]

2. Claims for half pilotage for offer and refusal of services, are cases of admiralty jurisdiction, and a suit therefor may be maintained against the vessel or master; and a state statute which provides that in a certain contingency the consignee shall also be liable therefor, does not affect the jurisdiction in admiralty, but only gives an additional remedy against a third person.

[Cited in The California, Case No. 2,312; Holmes v. Oregon & C. Ry. Co., 5 Fed. 84; The Glenearne, 7 Fed. 606; Sylvester v. The Edith Godden, 25 Fed. 512; McDonald v. Prioleau, 44 Fed. 770; The Allianca, 56 Fed. 613.]

3. Suggestions as to the regulations of pilot fees by congress rather than the state.

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

In admiralty.

Joseph N. Dolph, for libellant.
Erasmus D. Shattuck, for claimant.

DEADY, District Judge. This suit is brought to recover $95 for half pilotage, claimed to be due the libellant on account of the offer of his services to pilot the Wright from the port of Astoria, over the bar of the Columbia river to the open sea, and the refusal of the same by the master, on January 14 and April 8, 1869.

From the pleadings and stipulation of the parties, the material facts appear to be as follows:

I. That on the dates aforesaid, and each of them, the libellant was duly qualified and authorized by the laws of the United States, and of the state of Oregon, to pilot the George S. Wright from the port of Astoria over the bar of the Columbia river to the open sea, and that on said dates respectively said libellant hailed said Wright at the port of Astoria, and offered to pilot her from said port across said bar to the open sea, but that the master of said vessel then and there refused to accept said offer or permit libellant to come on board or pilot said vessel.

II. That on the dates aforesaid, and each of them, the George S. Wright was a sea-going vessel, propelled by steam, engaged in carrying passengers, and bound on a voyage from Portland on Wallamet, to the foreign port of Victoria; and that Henry Langdon was then and there the master of said vessel, and duly qualified, licensed and authorized under the statutes of the United States in such cases made and provided, to pilot said vessel from the port of Astoria over said bar to the open sea, but was not so qualified or authorized under the statutes of Oregon, relating to pilots and pilotage on said river and bar or either of them.

III. That at the dates aforesaid, and each of them, said vessel proceeded on her voyage from the port of Astoria to the port of Victoria aforesaid, and was then and there piloted from Astoria aforesaid to the open sea by the master thereof; but that the libellant was the first pilot that then and there offered to pilot said vessel from Astoria to the open sea who was duly authorized and qualified therefor, under the laws of the state of Oregon, relating to pilots and pilotage upon said river and bar.

Upon this state of facts, is the libellant entitled to recover half pilotage for the offer and refusal of his services as aforesaid? As the law then stood and still remains, this question must be answered in the affirmative. A brief statement of the legislation and judicial decisions upon the subject will make this apparent.

On August 17, 1789 (1 Stat. 54), congress passed an act adopting the existing laws of the states regulating "pilots in the bays, inlets, rivers, harbors and ports of the United States," together with such laws as they might hereafter enact for that purpose, "until further legislative provision should be made by congress."

On August 30, 1852, congress passed an act relating to vessels propelled by steam, and carrying passengers on any of the navigable waters of the United States. Section 9 of this act (10 Stat. 63) declares:

"That instead of the existing provisions of law for the inspection of steamers and their equipments, and instead of the present system of pilotage of such vessels, and the present mode of employing engineers on board the same," certain regulations prescribed by that act shall be observed. One of these regulations is to the effect that pilots for such vessels must be licensed and classified by United States inspectors; and another prohibits, under a penalty of $100, any person from employing, or any person from serving as pilot on such vessel without such license.

In The Panama [Case No. 10,702], this court decided, that under the act of 1852, a steam vessel carrying passengers anywhere upon the waters of the United States, must be under the charge of a pilot licensed under that act; and that the master of such vessel was prohibited from taking on a pilot anywhere, unless so licensed.

Three years afterwards, the supreme court of the United States, in Steamship Co. v. Joliffe, 2 Wall. [69 U. S.] 450, decided that the act of 1852 did not apply to port or bar pilots, and that, therefore, the state law regulating pilots in the bay of San Francisco was in nowise modified or affected by the act of 1852. As a matter of opinion simply, I have yet seen no reason to question the soundness of the conclusion arrived at in The Panama, but, of course this court is bound by the authority of Steamship Co. v. Joliffe, supra.

This was the state of the law upon the subject until July 25, 1866, when congress passed an act to provide for the safety of the lives of passengers on steam vessels. Section 9 of this act (14 Stat. 228) provides:

"That all vessels navigating the bays, inlets, rivers, harbors and other waters of the United States, except vessels subject to the jurisdiction of a foreign power and engaged in foreign trade, and not owned in whole or in part by a citizen of the United States, shall be subject to the navigation laws of the United States. * * *

"And every sea-going steam vessel now subject to the navigation laws of the United States, * * * shall, when under way, except upon the high seas, be under the control and direction of pilots licensed by the inspectors of steam vessels; * * *."

By the enactment of this provision congress has declared that the construction given to the act of 1852, by this court in The Panama shall prevail, so that, "except upon the high seas," or stated conversely, upon the

navigable waters of the United States, including ports and harbors, a sea-going steam vessel must be under the direction of a pilot licensed under the act of 1852, and not otherwise.

On February 25, 1867, the act of July 25, 1866, was amended by re enacting section 9 thereof (14 Stat. 411) with the following proviso:

"That nothing in this act, or in the act of which it is amendatory, shall be construed to annul or affect any regulation established by the existing law of any state requiring vessels entering or leaving a port in such state to take a pilot duly authorized by the laws of such state, or of a state situate upon the waters of the same port."

This is the latest congressional enactment upon the subject. In my judgment this proviso does not change the legal effect of section 9 of the act of 1866. A sea-going steam vessel anywhere upon the navigable waters of the United States, whether "entering or leaving a port," must still be under the direction and control of a pilot licensed by the inspectors of steam vessels.

But on the other hand, the act of congress, with or without the proviso, does not annul or abrogate the state laws, concerning pilots and pilotage in the ports and harbors, except so far as the latter may conflict or be inconsistent with the former. The former in effect prohibits a mere state pilot from piloting a sea-going steamer in the port or elsewhere upon the navigable waters of the United States. But if the pilot be licensed by the United States inspectors, then the act of congress is satisfied and does not exclude the operation of state laws providing additional regulations upon the subject of pilots and pilotage. In short, the act of congress is merely a cumulative provision. It annuls nothing, but adds an additional qualification, in the case of pilots, piloting sea-going steamers.

The state regulations upon the subject of pilots and pilotage between Astoria and the open sea are contained in an act for the establishment of a pilotage upon the Columbia and Wallamet rivers, passed October 17, 1860 (Code Or. 839), with the amendments thereto.

It provides for the creation of a board of pilot commissioners, who are authorized to examine and license pilots on the Columbia river and bar below Astoria, and prescribes their qualifications, duties and compensation. Any such pilot is authorized to take charge of any vessel, not less than twenty-five tons burden, bound in or out of the Columbia river. The master of such vessel may, if he choose, pilot her in or out of the river, "but he shall, notwithstanding, when bound into the river, pay to such pilot, as shall first offer his services outside the bar, full pilotage, * * * and if bound out, one half pilotage." If the "master omit or refuse to pay the pilotage fees in any instance, * * * then his consignee shall become liable for the same."

These regulations are not inconsistent with the acts of congress upon the same subject. They can stand together and be obeyed by the same person at the same time. Taken together, they constitute the law governing the pilotage of steam vessels on the pilot grounds of the Columbia river, below Astoria.

By virtue of the acts of congress a steam vessel, "when under way," elsewhere than "upon the high seas"—that is, beyond the territorial jurisdiction or dominion of the United States—must be under the control of a pilot licensed by the United States inspectors. This provision is imperative, a pilot without such license is not authorized to pilot such vessel. But a pilot with this qualification alone, is not, so to speak, a full pilot, on these pilot grounds. Before he is authorized to offer his services to such vessel, and in case of refusal, to demand whole or half pilotage, as the case may be, he must also be qualified under the state laws.

This conclusion accords with the following suggestion made by this court in The Panama [supra]. "The law (act of 1852) only so far abrogates the state law as to require that a steam vessel carrying passengers, shall have a pilot licensed by its authority, and to prohibit any pilot without such license from serving as pilot on such vessel. The compensation of pilots, the mode and manner of offering their services, until congress sees proper to provide for them, still remains legitimate subject for state legislation. The bar pilot, licensed by the state, may apply to the United States inspectors for license to pilot steam vessels, and, if found competent and licensed, may pilot such vessels."

This disposes of the case upon the merits. The libellant being qualified under both the national and state law, was the first pilot so qualified to hail the Wright and offer his services as a pilot. His offer being refused by the master, he is entitled to recover half pilotage. By the state pilot law, approved October 27, 1868, the fees for pilotage were reduced, so that the libellant is only entitled to $36 instead of $46 as claimed for each voyage.

The answer of the claimant also contains an article in the nature of a peremptory exception to the libel. This allegation is to the effect, that the state law giving half pilotage expressly makes the consignee of the ship liable therefor in case the master omits or refuses to pay the same, and that therefore the vessel is not liable also for the demand. But I do not think the statute can or ought to have such a construction.

A claim for half pilotage given by statute for services offered and refused, so far as the remedy is concerned, stands upon the same footing as an ordinary claim for pilotage. The transaction out of which the libellant's claim arises, is one from which the law will

imply a contract to pay the pilotage given by statute, as a compensation for the offer of services with a present ability to perform. Steamship Co. v. Joliffe, 2 Wall. [69 U. S.] 456.

Claims for pilotage are cases of admiralty jurisdiction, and the suit therefor may be against the vessel or against the master or owner, or both. Ben. Adm. 289, 391. The law of the state cannot take away or limit the admiralty jurisdiction of this court, if it would. On the other hand it is evident that the remedy given by the local law against the consignee was intended to be cumulative and not restrictive. A claim for half pilotage against an outgoing vessel, without an owner resident in this district, might otherwise be practically incapable of recovery. To meet such a case, the pilot act of the state gives the pilot an additional remedy against the consignee—a person supposed to be resident in the port.

As has been shown the law of this case is with the libellant. The legislation upon the subject of pilots and pilotage is practically still left with the states—except that, so far as steam vessels are concerned—the pilot must be licensed by United States inspectors.

But it is to be regretted that congress has not gone farther in the exercise of its undoubted powers to regulate commerce both foreign and domestic, and established some uniform rules in regard to the amount and mode of payment of pilot fees. The regulations made by the state are generally at the instigation and in the special interest of the local pilots, and at the expense of steam vessels, especially if owned without the district. In such cases, at least, where pilotage is ordinarily a mere tax for nominal and unnecessary services, the United States inspectors with the supervising inspector ought to be authorized to prescribe and establish the fees for pilotage.

There must be a decree given for the libellant for the sum of $72 and costs and expenses of suit.

GEORGE THOMAS, The (FISH v.). See Case No. 4,813b.

Case No. 5,341.

The GEORGE T. KEMP.

[2 Lowell, 477.] [1]

District Court, D. Massachusetts. June, 1876.

MARITIME LIENS—MATERIAL-MEN—FOREIGN VESSEL—STEVEDORES.

1. A ship whose legal owner is foreign, and whose flag is foreign, is a foreign ship, so far as material-men are concerned, though the equitable owner lives in Massachusetts.

[Cited in The J. L. Pendergast, 29 Fed. 128.]

2. Such a ship is not within the statute of Massachusetts, requiring a record to be made of claims for supplies and repairs to vessels.

3. Therefore, a material-man in Boston has a lien on such a ship, without recording his claim.

4. A stevedore has a lien upon a foreign vessel for his services rendered at the request of the master in a case in which the vessel is to stow the cargo.

[Distinguished in The E. A. Barnard, 2 Fed. 715. Cited in The Canada, 7 Fed. 121; The Esteban de Antunano, 31 Fed. 924; The Gilbert Knapp, 37 Fed. 211; The Main, 2 C. C. A. 569, 51 Fed. 956; The Hattie Thomas, 59 Fed. 299.]

5. It seems, if services or a contract properly concern a vessel and her owners, they are maritime services, and can be sued against the owners of a domestic vessel in a court of admiralty, or in rem against a foreign vessel.

[Cited in Roberts v. The Windermere, 2 Fed. 726; The Hattie M. Bain, 20 Fed. 390; The Wivanhoe, 26 Fed. 928; The Maggie P., 32 Fed. 301; The Gilbert Knapp, 37 Fed. 213, 214; Haller v. Fox, 51 Fed. 299; The Seguranca, 58 Fed. 908.]

6. One representing a vessel to be either foreign or domestic is estopped from setting up the contrary.

7. By the general maritime law, the presence of the owner does not preclude giving credit to the vessel.

[Cited in The Mary Morgan, 28 Fed. 199.]

8. It is a question of fact whether credit is given to a vessel or her owners; the equitable ownership does not always determine the question of credit.

[See The Norman, 6 Fed. 406.]

9. The United States may have an action against a vessel for tonnage duties; it seems, they may have an action against the owner, and perhaps against the master.

Petition by a committee of the creditors of Isaac Taylor, a bankrupt, asking that the proceeds of sale of the bark George T. Kemp, remaining in the registry after paying the wages for which the vessel had been arrested, might be ordered to be paid to them as representing the creditors generally. This was resisted by the libellants, who claimed liens on the vessel. There was evidence tending to show that the vessel was actually owned by Mr. Taylor, a resident of Massachusetts, doing business in Boston; that a transfer had been made, in form, to a resident of New Zealand, in order to obtain a British register; that this was probably done to save the vessel from capture during the war of the Rebellion; that Mr. Taylor remained the true owner; that the vessel was libelled by material-men, who had furnished her with supplies in Boston, at different times, when she was here in the prosecution of her ordinary business, which was the trade between the Cape of Good Hope and Boston. Some of the material-men knew of the ownership, others did not; some of the supplies had been ordered by the master, and others by Mr. Taylor; all the bills had been charged to the ship and owners; the libellant had taken the note of Mr. Taylor, and had given him a receipt, that the note,

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

when paid, should operate as payment of the account.

L. G. Farmer, for petitioners.

This is a domestic vessel, because the owner lived here: The Island City [Case No. 7,109]; The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409; Dudley v. The Superior [Case No. 4,115]; Hill v. The Golden Gate [Id. 6,492]; The Alice Tainter [Id. 194].

F. Dodge, F. Dabney, R. M. Thompson, P. West, and W. E. L. Dillaway, for libellants.

The owner who has put his vessel under a foreign flag is estopped to deny that she is foreign: The Laura, 2 Marit. Law Cas. 225; The Walkyrien [Case No. 17,091]. At any rate, the place of registration is strong evidence of the domicile of the vessel: The Sarah Starr [Id. 12,354].

LOWELL, District Judge. It is now settled that material-men have a lien by the general maritime law on foreign vessels, including those which belong in a state of this Union other than that in which the supplies are furnished, and that domestic vessels are governed by the domestic law: The Lottawanna, 21 Wall. [88 U. S.] 558. But what vessels are to be accounted foreign, and what domestic? No doubt has ever been entertained that the papers and the flag furnish prima facie evidence upon the question; but suppose the real ownership does not coincide with the apparent or documentary ownership. This difference may arise in two ways: the buyer of a vessel registered or enrolled in a state of the United States different from his own may have neglected to change the registration or enrolment, without any intention of fraud or concealment, but by inadvertence or neglect. In such a case it has been held that one who deals with the true owners in the place of their residence, and knows them to be owners, cannot treat the vessel as foreign: Dudley v. The Superior [supra]; Hill v. The Golden Gate [supra]; The Island City [supra]; Weaver v. The S. G. Owens [Case No. 17,310]. It may be observed that Taney, C. J., held that the port of registration or enrolment decided the character of the vessel conclusively: Pickell v. The Loper [Id. 11,119]. A similar decision was made by Judge Betts. There is another class of cases, like the present, where the real and the apparent ownership are purposely kept separate. In these, if any false pretence is made, the person making it will be estopped; as, if he purposely represents the vessel to be either one thing or the other, he will be bound by his statement. There are dicta which seem to announce a general rule that the equitable ownership decides the question in all cases. One of my own has been cited, which seems to go to that extent. But I am satisfied that they are unsound. It was formerly said that if the owner were present when the supplies were furnished, there could be no credit given to the vessel: The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409. This dictum will account for other broad dicta. If this were so, it would be of no particular importance what was called the home port, because wherever the owner happened to be would be such a port pro hac vice, and the equitable owner being proved to reside in the place where the supplies are furnished, and this being known to the material-men, there would be an end of the question. This rule cannot stand, because in the home port every thing depends on the local law, and if that gives a lien, notwithstanding the presence of the owner, the admiralty will enforce it: The Lottawanna, 21 Wall. [88 U. S.] 558. Nor is it the law that the presence of the owner precludes the possibility of a credit to the vessel in a foreign port by the general maritime law. This assumption was expressly overruled in The James Guy [Cases Nos. 7,195 and 7,196], 9 Wall [76 U. S.] 758; and see The Kalorama, 10 Wall. [77 U. S.] 204. Nor will it be safe to say that the equitable ownership governs the case. To one who is ignorant of that fact, the flag is entitled to credit, and would of itself work an estoppel: The Walkyrien [Cases Nos. 17,091 and 17,092].

I do not think it can be held that mere knowledge of the equitable ownership makes any difference. The vessel is either domestic or foreign: she must be one, and cannot be both. It comes, therefore, merely to a question of registration of the lien. By the law of Massachusetts, a record must be made; and by the general law there is no need or provision for such record. Is this a domestic vessel under the laws of Massachusetts, as interpreted and restricted within the constitutional authority of the state? I think not. When a ship is put by her owner under a foreign flag, he obtains all the benefits of that position. He ships his seamen according to the law of the flag, and the relative rights and duties of the parties are fixed by that law. In this very case I have decided some matters in controversy concerning the wages by the merchant shipping acts of Great Britain. The courts of the United States cannot punish offences committed on the high seas on board such ships. All international questions, public and private, are controlled by this circumstance. Why not, then, the privilege of material-men?

The theory of exclusive credit to the owner has become a mere fiction. No such credit is ever given in Massachusetts. I have never known a ship-chandler that did not prefer two securities to one; and it has been the usage of the trade to make their charges to the ship and owners, hoping and intending to have the security of both. Before the decision of The General Smith, 4. Wheat. [17 U. S.] 438, domestic vessels were held liable,

in this district, for all such supplies. I have seen many such cases on our records. Since that decision, the actions in this court for supplies to domestic vessels have been either in personam, or have been brought against the ship under some statute of the state. But, in my judgment, Massachusetts has no more to do with vessels rightly and lawfully owned by foreigners, and sailing under a foreign flag, than the United States have; and the statute of the state is not applicable and could not be conveniently applied to such a vessel.

I consider the decision in The Island City [Case No. 7,109], to be sound, because all parties had treated the vessel as a domestic one, and had recorded their liens upon that supposition; and so, whichever way the law might be, they were in the right; but, as I have already said, some of the dicta now appear to me to be broader than the law will sustain. A sound distinction may be taken between nearly all the cases above cited and the present, from the fact that here the flag and nationality of the ship are in question, and not merely the port of enrolment or registry.

I am of opinion, then, that it is a question of fact whether credit was given to the vessel; and, the presumption being the same in Massachusetts as by the general maritime law, and the evidence in this case confirming that presumption, that the libellants had, severally, a lien on the ship; that the ship being registered abroad, and flying a foreign flag by the consent and with the design of her owners, the creditors did not lose their lien by not recording their statement as required by the statutes of Massachusetts. Petition of general creditors denied.

Brown's Claim. The petitioners, S. R. Brown & Son, had acted as stevedores in stowing the cargo for the last voyage of the ship, and asked that they might be decreed to rank with the material men against the proceeds.

R. M. Thompson, for petitioner.

O. W. Holmes, Jr., and W. Munroe, for claimants.

LOWELL, District Judge. I am asked to review the decision which I felt bound to make in The A. R. Dunlap [Case No. 513], in which I followed the authorities, against my own opinion, in refusing a similar petition, expressing at the same time the hope that the case would be carried to the circuit court. Longer experience has taught me that cases of this sort rarely go beyond this court, and under these circumstances, the suitor, whose petition I consider sound, has a right to my judgment. Besides, it will be found, upon a critical examination of the decisions which I followed, that, although they have never been overruled on this special point of a stevedore's lien, their course of reasoning has been declared unsound by the highest authority; and so an adherence to the mere result of those cases is not defensible on the ground of stare decisis, because it is standing by the letter at the expense of the principle.

The cases referred to are The Amstel [Case No. 339]; The Joseph Cunard [Id. 7,535]; Weaver v. The S. G. Owens [Id. 17,310]. The reasons are more fully given in the first case than in the others, but are alike in all. They are, first, that a stevedore works on land, or on a vessel at the wharf; and, second, that his concern is with the cargo rather than with the ship, and they liken him in this respect to the drayman, who brings the cargo to the vessel. The notion that the maritime character of a contract for either labor or materials, or of the remedy for furnishing them independently of contract, depends upon the situation of the vessel as being upon the high seas or in a dock, reached its climax when it was held that a laborer who scraped the bottom of a foreign vessel, preparatory to her being coppered, had no lien: Bradley v. Bolles [Id. 1,773]; and that the ship-keeper of a domestic vessel could not sue even in personam, in the admiralty: Gurney v. Crockett [Id. 5,874].

These decisions were made during the time, after Judge Story's death, when the supreme court seemed bent upon narrowing the jurisdiction in all possible directions, by decisions, some of which have now been overruled and others explained to mean much less than they appeared to intend. Judge Betts, in the decisions above cited, was evidently embarrassed by this state of opinion; for he had himself decided, ten years earlier, that a watchman or ship-keeper, who was given a lien by a state statute, might proceed for it in the admiralty; which, of course, decided that the labor or contract was maritime, and, by consequence, that a proceeding in personam would lie: The Harriet [Case No. 6,097]. It is now settled that a contract for supplies and repairs or other necessaries to a vessel is maritime in its nature, because it has to do with a ship. While, therefore, I agree that the stevedore is not a mariner, and has no lien on a domestic ship unless the local law gives it, I cannot hold, consistently with the present binding authorities, that his contract is not maritime. And so of the ship-keeper. If the services or contract properly concern the ship and her owners, they are clearly maritime, and can be sued against the owner of a domestic ship personally, or against the foreign ship in rem, in this court. The cases in the supreme court are so recent that I do not cite them.

This brings us to the second point, that the ship and owner are not concerned with the wages of a stevedore, because they relate only to the cargo, and therefore are not maritime. Mr. Benedict expresses his

unhesitating opinion that the service is maritime: Ben. Adm. (2d. Ed.) § 285. Judge Benedict expressed a similar opinion, though he felt bound to follow the decisions: The Circassian [Case No. 2,722]. That was a domestic vessel, and I consider his decision to have been right, as well as his general opinion; that is, the service is maritime, but it gives no lien, unless by the state law. Whether a stevedore is a material-man, strictly speaking, may be doubtful; but I apprehend that the law itself is no longer doubtful that one who furnishes what is reasonably necessary for a foreign ship, her voyage or business, stands on the same footing towards the ship as a material-man: Thomas v. Osborn, 19 How. [60 U. S.] 22; The Emily Souder, 17 Wall. [84 U. S.] 666. And, if it was ever true, it is no longer so, that the ship is only responsible for what is physically annexed to it, such as repairs. In most cases the responsibility of the owner and of the ship are, by our law, coextensive; and whatever the master has the right to buy on credit will bind both, and this is not only what is absolutely necessary for the ship and crew, but for the voyage or business of the ship: The Fortitude [Case No. 4,953]; The Gustavia [Id. 5,876]; The Grapeshot, 9 Wall. [76 U. S.] 129; The Medora [Case No. 9,391]; The Robert L. Lane [Id. 11,892]; Stearns v. Doe, 12 Gray, 482; Webster v. Seekamp, 4 Barn. & Ald. 352; Weston v. Wright, 7 Mees. & W. 396; The Alexander, 1 W. Rob. Adm. 362; The Riga, L. R. 3 Ecc. & Adm. 516; The Zodiac, 1 Hagg. Adm. 320; The Duke of Bedford, 2 Hagg. Adm. 294; The Gauntlet, 3 W. Rob. Adm. 82. I am not now speaking of the necessity for a credit, which has been pretty much explained away. There is no doubt that the ship is liable in this case, if a ship would usually be liable in like cases. It seems incredible that it could ever have been thought that the master, who in proper cases may charter, hypothecate, or even sell his ship, cannot bind it for the cost of stowing the cargo, which is one of the ordinary and self-evident necessities of the voyage. The above-cited cases show what expenses may be made by the master on the credit of the owner or in bottomry. I will, however, cite one or two late decisions, to show the character of the charges which are now held to be legitimate liens upon a vessel without a bond.

It is well known that the high court of admiralty in England was, for some centuries, prohibited from enforcing these tacit hypothecations; and that an act of parliament has now given that court jurisdiction to decide all claims and demands for necessaries supplied to a foreign vessel: 3 & 4 Vict. c. 65, § 6. Thereupon the tacit lien revived, without mention of lien in the statute, and the courts have held, that not merely what is necessary for the ship, but what is reasonably proper for the voyage, comes within the statute. The decisions are cited and explained in The Riga, ubi supra; in which, among other charges, the following were allowed as necessaries: Tonnage and harbor dues, services of the libellant as agent and broker in procuring a charter, premium of insurance paid at the request of the owner. In The Emily Souder, 17 Wall. [84 U. S.] 666, 669, Field, J., says, "The moneys advanced by the libellants, it is true, were not entirely for the repairs to the vessel and the supplies needed for the voyage: they were intended and applied in part to meet the expenses of her towage into port and of pilotage, and to pay the custom-house dues, consular fees, and charges for medical attendance upon the sailors. These various items, however, stood in the same rank with necessary supplies and repairs to the vessel, and the libellant's advancing funds for their payment, were equally entitled as security to a lien on the vessel."

These cases are decisive. If the person who advances the money has a lien, it is because the service paid for was necessary. The stream cannot rise above its source. I hold, therefore, that the stevedore has a lien on a foreign ship for his services rendered at the request of the master in a case in which the ship is to stow the cargo. Petition granted.

Claim of the United States. Petition for $120.97, tonnage duties.

LOWELL, District Judge. The account presented by the United States for tonnage duties is the only one left to be disposed of. The law is, that upon vessels entering at any custom-house from any foreign port or place there shall be paid tonnage duties: Rev. St. § 4219. How or by whom these dues are to be paid is not expressed in the statute. Mr. Justice Story held that the consignee of a foreign ship was not personally liable to the United States for their payment, but said that the owner would be: U. S. v. Hathaway [Case No. 15,326]. It seems to me that a charge distinctly placed by a competent statute upon a ship, is payable by the ship. To be sure, by Rev. St. § 4206, all legal fees which shall have accrued on any vessel are to be paid to the proper officers before a clearance is granted her; and it is argued that this is the statute remedy, and is expressio unius. It is true that, where a statute creates at once a right and a remedy, the latter is in general exclusive. But this, of course, is so only when the statute is to be so understood; and I doubt whether the remedy must not be of a judicial or executive character against some person or thing. The mere right to refuse a clearance cannot be intended as the sole remedy for tonnage duties, because it is inadequate and incomplete, and for several other reasons. They are to be paid by the same ship but once a year; and, if refusing a clearance is the only remedy, then if the vessel is once assessed, and the collector neglects to refuse a clearance,

all remedy is gone, unless the vessel should happen to enter the same port again. So, if the vessel does not need a clearance, as may well happen, or chooses to take the risk of going to sea without one, the remedy is gone.

My impression is that the collector may refuse to enter as well as to clear a vessel which has not paid her tonnage duties; but supposing him to neglect or forget to do so, or supposing the vessel not to care about a clearance, I think the United States have an action for the duties against the owner, if they can find him; and perhaps against the master; and also against the thing, being a ship, upon which the duty is imposed, and more distinctly, I should say, against the ship than against the owner. It differs from ordinary duties on imports in the very important particulars, that those are not ships, and that the mode of collecting those duties is carefully pointed out, so that a remedy is provided; and, if it were not, there is nothing to give the admiralty court, as such, jurisdiction. But a charge on a ship, if it attaches to the ship itself, ordinarily gives this court jurisdiction, even in those domestic cases which require the sanction of a state statute for the creation of the charge.

In the case of The America [Case No. 289], I decided that a state statute imposing a charge upon a ship for pilotage might be enforced in the admiralty. The case of pilotage in the supreme court was in personam; but the reasoning is identical, as far as it goes, with that in The America. See Ex parte McNeil, 13 Wall. [80 U. S.] 236. It is true that pilotage is a maritime contract; but half pilotage imposed by statute, for not accepting a pilot, is only constructively a contract; only so because the statute makes it a debt rather than a penalty. I can see no legal distinction between pilotage dues imposed on a ship for entering the harbor without a pilot, and tonnage dues imposed on the same ship for entering for trade. Petition granted.

Case No. 5,342.

GEORGETOWN v. BAKER.

[2 Cranch, C. C. 291.] [1]

Circuit Court, District of Columbia. April Term, 1822.

MUNICIPAL CORPORATIONS—AUCTIONEER'S BOND—OBLIGEE—LICENSES.

1. An auctioneer's bond given to the corporation of Georgetown, by its corporate name, is void; it should be given to the mayor only, as required by the by-law.

2. The license must be under the corporate seal.

Debt [by the mayor, recorder, etc., of Georgetown for the use of the New England Glass Company] against [John W. Baker] the surety in an auctioneer's bond, taken under a by-law of Georgetown, for licensing auctioneers, which requires them to give bond to the mayor, and directs that the licenses shall be granted under the seal of the corporation. In this case, the bond was given to the corporation by its corporate name, and the license was without a seal.

THE COURT (nem. con.) decided that the bond was void, because given to the corporation, and not to the mayor, as required by the by-law. And that as the bond was taken prospectively, before the license was granted, and as the license was not granted under the corporate seal, as required by the ordinance, the auctioneer [John Peabody] never was such an auctioneer as was contemplated by the bond, although he continued to act as such through the whole year.

Verdict for the defendant.

The plaintiff's counsel took a bill of exceptions, but no writ of error was prosecuted, although there were several suits, for considerable sums depending upon the same questions.

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

Case No. 5,343.

GEORGETOWN v. BANK OF THE UNITED STATES.

[4 Cranch, C. C. 176.] [1]

Circuit Court, District of Columbia. May Term, 1831.

MUNICIPAL CORPORATIONS—SALE OF PROPERTY FOR TAXES.

Under the 10th section of the act of congress of the 26th of May, 1824 [4 Stat. 75], entitled, "An act supplementary to the act to incorporate the inhabitants of the city of Washington, passed the 15th of May, 1820 [3 Stat. 583], and for other purposes," the corporation of Georgetown, District of Columbia, in the year 1826, had a right to sell real property in that town, for corporation taxes due thereon in the years 1819, 1820, 1821, and 1822, as well as for taxes due thereon in the years 1813 to 1819 inclusive.

This cause was brought before the court, upon a case stated as follows:

"In the years 1813 to 1819, inclusive, John C. Baum was indebted to the corporation of Georgetown, for the taxes charged on lots 55 and 56, in the account A, amounting to $84.45, which taxes still remain due and unpaid, and there is no personal property of the said Baum wherewith to satisfy or pay the same. The said Baum continued to be the owner in fee of the said property till some time in the year 1826, when it was sold under a deed of trust, for the benefit of the Bank of the United States; and, at the said sale, the said bank became the purchaser, and now holds the title to the said property. In the year 1822, the corporation of Georgetown passed the ordinance hereto annexed, marked 'B,' and the said Baum, in pursuance to that ordinance, gave his notes, hereto annexed, marked 'C,' for the said taxes; which notes are due and unpaid. The amended charter of the 26th of May, 1824, hereto an-

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

nexed, marked 'D,' is also made part of this statement. The liability of said bank, as owners of said property, to pay the said taxes and interest charged in the account A., to the said corporation of Georgetown, is submitted to the court. If the bank is liable, judgment for the amount of the account A, with interest and costs, to be rendered for the plaintiffs; otherwise, judgment for the defendants, with costs. James Dunlop, for Corporation of Georgetown. B. L. Lear, for Defendants."

"The ordinances of the corporation, levying taxes for the years 1813 to 1819, inclusive, are agreed to be made part of the above case. J. Dunlop, for Corporation. B. L. Lear, for Defendants."

"The Bank of the United States is also the owner of various lots in Georgetown, purchased by them since the 26th of May, 1824, upon which arrears of taxes are due to the corporation of Georgetown, accrued previous to the 26th of May, 1824, and previous to the bank's purchase, there being no personal property of the former owners to pay said taxes. And it is also submitted to the court, whether, in cases so circumstanced, the corporation of Georgetown can properly claim said arrears of taxes upon said real estate so purchased and held by the said bank, and enforce the same against the bank, as the owners thereof. J. Dunlop, for Corporation of Georgetown. B. L. Lear, for Defendants."

By the by-law, or ordinance, marked "B," and approved on the 15th of June, 1822, it was ordained that the collector be authorized and directed to receive from any persons in arrears for taxes due the corporation, prior to the year 1820, the amount of such arrears in promissory notes, payable as follows, &c.: If over $40, in six, twelve, and eighteen months, with interest; "which are understood and declared to be secured by the property which is now bound for the payment of said taxes." By the 4th section of the same ordinance, it is further ordained, "That where persons do not avail themselves of the indulgence hereby allowed, by passing their notes to the said collector within three months from this time, he be, and is hereby authorized and directed to collect the taxes due, by sale of the property, first giving the usual notice."

The following is one of the three notes given by the said John C. Baum, in pursuance of the provisions of that ordinance: "$29.28. Georgetown, 16th September, 1822. I assent to the provisions of the ordinance, entitled 'An ordinance providing for the settlement of all arrears of taxes due prior to the year 1820,' passed the 15th day of June, 1822, and six months after the date hereof, I promise to pay to the mayor, recorder, aldermen, and common council of the corporation of Georgetown, or to their order, twenty-nine dollars and twenty-eight cents, with legal interest from this date, being one third of the amount of taxes due by me, for the years 1813, 1814, 1815, 1816, 1817, 1818, and 1819. John C. Baum." By the 7th section of the act of congress of the 26th of May, 1824 (4 Stat. 75), referred to in the case agreed, as marked "D," entitled "An act supplementary to the act to incorporate the inhabitants of the city of Washington, passed the fifteenth of May, one thousand eight hundred and twenty, and for other purposes," it is enacted, "That public notice of the time and place of sale of any real property chargeable with taxes, in Georgetown or Alexandria, in all cases hereafter, shall be given once in each week," &c., "in which shall be stated the number of the lot or lots, or parts thereof intended to be sold, and the value of the assessment, and the amount of the taxes due and owing thereon." By the eighth section it is enacted, "That if, before the day of sale advertised as aforesaid, the owner," &c., "shall not pay the amount of taxes, with all costs thereon assessed, said lots or so many," &c., "shall be sold for cash," &c. "Provided, that no sale of real estate, but where the owner or tenant of the property has not sufficient personal estate out of which to enforce a collection of the debt due; and where he has personal property, it shall be lawful to collect said taxes, by distress and sale thereof." And by the tenth section it is further enacted, "That where any taxes have fallen due and yet remain unpaid, or where any real estate has been sold by the corporation of Georgetown or Alexandria, which sale, from any defect of proceeding in relation thereto, has been declared, or is considered, void, said corporation may proceed, and are hereby authorized to collect said taxes by sale of the real estate liable, agreeably to the provisions of this act in relation to other cases of collecting taxes hereafter to fall due. Provided, that where any person without notice of the outstanding taxes, has made a bona fide purchase from the legal owner of any real estate previous to the 15th day of May, 1824, said real estate, so acquired, shall not be liable for the taxes due and owing previous to said purchase."

Mr. Dunlop, for plaintiffs, relied upon the opinion of Cranch, C. J., in the case of Georgetown v. Smith [Case No. 5,347], to show that Baum, by his express assent to the ordinance of the 15th of June, 1822, and giving his notes under the provisions of that ordinance, had created an equitable lien upon the lots, which a court of equity might enforce, and that the bank purchased the property with knowledge of the lien, and therefore was bound in equity to pay the taxes for which those notes were given. Besides which he contended that the corporation had a right, under the tenth section of the act of May 26, 1824, to sell the lots upon which taxes had then fallen due and yet remained unpaid, in the same manner as they might sell for taxes thereafter to become due. That the word "liable" in that section means

no more than chargeable, or assessable. The corporation, by that section, is "authorized to collect said taxes," (that is, the taxes already fallen due and then remaining unpaid,) "by sale of the real estate liable," that is, the real estate upon which the taxes had been assessed; so that if the corporation had not a previous right to sell the real estate for its taxes, it is given by this section. But he contended that they had a previous right under their previous charters and amendments, to sell the real property for its taxes; and referred to the original charter of December 25, 1789, c. 23, § 7 (Davis' Laws Columbia, p. 480); Amended Charter by Act Cong. March 3, 1805 (2 Stat. 332; Davis' Laws, 168, 172); 6 Bac. Abr. tit. "Statute," B, pp. 369, 380; Dugan v. Mayor, etc., of Baltimore, 1 Gill & J. 500.

Mr. Lear, contra. The giving of the notes by J. C. Baum, created no lien on the lots unless they were bound before; for the ordinance says that the notes are to be secured by the property now bound for the payment of the taxes. It is not necessary that the personal property of the owner or tenant should be found on the lots, before it can be seized and sold for the taxes. It may be distrained wherever it may be found. The case stated does not say that there was not personal property of the owner or tenant at any time on the premises, sufficient to pay the taxes, but only that "there is no personal property of the said Baum wherewith to satisfy and pay the same." If there has been sufficient personal property of Baum or his tenant on the premises at any time since the taxes became payable, there can be no right to sell the real. No real property can be sold for taxes under the tenth section of the act of the 26th of May, 1824, but such as was already "liable," that is, liable to be sold. That section does not make real property liable to be sold for taxes, which was not liable before. It only provides that it shall not be liable in the possession of a bona fide purchaser without notice, if purchased before the 15th of May, 1824; from which it is supposed that an inference may be drawn that, after that day, the property shall be liable whether the purchase was with or without notice; but the legislature only meant to authorize the sale of property already liable. The first and regular mode of collecting the taxes is distress and sale of the personal property. The sale of the real is only the ultimate remedy. The corporation ought to have used due diligence to get the taxes out of the personal property. They had no power to make the real property liable to sale. It is not a necessary power, and cannot be assumed unless expressly given by their charter, or the authority of congress. The amended charter of March 3, 1809, only confirms the powers which they had previously enjoyed. A tax upon a slave, or a carriage, gives no lien on the carriage or slave; why should a tax on land create a lien on the land?

Mr. Dunlop, in reply. The purchaser is bound to know what taxes were due upon the property when he purchased. The burden of proof is not on the corporation to show that there was not personal property on the real. It is sufficient if there was not personal property liable to seizure and sale at the time of the sale of the real. The corporation does not lose its remedy upon the real estate by the neglect of the collector to take the personal. The power to raise and collect taxes, given to the corporation by its original charter of 1789, implies all the powers necessary for that purpose; and gives, at least, all the powers which the state of Maryland then had in relation to that subject. The statement admits that there was no personal property of the owner or tenant. The bank is in no better condition than Baum would be if the property were not transferred to the bank. The practice, from 1802, has been to sell the real estate for its taxes.

THE COURT (CRANCH, Chief Judge, doubting, and THRUSTON, Circuit Judge, not giving an opinion as he had not heard the whole argument) was of the opinion, that the corporation of Georgetown had, under the tenth section of the act of the 26th of May, 1824 [supra], a right to sell land in Georgetown for corporation taxes due and unpaid at that date as well as for those subsequently becoming due.

Case No. 5,344.

GEORGETOWN v. BEATTY.

[1 Cranch, C. C. 234.] [1]

Circuit Court, District of Columbia. Dec. Term, 1804.

PLEADING — AMENDMENT OF WRIT AND DECLARATION.

The writ and declaration may be amended by substituting the corporate name of the plaintiff, for "The Corporation of Georgetown," on payment of all costs; and a continuance and leave to plead de novo.

[This was an action on debt by the corporation of Georgetown against C. A. Beatty.]

Special demurrer. The plaintiffs had leave to amend the writ and declaration, by stating the plaintiffs to be (instead of "The Corporation of Georgetown") "The Mayor, Recorder, Aldermen and Common Council of Georgetown," that being their corporate name; and by an averment that the bond was made to them by the name of "The Corporation of Georgetown,"—on payment of all antecedent costs and continuance, and rule to plead de novo. See the case of Tibbs v. Parrott [Case No. 14,022], at July term, 1804.

FITZHUGH, Circuit Judge, absent.

GEORGETOWN (BOOTHE v.). See Case No. 1,651.

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

Case No. 5,345.

GEORGETOWN v. CHEW.

[5 Cranch, C. C. 508.] [1]

Circuit Court, District of Columbia. Nov. Term, 1838.

MUNICIPAL CORPORATIONS—POWER TO RENT FISH WHARVES.

The corporation of Georgetown has power to rent fish wharves.

Debt [by the mayor, recorder, aldermen, and common council of Georgetown] upon a bond for $2,050, conditioned to pay to the plaintiff the sum of $1,025 for rent of certain fish wharves belonging to the corporation of Georgetown. After oyer of the condition the defendant [Samuel Chew] demurred to the declaration.

R. J. Brent, for defendant, contended that the corporation had no power to rent fish wharves; no such power is given them by their charter; and no corporation can exercise a power not expressly given or necessarily implied from some express power. Ang. & A. Corp. 145, 146.

But THE COURT (CRANCH, Chief Judge, not giving any opinion) instantly overruled the demurrer without hearing Mr. Dunlap, for plaintiffs.

GEORGETOWN (LENOX v.). See Case No. 8,245.

GEORGETOWN (NICHOLLS v.). See Case No. 10,228.

Case No. 5,346.

GEORGETOWN et al. v. PORTER et al.

[Hayw. & H. 139.] [2]

Circuit Court, District of Columbia. July 7, 1843.

BRIDGES—REPAIRS AND LOCATION OF DRAW.

The act of congress of March 3, 1841 [5 Stat. 426], putting the repairing of the bridge over the Potomac river between Washington city and Alexandria under the direction of the secretary of war, left it to the discretion of the said officer as to the position of the draw, and the court has no authority to control that discretion.

This was a suit brought by the complainants [the mayor, recorder, aldermen, and common council of Georgetown, and others] to enjoin the defendants [James M. Porter, secretary of war, and William Trumbull, corps topographical engineers] from proceeding further in constructing a draw-bridge. The complainants claimed they had a vested right and interest in the draw-bridge, the said draw to be constructed and formed by the defendants, that the bridge company from whom the United States purchased the bridge leading from Washington to Alexandria county, could not dispose of the right the complainants had in the bridge, or to cause the free navigation of the Potomac river to be obstructed by placing the site of the draw where the defendants are placing it. That placing the piers of the draw-bridge where they would obstruct the channel of the river is a nuisance. That the constitution of the United States cannot legalize that which is liable to be peaceably abated by any citizen affected thereby; that it is the proper subject for a public prosecution against all persons continuing, aiding or abetting it, and for which every party sustaining a special damage therefrom has a private and adequate remedy at law or in chancery. The motion for an injunction was argued by the several counsel; after which the court made the following order: "This cause coming on to be heard on the bill and exhibits and a motion of the complainants thereon for an injunction, it is thereupon by the court this 17th day of June, 1843, ordered that: On the complainants, or some of them, filing an injunction bond in the usual form and penalty of $15,000, with security approved by the court or a judge thereof, an injunction do issue as prayed to restrain said defendants, their agents and servants, from the further prosecution of the work of the draw complained of or of any part of the bridge occupying the site of the former draw of the bridge, or that recommended by William B. Thompson, in his report filed as an exhibit in this cause, until the first Monday in July next, and until the further order of the court in this case. And that meanwhile the defendants may file their answers, and each party take testimony before any justice of the peace, on two days notice to any one of the opposite parties, to be read in evidence at the final hearing of the cause; and that said cause may be by either party set down for final hearing on bill, answer and testimony, at said first Monday in July."

The secretary of war, in his answer, after citing the following acts of congress: Of February 5, 1808 [2 Stat. 457], authorizing the incorporation of a bridge company; of the 14th of May, 1830 [4 Stat. 402], authorizing the corporation of Georgetown to form a draw-bridge across the Potomac river, and appropriating $6,000 for that purpose; of July 14, 1832 [Id. 582], authorizing the purchase of the bridge from the said company; of June 30, 1834 [Id. 727], authorizing the secretary of the treasury to contract for its reconstruction; of March 3, 1835 [Id. 773], amending the act of June 30, 1834; of June 7, 1836 [5 Stat. 132], authorizing the secretary of the treasury to repair the said bridge; of July 1, 1836 [Id. 134], authorizing the commissioner of public buildings to repair the said bridge; of March 3, 1841 [Id. 426], putting the repairing of the bridge under the direction of the secretary of war, and of September 11, 1841 [Id. 462], appropriating $15,806, to be expended under the direction

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

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

of the secretary of war,—denied the jurisdiction of the court, but stated: "That the jurisdiction over the roads and highways within the District of Columbia, within which the Potomac river is situated from the head of tide near Georgetown, to some distance below Alexandria, embracing the site of said bridge, is vested exclusively in the congress of the United States. That congress has had from the establishment of the District of Columbia, until the present time, the right to declare in what manner the said public roads and highways shall be used and enjoyed. That if the public convenience required it congress had the power to direct the erection of a bridge on any stream or public water highway or even to place a dam or permanent obstruction across the same. That being a fit and proper matter for the exercise of legislative discretion which cannot be called in question by any judicial tribunal. That congress could either exercise this power itself or it could within the said District create a corporation for the purpose of making such bridge or dam, and permit them to receive in tolls a remuneration for the moneys expended in so doing. That any person owning property upon the stream above the place at which such bridge or dam should be erected, sustained any inconvenience from the navigation being impeded or the fish being prevented from ascending the stream in consequence of such bridge or dam, they are entitled to reasonable damage by reason of the premises, and the public have the right so to use the public highways as will best promote the public interest generally, of which the legislative power is the judge, and any inconvenience sustained by the owners of such property is one to which, from the nature of the property, they would naturally be subject, and of which they cannot complain. In the language of the law, it is damnum absque injuria. For the correctness of these views, the undersigned refer to the following adjudged cases: McClenachan v. Curwin, 3 Yeates, 373;[2] McClenachan v. Curwen, 6 Bin. 509;[3] Nebenoth v. Lehigh Coal & Nav. Co., 7 Haz. Reg. Pa. 292;[4] Shrunk v. Schuylkill Nav. Co., 14 Serg. & R. 71;[5] Com. v. Shaw, Id. 12; Zimmerman v. Union Canal Co., 1 Watts & S. 346;[6] Com. v. Charlestown, 1 Pick. 180.[7]

"The undersigned claims the right for the secretary of war, acting as such for the United States, and solely as the representative of the United States, to decide all questions in relation to the construction of the repairs of the said bridge. That this is not a ministerial but a judicial act, and that although in matters submitted to his discretion, the proper judicial tribunal may, if he fail to act in the premises as directed by law, compel him by mandamus or otherwise to proceed to act, there is no authority in any tribunal to direct him how to exercise the discretion committed to him by law. That in the present instance the discretion is so committed to him, and consequently the court has no authority in the premises. In illustration of this principle, it may be reminded that if this court should enjoin the undersigned from proceeding in the repair of the said bridge, and thus stop the completion of the said bridge, which is necessary and imperatively required for the public convenience, because the court would be of a different opinion from the undersigned as to the proper location of the said draw, who, then, is to decide where the draw is to be placed? The undersigned having formed his opinion deliberately upon the matter, would not be likely to change that opinion. The bridge being suspended, the next application would probably be by the corporation of Washington city to your honors for a mandamus to compel the undersigned to proceed to the completion of the bridge, in the course of which proceeding your honors would be called upon to enact the part of engineers, and declare where the said draw shall be constructed, a power which with all due deference this court neither possesses nor would attempt to exercise. It thus appears most conclusively to the undersigned that the court has no jurisdiction of this matter independent of the great and important question that this is an attempt to bring the United States into court and make them a party to the cause. The undersigned has done no act, neither has Major Trumbull, the officer in charge of the work, except in their official character and strictly in the exercise of their official duties as officers of the government of the United States. And the undersigned, as the head of one of the executive departments of the government of the United States, does hereby most solemnly protest against this or any other attempt to bring the actions of the official functionary as the head of such department before any judicial tribunal for review; he claims the right, which he will

[2] The act of the legislature applying a certain portion of every man's land for the purpose of laying out roads and highways without compensation, is not an infringement of the constitution.

[3] The commonwealth has a constitutional right to authorize a turnpike company to lay out a road through the private ground of the citizen without making compensation for the soil.

[4] The state had a right to give the streams to whom they please for the purpose of improving the navigation, and could either improve them themselves or permit companies or individuals to improve them for the use of the public and themselves, authorizing them to be compensated for so doing by the tolls to be received.

[5] Damages cannot be claimed for injury to individuals by the erection of a dam by the defendants under the act of assembly.

[6] No private action will lie for public nuisance without special damage.

[7] The court of sessions have no authority to lay out a highway over a navigable river. The legislature alone have that power. Charlestown v. Middlesex, 3 Metc. (Mass.) 202, and others cited in Minot's Mass. Digest.

never surrender so long as he remains in the public position he occupies, to exercise his own judgment in the discharge of duties submitted by law to his discretion, uncontrolled by any other tribunal in the country not expressly authorized by statute to control or overrule him."

The defendant Major Trumbull, through his counsel, in his answer, denied the allegations of the bill, and stated that there is no part in said bridge in which said draw could be placed to which objections equally strong with those already urged could not be made.

The counsel for the complainants in closing the argument on the bill, answers and exhibits, said that neither the United States, the secretary of war, nor Mr. Trumbull has any interest directly or indirectly in the position of the draw, whilst the very existence of Georgetown, as a port of entry, depends on the free and uninterrupted navigation of the river. The original act of congress, and all other acts, never repealed the vested rights of Georgetown. If any discretion had been reposed in the secretary, it is neither judicial in its character nor executive. The legislature had framed a law which requires agents to execute it; such agents, therefore, are the agents of the legislature, to perform its functions. The parties are the mere agents of the law. If the corporation of Georgetown are proved to be incapable of forming a correct judgment, why then the matter is at an end.

Clement Cox and R. S. Coxe, for corporation of Georgetown.

Joseph H. Bradley, for defendant Trumbull.

P. R. Fendall, Dist. Atty., for secretary of war.

CRANCH, Chief Judge (MORSELL, Circuit Judge, dissenting). A majority of the judges are of opinion that the corporation of Georgetown has not shown any vested right which is violated, or will be violated, by the repairing of the Potomac bridge or the location of the draw, according to the plan approved by the secretary of war. That the whole matter as to the manner of repairing the bridge was submitted by congress to the secretary of war, and this court has no authority to control that discretion. That the draw appears by all the charts to be placed over the deepest part of the channel; and it is not clear, from the evidence, that its location is not the most judicious which could be made.

MORSELL, Circuit Judge, stated that his disagreement with the majority of the judges, he being a citizen of Georgetown, placed him in a very delicate situation; and if he could, by any small concession of principle, agree with them, he would have done so. He considered the question of vested rights one of minor importance. The secretary of war, he thought, had transcended his limits, and exceeded the authority given him by the law; and therefore Georgetown had a common right to claim the protection of congress to preserve the free navigation of the river. He hoped the case would be carried to the supreme court to have the question, whether the rights of Georgetown were entitled to protection, decided for all future time.

The court dismissed the bill, and dissolved the injunction.

GEORGETOWN (PRITCHARD v.). See Case No. 11,437.

Case No. 5,347.

GEORGETOWN v. SMITH.

[4 Cranch, C. C. 91.] [1]

Circuit Court, District of Columbia. May Term, 1830.

MUNICIPAL CORPORATIONS — CHARTER AND BY-LAWS—SETTLEMENT OF TAXES BY NOTE—LIEN—JUDGMENTS — RIGHTS ACQUIRED AT EXECUTION SALE.

1. A person residing, or having real estate, in Georgetown, is bound to take notice of the charter and by-laws. A person, indebted for taxes on real estate in Georgetown, and availing himself of the benefit of the ordinance of June 15, 1822, by giving his notes therefor, creates an equitable lien on the real estate, of which a purchaser is bound to take notice, and is liable to pay the taxes with interest in the manner as the vendor was bound.

[Cited in brief in Georgetown v. Bank of U. S., Case No. 5,343.]

2. A purchaser, at a sale under judgment and execution, takes only the right of the debtor at the time of the judgment. A judgment at law does not overreach a prior equity of a third person, bona fide acquired for valuable consideration.

This case was submitted by the parties to CRANCH, Chief Judge. (THRUSTON, Circuit Judge, absent, and MORSELL, Circuit Judge, being an inhabitant of, and owning real estate in, Georgetown, declined giving an opinion.)

CRANCH, Chief Judge. John Threlkeld being indebted to the corporation of Georgetown for taxes due on real estate in that town for the years 1816, 1817, 1818, and 1819, gave his promissory notes for the amount thereof, to the corporation, at six, twelve, and eighteen months from the 15th of September, 1822, in the following form: "Georgetown, September 16, 1822. I assent to the provisions of the ordinance providing for the settlement of all arrears of taxes due prior to the year 1820, passed the 15th day of June, 1822; and, six months after date hereof, I promise to pay to the mayor, recorder, aldermen, and common council of the corporation of Georgetown, or their order, one hundred and fifty-two dollars and thirty-one cents, with legal interest thereon from this date, being one third of the amount of

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

taxes due by me on real and personal property for the years 1816, 1817, 1818, and 1819. John Threlkeld." Two similar notes were given for the like amount, payable in twelve and eighteen months.

By the ordinance of the 15th of June, 1822, the late collector is "authorized to receive from any persons, in arrears for taxes due the corporation, to the year 1820, the amount of such arrears in promissory notes, payable in six, twelve, and eighteen months, bearing interest at the rate of six per cent. per annum, which are hereby understood and declared to be secured by the property which is now bound for the payment of the taxes." The collector is also required to pay over to the clerk of the corporation, monthly, all such notes as may be by him received for the taxes aforesaid, in lieu of money. And it is further ordained that where persons do not avail themselves of the indulgence, thereby allowed, by passing their notes to the collector within three months from the date of the ordinance, he be directed to collect the taxes due, by sale of the property, first giving the usual notice. Mr. Threlkeld remained owner in fee of the property till the year 1828, when it was sold under an execution against him at the suit of Clement Smith, the defendant in this cause, who became the purchaser thereof, and received a deed from the marshal. The notes given by Mr. Threlkeld remain unpaid. In 1824, (May 26th,) the charter of Georgetown was amended by the "Act supplementary to the act to incorporate the inhabitants of the city of Washington, passed the 15th of May, 1820, and for other purposes" (4 Stat. 75); the seventh section of which provides for the notice, to be given, of the sales of real property in Georgetown, chargeable with taxes. The eighth section authorizes the sale of the real property where the owner or tenant has not sufficient personal estate out of which to enforce the collection of the debt due; and where he has personal property, it may be distrained and sold to pay the taxes. The tenth section provides, "that where any person without notice of the outstanding taxes, has made a bona fide purchase from the legal owner of any real estate, previous to the 15th of May, 1824, the said real estate so acquired, shall not be liable for taxes due and owing previous to said purchase." The liability of Mr. Smith to pay the taxes charged, is admitted, but he denies his liability for the interest; and this question is submitted.

It is contended on the part of Mr. Smith, that the property is not liable for interest on the taxes, unless it is made so by the agreement of Mr. Threlkeld and the ordinance of June 15, 1822; that such an agreement could only have created an equitable lien, which could only have been enforced against the property in the hands of Mr. Threlkeld, or in the hands of a purchaser with notice; that it cannot be enforced in the hands of Mr. Smith, because he is a bona fide purchaser of the legal estate, for a valuable consideration, without notice of such equitable lien.

On the part of the corporation it was contended, that Mr. Smith is a purchaser with notice and therefore bound to pay the interest; that the taxes were a legal incumbrance on the property, and that he was bound to take notice of them at his peril; that in order to ascertain the amount of the taxes, he must necessarily apply, for information, to the clerk of the corporation who keeps the tax-books, and the notes given for taxes, and who would have informed him of the notes given by Mr. Threlkeld, and of his agreement to the terms of the ordinance of the 15th of June, 1822, which declares that the notes were to be secured by the property then bound for the payment of the taxes; that it was, therefore, immaterial whether or not Mr. Smith had actual notice of the notes and agreement; for he was bound to take notice of that which would have led him to a knowledge of them; and, therefore, cannot protect himself under the plea that he was a purchaser without notice. It is also contended, that Mr. Smith, being a purchaser at the marshal's sale under a judgment and execution, acquired only the right of Mr. Threlkeld, whose right was subject to the lien for the payment of the notes; that although he took the legal estate, he took it subject to all the liens, equitable as well as legal, charged upon it by Mr. Threlkeld. And in support of this position, the case of Hampson v. Edelen, 2 Har. & J. 66, was cited, where the court of appeals of Maryland, upon a bill in equity filed by the vendee, affirmed the decree of the chancellor for a perpetual injunction, prohibiting a creditor of the vendor and the sheriff from selling the estate under a fi. fa. issued upon a judgment obtained against the vendor, after the sale and payment of part of the purchase-money, and after possession given to the vendee, but before the payment of the balance, which, however, was paid by the vendee, and a deed of conveyance from the vendor to the vendee, was duly executed and delivered, before the issuing of the fieri facias. In that case the court of appeals of Maryland did not go upon the ground of notice, but upon the ground that the creditor did not, by the judgment, acquire a legal estate in the land; and that a judgment obtained by a third person against the vendor, between the contract and the payment of the money, cannot defeat or impair the equitable interest acquired by the vendee, who, from the time of the contract, is a cestui que trust. Therefore it is contended that, either on the ground that Mr. Smith is a purchaser with notice of the equitable lien of the corporation, or on the ground that a judgment at law will not overreach a prior equity of a third person, bona fide acquired, for a valuable consideration, the corporation has a prior equitable lien which a court of equity will protect and enforce.

It seems to me that the right of the corpora-

tion is strong upon both grounds. Mr. Smith, whether he actually resided within the town or not, was bound to notice all the ordinances of the corporation affecting his real estate within the town. He was bound to know that the property was liable for taxes not paid. Upon the purchase of the real estate in question, he was, at his peril, to ascertain what taxes were due upon it. Upon inquiry at the proper office for that information, he would be informed that Mr. Threlkeld had accepted the terms offered by the ordinance of June 15, 1822, (of which also he was bound to take notice,) that he had given his notes agreeably to those terms, and that he had thereby bound the property as security for the payment of them. Mr. Smith is presumed to have done what every prudent man would do in a like case; and if he did not do it, he must abide the consequences. His knowledge that the property was liable for the taxes, unless they had been paid, was sufficient to put him upon the inquiry which, if properly pursued, would have led him to the knowledge of the equitable lien created by Mr. Threlkeld for the payment of the interest. I think, therefore, that he cannot be considered as a purchaser of the legal estate without notice. But if that view of the subject is not correct, it seems to me that the case comes within the principle decided by the court of appeals of Maryland, in the case of Hampson v. Edelen, 2 Har. & J. 66. The principle of that case, as I understand it, is this: That a judgment at law, against a debtor, binds only the interest of the debtor in the lands. That by a contract of sale, for valuable consideration, the vendee is in equity the owner of the land, from the time of the contract, although the money be not paid at the time, and the vendor becomes a trustee for the vendee. That when the money is paid, the vendee is entitled to a conveyance and to a decree for specific performance of the contract, if such conveyance is refused. That a judgment at law by a third person, against a mere trustee without interest, does not bind the trust estate so as to enable the creditor to make his debt out of it by execution. Or, in other words, that a court of equity will always protect a fair equitable prior title, against a judgment at law against a person who holds the mere legal estate.

It is not material whether the equitable interest to be protected extends to the whole of the subject, or not; so far as it extends it is entitled to protection. The date of the judgment under which this property was sold is not stated in the case agreed; but as all the notes had become payable in December, 1823, and the property was not sold under the execution until 1828, I infer that the judgment was rendered after all the notes had become payable, and the corporation had a right to enforce their lien by a sale of the property under a decree of a court of equity. Here, then, was a clear, vested, equitable interest which, according to the case of Hampson v. Edelen [supra], cannot be defeated or impaired by the judgment. In that case, indeed, it may be said that there was no actual sale; it was prevented by the injunction. But in the present case, Mr. Smith, the purchaser, was the creditor at whose suit the judgment was rendered, under which the sale was made; and if it would have been inequitable in him to proceed to sell under the judgment, it must be, at least, as inequitable in him to purchase under the judgment. And as, according to the principle of the case of Hampson v. Edelen, he ought to have been restrained from selling, so, upon the same principle, he ought to be prohibited from availing himself of his purchase to the prejudice of the corporation. I am, therefore, of opinion, upon both the grounds relied upon by the counsel of the corporation, that it is entitled to avail itself of its lien upon the property, by a decree in equity; and that, therefore, Mr. Smith, as purchaser of the property, is liable for the interest due upon that part of Mr. Threlkeld's notes which consists of the taxes upon the property purchased by Mr. Smith; which interest, according to the account stated (marked A.) amounted on the 1st of August, 1830, to $73.94.

GEORGETOWN (WRIGHT v.). See Case No. 18,080.

GEORGETOWN & A. TURNPIKE CO. (CURTISS v.). See Case No. 3,506.

GEORGETOWN BRIDGE CO. (DAVIS v.). See Case No. 3,637.

GEORGETOWN BRIDGE CO. (UNITED STATES v.). See Case No. 15,202.

Case No. 5,348.

GEORGETOWN TURNPIKE ROAD CO. v. CUSTIS.

[1 Cranch, C. C. 585.] [1]

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

JURISDICTION TO QUASH INQUISITION TAKEN UNDER TURNPIKE CHARTER.

This court has jurisdiction to quash an inquisition taken under the charter of the Georgetown and Alexandria Turnpike Company. The inquisition need not be under the seals of the jurors. If the jurors are not disinterested the inquisition will be quashed.

This was a rule upon G. W. P. Custis to show cause why an inquisition which had awarded him three thousand dollars on condemnation of a part of his land for the road, should not be quashed and a new warrant issued.

E. J. Lee, for defendant, contended that this court had no jurisdiction in this case. By the charter of the company (Act Cong.

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

[2] [Reversed in 6 Cranch (10 U. S.) 233.]

March 3, 1809, c. 31; 2 Stat. 539), the power to issue the warrant to summon the jury is given to one of the judges only, and the inquisition is to be returned to the clerk of the county, to be by him recorded, and the valuation is to be conclusive upon all persons. The court has no power to issue the warrant, nor to prevent the clerk from recording the inquisition. It is to be recorded only for safe-keeping.

C. Lee, contra. This court has all the powers of a court of record. The clerk is the officer of this court, and cannot insert any thing in the records of the court without its order. If the inquisition has been legally taken it is conclusive; but this court is to decide whether it has been legally taken. The courts in Virginia have, by the common law, power to quash an inquisition of escheat. Bennett v. Com., 2 Wash. [Va.] 154. And this court has the same powers as the district courts of Virginia. If one judge has the power to issue the warrant, a fortiori, the court, consisting of three judges, has it.

THE COURT (CRANCH, Chief Judge, doubting) were of opinion that they had jurisdiction to prevent the recording, and to quash the proceedings if irregular or illegal.

F. S. Key then objected to the inquisition that it was not under the seals of the jurors.

E. J. Lee, contra, was stopped by THE COURT, upon that point. But it appearing in evidence that some of the jurors were interested, and others did not stand indifferent,—

THE COURT (nem. con.) refused to suffer the inquisition and proceedings to be recorded, and ordered them to be quashed.

This judgment was reversed by the supreme court of the United States (6 Cranch [10 U. S.] 233), upon the ground that this court had no jurisdiction of the case. [See Case No. 3,506.]

GEORGE WASHINGTON, The. See Case No. 4,100.

GEORGE WASHINGTON, The (SUAREZ v.). See Case No. 13,585.

Case No. 5,349.

The GEORGIA.

[1 Lowell, 96.] [1]

District Court, D. Massachusetts. Sept., 1836.[2]

PRIZE—SALE OF VESSEL IN NEUTRAL PORT.

1. A sale by a belligerent of a war ship to a neutral in a neutral port is invalid by the law of nations as understood both in England and America.

[See note at end of case.]

2. This doctrine applied to the sale of the Georgia in the port of Liverpool in June, 1864, the purchaser having full notice of the character of the vessel, but buying in good faith and for his own use.

[See note at end of case.]

The Georgia was captured as prize on the high seas by the Niagara, and sent into a port of this district for adjudication. The taking of depositions in Liverpool, and elsewhere, occupied a considerable time. The facts appear in the opinion of the court.

R. H. Dana, Jr., Dist. Atty., for the United States and captors, cited: The Minerva, 6 C. Rob. Adm. 396; 2 Wildm. Int. Law, 90; U. S. v. The Etta [Case No. 15,060]; 3 Phillim. Int. Law, § 486; and, to show the knowledge of the claimant and the notice to the government of Great Britain, Diplomatic Correspondence of the United States, 1863 and 1864, and the claimant's deposition. He contended further that the Georgia was dismantled and sold for the express purpose of avoiding imminent capture.

J. A. Loring, for claimant. The whole doctrine asserted by the captors rests on The Minerva [supra], and that was decided on its own circumstances, the learned judge being of opinion that the bona fides of the sale was not clearly made out.

LOWELL, District Judge. The depositions establish that this is the same vessel that was the subject of diplomatic correspondence between Mr. Adams and Lord Russell in 1863 and 1864, before the sale to the claimant; that she was built on the Clyde, and manned, equipped, and armed, on the coast of France, by men, guns, and arms, taken from Liverpool; that she sailed on a cruise in which she captured and destroyed several American ships, put into a port of France for repairs, and sailed thence to Liverpool, where she arrived May 1, 1864. Her history was well known and was made the subject of a debate in parliament on the twelfth of May. On the second of June the claimant agreed to buy the vessel, but delayed to take title, having some doubt whether a British register would be granted her; but being reassured upon this point by the collector of customs at Liverpool, the sale was completed on the thirteenth of June. On the seventh of June Mr. Adams wrote to Lord Russell, "I must pray your lordship's pardon, if I take the liberty to renew, in this case, the observations which I had the honor to submit in my note of the 14th of March of last year, on the case of the steamer Sumter alias the Gibraltar. On behalf of my government I feel it my duty, in consonance with the practice heretofore adopted by Great Britain, to decline to recognize the validity of the sale of this armed vessel, heretofore carrying on war against the people of the United States, in a neutral port, and to claim the right of seizing it wherever it may be found, on the high seas." Dip. Corresp. 1864, pt. 2, p. 100. The note referred to, is one in which Mr. Adams had

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

[2] [Affirmed in 7 Wall. (74 U. S.) 32.]

cited from Mr. Phillimore's[3] then recent work on International Law, the statement that the purchase by neutrals of enemies' ships of war was held by British courts to be invalid. Dip. Corresp. 1863, pt. 1, p. 152. In accordance with this notice, given six days before the claimant's title was completed, Mr. Adams sent word to the commander of the Niagara to seize the Georgia, if he could find her on the high seas. This, too, was well known before the ship sailed, as appears by the letters and telegrams in this record. She was seized and sent in accordingly.

I ought at the outset to say that I am entirely satisfied that the sale was genuine and for value, and that any suspicions which were raised by the apparent connection of certain persons with the Georgia, as well after as before the sale, are fully explained; so that the only question of any importance in the case is whether the point of law was well taken by Mr. Adams. Only one case earlier than our war has been found; and the text writers have contented themselves with citing it; The Minerva, 6 C. Rob. Adm. 396, is agreed by them all to have settled the law for Great Britain, that such a sale is invalid. 3 Phillim. Int. Law, 607; 2 Wildm. Int. Law, 90; Twiss, Law of Nations (in time of war), 465. In France the law is said to be that not even merchant ships can be lawfully sold by a belligerent to a neutral after the war has begun: 2 De Pistoye & Duverdy, p. 1, tit. 6, c. 2; Lawr. Wheat. 581, note 182; Heffter (French Ed.) § 166. This stringent doctrine is defended by some writers and attacked by others on grounds of justice and policy, but all agree that it is the law now administered in France. Mr. Lawrence, in the note above cited, says the law of Russia is like that of France. In England merchant ships are put on the same footing as other merchandise, but the sale must be above suspicion. Phillim. ubi supra.

Mr. Phillimore in this part of his treatise adopts the Essay of Judge Story, printed as an appendix to the second volume of Wheaton's Reports, so that we have the authority of both these learned jurists for the doctrine that a sale of a ship of war is illegal. When we find that the law of several continental nations prohibits the sale of all ships, and the law of England, approved by Mr. Justice Story, and by the English and American writers who mention the subject at all, excepts only merchant ships, we may well conclude that this sale was illegal.

But we need not rest here. In August, 1864, Lord Russell notified Mr. Adams that the government had given directions that in future no ship of war, of either belligerent, should be allowed to be brought into any of her majesty's ports for the purpose of being dismantled and sold. Dip. Corresp. pt. 2, p. 278. This order is carefully worded, as if it were a mere regulation of the right to enter the port for a particular purpose; but it in fact assumes the right to prevent a sale of war-ships when in port; a power which the government would never have usurped if the sale were considered lawful. It is an admission of its illegality. In October, 1864, The Etta, which had been a Confederate cruiser, and had been sold to British merchants in Nassau, and afterwards captured, was condemned by Judge Field, who delivered an able and learned judgment, founded on the case of The Minerva and the other opinions which I have cited. U. S. v. The Etta [Case No. 15,060]. In the argument of the case before me, it was said that the British government had not only acquiesced in this judgment, but had affirmed its justice and propriety in a dispatch from Lord Russell to Lord Lyons or one of her majesty's representatives here. I have not been able to verify the accuracy of this statement, but it was admitted by counsel to be true, and is highly probable, as the doctrine had already been conceded by the dispatch of August, 1864. Considering the part which negotiation necessarily plays in international law, and the great experience and well-known character of the statesman who expressed this opinion, we cannot but attribute to it at least the weight that the civil law gives to the responsa prudentum.

Such being the uniform voice of all the authorities, without a single dissent, it is hardly necessary to examine the reasons on which the doctrine rests. The duty of a neutral is to give no aid to either belligerent. This duty is evaded if ships of war in great danger of capture, as was notoriously the case here, can be turned into money in the neutral port in which they have taken refuge. The standing order which the British government had adopted, limiting the time that such vessels should stay in the ports of the empire, was in fact evaded by the sale of the Georgia, against the protest of our representative, and the very dangers which Lord Stowell apprehended are illustrated by this case.

While, therefore, I cannot but regret that an innocent purchaser should suffer, I must hold the claimant's title to be bad. If Mr. Bates had taken the advice of a lawyer, or of the foreign office, instead of relying on the opinion of the collector of customs of Liverpool, whose communications with the foreign office appear to have been liable to some interruptions during the war, he would have learned that the law of nations, as accepted both in England and the United States, was against the validity of such a transaction, and that the government of his country had been twice distinctly notified of our opinion in the matter. The claimant appears to have relied on some warranty from his own government which the issuing of

[3] Now Sir R. Phillimore, judge of the high court of admiralty.

British papers might imply. If so I have no reason to suppose that his reliance is vain. If an official person has made a mistake, no doubt the sufferer will be indemnified by any right-minded government; and that of Great Britain has not been backward in meeting such obligations.

Decree of condemnation.

[NOTE. The decree of condemnation in this case was affirmed by the supreme court, Mr. Justice Nelson delivering the opinion. The rule that the purchase of a ship of war from an enemy, while lying in a neutral port to which it had fled, is invalid, was applied, and the learned justice referred to the proofs as establishing the fact that the claimant had purchased the Georgia without any purpose of permitting her to be again armed and equipped for the Confederate service, and for the purpose, as avowed at the time, of converting her into a merchant vessel. He had, however, full knowledge of her antecedent character, of her armament and equipment as a vessel of war of the Confederate navy, and of her depredations on the commerce of the United States. The vessel had been dismantled, and repairs to fit her for the merchant service made at the cost of some £3,000. It was held that the purchase of such a vessel could not be allowed, since it would enable the enemy to secure himself from the disadvantage into which he has fallen, so far, at least, as to have the value of the vessel restored to him by the neutral purchaser. 7 Wall. (74 U. S.) 32.]

Case No. 5,350.

GEORGIA v. ATKINS.

[1 Abb. U. S. 22;[1] 35 Ga. 315; 8 Int. Rev. Rec. 113; 1 Am. Law T. Rep. U. S. Cts. 105.]

Circuit Court, N. D. Georgia. 1866.

JURISDICTION OF CIRCUIT COURTS—TAXATION OF CORPORATIONS.

1. The circuit courts are competent to take cognizance of an action prosecuted by a state.

2. The circuit courts have power, in a proper case, to grant an injunction against threatened proceedings of a collector of internal revenue, to collect a tax which is not authorized by act of congress.

3. The word "corporation," as used in a revenue law declaring that every person or corporation owning a railroad, &c., shall be subject to a tax in respect thereof (Act June 30, 1864, § 103; 13 Stat. 275), as amended by Act March 3, 1865 (14 Stat. 135), does not include a state. A railroad wholly owned by a state, managed by state agents, and the profits of which form a part of the revenue of the state, is not liable to taxation under such a law.

[Cited in U. S. v. Baltimore & O. R. Co., 17 Wall. (84 U. S.) 328.]

Demurrer to a bill in equity.

Mr. Fitch, U. S. Dist. Atty., in support of demurrer.

Law and Jackson, for complainants.

ERSKINE, District Judge. This is a bill in equity filed in this court by the state of Georgia against James Atkins, the defendant, collector of the Fourth collection district of this state, under the internal revenue law of the United States; praying that a writ of injunction may be granted to restrain the defendant from further proceeding in the collection of the sum of six thousand and four dollars and fifty-six cents, claimed to be due to the United States, under section 103 of that law, from the Western & Atlantic Railroad.

The bill alleges that this railroad is the property of the state of Georgia exclusively; that the entire net income of this railroad forms a part of the revenue of the state, and is applied to the support of its government; and that the superintendent is the mere agent of the state, and has no authority over the road or its income which is not specifically given to him by the act of the state. The following portion of the bill, showing its general scope and object, may be cited at length: "And your orator further complains, and says, heretofore, on the tenth day of May, eighteen hundred and sixty-six, the said James Atkins, collector of the internal revenue of the United States, as aforesaid, gave notice to Campbell Wallace, the superintendent of said railroad, that he, the said superintendent, should pay to him, the said collector, the sum of six thousand and four dollars and fifty-six cents ($6,004.56), the said sum being demanded as revenue tax of the United States on six hundred and forty thousand one hundred and eighty-two dollars and forty-nine cents, gross earnings of said road for five months and two days, to the twenty-eighth day of February, eighteen hundred and sixty-six; and that should he, the said superintendent, fail to make said payment by the twentieth day of May following, that he, the said collector, would issue and have levied upon said railroad and its property a distress warrant for said amount, with ten per cent. added thereto."

The defendant has demurred to the whole bill. This admits all the facts in the bill that are well pleaded.

From the view which I take of this suit, it will not be necessary to pass upon more than two of the questions discussed.

The first matter for inquiry is that of jurisdiction. The district court of the United States for the Northern district of Georgia has, by the act of congress approved August 11, 1848 (9 Stat. 280), annexed to it the powers of a circuit court. The circuit courts of the United States are courts of special and limited jurisdiction, deriving all their powers from the constitution and the acts of congress.

I will briefly endeavor to ascertain whether this court has jurisdiction of the parties.

In the case of Pennsylvania v. Wheeling & B. Bridge Co., 13 How. [54 U. S.] 516, it was asserted in explicit language by Mr. Justice McLean, who delivered the opinion, and also by Mr. Chief Justice Taney, in his dissenting opinion, that the suit might have

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

been instituted in the circuit for the Western district of Pennsylvania, instead of originally presenting it to the supreme court.

And as to the controversy: the first part of section 2 of the act of March 2, 1883 [4 Stat. 632], provides, "that the jurisdiction of the circuit courts of the United States shall extend to all cases in law and equity, arising under the revenue laws of the United States, for which other provisions are not already made by law." It will be observed that the jurisdiction here conferred by congress does not depend upon the amount in dispute, nor the citizenship of the parties.

The case of Cutting v. Gilbert [Case No. 3,519], assessor, and Shook, collector of the Thirty-Second collection district of the city of New York, was a suit in equity, instituted by the complainants in the circuit court of the United States for the Southern district of New York, for themselves, as well as all others in interest who might come in, &c., against the defendants, to enjoin the assessment and collection of a tax claimed by those officers to be due to the United States under section 99 of the national internal revenue law, for bonds, stocks, &c., bought and sold by claimants, as licensed brokers and bankers. Because, among other things, of the joinder of improper parties, the injunction was denied by the court, and the parties left to their remedy at law. But Mr. Justice Nelson, in delivering the opinion, said: "The second section of the act of congress of March 2, 1833, known as the 'Force Act,' confers jurisdiction in express terms, and which has been applied to this act by its fiftieth section. And jurisdiction had previously, and has since, been upheld and exercised upon general principles of equity jurisprudence." [Osborn v. Bank of U. S.] 9 Wheat. [22 U. S.] 739, 903; [State Bank v. Knopp] 16 How. [57 U. S.] 369; [Dodge v. Woolsey] 18 How. [59 U. S.] 331; [Jefferson Branch Bank v. Skelly] 1 Black [66 U. S.] 436; pamphlet, containing argument of Mr. Courtney, United States district attorney, in behalf of the defendants, and the decision of Judge Nelson, New York, 1865, p. 27.

The preceding extract is a direct authority on the question under immediate consideration; and, for myself, I entertain no doubt whatever of the jurisdiction or power of this court, if the tax sought to be collected is illegal, unwarranted by the act of congress, to interpose by writ of injunction, and arrest the threatened invasion of the property of the complainant.

One other question only need be the subject of examination, and that is whether, under the internal revenue laws, it was the intention of congress that a duty or tax should be collected out of the property owned, controlled, and managed solely by a state; for it is admitted in the pleadings that the Western and Atlantic Railroad is the property of the state of Georgia, exclusively, and that the net income arising from the road is revenue applied to the support of the government of the state. Section 103 of the act of congress of June 30, 1864 (13 Stat. 275), as amended by that of March 3, 1865 (14 Stat. 135), declares "that every person, firm, company, or corporation, owning or possessing or having the care and management of any railroad, canal, steamboat, ship," &c., "engaged or employed in the business of transporting passengers or property for hire, or in transporting the mails of the United States, ... shall be subject to and pay a duty of two and one-half per centum upon the gross receipts of such railroad, canal, steamboat, ship," &c. The question, narrowed to a point, is this: Does the word or term "corporation," for the purposes of this act, and as herein used, include the term "state?" The United States is formed of a number of states or commonwealths united together, and these constitute one general government. The state of Georgia is an integral and indissoluble part of the United States; but it is, nevertheless, in the meaning of the public law, a state. When the term "corporation" is applied to a nation or a state, it is employed in its most extensive signification; and thus used, the United States or commonwealths composing the Union may be termed "corporations." But when the term "corporation" is directed or refers to those artificial persons, bodies corporate or politic, instituted for the promotion or advancement of religion, learning, or commerce, and for various other objects, public or private, where charity, industry, skill, and speculation can be freely and advantageously employed, and which owe their existence, name, powers, and duration to a government, it is used in its ordinary, and, to the common understanding, explicit sense. Is the former or the latter application of the term the fair and legitimate one intended by the act?

Now in order to arrive at the intention of the lawgiver the whole and every part of the statute should be considered in determining the meaning of any of its parts; taking the words to be understood in that sense in which they are generally used by those for whom the law was intended, and discarding all subtle and strained construction for the purpose of limiting or extending their operation or import. In the case of Martin v. Hunter, 1 Wheat. [14 U. S.] 326, Mr. Justice Story, in delivering the opinion of the court, said that "words are to be taken in the natural and obvious sense, and not in a sense unreasonably restricted or enlarged." And in Dunn v. Reid, 10 Pet. [35 U. S.] 524, it was remarked by Mr. Justice McLean, in pronouncing the decision of the court, that "cases may be found where courts have construed a statute most liberally to effectuate the remedy; but where the language of the act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature." I am of the opinion that congress intended the term "corporation," as used in this act, to be understood in its general, ob-

vious, and natural meaning; and, therefore, it does not include the term "state." And so far as my limited researches go, I am unable to discover a single case in the supreme court, or in any of the circuit or district courts of the United States, wherein it has been decided that the term "corporation"—body corporate or politic—when used in a statute, includes a "state," or where the one term is used as a synonym for the other.

It is therefore ordered that the demurrer be overruled; and that the writ of injunction issue in accordance with the prayer of the complainant, upon giving bond in the sum of thirty thousand dollars.

Order accordingly.

Case No. 5,351.

GEORGIA v. ATLANTIC & G. R. CO.

[3 Woods, 434.] [1]

Circuit Court, S. D. Georgia. April Term, 1879.

TAXATION—LIEN—EXECUTION — AFFIDAVIT OF ILLEGALITY TO STAY—JURISDICTION—EQUITY—RECEIVERS—TITLE TO PROPERTY.

1. The lien of the state for taxes upon the property of a railroad company, rightfully in the custody of the law, is prior to all other liens whatsoever, except the lien of judicial costs.

2. Section 3669 of the Code of Georgia provides that when an execution has been levied on property, and an affidavit of illegality filed to stay proceedings thereon, the property so levied on shall be subject to levy and sale under other executions. *Held*, that under this section, such property was subject to execution from the federal as well as the state courts.

3. The courts of the United States, within a state, have equal and concurrent power with the courts of the state, to render judgments and carry them into execution.

4. The equity of section 3669, Code Ga., applies to the taking into possession of property by a receiver, under the order of the court, as well as to a levy under execution.

5. The receiver holds the property as a sheriff would, subject to the prior lien which is being contested.

6. Where a levy on railroad property is suspended by an affidavit of illegality and bond, under the Code of Georgia, the federal court does not exceed its jurisdiction in taking possession of the same property by its receiver.

[Cited in Ex parte Chamberlain, 55 Fed. 707; Ex parte Tyler, 149 U. S. 164, 13 Sup. Ct. 792.]

7. In Georgia a writ of fieri facias for taxes is subject to the same rules as to its mode of execution as writs issued on judgments in favor of private parties.

8. A railroad cannot be cut up into parcels and sold piecemeal on execution.

This was an application made by counsel on behalf of the state of Georgia for leave to sell the depots, freight-houses, passenger-houses and offices of the railroad company, by virtue of a writ of fieri facias, which had been levied on said property to enforce the collection of taxes due the state. The levy had been suspended by an affidavit of illegality filed by the railroad company.

R. N. Ely, Atty. Gen. of Georgia, and Robert Toombs, for the State, cited Hagan v. Lucas, 10 Pet. [35 U. S.] 400; Wiswell v. Sampson, 14 How. [55 U. S.] 52; Hall v. Boyd, 52 Ga. 456; City of Atlanta v. Grant, 57 Ga. 340.

W. S. Chisholm and Robert Falligant, contra, who contended that: (1) As soon as an affidavit of illegality was filed to the tax execution, the property on which those executions had been levied, immediately became subject as the property of the defendant, under section 3669 of the Code of Georgia, to the process of other courts. (2) The execution was levied on a small part of the defendant company's property, to wit, its depots, grounds, etc. No sale could be made under such a levy. Equity would enjoin such a sale, and as this court is now doing, take jurisdiction of the matter, and direct a sale of the entire property of the defendant company for the benefit of all concerned. Macon & W. R. Co. v. Parker, 9 Ga. 377; City of Atlanta v. Grant, 57 Ga. 340.

BRADLEY, Circuit Justice. In relation to the application made on behalf of the state for the collection of its taxes against the railroad company, we may remark, in limine, that the lien of the state for its taxes is undoubtedly prior to all other liens whatsoever, except judicial costs, which are first to be paid where the property is rightfully in the custody of the law.

We are of opinion, however, that the suspension of the tax executions by the contestation thereof, under an affidavit of illegality, left the property levied on open to be proceeded against by subsequent executions or other judicial process. This, we think, follows from a fair construction of section 3669 of the Code. This section declares as follows: "When an execution has been levied on property, and an affidavit of illegality filed to stay proceedings thereon, the property so levied on shall be subject to levy and sale under other execution, and the officer making the first levy shall claim, receive, hold and retain such amount of the proceeds of the sale as the court shall deem sufficient to pay the execution first levied, including interest up to the term of the court at which said illegality shall be determined; and any bond given by the defendant, on filing such affidavit, shall be released and discharged, so far as relates to the property sold."

We have no doubt that this release of the property in favor of a subsequent execution inures to the benefit of executions issued by the circuit court of the United States, sitting in Georgia, as well as to those issued by a state court. The circuit court is not a for-

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

eign court, though established by another jurisdiction. It is one of the courts which, under our complex form of government, is rightfully established for the administration of justice in the state of Georgia. The people of Georgia, and litigants therein, have state courts to resort to, and, in special cases, United States courts as well. They are their own courts in both cases—in the one case their own as citizens of the state; in the other case their own as citizens of the United States. The peculiar circumstances which give jurisdiction to the latter courts do not affect their entire equality and concurrence of power to render judgments or to carry them into execution. In this regard they have the same power and rights which the state courts have. The forms and modes of procedure used in the United States courts are precisely the same, in all cases at law, as those used in the state courts, and the proceedings in equity are not substantially different, though different in form.

We think, also, that the equity of the statute applies to a taking possession by a receiver under an order of court, as well as a levy under execution. The appointment of a receiver, in such a case as the present, is for the purpose of preserving the property, preparatory to a sale of it. The receiver holds it, as a sheriff would, subject to the prior lien of the execution which is being contested. That lien is not disturbed. The court will take care not only that it shall be respected, but will see that no injustice shall be done to the execution creditor by any unreasonable delay in satisfying his claim, either by a sale of the property, or in some other mode. Perhaps, if the property levied on could possibly be sold separately, so as not to injure other parties interested therein, it would order that the execution might be carried into effect by a sale of the property under the same; but if that would be destructive of the whole property as an entirety, it would require the same to be sold in a manner more conducive to the rights of all concerned, but still, according to the execution creditor, the effect of his prior lien. In our judgment, therefore, this court did not exceed its jurisdiction in taking possession of the property through its receiver at a time when the levy under the execution was suspended.

But there is a difficulty in this case attending the tax levy made by the sheriff, which, if not obviated by some decision or course of decisions, of the supreme court of Georgia, seems to us to render that levy ineffectual and void. [See 98 U. S. 359.] A fi. fa. for taxes is subject to the same rules as to the mode of its execution as other writs of fi. fa. are, which are issued on judgments in favor of private parties, and it seems to us that a portion of a railroad cannot be levied on and sold by virtue thereof.

A railroad is a public highway, and a highway of a most peculiar kind. It is not land, nor like land, in the ordinary sense. For, though in form, the railroad company may own the fee, or some other legal estate in the strip of land on which the road is constructed, yet the company owns it and holds it under a franchise for a particular purpose, namely, that of a roadway for the operation of a railroad under and by virtue of the franchises which have been conferred upon it, and for the purposes of travel and transportation thereon by the public. It is an artery of commerce; it is the means of communication between one part of the country and another. The interest which the public has in it is greater and more important than the interest which the company has in it. It cannot be supposed that the legislature, in authorizing its construction, and granting peculiar franchises for its operation and use, ever intended that execution creditors might levy upon parcels of it, and cut it up into sections, and destroy it as a great public thoroughfare. Such a supposition seems to us preposterous. Suppose a mile of the road should be levied on and sold, would the purchaser have a right to fence it in and take up the rails and cross-ties, and plant it, and thereby destroy the railroad? Could this be done without contemning the power of the state by which it was created and made a public highway?

We think not. There are other ways and means known to the law, or, at least, to equity, if not to the common law, by which creditors may compel the payment of their debts out of the property of the company—seizure of disconnected property belonging to the company, sequestration of earnings, or, if necessary, the sale of the entire road and its franchises. In one of these ways the rights of creditors can be protected, and the public would not be deprived of the means of communication which the erection and establishment of the line has created between different portions of the state, and between this state and other states of the Union. To sell it in parcels would be to sever an artery of commerce. It would affect the whole state in a vital part. Its public means of intercommunication are essential to the prosperity of the people. They are the most efficient appliances of modern civilization.

We cannot believe that the supreme court of Georgia, when the question is fairly presented to it, will ever sanction such a proceeding. That court, in the case of Macon & W. R. Co. v. Parker, 9 Ga. 377, struck the keynote of the matter when it declared as follows, through Judge Lumpkin: "The facts of the case under consideration were novel and peculiar. Here was a road extending through six counties, and one hundred miles in length. What disastrous consequences would have resulted, if each judgment creditor had been allowed to seize and sell separate portions of the road, at different sales, in six different counties through which it passed, and to different purchasers. Would

not this valuable property have been utterly sacrificed; the rights and interests of creditors, as well as the objects and intention of the legislature in granting this charter, entirely defeated? I feel warranted in saying that the whole history of equity jurisprudence does not present a case which made the interference of its powers not only highly expedient, but so indispensably necessary in adjusting the rights of creditors to an insolvent's estate, as this did." The chancellor, then, in taking this matter in hand and directing a sale of the entire interest for the benefit of all concerned, was but invoking the powers of equity to aid the defects of the law; and so far from transcending his authority, he is entitled to the thanks of the parties and the country, for the correct and enlightened policy which he adopted.

The courts of law have now become so constituted, that every court may exercise equity powers, and no resort need be had to a separate court of equity to mould and frame the process and proceedings in such manner as to prevent injustice and wrong. The Code has authorized the superior courts to frame their judgments and executions in accordance with equity, and in the recent case of Atlanta v. Grant, 57 Ga. 340, the following decision has been made:

1. "A chartered railroad, with all rights and privileges that properly appertain to it as an instrument of transportation (excluding, of course, the franchise of the corporation to be a body politic), is property, subject to be applied to the payment of its just debts, and the whole may be sold for that purpose, in this state, under a judgment at law.

2. "But the judgment, and the execution founded thereon, must be specially moulded in substantial compliance with sections 3082, 3562, 3639 of the Code; if not in all cases, certainly in a case where the railroad, in pursuance of the charter, has been located and partially constructed in three counties.

3. "A sale under an execution not thus moulded, about to be made by the sheriff, may be arrested by an affidavit of illegality interposed by the corporation through its proper officers.

4. "Such a sale, though consummated without legal resistance, would be void, and consequently the rights of other creditors, or of the stockholders, would not be lost."

Whether the executions in the present case have been moulded in such form as law and equity require, it is not proper for us to say. They command the sheriff generally, that of the goods and chattels, lands, tenements and franchises of the Atlantic & Gulf Railroad Company, they cause to be levied the amount of the taxes in question. This form may be sufficient to enable the sheriff to proceed according to law, but not contrary to law. Various goods, chattels and lands of the company might, perhaps, have been found on which a lawful levy might have been made. Perhaps the terms of the execution would have authorized the sheriff to levy on the road and franchises of the company as an entirety. But he has done none of these things. He has levied on a part, and a vital part of the road, without which its business cannot be carried on; namely, the depots and the freight-houses, and passenger houses and office. He has levied on the head, without which the railroad must become a lifeless trunk. We are clearly of opinion that this levy was void. Whether the railroad company has acquiesced, or has but faintly opposed this unlawful proceeding, we do not know. The bondholders and creditors who are represented in this cause, were not parties to the proceedings had in the supreme court, and are not bound thereby.

Under these circumstances, we have no hesitation in saying that this court had power, at least during the suspension of the illegal levy, to take possession of the property by means of its receiver. But the lien of the state for taxes does not depend on any execution or levy. It is declared by the Code, and is an independent lien, and this court will take care that the full right of the state shall be preserved so far as it shall be judicially brought to our notice. The application for leave to proceed with the execution is denied.

Case No. 5,352.

GEORGIA v. O'GRADY.

[3 Woods, 496;[1] 5 Cent. Law J. 465; 24 Int. Rev. Rec. 5.]

Circuit Court, N. D. Georgia. Sept. Term, 1876.

REMOVAL OF CAUSES — CRIMINAL CASES — COMMENCEMENT OF PROSECUTION — RIGHT TO CHALLENGE JURORS—TRIAL OF INDICTMENT FOR MURDER — SOLDIER ACTING AS PART OF MARSHAL'S POSSE.

1. Under section 643 of the Revised Statutes, providing for the removal of criminal cases from a state to a federal court, the prosecution is not commenced until the finding of an indictment.

[Cited in State v. Port, 3 Fed. 117; State v. Bolton, 11 Fed. 218.]

2. Upon the trial of a case, removed under said section, the right of the parties to challenge jurors is regulated by the law of the United States.

3. Upon the trial of an indictment for murder, removed to the federal court, under said section, the accused is called to answer to the offense as defined by the laws of the state.

4. A United States soldier, when acting as a part of the posse of a United States marshal or revenue officer, is as much bound to obey the laws of the United States as any other citizen, and he has the same rights of self-defense, and no other.

Trial of an indictment for murder.

In January, 1876, three United States soldiers, belonging to the garrison in Atlanta, Ga., were arrested in Gilmer county, Ga., under state process, for the alleged murder

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

of one John Emory, a citizen of that county. After examination by the magistrates, they were committed to prison to await trial. They then petitioned the circuit court of the United States, for the Northern district of Georgia, the district which includes Gilmer county, for the removal of the cause into that court by the writ of habeas corpus cum causa, under the provisions of section 643 of the Revised Statutes of the United States, alleging that the prosecution was for acts done by them while acting under a revenue officer of the United States, and on account of a right claimed by them under the revenue laws. The court not being in session, the petition was presented to the clerk, who issued the writ. This was served, and the marshal took the prisoners into custody and took them before the United States district judge. On motion of the attorney general of Georgia, Judge ERSKINE, after argument, directed the marshal to return the prisoners to the state officers, holding that the prosecution was not commenced, in the meaning of that section of the Revised Statutes, until the finding of an indictment. At the next term of the superior court of Gilmer county, in May, 1876, an indictment was found against the three prisoners for the crime of murder, charging one of them, O'Grady, as principal in the first degree, and the two others, Wells and Newman, as principals in the second degree, as accessories before the fact and as accessories after the fact. The prisoners then petitioned anew for the removal of the cause into the United States circuit court, and for the writ of habeas corpus cum causa. The circuit court was not in session, and therefore the petition was presented to its clerk and filed in his office. He issued the writ, and it was promptly served on the clerk of Gilmer superior court by the marshal. The prisoners then moved that court for two orders—one directing the clerk to certify and send the record to the circuit court; the other, that the sheriff should deliver the prisoners to the United States marshal. The court, after careful examination of the writ, became satisfied that it conformed to the act of congress, and granted the orders. The marshal took the prisoners to Atlanta, and applied for the direction of Judge ERSKINE, who ordered that they should be held in prison, by the marshal, for trial at the next term of the circuit court, but permitted Wells and Newman to be released, if they should tender sufficient bail, in an amount fixed by him, a state judge having previously pronounced their offense to be bailable.

At the next term of the circuit court, WOODS, Circuit Judge, and ERSKINE, District Judge, sitting, the prisoners were arraigned and pleaded not guilty, and claiming the right to be tried separately, O'Grady was put on trial. The question arose, whether the parties should respectively have the number of challenges of jurors allowed by the law of Georgia, or the number allowed in cases of the same class by the law of the United States. The court decided that in this matter the law of the United States was applicable, and, accordingly, allowed the prosecution five peremptory challenges, and to the defense twenty, as provided in section 819 of the Revised Statutes.

The evidence showed that the three soldiers belonged to a detachment that had been sent from the garrison in Atlanta, to aid the deputy collector of internal revenue, and the deputy marshal of the United States, in executing the law in the mountain regions of Georgia. That country is distant from markets for its farm products, and therefore presents temptations to the conversion of corn into so portable a form as whisky, and abounds in obscure recesses where small distilleries can be run without much danger of general observation. The inhabitants have long been accustomed to make whisky without license or tax. The revenue law is odious to them, and they have the reputation of being ready to do violence in resisting the enforcement of it. The three soldiers were detailed from the camp by the lieutenant commanding, to go with the deputy collector and deputy marshal on a nocturnal expedition to a neighborhood in which illicit distilleries were reported to be carried on. When they were leaving the camp their commander told them to beware of surprise. On the way they were informed by citizens that the neighborhood was dangerous, and that their party was too small. After midnight, they found an illicit distillery in operation on the premises of Emory, the deceased; took possession of it, and arrested four persons whom they found inside. Wells, who was a sergeant, went off in search of a wagon belonging to the party, leaving Newman and O'Grady to guard the prisoners and the distillery, having placed Newman inside, with the four prisoners, and O'Grady outside, as a sentinel, with a caution to O'Grady to challenge all comers, and to be on the alert against surprises. Soon after he left, the prisoners made some movement which Newman took as hostile, and he threatened them in rather rough language, audible to O'Grady. Emory, the proprietor, knew nothing of all this, but was sleeping in his house a few rods distant, when a friend came, waked him, and gave him information that the revenue officers were in the neighborhood. Not suspecting that they were so near, he ran from the house toward the distillery, shouting to his friends there to escape. About the time that he would have reached the distillery, O'Grady fired his musket, and nothing more was seen of Emory that night by any witness. There was a conflict of testimony on the point, whether O'Grady challenged before firing, Newman testifying that he heard the challenge, and the prisoners in the still-house testifying that they did not hear it. Wells

and others of the revenue party soon came with the wagon, and they all left the premises, carrying away the prisoners and the still. The next morning Emory was found dead in a small water-course near the distillery, with a fatal bullet wound in his head, and blood was traced from a spot near the distillery to the brink of the stream.

N. J. Hammond, Atty. Gen. of Georgia, for the prosecution.

A. T. Ackerman, H. P. Farrow, U. S. Atty., and George S. Thomas, Asst. U. S. Atty., for the defense.

Before WOODS, Circuit Judge, and ERSKINE, District Judge.

WOODS, Circuit Judge (charging jury). Though this case is tried in a court of the United States, it is to be determined by the law of Georgia, and you are to decide whether, under the law, O'Grady is guilty or not of the crime of murder, with which the indictment charges him. Murder is defined by the Code of Georgia as "the unlawful killing of a human being, in the peace of the state, by a person of sound memory and discretion, with malice aforethought, either express or implied." Attention has been called in the argument of counsel to another species of homicide —manslaughter, which is defined in the same Code as "the unlawful killing of a human creature, without malice, either express or implied, and without any mixture of deliberation whatever," etc. We are of the opinion that if the facts in proof in this case show any crime, it is murder, and not manslaughter, and therefore you may dismiss the question of manslaughter from your consideration.

The defendant comes to this bar, like every other person charged with crime, presumed to be innocent until his guilt is proved, and the proof is insufficient for conviction unless it excludes all reasonable doubt. It is conceded that the deceased was killed by the prisoner. This fact, without explanation, would make out a case of murder, and if no explanation were offered, it would be your duty to return a verdict of guilty. But the fact of the homicide is open to explanation. The defense undertakes the explanation, and justifies the killing on the ground of self-defense. It insists that O'Grady, situated as he was at the time, had reasonable cause to believe, and did believe, that deceased was approaching him with a hostile and felonious intent, and that, in consequence thereof, he stood in peril of his life, or of great bodily harm. If the evidence satisfies you that this view is correct, you should acquit the prisoner. To form a right judgment upon this defense, you should put yourselves in his place at the time, and look at the facts, not as they appear by the light of subsequent disclosures, but as they then appeared to him.

His counsel relies on facts which he insists are proved, that the neighborhood had a reputation for violence towards those in the revenue service; that there was a supposed necessity of protecting and aiding them with military force; that it was night; that the prisoner was unacquainted with the ground; that his officers had warned him to be watchful against surprise; that the sergeant had ordered him to challenge every one who might come near; that he and his comrade were guarding four prisoners, who, if reinforced, might easily overpower them, and who had manifested a hostile disposition; and that deceased came running and shouting in a manner that might well be taken for a bold assault, and did not halt when challenged, and argues that there was enough to excite the fears of a reasonable man, and to justify him in repelling the apprehended violence with a shot. You will consider all these facts, so far as they have been proved, and allow them due weight in support of the defense. The Code of Georgia justifies a homicide committed in defense of one's person "against one who manifestly intends, or endeavors, by violence or surprise, to commit a felony on the person"; but it also declares that a bare fear of such an offense shall not justify the killing. "It must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing really acted under the influence of those fears."

The defendant derives no protection from the fact that he was a soldier. It was a time of peace, and a soldier was as much bound as a citizen to respect the laws of the state. He was there as a part of the posse of the revenue officer and of the marshal, and had the same, and only the same, rights of self-defense that a citizen would have had under the same circumstances. Even if he had been ordered by his military commander to fire the fatal shot, that order, unless in itself lawful, would be no protection to him, for a soldier has no right to obey an unlawful order.

Nor can the accused derive any protection from the fact, if it be a fact, that the deceased was engaged in the habitual violation of the revenue laws of the United States. By violating the revenue laws the deceased did not forfeit his life. He was still under the protection of the law. The killing of him unnecessarily, wantonly and willfully, by a revenue officer, or any of his posse, would be as clearly murder as the killing of the most law-abiding citizen of the land.

It is not denied that the accused was lawfully on the spot, or that it was his duty to prevent the rescue or escape of the prisoners, but if, under the pretense of performing that duty, he fired on the deceased unnecessarily, wantonly and willfully, the law holds the act to be with malice; and if you find that such were the facts of this case, your verdict should be guilty. But if, on the other hand, the evidence satisfies you that the accused had reasonable cause to believe, and did believe at the time he fired the fatal shot, that in consequence of the hostile approach of the deceased he was placed in peril of life or limb, and by

reason of such supposed peril he fired upon the deceased, in that case it would be your duty to return a verdict of not guilty.

Under this charge the jury retired, and soon brought in a verdict of not guilty. The counsel for the prosecution then entered a nolle prosequi as to the defendants Wells and Newman.

NOTE [from original report in 5 Cent. Law J. 465]. No objection was made to the jurisdiction of the United States court in this case. A few days before, a motion had been made to remand to the state court a case of misdemeanor that had been transferred under the same section of the Revised Statutes, which, after full consideration, the court denied; and, as the opinion of the court on the right to remove cases of this kind was thus ascertained, it was probably deemed useless to make a similar motion in the present case.

Case No. 5,353.

The GEORGIA D. LOUD.

[8 Ben. 392.] [1]

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

PILOTAGE THROUGH HELL GATE—TENDER OF SERVICES—LONG ISLAND SOUND—CONSTRUCTION OF STATE STATUTE.

Where a Hell Gate pilot offered his services to a vessel bound through Hell Gate, at a point 17 miles east of Sand's Point, and was refused: *Held*, that, under the statute of the state of New York such tender of pilotage services at that place was effective, and the libellant might recover half pilotage upon such refusal.

[Cited in The Glaramara, 10 Fed. 679.]

In admiralty.

Beebe, Wilcox & Hobbs, for libellant.

W. W. Goodrich, for claimant.

BENEDICT, District Judge. This is an action by a Hell Gate pilot to recover half pilotage, as provided in the laws of the state, by reason of a tender of services and a refusal thereof at a point off Norwalk Island, some 17 miles eastward of Sand's Point, to a vessel then on a voyage through Hell Gate.

The evidence shows a tender and a refusal, and the only question left for determination is the question referred to and left undecided in Horton v. Smith [Case No. 6,709], whether a tender, at a point as far distant as 17 miles to eastward of Sand's Point, entitles the pilot to half pilotage, in case of a refusal of his services then made. I have examined the statute of this state with care to see if any ground exists therein for the limitation which the claimants here contend for; and certainly without any desire to give to the statute any more extended operation than its language compels—for the necessity of compulsory pilotage for a thoroughfare like Hell Gate in the present state of commerce in the port of New York may well be questioned. But I fail to find any ground for saying that an effective tender of pilotage services may not be made at the point where the libellant made his tender.

The provisions of the act clearly indicate an intention to afford an inducement to pilots to go further east than Sand's Point, and a tender off Norwalk Island is within the letter and the spirit of the statute. The libellant must accordingly have his decree.

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

Case No. 5,354.

GEORGIA INS. & TRUST CO. v. ELLICOTT et al.

[Taney, 130.] [1]

Circuit Court, D. Maryland. Nov. Term, 1849.

LIMITATIONS — ACKNOWLEDGMENT — INCLUDING DEBT IN LIST FILED BY INSOLVENT.

1. In order to remove the bar of the statute of limitations, it is necessary that there should either be an express promise to pay, or an admission of the debt, in such terms as imply that the party is liable and willing to pay.

[Cited in Kirk v. Williams, 24 Fed. 446.]

2. Where a person applies for the benefit of the insolvent laws of Maryland, the list of debts due by him, required to be filed with his application, is not such admission of indebtedness, as, upon any just construction, can be held to imply that he is willing or intends to pay such indebtedness to its full extent.

3. On the contrary, the very object of the petition, and the list of debts or other papers accompanying it, is to be discharged from his debts without payment in full.

Plaintiff's prayers: "1. The plaintiff prays the opinion of the court and their instruction to the jury, that the return of the debt sued on in this case, in the schedule of the defendants [Evan J. Ellicott, Andrew Ellicott, and Elias Ellicott], when they made their respective applications for the benefit of the insolvent laws of Maryland, is evidence to the jury of an acknowledgment of the said debt by the defendants, sufficient to remove the bar of the statute of limitations, pleaded in this case, so far as to entitle the plaintiff to recover a judgment to affect the property of the defendants, which they may hereafter acquire by gift, descent or devise, or in their own right by due course of distribution. 2. The plaintiff prays the opinion of the court and their instruction to the jury, that the return of the debt sued on in this case, in the schedule of the defendants, when they made their respective applications for the benefit of the insolvent laws of Maryland, is evidence to the jury of an acknowledgment of the said debt by the defendants, sufficient to remove the bar of the statute of limitations, pleaded in this case."

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

D. Stewart, for plaintiff.
John Glenn, for defendants.

TANEY, Circuit Justice. It appears from the evidence, that the claim of the plaintiff is barred by the act of limitations, unless the bar is removed by the subsequent admissions of the defendants. The admission relied on is contained in the papers filed by them upon their application to the commissioners for the benefit of the act passed by the general assembly of Maryland for the relief of insolvent debtors. This law requires the applicant to present with his petition a list of the debts then due by him. And in the list of debts due from them, presented by the defendants, the claim in question is stated to be one; and three years had not elapsed from the time the petition was presented before this suit was brought. In order to remove the bar of the statute, it is necessary that there should either be an express promise to pay, or an admission of the debt, made in such terms as would imply that the party was liable and willing to pay. This was the decision of the supreme court in the case of Moore v. Bank of Columbia, 6 Pet. [31 U. S.] 86; and this decision is perhaps entitled to the more weight, because it was made upon the construction of the statute of limitations of Maryland, which, by act of congress, was the law of that part of the district in which the suit had been brought.

There is no express promise in this case, nor can the admission, upon any just construction, be held to imply that the defendants are willing or intend to pay the debt to its full extent; on the contrary, the very object of the petition, and the list of debts or other papers that accompany it, is to be discharged from this and other debts without paying the full amount; and if we were to construe this admission to imply a promise on their part to pay the whole claim, and sufficient to authorize a verdict for the entire debt, we should expound it in direct contradiction to its obvious meaning. They make the admission in order to obtain a discharge without full payment, and to be released from so much of it as their property may be found insufficient to pay. The second instruction asked for cannot, therefore, be given.

The first is equally objectionable. Undoubtedly, any property which the defendants may have since acquired, or may hereafter acquire, by descent, devise or in the course of distribution, will be liable for this debt, as well as the other debts mentioned in their schedules; but there is no evidence that the defendants have acquired property of any kind, by either of these modes, since their petition; and consequently, there is no testimony in the case upon which this instruction could be founded.

The verdict of the jury must, therefore, be for the defendants. Verdict for defendants.

Case No. 5,355.

The GEORGIANA.

[1 Lowell, 91.] [1]

District Court, D. Massachusetts. May, 1866.

SALVAGE—DERELICT—DEGREE OF PERIL—COMPENSATION—DISTRIBUTION.

1. The doctrine is now well established in courts of admiralty that the salvors of derelict property stand on the same footing as other salvors, although in estimating the peril from which they have rescued the goods, the fact that they were derelict on the high seas is of great importance, because the chance of recovery by the owner is very small.

2. This peril depends more on the actual situation of the saved property, than on the intent with which it was abandoned.

3. Where a vessel of small value was found derelict on the high seas and towed into port by a vessel of much larger value with a valuable cargo on board, without great personal risk or labor, two-fifths of the gross proceeds of sale were awarded as salvage, together with some necessary expenses and costs.

[Cited in The Anna, Case No. 398.]

4. Distribution of this salvage between the owners and the men.

In admiralty.

R. R. Bishop, for libellants.
G. E. Betton, for claimants.

LOWELL, District Judge. The brig America of ——— tons burden, and valued at about twenty thousand dollars, with a cargo the cost of which is not given, and manned by ten persons including officers, in the course of her voyage from Halifax to Boston, on the twenty-ninth day of March, 1866, at about seventy miles from Cape Ann, namely, in latitude 42° 37′, and longitude 68° 58′, saw the schooner Georgiana drifting with her sails loose and dragging overboard, and her main-boom swinging. The appearance of the schooner was such as to attract attention, and the master of the brig went some two miles out of his direct course to speak her, and found, as he expected, that there was no person on board. He lay to in a convenient position and sent his mate with five men to board the schooner. The roughness of the sea made it impossible to approach her with safety on the weather side, and this with the danger from the sails and other hamper which were dragging on the lee side, rendered the attempt to board her at all one of considerable difficulty and some danger, and one which succeeded only after persevering efforts, continued for about an hour and a half. Upon boarding the schooner it was found that she was in ballast and had apparently broken from her moorings; for both anchors were gone and both chains parted; her foresail was so much damaged as to be of no service; but it appears by the evidence that she was otherwise staunch and in good

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

order. The mainsail and jib were at once hoisted, a hawser was passed on board from the brig, and she was towed for some two hours, when the line parted, and she was again taken in tow and so continued until some time in the following night, about twelve hours in all, when they had nearly reached Cape Ann, and the wind having died away, the master was afraid of the vessels fouling each other, and cast her off, and both vessels proceeded to Boston, but no longer in company. The value of the schooner, as proved by the marshal's sale, is nineteen hundred and fifty dollars, which is considerably less than the libellants supposed it to be. It is said that the owners were the purchasers, and no complaint is made that the sale, which was by agreement of parties, was not a fair one, and I must assume it as the basis of my judgment so far as value is concerned.

The answer, which is by an agent, upon information and belief, raises no issue except as to the value of the property saved, and the amount which ought to be awarded to the salvors, and as incidental to this, whether the schooner was derelict. It alleges that she was anchored in a small harbor on the coast of Maine, and in a gale the chains parted, and the captain and crew took to their boats and went on shore, intending, however, to return and retake the vessel, and that they made some efforts in this behalf. No evidence was offered by the claimants in support of their allegations; but taking the answer to be true, it is plain that the schooner was derelict in the ordinary sense of the law of salvage, that is to say, she was left and found under circumstances which show that the possession of her by her crew was not continuous, and that any hope they may have entertained of recovering her must have had very slight foundation in fact. This question of derelict vessels and goods at sea has been much discussed, and there are many cases in the books upon the subject. I understand the modern doctrine to be that there must be not only a hope of recovery, which indeed the law will always presume, but some reasonable prospect that the hope may be realized, to rebut the presumption arising from the condition in which the goods are found. Where the peril is such as to force an abandonment of the ship, the mere intention to return and recover her, if possible, will not prevent her being considered derelict. L'Esperance, 1 Dod. 46; The Coromandel, Swab. 205; The Sarah Bell, 4 Notes of Cas. 144; Rowe v. The Brig [Case No. 12,093]; The Boston [Id. 1,673].

The question is not quite so important now as it was formerly thought to be, because the finders in such cases are no longer considered to be entitled prima facie to one-half or any other fixed proportion of the property; but the courts are inclined to fix the reward rather by a consideration of the danger, labor, value, and other circumstances which govern in ordinary cases of salvage service. Post v. Jones, 19 How. [60 U. S.] 150. It is very rare indeed that more than one-half the value of the property saved is awarded.

There are two circumstances, however, which are usually found to exist in cases of vessels or other goods found abandoned at sea, which entitle the salvors to favorable consideration. One is, that the owner's chance of recovering his property is commonly very slight; and the other, that the salvors have not the aid or directions of the owner or master in relation to the measures to be adopted for its preservation. Besides these circumstances, there is not much in the present case to call for a very large reward. Though there was some danger in boarding the vessel, yet from the time she was in possession of the salvors their task was neither difficult nor dangerous. She was navigable and was not leaky, and the taking her in tow appears to have been more a matter of convenience than absolute necessity. The total detention of the brig's voyage cannot have exceeded two or three hours, for she appears to have made Cape Ann in about twelve hours from the time of taking the schooner in tow, which shows a rate of sailing of about six miles an hour. Indeed the master estimated the retardation, if it may be so called, of his brig by the tow at only about a knot an hour, which gives rather less than two hours as the total delay. A good deal has been said concerning the insurance of the brig having been vitiated by the deviation, and this is a point which has been thought by many learned judges to enhance the owner's claim. See The Boston, above cited. On the other hand it was said in argument, that the latest doctrine in England is to consider all vessels in such cases as uninsured. The Deveron, 1 W. Rob. Adm. 180, and unpublished cases cited 2 Pritch. Dig. 835; Salvage, 690. If a general rule is to be adopted, it is certainly more in accordance with the truth to assume all vessels to be insured than the contrary. And I should assume in the absence of evidence, that the vessel and cargo are put to some additional risk by the deviation. In case of cargo not belonging to the owners of the vessel, it cannot be doubted that the latter may be incurring a great risk by such a deviation, because they become insurers, and it might often be the duty of the master not to take such a risk where the comparative value of the derelict property to that under his charge is small. In the present case the question is not very important, because the theoretical risk by deviation, was slight, the vessel being near the end of her voyage. It was not worth a large sum to insure her for twenty-four hours. So far as any actual risk was encountered by the brig, that is always a subject of consideration by the court, and whether that risk is taken by the owners or the underwriters is of no consequence. That a valuable vessel has been endangered

by a towage or other salvage service, is as proper an element in the computation of the reward, as the number of the salvors and the risks and hardships to which they have been exposed. The owners of the derelict property cannot object to this, because the question with them was whether their goods should be saved by risking this valuable instrument or not saved at all. It is not for them to complain of the means by which their property has been rescued. Taking into view the comparatively small value of the schooner, and that the risk and hardship of the salvors were not considerable, although the peril from which they saved the property was great, I have thought right to award two-fifths of the gross amount, or seven hundred and eighty dollars, to be divided as follows: to the owners of the brig, one-third, $260; to the master, one-sixth, $130; to the mate, one-twelfth, $65; to the second mate and crew, five-twelfths, to be divided in proportion to their wages, $325.

The bill for expenses, $47.50, appears to be proper, and this and the taxable costs are to be allowed out of the remaining three-fifths.

GEORGIA RAILROAD & BANKING CO. (PETTUS v.). See Case No. 11,048.

GERARD (HOURQUIEBE v.). See Case No. 6,733.

GERARD (JUDY v.). See Case No. 7,571.

Case No. 5,356.

The GERARD STUYVESANT.

[8 Ben. 183.] [1]

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

COLLISION IN EAST RIVER — STEAMER AND SLOOP —CHANGE OF COURSE.

A sloop was sailing up the East river against the tide, running free. A ferry-boat coming down the river was running within about a hundred and fifty feet of her course, so that she would have cleared the sloop, if the latter had held her course. The master of the sloop, who was at her helm, left it in the becket and went forward to assist in bearing off the anchor, so as to get it on the bow, and while he was thus absent from the helm, the sloop luffed towards the course of the ferry-boat. The latter whistled, and the whistle called the attention of the master to the ferry-boat. He ran to the wheel and put it hard aport, and the sloop rapidly swung off, but was struck by the ferry-boat on her port side. *Held*, that the ferry-boat was not in fault in running so close to the course of the sloop; and that the latter was in fault in luffing, and was solely responsible for the collision.

In admiralty.

Scudder & Carter, for libellant.
Wm. A. Duer, for claimants.

BENEDICT, District Judge. This action is brought to recover of the ferry-boat Gerard Stuyvesant, for injuries to the sloop Gold Leaf, arising from a collision between these vessels in the East river, on the 13th of November, 1873.

The collision occurred about 9 or 10 o'clock a. m., on a clear, fair day, the wind at the time blowing a fresh breeze from west by south, and the tide running ebb. The sloop was bound for Norwich, Connecticut, and was sailing through the East river, with single-reefed mainsail and jib, and with her sheet broad off. When about opposite Houston street, from midway in the river to one-third of the way to the Brooklyn side, her master left her helm in the becket, and went forward to assist in bearing off the anchor to get it on the bow. While he was thus engaged the sloop luffed, and about the same instant a whistle first called the attention of the master to the ferry-boat Gerard Stuyvesant, then proceeding from the New York shore, and not far distant. The master of the sloop at once ran aft to his wheel and hove it hard aport. The sloop swung off rapidly, but was struck by the ferry-boat on her port side, receiving the injury complained of. The ferry-boat was at the time upon one of her regular trips from New York to Brooklyn. The sloop was seen coming up, and the intent of the ferry-boat was to pass under the sloop's stern. Upon the supposition that the sloop would keep her course, the ferry-boat had slowed to allow the sloop to pass, and, if the sloop had not luffed, would have given her some 150 feet of room to pass ahead of the ferry-boat. As soon as the sloop luffed, the whistle of the ferry-boat was blown and her engine reversed, but she failed to get sternway in time to clear the sloop.

These facts clearly appear in the testimony, and are scarcely denied. They appear to me to make out a case of fault on the part of the sloop, and not on the part of the ferry-boat. It was negligence on the part of the master of the sloop, sailing as he was, to leave the helm. This careless act gave the sloop the opportunity to luff, which she did when it was incumbent upon her to hold her course, and this luff caused the collision.

It was urged, on the part of the sloop, that the collision arose from the fault of the ferry-boat in approaching so near to the sloop, that a slight luff would bring the vessels together in spite of all efforts; but I do not consider that there was any fault in the navigation of the ferry-boat in this respect. The course the sloop was bound to pursue was plain. Her ability to pass clear was evident. There was nothing to prevent her from holding her course, and the pilot of the ferry-boat was justified in assuming that she would do so. Had she done this, the room given by the ferry-boat was abundant to enable her to pass in safety. I am unwilling to hold it negligence on the part of a ferry-boat to approach within 150 feet of the course of a sloop sailing as this one was. The necessities of the river permit the ferry-boats to approach as near as that

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

when it can be done with safety, as in this case it certainly could be. But the sloop did not hold her course. She luffed and then bore away. The latter movement was no doubt well enough. But the luff was wrong, and it arose from the great carelessness of the master leaving his vessel with no one at the helm. For this fault the sloop must be held to be solely responsible for the accident. Libel dismissed, with costs.

Case No. 5,357.

GERBIER v. EMERY.

[2 Wash. C. C. 413.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

NEW TRIAL.

1. The court refused to grant a new trial, because the defendant would, in the event of the same being granted, compel the plaintiff to submit to a nonsuit in consequence of a defect in the declaration, and thus defeat the justice of the case, unless the court would allow the plaintiff to amend his declaration, and thus the granting of a new trial would be of no avail.

2. Where, if a new trial should be granted, the defendant could not be allowed in the suit to make the set-off, which, by the weight of evidence, he seemed entitled to, the court refused to grant the same.

This was a motion for a new trial.

Mr. Hallowell, for defendant, stated the grounds of his motion to be: First, that the court had improperly refused to allow him to prove, by a clerk of the bank, from the books of the bank, that a check of Gerbier for the amount of the premium on the Fanny, had been paid by the bank. The reason assigned by the court, was, that as notice had not been given to the opposite party to produce the check, no evidence could be given of it. Their object was to prove, not the contents of the check, but that such a check had been paid by the bank. Besides, it is not to be presumed that a check is in existence seven years after it is paid. He cited 1 Macn. Ev. 343; 1 Bin. 273, 274. Secondly, on the ground of surprise. Thirdly, that the verdict was against the weight of evidence. The defendant had consigned to Gerbier, Bailey & Co., a cargo of lumber, and they, without authority, sold it upon credit, and neglected to collect the proceeds. The defendant was entitled to credit for the amount, but the jury omitted to allow it.

Mr. Sergeant, for plaintiff, was directed by the court, to confine his answer to the last point. He contended: First, that Gerbier, Bailey & Co. were authorized to sell on credit. The defendant's letter to them, directs them to sell "to the best advantage"; and under such a general authority, a factor is authorized to sell on credit, unless a usage to the contrary be proved. Willes, 400; Beames, Bankr. 44; 3 Bos. & P. 489. Secondly, admitting the factor to have broken his orders, the claim is for damages, and could not be set off. Winchester v. Hackley, 2 Cranch [6 U. S.] 342.

M. Levy, in reply. Under a general authority, a factor has no right to sell on credit. 1 Bulst. 103. But in this case, the authority was special; for, though it is said, to sell "to the best advantage," yet the factor is also directed to "remit by the first opportunity," which he could not do, unless he sold for cash. As to the right to offset, the factor, in such a case as this, is to be considered as the purchaser himself, or as guarantying the payment; and the case is analogous to that of a factor, who, being ordered by his principal to insure, and being bound to do so, omits it, in which case, he is considered the insurer himself, and in case of a loss, the amount ordered to be insured, may be recovered against him, or may be offset. De Tastett v. Crousillat [Case No. 3,828]; Morris v. Summerl [Id. 9,837].

BY THE COURT. This is a rule to show cause, why a new trial should not be granted upon the following grounds: First, that the clerk of the Bank of Pennsylvania ought to have been examined as a witness, to prove the payment of Gerbier's check, which, it is said, was given to reimburse the defendant the premiums paid by him on the insurance of the lumber shipped in the two vessels, as the property of the plaintiff; because, as the drawer of a check, after he settles his account with the bank, is not supposed to keep it by him, a notice to produce it, in order to let in inferior testimony, is not necessary. Secondly, that the defendant was surprised by this objection. Thirdly, that the verdict was against the weight of the evidence, particularly in not crediting the defendant with the amount of the sales of his lumber, because Gerbier, Bailey & Co. had not collected it. That they had no right to sell on credit, particularly under the instructions to the plaintiff, which, it is said, amounted to a positive instruction to sell for cash.

As to the first and second reasons, although they were well founded in other respects, they would not be sufficient, in this case, to warrant a new trial, which could only be wished for, for the purpose of nonsuiting the plaintiff, by holding him to the strict proof of his contract, as laid in the declaration, against the justice of the case. And if we were, for these reasons, to grant a new trial, it would be upon the terms of permitting the plaintiff to amend, and to add a new count, so as to omit that part of the case which states a promise by the defendant, to deliver the lumber, clear of insurance; then, it is obvious, the new trial could be of no use to the defendant, on these grounds. The last reason might weigh with the court, if the defendant could avail himself of the misconduct of Gerbier, Bailey & Co., in selling on

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

credit, (if they were faulty for so doing,) so as to exclude from their account, the debit for those sums not collected. But, upon the authority of Winchester v. Hackley [supra], we think that the defendant could not, at law, bring that subject into view. Rule discharged.

GERDING (ANDERSON v.). See Case No. 356.

GERHARD (GROSS & P. MANUF'G CO. v.). See Case No. 5,843.

GERKE (SEAVERNS v.). See Case No. 12,595.

Case No. 5,358.

GERMAIN v. KNOX.

[Nowhere reported; opinion not now accessible.]

Case No. 5,359.

GERMAN-AMERICAN BANK v. THIRD NAT. BANK.

[18 Alb. Law J. 252; 6 Reporter, 484; 11 Chi. Leg. News, 7; 2 Tex. Law J. 150; 7 N. Y. Wkly. Dig. 279; 24 Int. Rev. Rec. 316; 3 Cin. Law Bul. 794.] [1]

Circuit Court, E. D. Missouri. Sept. 17, 1878.

BANKS AND BANKING—COLLECTIONS—AGENCY.

Plaintiff sent a draft on T. to the defendant bank for collection, indorsing it "for collection and credit." It was received by defendant June 19, and presented to T. who gave his check for the amount, which was certified as good by the bank on which it was drawn, at the procurement of defendant. On the same day defendant, which was insolvent, suspended payment. On the 20th of June, after the suspension, defendant presented the check and received payment. *Held*, that defendant was the agent of plaintiff to collect the draft; that the agency remained until the money was received on the check, and such money being received after the defendant suspended, it was held by it in trust for plaintiff and could not be distributed among the general creditors.

This is a suit in equity wherein the plaintiffs seek to recover from the defendants a certain sum of money which they allege the receiver of the defendant—the Third National Bank of the State of Missouri—has in his possession, which are the proceeds of a certain draft drawn by August Taussig on the firm of Taussig Bros. & Co. for $10,000, which said plaintiff forwarded to the defendant on the 18th June, 1877, "for collection and credit." This sum of money the plaintiffs claim on the ground that the said bank did not collect it until after its suspension, on the 19th day of June, 1877, and therefore holds the money as plaintiffs' agent. Plaintiffs also seek to recover said sum of money on the ground that the directors of defendant bank received said draft for collection after they had knowledge of the fact that the bank was insolvent and on the very day the bank suspended payment, and that therefore the receipt by the defendant bank of said money was a fraud on the plaintiffs, and they are entitled to the full proceeds. To this bill the defendants filed an answer putting in issue the averments of the plaintiffs' bill and stating the facts of the transaction specially, to which answer the plaintiffs replied.

The facts, so far as material to the ground of the court's judgment, are shortly these: The defendant bank was the correspondent of the plaintiff bank. On June 18, 1877, the plaintiff transmitted to the defendant bank "for collection and credit," a draft or bill of exchange for $10,000 drawn by one August Taussig on the firm of Taussig Bros. & Co., St. Louis. This was received by the defendant bank on the morning of June 19 and the amount provisionally credited in account to the plaintiffs. The defendant bank on the same day presented the bill of exchange for payment and received from Messrs. Taussig Bros. & Co. their check for the amount on the Franklin Savings Bank of St. Louis, and thereupon surrendered the bill of exchange. This bill of exchange was specially indorsed to the defendant bank for collection on account of the plaintiffs. On the same day (June 19) the defendant bank presented this check and had it certified as "good" by the Franklin Savings Bank, and took it away; and on the same day the directors of the defendant bank resolved that "all payments shall be suspended and all its banking business shall cease, except to collect and preserve its assets." It never again opened its doors. The next day after the suspension, its officers collected the amount of the certified check, and a receiver having been appointed by the comptroller of the currency, the money thus collected having been mingled with the other money of the bank came into his hands. No notice to the plaintiffs of the provisional credit was given until after the check had been collected on the 20th day of June. The defendant bank was hopelessly insolvent at the time, and had been known to be so for a considerable period by its executive officers and a majority of the directors, but as the judgment of the court does not proceed upon the distinct ground that the collection of the draft was for this reason fraudulent, the particular facts in this regard need not be stated in detail.

Two questions were argued: First. Whether or not the defendant Johnston, as receiver of said bank, holds the amount of money so collected, as a trustee for the plaintiffs, or whether they are simple contract creditors for said amount and entitled only to their dividends as other creditors. Second. Whether or not the insolvency of the bank, together with the facts in evidence in relation to the knowledge of the directors of its insolvency, rendered the collection of the money by defendant bank a fraud against

[1] [6 Reporter, 484, and 7 N. Y. Wkly. Dig. 279, contain only partial reports.]

plaintiffs, so as to entitle them to recover the full amount of the proceeds of said Taussig draft.

William Patrick and Nathan Frank, for plaintiffs.

Henderson & Shields, for defendants.

DILLON, Circuit Judge. It is only necessary to decide the first of the above questions, although counsel have discussed both of them with great fullness and referred to numerous cases. While these cases have been considered, I do not feel called on to examine them at length in this opinion, for, in my judgment, on the facts here presented, the principles of law decisive of the case are clear and well settled.

In respect to the Taussig draft, out of which the controversy arises, the defendant bank was the collecting agent of the plaintiffs. This is manifest from the relations of the two banks to each other; from the letter transmitting this draft "for collection and credit," and from the plaintiff's special indorsement thereon to the cashier of the defendant bank "for collection on account of" the plaintiffs. This relation was not only known to the banks, but knowledge of it, that is to say, that the defendant bank was merely the agent to collect this draft for the plaintiffs and not the holder of it in its own right, was imparted to the drawees of the draft, the Messrs. Taussig Bros. & Co., by the above-mentioned special indorsement of the plaintiffs on the draft itself, and which was surrendered to the drawees when their check for the amount thereof on the Franklin Bank was received. What, then, was the duty of the defendant bank, and the rights and obligations of the drawees, the Messrs. Taussig Bros. & Co.? It was the duty of the defendant bank, as the collecting agent of the plaintiffs, to present the draft for payment, and as there is no proof of any special authority to the defendant, or agreement of usage varying the legal rights of the parties, the defendant bank could receive in absolute payment thereof nothing but money, "that which the law declares to be a legal tender, or which, by common consent, is considered and treated as money." Ward v. Smith, 7 Wall. [74 U. S.] 452. This settled principle of law has not been drawn in question by the defendant's counsel. As the defendant bank was not authorized to receive payment except in the manner above stated, and as the Messrs. Taussig Bros. & Co. knew that the defendant bank did not hold the draft as their own, but as agents to collect, they are charged with knowledge that they could only make a valid payment, binding upon plaintiffs, by making such payment in money. Their check for the amount of the draft would at most be conditional payment —that is, payment when the money was actually received thereon by the agents of the plaintiffs. Even if the defendant bank had undertaken by a special agreement to receive the check in absolute payment (of which there is no pretense) such an agreement would have been void for want of authority from the plaintiffs to make it. When the check was received in exchange for the draft the drawers of the check must be taken to have constituted the defendant bank their agents to collect the check, in order that its proceeds might be paid to the plaintiffs. Without special authority to the defendant bank to take a check in absolute payment, or without ratification of its act in receiving a check instead of money, this act of the defendant would not bind the plaintiffs ex proprio vigore. The latter could affirm or disaffirm as they might elect. If the money had been received on the check by the defendant bank before its suspension, this would have presented a very different question from the one which actually arises. The check was presented, but instead of payment being demanded and received, a certification of it was accepted. That was an act which did not bind the plaintiffs—for it was alike without their knowledge or authority. If this was done by the defendant bank without authority from the Messrs. Taussig Bros. & Co. it might, as between them and the bank, discharge them as drawers of the check, but it could not operate to pay the bill of exchange for which the check was given, or in any manner vary the rights of the plaintiffs. Their debt subsisted until payment was made by Messrs. Taussig Bros. & Co., and no payment was made until the check was actually paid, which was the day after the failure of the defendant bank and its resolution to cease business and wind up its affairs. It is, therefore, a mistake to suppose that the act of the defendant bank in originally receiving the check of the Messrs. Taussig Bros. & Co., or in subsequently procuring it to be certified, discharged Taussig Bros. & Co. from their liability to the plaintiffs. I am, therefore, of opinion that the defendant bank remained the agent of the plaintiffs to collect the bill of exchange on Taussig Bros. & Co., until the money was actually received. When the money was received, and not before, the agency of the defendant bank to collect terminated, and its authority to credit the amount to the plaintiffs and to make itself an absolute debtor therefor would arise, provided it was still a going concern; but inasmuch as before it received the money it had failed, its agency to constitute itself a general creditor for the amount had ceased to exist. It would hold the amount as the agent of the plaintiffs or in trust for it, subject to any balance due to it from the plaintiffs.

Against this view the defendants urge two objections. The first is thus stated in the defendant's printed argument: "The letter transmitting the draft was simply asking for 'credit'—the depositing of the Taussig draft by the plaintiffs in the defendant bank. The

words 'for collection and credit' mean 'credit.' While it is reasonable to suppose that the defendant bank would not give the credit until it was satisfied that it would obtain the money on the draft, yet the ultimate object of the plaintiffs being 'credit,' if they received the credit, it matters not to them whether the defendant bank received the money or not. And as soon as the defendant bank was satisfied to give the credit, as requested, the plaintiffs' demand was complied with, whether the collection was ever made or not." The argument is fallacious. The words "for collection and credit" do not mean that the credit shall be given until the money is collected. And it does make a difference whether the defendant bank ever received the money or not. On this point the language of Byles, J., in Sweeting v. Pearce, 7 C. B. (N. S.) 485, is applicable. He says: "It is not disputed that the general rule of law is that an authority to an agent to receive money implies that he is to receive it in cash. If the agent receives the money in cash the probability is that he will hand it over to the principal; but if he is allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over; at all events it would very much diminish the chance of the principal ever receiving it; and upon that principle it has been held that the agent, as a general rule, cannot receive payment in any thing but cash." This language is approved in the case of Pearson v. Scott, decided in the chancery division of the high court of justice, May 4, 1878, 18 Alb. Law J. 193 [38 Law T. (N. S.) 747].

The second objection of the defendant's counsel to the view above stated is, "that even if the defendant bank was the agent of the plaintiffs, for the collection of the Taussig draft, and had no right to receive payment thereof in any thing but money, the acceptance of the Taussig check, and having it certified by defendant bank was a simple breach of their duty as such agents, for which they became instantly liable on the 19th day of June, as a simple contract debtor." I answer that it has been shown above that the act of the defendant bank in having the check certified wrought no change in the plaintiffs' rights, and that their debt still remained. This unauthorized act, if it resulted in any injury to the plaintiffs, would undoubtedly give them a right to recover any damages suffered thereby, but it did not dissolve or terminate the relationship of principal and agent between the plaintiffs and the defendant bank, nor preclude the plaintiffs from the right to elect to ratify the act of receiving the check and to claim the money afterward collected thereon.

The force of the argument of the defendant's counsel that the defendant bank, on the very day of its failure and when it was in articulo mortis, had the right by a credit in advance of collection, or by its unauthorized act in receiving the check and in procuring its certification, to terminate, without the plaintiffs' consent, the agency, and to constitute itself the actual debtor for the amount, against the plaintiffs' will and against their interest, I must confess I have been unable to perceive. It is not unusual for bankers to credit their correspondents or customers with the amount of paper of a certain character at the time of its receipt for collection, but such credits are provisional only, being made in anticipation that the paper will be promptly paid, and with the right to cancel the credit if the paper is dishonored. First Nat. Bank of Trinidad v. Denver Nat. Bank [Case No. 4,810]. Such was the nature of the credit made in this instance, and the circumstance is immaterial, as it does not vary the ultimate rights of the parties.

The conclusion, therefore, is that the defendant bank was the agent of the plaintiffs to collect the draft on Taussig Bros. & Co.; that the agency remained until the money was received on the check, and as this was after the defendant bank had ceased to do business and had resolved to wind up its affairs, it was received in trust for the plaintiffs (less the plaintiffs' indebtedness of the defendant bank), and here the receiver has no right to hold it to be distributed ratably among the general creditors of the bank. Let a decree be entered for the plaintiff for $8,168.58, with interest from the date of the commencement of this suit, at the rate of six per cent. per annum. Decree accordingly.

Case No. 5,360.

The GERMANIA.

[9 Ben. 356.] [1]

District Court, S. D. New York. March, 1878.

DAMAGE TO PERSON—RIGHT OF ACTION IN ADMIRALTY—LIABILITY OF OWNER AND VESSEL—PRIVITY OF CONTRACT.

1. In admiralty, the owner of a vessel is liable in personam, and the vessel is liable in rem, for injuries done to person or property by the negligence of the master and crew of the vessel, only where the owner would, under the same circumstances, be liable in a suit at common law.

[Cited in Gerrity v. The Kate Cann, 2 Fed. 244; The Rheola, 7 Fed. 782; The Kate Cann, 8 Fed. 720; The Victoria, 13 Fed. 44; The Carl, 18 Fed. 656; The Explorer, 20 Fed. 139; The Gladiolus, 21 Fed. 418; The Max Morris, 24 Fed. 862, 28 Fed. 882.]

[Cited in Davies v. Oceanic S. S. Co., 89 Cal. 280, 26 Pac. 827.]

2. A person not in the employment of a vessel or of her owners, nor acting in their service or for their benefit, and sustaining no relation to them by contract, has no right of ac-

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

tion in rem, in admiralty, against the vessel, for an injury received by him on board of her by falling through an open hatchway.

[Cited in Carriff v. Blanchard Nav. Co., 66 Mich. 646, 33 N. W. 748.]

In admiralty.

S. H. Randall, for libellant.
Beebe, Wilcox & Hobbs, for claimant.

BLATCHFORD, District Judge. This is a libel in rem against the bark Germania, to recover damages for personal injuries sustained by the libellant, by his having fallen through a hatchway in the between decks of the bark, into the lower hold, while the vessel was lying floating in the water, moored to a wharf in the city of New York.

The firm of Hagemeyer & Brunn, of New York, were agents of the bark, which was a foreign vessel. They did the business of the vessel at New York, on behalf of her owners. They were also general commission merchants, and as such, purchased and paid for, on behalf of certain parties in Europe, other than the owners of the vessel, a quantity of grain, destined for Portugal, which they shipped on board of the bark at New York, to be carried on behalf of the owners of the grain, to Europe. The grain was discharged into the bark from a steam elevator, and, as it came from the mouth of the spout of the elevator, it was received in bags. Each bag, after being filled, was sewed up in the between decks of the bark. The libellant was a sewer of bags, and was proceeding to his destined place for work when he fell through the hatchway. The libel alleges that the shippers or owners of the grain were to have the grain properly bagged for shipment on board of the bark, by persons duly employed for that purpose, among whom was the libellant. In another place it alleges that the libellant had been employed on behalf of the shippers of the grain. The ground of action set forth in the libel is, that the master and officers of the bark were negligent in leaving the hatchway open and unguarded.

The evidence shows that Hagemeyer & Brunn, as shippers of the grain, and acting on behalf of the owners of the grain, (and not as agents for the bark, or acting on behalf of the owners of the bark,) being under obligation to deliver the grain to the bark in sewed bags, contracted with one Williamson that he should furnish the bags, and furnish men to hold the bags under the spout of the elevator on the bark, and to sew up the mouths of the bags when they should be filled; that Williamson supplied the bags and employed one Scanlon, at the rate of so much for each bag filled and sewed, to furnish men to hold and fill and sew the bags, and to deliver the bags sewed to the employers of the bark; that Scanlon employed the libellant and other men; that Scanlon had the sole charge and direction of the men whom he employed; that Williamson paid Scanlon for filling and sewing the bags; and that Hagemeyer & Brunn paid Williamson for the bags, and for the filling and sewing of the bags.

The libellant, under his employment by Scanlon, went on board of the bark, and went down a ladder through a hatchway in the main deck to the between decks, and started to go to a distant point on the between decks to attend to the business for which he had been employed, and on his way fell into and through an open hole or hatchway into the hold of the vessel, and was seriously injured. It is contended that the master and officers of the bark, in leaving such hole or hatchway open or unguarded, so that the libellant fell into it, neglected a duty which they owed to the libellant, and that the vessel is liable in rem, for the injuries to the libellant.

It is undoubtedly true, that the jurisdiction of the admiralty over marine torts depends upon locality. This means that the tort must have been committed on navigable waters within the cognizance of the admiralty. But the owner of a vessel is liable in personam, and the vessel is liable in rem, for injuries done to person or property by the negligence of the master and crew of the vessel, only where the owner would, under the same circumstances, be liable in a suit at common law. The fact that the tort, if a tort, was committed on navigable waters, makes the case one of admiralty cognizance. But the fact that the occurrence took place on navigable waters, still leaves open the question whether the circumstances of the case were such as to amount to a tort. The duty of the officers and crew of a vessel to see that the vessel does no injury, while she is being navigated, to another vessel, or to persons and property on board of such other vessel, makes the shipowner and his vessel liable, if such injury is negligently done. So, their duty to see that a passenger on their own vessel suffers no injury from them, or from any one on board, creates a liability on the owner and the vessel if such duty is negligently discharged. But, in all these cases, there is a duty on the part of the officers and crew, as representing the owner, and in the discharge of the authority entrusted to them by him, and while acting within the scope of such authority, not to be negligent towards the person to whom the liability is incurred. The duty may arise out of the fact that the vessel is being navigated, or is anchored in the pathway of other vessels, or has a relation by contract to the person injured in person or property, and, no doubt, out of other circumstances. But no case can be found where the duty has been held to exist under circumstances such as those in this case. Here the libellant was not in the employment of the vessel or of her owners, nor acting in their service or for their benefit. He sustained no relation to them by contract. All that can be said is that the accident happened on board of the vessel. But that mere fact cannot remove the difficulty, that in no event could it be held that there was any

breach of any maritime duty or obligation on the part of the officers of the vessel.

The libellant may have been rightfully on the vessel, and not a trespasser, and it may be considered that he was there with the assent of the officers of the vessel; but it by no means follows that the vessel or her owner is liable for what occurred, even though the leaving the hatchway open was a negligent and careless act on the part of some person. There was no contract between any one representing the vessel and the libellant, and there was no duty to the libellant on the part of the officers and crew of the vessel. Loop v. Litchfield, 42 N. Y. 351.

I have preferred to put the decision of the case on the views above stated, but I am not satisfied that there was any negligence on the part of the master, officers or crew of the vessel. The opening was a usual one, in a usual place, and, if an obligation rested on any person to warn the libellant in regard to it, it was one which, under the circumstances, did not rest on the ship's company.

The libel is dismissed, with costs.

GERMANIA BANK (SAVARY v.). See Case No. 12,387.

Case No. 5,361.

GERMANIA INS. CO. v. LA CROSSE, ETC., PACKET CO.

[3 Biss. 501.] [1]

District Court, E. D. Wisconsin. April, 1873.

DELIVERY BY CARRIER—WHAT CONSTITUTES—CUSTOM—CONDITION OF CARGO.

1. Where a cargo of wheat is shipped in bulk, to be delivered under a bill of lading to a consignee who has charge of an elevator at the port of destination, it is not a sufficient delivery to moor the barge at the dock of the elevator during bad weather, without notice to the consignee.

2. An alleged custom so to moor barges, leaving them to be taken charge of by the elevator, does not discharge the carrier.

3. The carrier must show satisfactorily that the cargo was in good order on arrival at its destination.

In admiralty. This was a libel in personam brought by several insurance companies to recover amounts paid by them respectively on policies of insurance on damaged wheat. The wheat had been shipped at Red Wing, Minnesota, on the steamboat Keokuk and barge Lucy, owned by respondent [the La Crosse & Minnesota Packet Company], to be delivered according to the bill of lading at La Crosse to —— Whitney, or assigns, in good order, the unavoidable dangers of the river and fire excepted, he or they paying freight and charges. Whitney, the consignee, had charge of the elevator at La Crosse, and on unloading the wheat it was found to be damaged.

Mariner, Smith & Ordway, for libellants, cited Garrison v. Memphis Ins. Co., 19 How. [60 U. S.] 316; Oelricks v. Ford, 23 How. [64 U. S.] 63; McGregor v. Insurance Co. of Pennsylvania [Case No. 8,811]; Barnard v. Kellogg, 10 Wall. [77 U. S.] 388; Wadley v. Davis, 63 Barb. 500, Ostrander v. Brown, 15 Johns. 39; Gibson v. Culver, 17 Wend. 305; The Peytona [Case No. 11,058]; Clendaniel v. Tuckerman, 17 Barb. 184; Richardson v. Goddard, 23 How. [64 U. S.] 28; The Eddy, 5 Wall. [72 U. S.] 481.

Carys & Cottrill, for respondent.

MILLER, District Judge. It is alleged in the answer that the wheat was to be delivered at the elevator at La Crosse, and that on the arrival of the steamboat and barge at La Crosse the master and crew safely, properly and securely moored the barge Lucy, laden with the wheat, to the dock of the elevator at the usual and customary place for mooring barges whose cargoes were to be discharged at the elevator, and after the barge was so safely moored to the dock, the wind blowing fresh forced the barge laden with the wheat against the piles of the dock and caused the barge to leak and damage a portion of the wheat; and that the damage was caused by the unavoidable dangers of the river.

It is further averred in the answer that when the barge was caused to leak and damage the wheat, the voyage of the steamboat and barge had been fully completed and terminated, and that the cargo had been delivered at the port of La Crosse according to the terms of the bill of lading, and according to the custom of delivering cargoes of grain which were to be discharged at the elevator.

It appears in evidence that Whitney, mentioned in the bill of lading, was agent of the railroad company having charge of the elevator at La Crosse. Whitney's name appears in the bill of lading, as the course of business was to deliver all grain shipped in bulk to the elevator at La Crosse, the barges were moored at the dock at such place as entitled them to be discharged into the elevator in their order as to their time of arrival. When the barge's time for discharge came, the men in charge of the elevator loosed her from her mooring and brought her up to the proper position for discharge. The master of the "tow" considered his voyage at an end, and the stipulations of the bill of lading performed, upon mooring the barge at the dock; such seems to have been the loose manner of business at that point.

There is no satisfactory evidence that the wheat was in good order when the barge arrived at the dock. The master of the steamer very seldom went on board a barge, and if on board the Lucy on the trip, he did not make any examination into the condition of the wheat. The mate did not report water

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

in the hold, but he is not a witness in the case. One witness testifies that he was looking out for the Lucy; she arrived in the forenoon, and on that same forenoon the witness thinks the wheat was removed from the barge, immediately on its arrival at the elevator. The wheat was wet at the bottom. It may be that the barge had made water before arriving at the dock.

From the answer of the respondent and the evidence, the master and crew of the steamer left the barge in peril of the winds. The barge was made fast to the dock either in the midst of a blow or on the immediate approach of one, without regard to the safe delivery of the cargo. The master had no right, under those circumstances, to consider his voyage at an end. He was in fault even if the alleged custom was satisfactorily proven. Such neglect as this would be entirely inexcusable.

The alleged custom of mooring barges at the dock of the elevator and leaving them to be taken in charge of the elevator in turn, if proven to prevail in all cases, which it is not, would not excuse the carrier.

The bill of lading required the wheat to be delivered to Whitney at La Crosse. It is not alleged nor proven that there was notice to Whitney of the arrival of the barge with the cargo on board, or an offer to deliver the wheat to him. In order to relieve the carrier of responsibility, it should be made to appear at least that Whitney had such notice. The wheat was in no sense turned over to the custody of Whitney.

For these reasons a decree will be pronounced for libellants.

GERMANIA INS. CO. v. The LADY PIKE. See Case No. 7,985.

GERMANIA INS. CO. (TAYLOR v.). See Case No. 13,793.

GERMANIA INS. CO. (WEIDE v.). See Case No. 17,358.

GERMANIA LIFE INS. CO. (DORN v.). See Case No. 4,005.

Case No. 5,362.

GERMAN SAVINGS & LOAN SOC. v. OULTON.

[1 Sawy. 695;[1] 14 Int. Rev. Rec. 138.]

Circuit Court, D. California. Sept. 18, 1871.

BANKS AND BANKING — SECTION 110, INTERNAL REVENUE ACT, CONSTRUED—CLASS OF DEPOSITS TAXABLE—CASE DISTINGUISHED.

1. The one hundred and tenth section of the revenue act of the United States, as amended on the thirteenth of July, 1866 [14 Stat. 136, 137], enacts that "there shall be levied, collected and paid a tax of one twenty-fourth of one per centum each month upon the average amount of the deposits of money, subject to payment by check or draft, or represented by certificates of deposits or otherwise, whether payable on demand or at some future day, with any person, bank, association, company or corporation engaged in the business of banking," with a proviso that "deposits in associations or companies known as provident institutions, savings banks, savings funds or savings institutions, having no capital stock and doing no other business than receiving deposits to be loaned or invested for the sole benefit of the parties making such deposits, without profit or compensation to the association or company, shall be exempt from tax on so much of their deposits as they have invested in securities of the United States, and on all deposits less than five hundred dollars made in the name of any one person:" *Held*, that where in an action to recover back moneys, paid under protest for taxes, the plaintiff in his complaint negatives the existence of the conditions required in the general clause of this section, it is unnecessary for it also to bring itself by its allegations within the terms of the proviso.

[Cited in Oregon & W. Trust Inv. Co. v. Rathburn, Case No. 10,555.]

[See note at end of case.]

2. The deposits which are liable to taxation under the above section, are those which are in all cases subject to payment by check or draft, or otherwise; that is, the liability of payment to the depositor, on the part of the bank or banker, must be absolute and not contingent. The payment must be made under all circumstances, either on demand or at some definite period, and not be dependent upon the occurrence of losses, or the acquisition of profits, or any other event.

[See note at end of case.]

3. This case distinguished from the case of Bank of Savings v. The Collector, 3 Wall. [70 U. S.] 495.

This was an action brought by the plaintiff, a corporation created under the laws of California, against the defendant [George Oulton] collector of taxes of the United States for the first collection district of California, to recover taxes paid to him by the plaintiff under protest. The facts are sufficiently set forth in the opinion of the court.

L. D. Latimer, U. S. Dist. Atty., moved for judgment in favor of the defendants, on the pleadings.

Jarboe & Harrison, for plaintiff, opposed.

FIELD, Circuit Justice. The one hundred and tenth section of the revenue act of the United States, as amended on the thirteenth of July, 1866, enacts that "there shall be levied, collected and paid a tax of one twenty-fourth of one per centum each month upon the average amount of the deposits of money, subject to payment by check or draft, or represented by certificates of deposits or otherwise, whether payable on demand or at some future day, with any person, bank, association, company, or corporation engaged in the business of banking," with a proviso that "deposits in associations or companies known as provident institutions, savings banks, savings fund or savings institutions, having no capital stock and doing no other business than receiving deposits to be loaned or invested for the sole benefit of the parties making such deposits, without profit or compensation to the association or company, shall be exempt from tax on so

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

much of their deposits as they have invested in securities of the United States, and on all deposits less than five hundred dollars made in the name of any one person." 14 Stat. 136, 137.

The plaintiff, the German Savings and Loan Society, is a corporation created under a statute of California, for the purpose of aggregating the funds and savings of its members and others, and of preserving and safely investing the same for their common benefit. Its principal business consists in loaning at interest its own funds and moneys deposited with it for that purpose, upon certain specified securities; in collecting the interest on the loans when made, and the principal of the same, as they respectively become due; and in reinvesting the proceeds, or in applying them in payment of the depositors, or to the uses prescribed by the by-laws of the institution.

In 1870, and up to March of the present year, the defendant was collector of taxes of the United States for the first collection district of California, within which the plaintiff has its office and principal place of business; and as such officer he claimed that the plaintiff was liable, under the above section of the revenue act, as a corporation engaged in the business of banking, to a tax of one twenty-fourth of one per cent. each month on the average amount of moneys deposited with it during that period for loan and investment.

The plaintiff refused to pay the tax thus claimed on the moneys deposited for the months of August, September and October of the past year, and the collector accordingly, in February last, levied upon the property of the institution to enforce the payment, and was about to expose the property to sale, when the plaintiff paid the tax under protest. The present action is brought to recover back the money thus paid, amounting to upwards of twenty-six hundred dollars.

The district attorney moves for judgment in favor of defendant, upon the pleadings. The complaint negatives the existence of the conditions required in the general clause of the above section to authorize the imposition of the tax; but the district attorney contends that the plaintiff must also, in pleading, bring itself within the terms of the proviso to that section; and not having done so, that judgment must go against it upon its own allegations. This position is not tenable. The authority for the tax must be found in the general clause of the act. The proviso only excepts from the operation of that clause a case which would otherwise be covered by it. Its object is to limit, not to extend, the general clause. That clause declares that a tax shall be levied and collected upon deposits of money, payable in a specified way, made with any person, association or corporation engaged in the business of banking. The proviso excepts deposits thus designated when they are made with particular banking institutions, and are invested in securities of the United States, or when the deposits in the name of one person amount to less than five hundred dollars.

If the plaintiff were within the terms of the general clause, and were exempt from taxation on its deposits only by virtue of the proviso, it would be obliged in its complaint to allege the facts creating the exemption; but as it denies that it is within the terms of the general clause, it is only necessary for it to make sufficient allegations to exclude itself from the operation of those terms.

The deposits which are liable to taxation are those which are subject to payment by check or draft, or those which are represented by certificates of deposit, or in some other form, payable either on demand or at some future day. The deposits must in all cases be subject to payment by check, draft or otherwise; and that means that the liability of payment to the depositor, on the part of the bank or banker, must be absolute and not contingent; that the payment must be made, under all circumstances, either on demand or at some definite period, and not be dependent upon the occurrence of losses, or the acquisition of profits, or any other event. The deposits must also be made with a person, bank, association or corporation engaged in the business of banking.

The seventy-ninth section of the revenue act, as amended in 1866, declares, "that every incorporated or other bank, and every person, firm or company, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes; or where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker." 14 Stat. 115.

It will be here seen, also, that when credits are opened by deposit or collection of moneys, the deposits are subject to payment or remittance upon draft, check or order.

Banks are generally classed under one of three heads—namely, banks of deposit, banks of discount, and banks of circulation. The distinctive feature of the first class lies in their liability to repay the deposits made with them, either on demand or at some definite time. This absolute liability of repayment is expressed in the statutory definition already cited, and is recognized by all the text writers.

In the case of Bank of Savings v. The Collector, 3 Wall. [70 U. S.] 495, relied on by the district attorney, the bank could be required to make payments on four stated days in the year. It therefore held its deposits payable at some future day, and was thus brought within the very terms of the general clause of the section in question. The decision in that case was placed upon the express ground that the bank was under obligation to pay each depositor the amount de-

posited by him when demanded, agreeably to its by-laws and charter.

The complaint in this case alleges that the plaintiff has been, at all times since its incorporation, engaged solely in the business of receiving such moneys as were placed in its hands by persons doing business with it, lending and investing moneys upon mortgages on real estate, and applying the interest accruing from the investments. 1st. To the payment of the expenses of conducting the business of the corporation; 2d. To the creation of a reserve fund, for the security of those doing business with it; and 3d. To the payment of the remaining portions of the interest, pro rata, to such persons as had placed money with it for keeping and investment; and that all the moneys deposited with it have been so deposited upon an agreement that they shall be reimbursed to the depositor only out of the first disposable funds that shall come into the control of the corporation after demand for reimbursement, and after the payment of all sums for the reimbursement of which previous demands shall have been made; and that the depositors shall rely, for indemnification for any losses that may occur in the investment of their moneys, solely upon the guaranteed capital and reserve fund of the corporation.

It also alleges that the plaintiff has never been engaged in the business of banking, specifically designating the business, the transaction of which constitutes an institution a bank, within the definition contained in the seventy-ninth section of the act; and that it has never had or held on deposit any sum or sums of money whatsoever subject to payment by check or draft, or represented by certificates of deposit, or represented in any other manner than by the investments mentioned, or payable to any person or persons on demand, or in any other manner than as above stated.

If these allegations can be sustained by proper proof, the plaintiff will be entitled to recover; its appeal to the secretary of the treasury for relief against the amount of the tax having been duly taken, and an adverse decision having been rendered thereon within six months previous to the commencement of the action.

It follows that the motion for judgment in favor of the defendant on the pleadings, must be denied; and it is so ordered.

[NOTE. Leave was subsequently granted to the defendant to amend his answer, which he accordingly did. Evidence was taken, and the parties, having waived a jury, submitted the case law and fact to the determination of the court, and the court rendered a judgment in favor of plaintiff for the whole amount claimed in the declaration, whereupon the defendant sued out a writ of error. The judgment of the circuit court was reversed by the supreme court, Mr. Justice Clifford delivering the opinion. It was held that, as the managers of this institution had a place of business where credits were opened by deposits or collection of money or currency subsequently to be paid or remitted by check or draft or represented by certificates of deposit, it fell within the body of the section levying a tax upon banks, notwithstanding the fact that in this case the deposits were represented by a savings bank pass book furnished the depositor. The learned justice remarked that originally the business of banking consisted in receiving deposits of bullion, plate, and the like, to be withdrawn by the depositor at his pleasure, but in course of time the bankers have assumed to discount bills and notes, and to loan money upon mortgage and other security; and at a still later period to issue notes of their own, intended as a circulating currency or a medium of exchange. Modern bankers frequently exercise any two, or even three, of these functions; but it is still true that an institution is a bank, in the strictest commercial sense, although it may be prohibited from exercising more than one of those functions. As the bank in this instance had a capital stock, it did not fall within the proviso of the section, and the tax was legally assessed and collected. 17 Wall. (84 U. S.) 109.]

Case No. 5,363.

In re GERMAN SAV. BANK.

[The case reported under above title in 14 Int. Rev. Rec. 138, is the same as Case No. 5,362.]

Case No. 5,364.

GERMAN SAV. BANK v. ARCHBOLD.

[15 Blatchf. 398;[1] 24 Int. Rev. Rec. 413.]

Circuit Court, S. D. New York. Dec. 11, 1878.[2]

BANKS AND BANKING—TAXATION—DEPOSITS EXCEEDING $2,000.

1. Under section 3408 of the Revised Statutes of the United States, which provides, that "the deposits in savings banks shall be exempt from tax * * * on all deposits not exceeding two thousand dollars, made in the name of any one person," such deposits are not exempt from tax on $2,000 of the deposits in the name of any one person, which exceed $2,000.

[See note at end of case.]

2. Under section 3176 of said Revised Statutes, an addition of 100 per cent. to the tax is authorized for an untrue return, although the return is not wilfully false.

3. The tax imposed by said section 3408 is a tax on the bank and not on the depositor, and is not subject to the objection that it is not a uniform tax, and so in violation of article 1, § 8, of the constitution of the United States.

[This was a suit by the German Savings Bank of New York City against Joseph Archbold, collector of internal revenue for the Southern district of New York.]

Lewis Sanders, for plaintiff.

E. B. Hill, Asst. Dist. Atty., for defendant.

SHIPMAN, District Judge. This is an action at law, which was submitted to the court upon an agreed statement of facts, a trial by jury having been waived, by written stipulation of the parties.

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

[2] [Reversed in 104 U. S. 708.]

Section 3408 of the Revised Statutes of the United States provides, in substance, that a tax of one twenty-fourth of one per centum shall be levied and paid, each month, upon the average amount of the deposits of money, subject to payment by check or draft, with any bank, and that the deposits in savings banks shall be exempt from tax on so much thereof as have been invested in securities of the United States, "and on all deposits not exceeding two thousand dollars, made in the name of any one person."

The plaintiff is a savings bank in the city of New York, and, having been advised that the sum of two thousand dollars of the deposits of any one person was exempt from tax, made, on June 1, 1876, a return of its internal revenue tax for the six months ending May 31, 1876, in accordance with said opinion. It deducted from the average of its deposits, as exempt, not only the deposits which did not exceed two thousand dollars, made in the name of any one person, but, also, two thousand dollars of the deposits in the name of any one person, which exceeded that sum. The amount of the tax, according to this return, was $253, which was paid. On or about July 6, 1876, in accordance with a request of the supervisor of internal revenue, the plaintiff made and delivered to said supervisor a schedule of the deposits in said bank, not deducting anything from any person's account the sum of whose deposit amounted to more than two thousand dollars. Upon this list or schedule, the supervisor made a return without said deduction, and requested the plaintiff to sign and make oath to the same, which its officers refused to do. No objection is taken that this return was made by a supervisor, rather than by a collector or a deputy collector. Said return, as made out, was forwarded to the commissioner of internal revenue, who made assessment thereon as by law provided. According to this assessment, the tax, less $253 paid as aforesaid, was $5,236; penalty of 100 per cent., for false return, $5,236; penalty of five per centum for failure to pay tax within the time prescribed by law, $261.80; interest, $104.72; total, $10,838.52. This amount was collected by distraint. Subsequently, and within the proper time, the plaintiff duly appealed from said assessment to the commissioner of internal revenue, which appeal was denied.

The first question relates to the construction of the clause in the statute which exempts from the tax on deposits in savings banks, "all deposits not exceeding two thousand dollars, made in the name of any one person." The natural construction is, that all those deposits, made in the name of one person, which do not exceed two thousand dollars, are exempt. It is a very different expression from the clause in the statute relating to income taxes (Act July 14, 1870, § 8; 16 Stat. 258), in which it is provided, that "the sum of two thousand dollars of the gains, profits and income of any person shall be exempt from said income tax." The obvious intent of that clause was to deduct, for taxable purposes, the sum of two thousand dollars from the income of any person, and to do more than exempt from tax all incomes of any one person, not exceeding two thousand dollars. The clause under consideration exempts those deposits, and those only, of any one person, which do not exceed two thousand dollars.

This construction has been placed upon similar language by the supreme court. The ninth section of the act of July 13, 1866 (14 Stat. 137), provided that savings banks should be exempt from tax "on so much of their deposits as they have invested in securities of the United States, and on all deposits less than five hundred dollars made in the name of any one person." Mr. Justice Clifford, who gave the opinion of the court, in discussing the subject of taxation of savings banks under this statute, says: "Savings banks are not exempt from such taxation except in certain cases, nor are they entirely exempted unless they have invested the whole of their deposits in the securities of the United States, if any of the deposits made in the name of one person amounted to or exceeded $500. Deposits in sums less than $500, and all such as are invested in the public securities, if the bank falls within the category described in the proviso, are exempt from such taxation." Oulton v. Savings Inst., 17 Wall. [84 U. S.] 109.

The plaintiff claims, in the second place, that it was not liable to the penalty of one hundred per cent. Section 3414 of the Revised Statutes provides, that "a true and complete return of the monthly amount of * * * deposits * * * shall be made and rendered in duplicate, on the first day of December, and the first day of June, by each of such banks * * * with a declaration annexed thereto, under the oath * * * of the president or cashier of such bank, * * * in such form and manner as may be prescribed by the commissioner of internal revenue, that the same contains a true and faithful statement of the amounts subject to tax as aforesaid." Section 3415 provides, that, "for any refusal or neglect to make return and payment, any such bank * * * shall pay a penalty of two hundred dollars, besides the additional penalty and forfeiture provided in other cases." Section 3176 provides, that "the collector, or any deputy collector, in every district, shall enter into and upon the premises, if it be necessary, of every person therein who has taxable property, and who refuses or neglects to render any return or list required by law, or who renders a false or fraudulent return or list, and make, according to the best information which he can obtain, including that derived from the evidence elicited by the examination of the collector, and on his own view and information, such list or return, according to the form prescribed, of the objects liable to tax, owned or

possessed or under the care or management of such person, and the commissioner of internal revenue shall assess the tax thereon, including the amount, if any, due for special tax, and, in case of any return of a false or fraudulent list or valuation, he shall add one hundred per centum to such tax." It is not a prerequisite to the addition of the penalty that the return should be wilfully false. If the return is not in fact true, the commissioner is authorized to affix the penalty. The record shows that the plaintiff was in default, and that the assessor was authorized by the statute to make his return of the objects liable to tax, and that the requirements of the statute were complied with. Bailey v. Railroad Co., 22 Wall. [89 U. S.] 604.

The plaintiff next claims, that, if those deposits only which do not exceed two thousand dollars are exempt from taxation, the statute is in violation of the clause of the constitution which provides, that "all duties, imposts and excises shall be uniform throughout the United States" (article 1, § 8), because the tax is against the depositors, and all depositors are not required to pay the tax. Whatever may be the true theory in regard to the nature of the tax upon dividends and interest upon bonds of railroad and other corporations, which was imposed by the 122d section of the act of June 30, 1864 (13 Stat. 284), as amended by the ninth section of the act of July 13, 1866 (14 Stat. 138), and which was the subject of discussion in Barnes v. Railroads, 17 Wall. [84 U. S.] 294, and in U. S. v. Railroad Co., Id. 322, and in Stockdale v. Insurance Cos., 20 Wall. [87 U. S.] 323, it is sufficiently plain, that the tax now in question is a tax upon the corporations. Bank for Savings v. Collector, 3 Wall. [70 U. S.] 495; Oulton v. Savings Inst., 17 Wall. [84 U. S.] 109.

The remaining objection to the validity of the assessment, which was stated in the appeal, was not insisted upon. Let judgment be entered for the defendant.

[NOTE. On writ of error sued out by the plaintiff, this cause was heard by the supreme court, and the judgment of the circuit court reversed, Mr. Justice Field delivering the opinion. It was held that the defendant had erred in his construction of the law; that the assessment of the tax on all deposits which exceeded $2,000 without any deduction of that amount, and the imposition of a penalty for not making a return in accordance with his views, were illegal, and that the moneys thus exacted from the savings bank should be returned. 104 U. S. 708.]

Case No. 5,365.

GERMOND v. ANTHRACITE INS. CO.

[2 Wkly. Notes Cas. 399.]

District Court, E. D. Pennsylvania. Sept. 10, 1875.

INSURANCE UPON ADVANCES.

Insurer of a debt liable only to extent that the res as a security is impaired by the peril insured against. No contribution for general average in insurance on advances.

In admiralty. This was an action upon a policy of insurance for $4,500, effected by libellant upon advances valued at the sum insured upon the bark Irma, from Baltimore to Aspinwall, in which the libellant claimed for a total loss. The vessel sailed from Baltimore, and becoming disabled put into Nassau, where she remained for over four months. The master being unable to obtain funds to continue the voyage, the bark sailed for New York, under a bottomry bond for $4,500, given to secure a debt incurred for temporary repairs and the expenses of the vessel while at Nassau, for nonpayment of which she was, under proceedings instituted under the Nassau bottomry bond, sold at marshal's sale in New York for $1,350. A reference to commissioners was had, who reported that the amount of expenses incurred for sea damages, included in the bottomry bond, was $2,000, and that the contribution in general average, payable by the vessel for the detention in the port of necessity, was $896, making the total sum payable by the vessel $2,896.

Mr. Coulston, for libellant, argued that this was an abandonment of the voyage, and that the sale under the bottomry bond at New York constituted a technical total loss, and, the insurance company, having neglected to take up the bottomry bond, the whole amount of the policy should be paid by the respondents; that respondents had acted as insurers upon the hull, and had placed themselves in the predicament of accepting an abandonment, although an actual abandonment by libellant was impossible, and cited Arn. Ins. 944; Bradlie v. Maryland Ins. Co., 12 Pet. [37 U. S.] 378; Da Costa v. Newnham, 2 Term R. 407.

Mr. Henry, contra, contended that there was no total loss, as there was no abandonment, nor would the sale by reason of the failure of the owner to furnish funds for the vessel at Nassau, change a partial to a total loss. American Ins. Co. v. Ogden, 20 Wend. 287. The utmost extent to which liability attached under this policy was for sea damages sustained by the vessel. The insurer of a debt was liable only to the extent that the res as a security is impaired by the perils insured against. 1 Pars. Mar. Ins. 229. Smith v. Columbia Ins. Co., 17 Pa. St. 253. The general average charges upon the hull cannot be considered in an insurance upon advances also; otherwise in adjusting a loss, in addition to the known contributory interests of hull, freight and cargo, it would be necessary to add another interest, that of lien creditors, whose debt has been preserved by such expenditure, for which there is no authority, and which would render adjustments too uncertain.

THE COURT (CADWALADER, District Judge) was of opinion that no question of contribution, under the name of general average, or otherwise, arose in this case, and decreed for the amount of the sea damage, as reported by the commissioners, $2,000, with interest. Decree accordingly.

Case No. 5,366.

GERNON v. BOCCALINE.

[2 Wash. C. C. 199.] [1]

Circuit Court, D. Pennsylvania. April Term, 1808.

PLEADING IN EQCITY—REPLICATION DENYING ALLEGATIONS IN PLEA—ANSWER—PLEA IN AVOIDANCE.

1. Where the replication denies all the allegations in the plea, the plea must be supported by evidence.

2. If an answer to any particular charge in the bill deny the same, it must be opposed by the plaintiff, by two witnesses, or by one and circumstances.

3. A plea in avoidance of, and not responsive to the bill, stands for nothing as evidence of the facts stated in it.

[Cited in Tilghman v. Tilghman, Case No. 14,045.]

In equity. Plea to the jurisdiction of the court, (sworn to,) that the plaintiff was, at the time of filing his bill, a citizen of the state of Pennsylvania. To the plea, a general replication was filed. The deposition of one witness was read, who proved that the plaintiff, in the summer of 1807, removed into the state of New-Jersey, with his family, sold part of his furniture after his leaving this state, and removed the rest to his place of residence at Burlington.

M. Levy, for defendant, observed, that the plea, being sworn to, could not be overruled by the deposition of one witness.

WASHINGTON, Circuit Justice. The replication having denied all the matter of the plea, the latter must be supported by evidence. If an answer, responsive to any charge in the bill, deny the same, it must be opposed on the part of the complainant, (who makes this part of the answer evidence, by calling upon the defendant to give evidence against himself,) by two witnesses, or by one witness, with the addition of circumstances. But a plea is always in avoidance of the bill, and never responsive to it. It of course stands for nothing, as evidence of the facts stated in it. Plea overruled.

[See Case No. 5,367.]

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

Case No. 5,367.

GERNON v. BOECALINE.

[2 Wash. C. C. 130.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1807.

NE EXEAT — AUTHORITY OF DISTRICT JUDGES TO ISSUE—SUPPORTING AFFIDAVIT—AMENDMENT.

1. The district judges of the courts of the United States have no authority to issue writs of ne exeat.

[Cited in Loewenstein v. Biernbaum, Case No. 8,461a; Lewis v. Shainwald, 48 Fed. 500.]

2. The affidavit upon which this writ will issue, should be positive to a debt, or to the belief of the plaintiff, that a certain balance of account was due.

3. The plaintiff was admitted to amend his affidavit; and being sworn, at the instance of the defendant, he was permitted to state, that a particular item of his claim had not been passed upon by arbitrators, who had examined the accounts between the parties.

A ne exeat had been awarded in this case, by the district judge, and bail taken. A motion was now made to discharge it, on the ground that the district judge had no power to award it. Upon this ground, the court quashed the writ. The plaintiff then moved to award a new writ, which was objected to by Levy, for defendant; the plaintiff having stated, that the bill is filed on account of a particular transaction, in a certain vessel, which transaction has been referred, and was settled, as appears by an item in the account, on which the arbitrators acted, in which they credit the defendant 9,000 dollars, on account of this vessel and cargo. Secondly: that the affidavit is insufficient, as it merely states that the plaintiff has a just demand against the defendant; whereas if he claimed a debt, he should have stated positively, that so much was due, or if he claimed a balance of account, he should have sworn, that he verily believed the balance in his favour to be so much. Tidd. Pr. 21; 2 Ves. Sr. 489; 3 Atk. 501. Thirdly: the bill has no equity for this court; for if a balance is due the plaintiff, he may have a remedy at common law.

Mr. Rawle, for plaintiff.
Mr. Levy, for defendant.

BY THE COURT. The affidavit is clearly defective. The plaintiff should swear positively to a debt, or to his belief that a certain balance of account was due. The plaintiff being in court, and making this affidavit, the court awarded a new writ; it appearing upon the examination of the plaintiff, who was sworn at the instance of the defendant, that the particular account on which this suit was brought, though laid before the arbitrators, had not been acted upon in any manner.

[See Case No. 5,366.]

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

Case No. 5,368.

GERNON et al. v. COCHRAN.

[Bee, 209.] [1]

District Court, D. South Carolina. Aug. 9, 1804.

PRIZE—REFERENCE TO RESPECTIVE GOVERNMENTS OF THE PARTIES—DECISION BY MINISTERS—EVIDENCE OF — MASTER OF VESSEL AS AGENT OF OWNERS AND SHIPPERS.

1. Parties agreeing to refer a matter of prize or no prize to their respective governments shall be concluded by the decision of the ministers of those governments resident here.

2. Such decision sufficiently evidenced by a letter from the consul general of the party against whom the decision is made, stating what the ministers had ordered him to communicate as their determination.

3. Consuls represent the subjects of their respective nations (if not otherwise represented), where such consuls reside.

[Cited in Harrison v. Vose, 9 How. (50 U. S.) 382.]

4. A captain of a ship, in a foreign port represents both owners and shippers not having any other agent on the spot.

Before BEE, District Judge.

Carvin, owner of a French privateer, had captured this Spanish brig at a time when it was insisted, that no such capture could be legally made, peace having then taken place between France and Spain. By recurrence to the proceedings of this court so far back as August, 1796, it appeared that a suit was instituted by the Spanish consul against the Ceres; but, no libel having been filed, that suit was, upon motion, dismissed. On the 30th of November following, the Spanish consul instituted another suit, and on the 14th of December following, before any other proceedings were had than a return of the warrant and proclamation for claim, the parties, by their proctors, obtained an order, founded on consent, that the marshal [Cochran] should sell the brig Ceres and cargo, and pay the net amount according to the stipulations of the following agreement between Carvin, owner of the privateer, on the one part, and Gernon, captain of the Spanish brig Ceres, on the other. It was also signed by the consuls of France and Spain. "Whereas we find it impossible to settle definitively the difference existing between us, as to the validity of the capture of the brig Ceres, by the privateer LeVengeur, we do therefore, refer the decision of the matter to our respective governments, obliging ourselves respectively to pay such damages and interest, as the said governments shall award. In the mean time we consent that the said vessel and her cargo, shall be sold by the marshal of the court of admiralty of South Carolina at public auction, for cash, after a notice of twelve days in the gazettes of Charleston. We consent, that the said marshal shall receive the amount of the sales, and after deducting therefrom all customhouse charges, and other necessary expenses, shall lodge the balance in the Bank of South Carolina, to be paid over to the party, in whose favour the two governments shall decide: for which purpose no other form shall be required, than the production at the bank of a copy of said decision duly legalized by the consuls of France and of Spain. Reserving to ourselves respectively, a right to adopt such means for obtaining a decision favourable to our claims as to each of us may seem most expedient." "(Signed) Carvin. Gernon." On the 10th of June, 1796, a letter was produced from the consul general of France at Philadelphia, to the French consul in Charleston, which states that the ministers of France and Spain at Philadelphia had determined the prize to be illegal, and ordered restitution thereof to the persons entitled thereto: they further directed that appraisers should be appointed to ascertain damages for detention.

The judge said that this certificate of the consul general of France was conclusive, as to a decision on the point contained in the agreement; and that such decision by the ministers of the two countries, resident in the United States, was sufficient to justify him in saying that the two governments had decided, and in ordering the agreement to be carried into execution. He added that, though doubts might have arisen as to the original power of the court to order a sale, yet, as it had been made by the solemn consent of all the parties in whom any interest then appeared, and as the agreement was sanctioned by the French and Spanish consuls, who are general agents for the subjects of their respective countries, not otherwise represented, no objection to the jurisdiction could now be suffered to avail. The marshal was, therefore, ordered to pay into the Bank of South Carolina, the balance in his hands of the proceeds of sale referred to, in the agreement, in the name and for the use of Gernon, and sundry other persons, who have since produced powers of attorney from those interested in the vessel and cargo. Gernon had originally been mate of the Ceres, but appointed captain by one Golibart, who then commanded her. A letter of attorney from Golibart to Gernon was produced, and contained full powers to act in Golibart's name and stead. This, the judge said, made him lawful representative, in a foreign port, of the owners and shippers concerned in the Ceres and her cargo, unless some more special power to the contrary should appear. Even admitting, as had been asserted, but not proved, that Golibart was dead, still Gernon's power subsisted as to all such of the concerned as had not thought fit, in the long period of eight years, from the commencement of these proceedings, to divest him of his general authority, by some special revocation of it. Three of the parties had done this. As it could not be doubted that the rest had received equal information of the

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

state of the vessel, their silence must be construed into an acquiescence in Gernon's agency.

GERNON (CRANMER v.). See Case No. 3,359.

GERRITY (FOGARTY v.). See Case No. 4,895.

Case No. 5,369.

The GERTRUDE.

[Blatchf. Pr. Cas. 374.] [1]

District Court, S. D. New York. July, 1863.

PRIZE—BLOCKADE—FALSE PAPERS.

Vessel and cargo condemned for an attempt to violate the blockade, and because of false papers as to their destination, and because the cargo was partly contraband of war, on transportation to a port of the enemy.

[Cited in The Stephen Hart, Case No. 13,364; The Springbok, Id. 13,264, 5 Wall. (72 U. S.) 20.]

In admiralty.

BETTS, District Judge. The above vessel and cargo were captured, as prize, at sea, by the United States ship-of-war Vanderbilt, on the 16th of April, 1863; and, due proceedings being thereupon taken before the court, on the return of the marshal of the monition and attachment served in a suit, a decree of default, for want of an appearance or answer of any party intervening for the vessel or cargo has been regularly entered.

Upon papers captured on board of the vessel, and the proofs in preparatorio, the facts in the case appear to be, that she had a certificate of British registry, executed at London, January 10, 1863, to Thomas Sterling Begbie, of that place, she being of British build, the same month. On the 8th of April, 1863, a shipping agreement was made between James Raison and a crew for a voyage in said vessel from the port of Nassau to any port or ports in North or South America, or the West Indies, or Bermuda, and back to the port of Nassau, not to exceed three months. On the same day she cleared from said port of Nassau, for St. Johns, N. B., with a miscellaneous cargo, including contraband of war, shipped the same day by Henry Adderly & Co., at Nassau, for St. Johns, N. B., deliverable to order, with a letter of advice from the shipper, dated April 7, 1863, addressed to W. J. R. Wright, at St. Johns. No log-book was found on board.

The master, the third mate, and the engineer of the vessel were examined as witnesses. The prize was captured about 8 o'clock a. m., on the 16th of April, off the island of Eleuthera, after three hours' chase. Four guns were fired at her by the chasing ship to bring her to. The master says that he understood the object, but kept on his course, endeavoring to get out of the way; that he was bound, by his papers, to St. Johns, but was going to Charleston, if he could get there; that his cargo, loaded at Nassau, consisted of powder, tin plate, boots, blankets, and hops; that he and the owner knew all about the war and the blockade of Charleston; that he attempted to enter that port knowing that it was blockaded by the United States government; that there was a passenger on board—a Charleston pilot—under an assumed name; that the witness was generally steering his vessel for Charleston; and that he had attempted, during the voyage, to enter Charleston or Wilmington, or wherever he could get in, and was chased off. The other two witnesses give no testimony contradicting the master, or favoring the innocency of the vessel.

It accordingly is proved satisfactorily to the court, that the voyage was got up, and prosecuted down to the seizure of the vessel, with the intent and endeavor to break the blockade; that her papers as to her destination were simulated and false; and that she was carrying cargo contraband of war, with the design to convey it to the aid and use of the enemy, with full knowledge of the criminality of the enterprize.

A decree of condemnation and forfeiture of the vessel and cargo must be entered.

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

Case No. 5,370.

The GERTRUDE.

[3 Story, 68; 2 Ware (Dav. 176) 181; 4 Law Rep. 444.] [1]

District Court, D. Maine. Dec. Term, 1841.

Circuit Court, D. Maine. May Term, 1844.

CUSTOMS DUTIES — PROPERTY SUBJECT TO DUTY—TACKLE, APPAREL AND FURNITURE OF WRECKED VESSEL—GOODS LANDED FROM SUCH VESSEL.

1. The tackle, apparel and furniture of a foreign vessel wrecked upon our shore, and landed and sold separate from the hull are not goods, wares and merchandise imported into the United States within the meaning of the revenue laws.

[Cited in M'Lean v. Hager, 31 Fed. 606; The Conqueror, 49 Fed. 105.]

2. Goods taken and landed from a foreign vessel wrecked upon the coast are not subjected to forfeiture under the 50th section of the act of March 2, 1799, c. 128 [1 Story, Laws, 617; 1 Stat. 665, c. 22], by being landed without a permit from the collector.

[Cited in The Ex Lady Essex, 39 Fed. 767.]

This was an appeal from the decree of the district court for the district of Maine. The original proceedings in the district court are fully presented in the following statement of facts and in the opinion of the district judge. This was a libel for a forfeiture founded on the 50th section of the collection act of 1799.

[1] [Reported by William W. Story, Esq. 4 Law Rep. 444, contains only a partial report.]

c. 128 [1 Stat. 665, c. 22]. The libel alleged, that on the 1st of January, 1840, certain goods, wares and merchandise of the value of $400, brought from a foreign port, were unladen from the brig Gertrude [William F. Andrews, claimant] without a permit therefor having been first obtained from the collector of the port, against the form of the statute, whereby said brig became forfeited to the United States. It appeared from the evidence, that she was a British brig, and that on the 9th of December, 1840, she was driven on shore in a storm, and wrecked on the north side of West Quoddy Head. On the application of the master, surveyors were appointed by Solomon Thayer, a notary public, to examine the vessel, who after visiting and examining her, reported her to be a wreck, and in consideration of her exposed situation and the danger that she would go to pieces in the event of another storm, advised that she should be sold the next day where she lay, and she was sold accordingly. The day following the sale she was got off the rocks and towed into the harbor of Eastport. She had at the time no cargo on board, but her cables, anchors and rigging appear to have been taken on shore while she lay on the rocks at Quoddy Head, and before she was carried to Eastport, and this was the unlading, which was relied upon as involving a forfeiture of the vessel.

Holmes, Dist. Atty., for the United States.
C. S. and E. H. Daveis, for claimant.

WARE, District Judge. The single question in issue, between the parties in this case, is whether there has been a forfeiture by unlading goods, wares and merchandise from the brig Gertrude, of the value of $400, without a permit having been first obtained therefor from the collector of the district, within which they were landed. The argument has indeed taken a somewhat wider range, but the judgment of the court must follow the allegata et probata, and be confined to the matters that have been put in issue by the parties in their pleadings, and which are made out by the proofs. By the act of congress, March 2, 1799, c. 128, § 50 [1 Stat. 665, c. 22], under which the forfeiture is claimed, it is provided, that no goods, wares or merchandise, brought in any ship or vessel from any foreign port or place, shall be unladen from such ship or vessel within the United States without a permit from the collector of the port, or the naval officer, if there be one; and, if they are unladen contrary to the act, the master and all other persons knowingly concerned in aiding in the unlading or delivering are subjected to a penalty of $400; and when the goods so unladen shall amount to $400 in value, the ship herself with her tackle, apparel and furniture, shall be subject to forfeiture. There is no direct evidence that any thing was unladen from the vessel, and it is conceded that she had no cargo on board. But it appears when she went ashore, that she had on board two anchors and two chain cables, and certain other furniture and rigging employed in the navigation of the vessel, which were not on board when she was brought into Eastport. As no account is given of them by the claimant, it must be presumed that they were landed while she was lying on the shore near West Quoddy Head. If it were otherwise, it would be easy for the claimant to show it. It is also clear from the evidence, that the value of the rigging, of which the vessel had been stripped, including the cables and anchors, was more than $400.

Upon these facts two questions have been raised and argued at the bar. First, whether the tackle, apparel and furniture of a vessel thus cast on shore a wreck, which have been actually used or have been specially destined for the use of the vessel in navigating her, are goods, wares and merchandise imported into the United States within the true intent and meaning of the revenue laws. At the first blush, this question would seem to admit a very easy answer. The rigging and apparel of a ship are a part of the ship, and therefore not merchandise in any other sense of the word than that in which the ship herself is. But it is said, that when the ship is wrecked and the rigging separated from the hull, it becomes merchandise in the ordinary sense of the word. It is sold as such, and becomes mixed in the general mass of consumable commodities in the country. When thus separated with the intention of being thrown into the market and sold, as these articles take the place of others of the same character, which are regularly imported, the argument is, that there is the same reason for charging them with duties as there would be if they were imported as cargo, and of course subjecting them to all the restraints and safeguards imposed by the revenue laws upon regular importations. All this may be admitted to be true, and the question will still return, whether this has been done by the legislature. However just and reasonable it may be, that goods thus introduced into the country, and sold for common use and consumption, should be subject to duties, it is quite clear that the court has no authority to impose the tax. Our duty is limited to the inquiry whether it has been imposed by the legislature.

If we look through the whole of the numerous acts of congress laying duites on merchandise imported, as well as those regulating the collection of the same, we shall find they uniformly contemplate the cargo; they refer to articles having the quality of merchandise in the ordinary and most popular sense of the word. They refer also to goods intended to be introduced into the country for sale and consumption, or for the general purposes of commerce. Although they speak generally of goods imported or

brought into the United States, it has been uniformly held that, to constitute an importation within the true meaning and intent of these laws, the arrival must be voluntary, with the intent to import them. If therefore a vessel not bound to the United States is by stress of weather forced into our ports, this will not constitute an importation, upon which the right to duties will attach. This, as the authorities cited at the argument abundantly prove, has been the uniform construction given to the revenue laws. The Mary [Case No. 9,183]; U. S. v. Vowell, 5 Cranch [9 U. S.] 368; U. S. v. Arnold [Case No. 14,469]; Prince v. U. S. [Id. 11,425]; Perots v. U. S. [Id. 10,993]; Peish v. Ware, 4 Cranch [8 U. S.] 347. A like construction has been given to the navigation laws of England (Reeves, Shipp. 203); and probably the same rule prevails in every civilized community. It can only be a people, who have made but little progress in civilization, that would not permit foreign vessels in distress, to seek safety in their ports, except under the charge of paying import duties on their cargoes, or under penalty of confiscation, if they were prohibited goods, which would be the consequence of applying to such cases the rigor of the fiscal laws. Against such a country the unfortunate mariner might justly exclaim,

——"Quae hunc tam barbara morem
Permittit patria? hospitio prohibemur arenae."

To hold then the rigging of a vessel cast by misfortune a wreck on our shores to be goods, wares and merchandise imported into the United States, would be extending the operation of the revenue laws beyond what their natural and obvious meaning requires. The fiscal laws of the country, which furnish the means by which the whole machinery of the government is sustained, although they impose burthens on individuals, are not to receive the strict and narrow construction, that is given to penal laws. Neither are they, like remedial laws, to be enlarged by construction, so as to include cases, which seem to stand on the same reason with others, which are within the express words and the plain intention of the law, if it is not apparent that they were intended to be included by the legislature. They are to be applied according to their plain, natural and obvious meaning, regarding as well the general tenor as the particular words of the law; as comprehending all cases, which, from the general scope of the law, appear to have been intended and contemplated by the legislature; and neither to be extended by analogy, nor restrained by a strict construction, from the notion that they belong to the class of penal laws, because they impose burthens on individuals as a condition of their being allowed the free disposition of their property. Sullivan v. Winthrop [Case No. 13,600].

The revenue laws, in all cases contemplate a ship as a single object, and when it is subjected to any fiscal charge, it is imposed under the name of a tonnage duty. The rigging, furniture and appurtenances are a part of the ship. See the case of U. S. v. Chain Cable [Id. 14,776]; the very question was presented whether a chain cable, which had been purchased in a foreign country for the use of the vessel, was embraced by the revenue laws, under the terms "goods, wares and merchandise," which could not be landed without a permit. The court held, that it was not. If this vessel had gone to pieces on the rocks, so that there had been nothing but fragments remaining, it would hardly be pretended that the broken yards, the torn sails and damaged cordage, with the fragments of the hull, would come within the descriptive words of goods, wares and merchandise imported, and liable to duty, or that it would be necessary for the master under penalty of confiscation of the wreck to obtain a permit from the collector before he could collect the disjecta membra on the shore. And yet in what discriminative features would that case differ from the present? It might be said of every part of these fragments, that they were goods, wares and merchandise brought into the United States from a foreign country, with the same reason as it is said of the rigging in this case. My opinion is, that the materials and rigging of a foregn vessel cast upon our shore as a wreck, when landed and sold do not come within the purview of the revenue laws as merchandise imported.

But if this opinion is erroneous, then the second question which has been argued will arise, whether in this case a forfeiture of the vessel has been incurred by landing the goods without a permit. It is not to be readily supposed, that a provision so highly penal, as this section of the law is, was intended to be applied to a class of cases, in which a compliance with its terms would in some instances be impossible, and in all involve the most imminent danger of the entire loss of the property. When a vessel is thrown upon the coast a wreck, the cargo must be saved by such means as are practicable, or not saved at all. If the master, before taking measures for placing it beyond the reach of the waves, must wait until he can obtain a permit of the collector for that purpose, whose residence may be a day's journey from his vessel, it is very evident, that in many cases the entire cargo would be swallowed up by the waves before the permit could be obtained. To require a compliance with this section of the law in such cases would be nearly equivalent to the revival of the old and barbarous custom, by which all wrecked goods were confiscated. Such a construction of the law is wholly inadmissible, if it will admit of any other. Now if we look at this section in connexion with the whole tenor of the law, it is evident that the legislature contemplated only cases of vessels, which had arrived in safety

at the regular port of their destination, and certainly did not contemplate cases where a compliance with the law would be impracticable. Upon the common principles therefore of construing statutes, the words of this section must be so interpreted as to carry into effect the general intent of the lawgiver, neither to defeat it, nor to extend it to cases clearly beyond the purview of the law. But this can hardly be considered as an open question. It was, as it seems to me, conclusively settled in the case of Peish v. Ware, 4 Cranch [8 U. S.] 347, more than thirty years ago. For though in that case there was no allegation in the libel founded on this section of the law, there was one founded on the 51st section, and in deciding it, the court thought necessary to give a construction to the 50th. In that case, the goods were landed from a wreck without a permit, and it was held that, upon just legal construction, the landing of the goods did not subject them to forfeiture under the 50th section. The act of landing in such a case, the court said, is not within the law, which is calculated for cases in which the general requisitions of the law can be complied with, and not for salvage goods in cases where they cannot be.

Upon the whole, the conclusion to which I am brought is, first, that the tackle, apparel and furniture of a foreign vessel wrecked upon our shore, and landed and sold separate from the hull, are not goods, wares and merchandise imported into the United States, within the meaning of the revenue laws. And in the second place, if they are to be so considered, that they are not subject to forfeiture under the 50th section of the act of March 2, 1799, c. 128 [c. 22,] by being landed without a permit from the collector. At the same time, it may not be improper to remark, that there is something of mystery hanging over this case. The evidence before the court is sufficient to raise the questions, which have been considered, and yet it is pretty clear, that the whole evidence which it was in the power of the parties to produce, has not been before the court. It is a little singular, that the informer in this case is the purchaser of the vessel at the sale that was made in conformity with the recommendation of the surveyors; that he does not insist upon his title, and that the claimant now resisting the forfeiture is the original British owner. What might be the result if every fact in the power of the parties to prove was spread upon the record, is not for me to say. I can act only upon the allegations that are made and the facts that are proved, and on them my opinion is, that the law requires me to pronounce, for the restoration of the vessel, but I shall grant a certificate of probable cause of seizure.

From the decree an appeal was taken to the circuit court on behalf of the United States.

G. Parks, for the United States.
Charles L. and E. K. Daveis, for defendant.

STORY, Circuit Justice. I have examined the record and the opinion of the learned judge of the district court delivered in the present case. I fully concur in that opinion, and have no desire to add any thing to his reasoning, which is so cogent and so satisfactory; or to amplify the authorities which he has so diligently consulted and commented on. My judgment is, that the decree of the district court ought to be affirmed.

GERTRUDE, The (UNITED STATES v.). See Case No. 5,369.

Case No. 5,371.

In re GETCHELL.

[8 Ben. 256.] [1]

District Court, S. D. New York. Nov., 1875.

PRACTICE—SETTING ASIDE ADJUDICATION—JURISDICTION—VERIFICATION—NOTARY PUBLIC—SERVICE OF PAPERS—WAIVER OF IRREGULARITY.

1. A petition in involuntary bankruptcy verified before a notary public was filed on the 25th of February, 1875, and an order to show cause was made returnable March 6th, 1875. On the return of the order, proof of service of the petition and order to show cause was presented to the court, in the form of an affidavit, sworn to before a notary public, which contained no venue and in which the affiant swore that he served the copy of the petition and order to show cause on the bankrupt "by leaving the same personally with him." On the 6th of March, an adjudication of bankruptcy was made by default, a warrant was issued, an assignee was appointed, proofs of debt were filed and the bankrupt filed an application for his discharge. On November 1st, 1875, a creditor presented a petition to vacate the adjudication and all proceedings thereunder, because (1) the petition was verified before a notary public; (2) no deposition of any witness to any act of bankruptcy and no deposition as to any claim of any petitioning creditor is to be found on the files of the court; (3) because the proof of service of the petition and order to show cause was defective, and no order of publication thereof was made: *Held*, that the verification of the petition before a notary public was irregular under the Revised Statutes, but that such irregularity was a question of practice and not of jurisdiction.

[Cited in Re Donnelly, 5 Fed. 787.]

2. The adjudication was a judgment, and as effective as any other judgment to cure irregularities in practice which do not touch the jurisdiction of the court.

3. The absence of the depositions from the files was also a matter of practice and regularity, and not of jurisdiction.

4. The lack of the venue in the affidavit of service, its being verified before a notary, and its failure to state that the petition and order to show cause were served on the bankrupt by delivering the same to him personally, and that no order of publication was made, were also matters of regularity and there was nothing jurisdictional in them; and the debtor, by ap-

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

plying for a discharge, had waived all such objections, and his waiver was binding on all creditors whose debts were provable.

In bankruptcy.

R. Sampter, for the application.
W. F. Scott, in opposition.

BLATCHFORD, District Judge. In this case, which is one in involuntary bankruptcy, the petition was filed on the 25th of February, 1875. An order to show cause was issued on the same day, returnable on the 6th of March, 1875. The petition was verified by the taking of the oaths before a notary public. This was done before the Revised Statutes of the United States, approved June 22d, 1874, were promulgated in a volume, and when it was not known that their effect was such as to repeal the statute which had authorized oaths to be used in proceedings in the courts of the United States, to be taken before notaries public. On the 6th of March, 1875, proof of service of the petition and order to show cause on the debtor was presented to the court, in the form of an affidavit entitled in the matter and made by one William C. Gayler, and sworn to before a notary public. The affidavit contained no venue. In it the affiant swore that he served a certified copy of the petition and of the order to show cause, on the 26th of February, 1875, "upon Delos W. Getchell, in the city of New York, by leaving the same personally with him." On the 6th of March, 1875, an order of adjudication was entered, on the default of Getchell to appear, adjudging him a bankrupt. Thereupon a warrant was issued, under which his property was taken, and an assignee was duly appointed, and an assignment was made to him, and a number of proofs of debt have been filed, and the bankrupt has filed an application for his discharge, proceedings under which are now pending before a register. Afterwards, and on the 1st of November, 1875, a creditor of the bankrupt's, who is not shown to have proved his debt, presented to the court a petition, praying that the adjudication of bankruptcy and the proceedings thereunder be vacated, on the following grounds: (1) Because the original petition was verified before a notary public; (2) because no deposition of any witness to any act of bankruptcy, and no deposition as to any claim of any petitioning creditor, is to be found on the files of the court, and the petitioner had been informed by the clerk and believed, that such depositions had never been presented to the court or filed with the clerk; (3) because the proof of service of the petition and order to show cause on the debtor was defective, in that the venue was not stated therein, and it was sworn to before a notary public and it did not allege that the petition and the order to show cause were served on the debtor by delivering the same to him personally, or by leaving the same at his last or usual place of abode; and no order for the publication of the same had been entered or obtained.

1. As to the verification of the petition before a notary public. This was irregular, but the irregularity did not affect the jurisdiction of the court. If, before the order of adjudication was entered, the irregularity had been brought to the notice of the court, it could and would have been remedied. But the question as to whether the petition is verified before a proper officer, is one of practice and not of jurisdiction. It is competent for the court to decide that it is verified before a proper officer, and, when the court has so decided, and an order of adjudication has been entered, it is too late for the debtor or for any creditor to raise the question. An order of adjudication is a judgment, and is as effective as any other judgment to cure irregularities in practice which do not touch the jurisdiction of the court.

2. As to the depositions which are not now to be found on file and which it is alleged were never filed, the objection is of the same character with that in regard to the verification of the petition. The order to show cause which was issued recites that it is made on "reading and filing proofs sustaining the allegations of the petition in the matter aforesaid." The matter is one of practice and regularity, and not of jurisdiction. The filing of the proper petition confers jurisdiction to issue the order to show cause, and the depositions are only necessary as evidence to enable the court to decide that sufficient grounds exist for the entry of an order to show cause.

3. The objection in respect to the absence of the statement of any venue in the affidavit of service of the petition and order to show cause on the debtor, and the objection that such affidavit was sworn to before a notary public, and the objection that such affidavit did not allege that the petition and the order to show cause were served on the debtor by delivering the same to him personally, or by leaving the same at his last or usual place of abode, and that no order for the publication of the same had been entered or obtained, are not tenable. They are not made by the debtor, but are made by a creditor, who does not bring them to the attention of the court until nearly six months after an adjudication of bankruptcy has been entered. The statute directs that "a copy of the petition and order to show cause shall be served on the debtor, by delivering the same to him personally, or leaving the same at his last or usual place of abode, or, if the debtor cannot be found and his place of residence cannot be ascertained, service shall be made by publication in such manner as the judge may direct;" and that "no further proceedings, unless the debtor appears and consents thereto, shall be had, until proof has been given, to the satisfaction of the court, of such service of publication." The court

had a right to declare on the presentation of the proof of service, that it was satisfied with the affidavit of service (the debtor not appearing and not raising any question) although it contained no venue, and although it was sworn to before a notary public, and although it only stated that the person making the service left the copy of the petition and order to show cause personally with the debtor, and did not state that he delivered it to the debtor personally. These are matters of regularity. There is nothing jurisdictional in them. It is not offered now to be shown that the copy of the petition and order to show cause was not delivered to the debtor personally. On the contrary, Gayler, the person who made the affidavit of service on which the court acted, now deposes, that, on the 26th of February, 1875, he personally served upon the debtor a copy of the petition and order to show cause, by handing said copy to him and leaving the same with him, and that he personally knew the debtor and knew him to be the person to whom the order was directed. The bankrupt also deposes, that Gayler, on the day named, personally handed to and left with him a copy of the petition and order to show cause; that he well knew that he was insolvent, and had stopped payment, for more than forty days immediately preceding the day the petition was filed, of certain promissory notes made by him (that being the act of bankruptcy alleged in the petition), and well knew that he could not make any good answer to the petition nor show any cause why he should not be adjudged a bankrupt; and that, therefore, he refrained from making any appearance on the order to show cause.

It may also be said, in regard to the objections raised under the third head, that they go at the utmost only to the question whether the court obtained jurisdiction of the person of the debtor, and that the debtor, by applying for discharge in the proceedings, has waived all such objections, and his waiver is binding on all creditors whose debts are provable.

The application to vacate the adjudication is denied, with costs.

Case No. 5,372.

Ex parte GETTLESON.

[The case reported under above title in 1 Gaz. 132, is the same as Case No. 5,373.]

Case No. 5,373.

In re GETTLESTON.

[1 N. B. R. 604 (Quarto, 170);[1] 1 Gaz. 132.]

District Court, D. California. Dec. 14, 1867.

BANKRUPTCY—POWERS OF REGISTER — EFFECT OF DECISION.

It was the intention of congress to make the register's acts the acts of the courts, and to vest them with all the powers of the district courts in relation to all matters about which there is no contest. They are also to give their opinions upon all questions, points, and matters arising before them upon which there is a contest, which opinions will be final unless the parties litigant request the question, point, or matter contested to be certified to the district judge.

[Cited in Re Lanier, Case No. 8,070; Re Hyman, Id. 6,984; Re Bogert, Id. 1,598; Re Kingon, Id. 7,815; Re Bond, Id. 1,618; Re Blaisdell, Id. 1,488; Re Allen, Id. 208.]

In this case, on the 25th of November, 1867, Henry Gettleston the bankrupt, by Wm. P. Daingerfield, his attorney, presented to the undersigned, as register in bankruptcy, a petition, a copy of which is hereto annexed, praying that he may be decreed to have a full discharge from his debts provable under the bankrupt act [of 1867 (14 Stat. 517)], and that a certificate thereof may be granted to him in accordance with the same. On the 10th day of December, A. D. 1867, the said bankrupt, by his attorney, appeared before the undersigned and moved that an order of publication and notice be granted, fixing the time and place of holding a court of bankruptcy, at which all the creditors who have proved their debts, and other persons in interest, may appear and show cause, if any they have, why the prayer of the aforesaid petition should not be granted; and also, they further order that the second and third meetings of the creditors of the said bankrupt, required by the 27th and 28th sections of the bankrupt act, shall be held at the same time and place to be fixed for the serving of the petition for a discharge, and that all the creditors of the said bankrupt, and other persons in interest, may then and there appear and prove their debts, if not already proved, and show cause, if any they have, why the prayer of the petitioner should not be granted. And also, the further order that a copy of the said petition and order to be granted, shall be published according to law. Upon hearing the foregoing motion for the order aforesaid, the undersigned, as register in bankruptcy, refused to grant the motion, on the ground that although the acts set forth in this petition were sufficient upon which to base the order asked for, doubts have been expressed by members of the bar as to the powers of the registers in bankruptcy to act in relation to any other matters than those specified in section 4 of the bankrupt act, and rule 5 of the general orders in bankruptcy of the supreme court of the United States, unless the district court shall in any particular matter otherwise direct. Upon the undersigned, as register, refusing to grant the order, as requested, the petitioner, by his attorney, pursuant to the provisions of section 6 of the bankrupt act, proposed to take the following points of law, arising in the course of proceedings before a register, which the undersigned hereby certifies to

[1] [Reprinted from 1 N. B. R. 604 (Quarto, 170), by permission.]

the judge for his opinion thereon: Have not registers in bankruptcy, to whom a case is referred, under form 17, as prescribed by the supreme court of the United States, power, and is it not their duty to do and perform each and all of the acts that the district judge has the power to do and perform, unless an issue of fact or law is raised and contested by a party to the proceeding before him? And until such issue of fact or law is raised, does not a register to whom a case is referred possess all the powers of the district court in relation thereto, except the power to commit for contempt? Rule 17 of the district court requires that a register, certifying a question of law to the court, shall briefly state his opinion of the same. Pursuant to the requisition of the rule the undersigned gives the following:

The bankrupt act, as it was finally passed by congress, contained many provisions that are not precise in language, and therefore impose upon the courts of the country the onerous duty of hearing, and deciding, many questions as to their construction, that would have been avoided had the original bill, as proposed, been passed. The act, as it now stands upon the statute book, contains many of the provisions of the insolvent laws of Massachusetts and of "the new law of bankruptcy," as recently adopted in England. The provisions in relation to the powers and duties of registers are almost identical in the English and American bankrupt law. Such being the case, it is not a matter of surprise that the language of the several provisions of the law is not as carefully selected, or precisely used, as would be desirable. In England the administration of the bankrupt law devolves upon the lord chancellor, commissioners who are vested with like powers as the district judge, registers and assignees, and other inferior officers, as clerks, taxing masters, &c.; and the registers bear the same relation to the commissioners that the registers in the United States do to the several district courts. Being without the ability to refer to books of English authority to determine what have been adjudged to be the powers of the registers under the English bankrupt act, I can only infer that as there are but a limited number of commissioners, that the powers and the duties of the registers are coequal with the commissioners in all cases, when there is no contest, as any other supposition would impose upon the commissioners more duties than it would be possible for them to perform.

In exercising the powers imposed on congress, by the 7th section of article 1 of the constitution, to establish "uniform laws on the subject of bankruptcies throughout the United States," that body was embarrassed by the conflict of interest of the several states, which have heretofore given different measures of justice to creditors residing within and without their jurisdiction, and forced to impose upon the federal district courts already in existence the duty of administering the bankrupt law, rather than establish separate and distinct bankrupt courts to carry out the wholesome provisions of the act that recognized a bankrupt as the trustee of his creditors. But for the conflict of interest of the several states, a uniform and independent system would probably have been adopted, and in providing for its administration the confusion and uncertainty that now exists as to the powers and duties of the registers would not have occurred. To impose upon the federal courts, without additional assistants, the burden of administering the law, would practically have nullified the benefits to result from the act, both to the debtor and creditors, who are alike interested in its speedy and just administration. It became, therefore, necessary to create a large number of federal officers called "registers," and, to avoid the complaint that the treasury was to be depleted for their benefit, the law provides for their appointment, and the payment to them of fees for their services, by the bankrupt, or out of the fund belonging to the creditors, and then imposes upon them certain duties to perform for those fees. It was clearly the purpose of congress to relieve the federal courts by providing for their appointment and conferring upon them powers, as "assistants to the district judges," that would leave the district judges only to decide contested questions, after they had been passed upon by the registers; and when that body defined their duties, it appears to me, it was intended that they should perform all other duties imposed upon the district court, when there was no issue of law or fact raised in the proceedings, and that their adjudications were to be complete and final in all other cases. When a conflict arose between a bankrupt and his creditors, or the assignee of the estate of the bankrupt and the representative and the trustee of the creditors, upon a question of fact, to save the machinery and expense of an independent and separate court, it was thought prudent and wise to provide that the issues of facts should be certified in the district court, that the same might be tried and settled by a jury, if necessary, or reviewed by the district judge, if the parties litigant were not satisfied by the decision of the register.

When a question of law should arise in the proceedings, congress evidently intended that parties to the contest should have a right to the final decision upon it given by the district judge, as it was not to be expected that the several hundred registers appointed under the bankrupt act, would be found competent to finally dispose of the many grave questions of law that will arise in adjudicating upon, and distributing, the large funds belonging to creditors that will become subject to the control of the court of bankruptcy. But when there is no contest, and no opposing interests are in conflict, no

good reason can be given why the registers shall not "sit in chambers, and dispatch there such part of the administrative business of the courts, and such uncontested matters, as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct," in accordance with the letter of the law. The judges of the supreme court, when they prescribed the order of a form of an order of reference in voluntary bankrupt cases, must have understood the act as conferring upon the register all of the powers of the district court not reserved by special prohibitions, or they would not have used the following language: "It is thereupon ordered that the petition be referred to one of the registers in bankruptcy in this court, to make adjudication thereon, and take such other proceedings therein as are required by said act; and further, that the said bankrupt shall, on or before —— day ——, at —— o'clock, file with said register a duplicate copy of said petition and the schedules thereto annexed, and that he attend before said register on said day, and thenceforth as said register may direct, to submit to such orders as may be made by said register, or by this court, relating to his said bankruptcy; and further, until otherwise ordered by this court, the said register shall act upon the matters arising in this case at his office at ——, at such times and place as he shall fix for that purpose." By this form of reference the bankrupt is subject to the control of the register of the court, during the pendency of the reference; and, unless the register makes illegal orders, upon which the bankrupt takes the opinion of the district judge, who may determine the question as to their legality, he is to submit to such orders as judicial mandates of a court competent to make them. The register shall also, by express letters of order of reference, act upon the matters arising in the case, until otherwise ordered by the court.

By the general rules and orders of the supreme court, therefore, in all cases where a reference is made under the form of reference prescribed, the authority to act upon and dispatch all matters arising in the case so referred, is clearly given to the register, under section 4 of the bankrupt act. Should any other construction be given to the act, and rules and orders of the supreme court, it would operate as a great hardship upon the parties litigant, and practically defeat the objects intended to be accomplished by them. A register in bankruptcy is privileged to reside wherever it may suit his convenience, within the jurisdiction of the district court, the judge of which he is "to assist in the performance of his duties" (as provided in section 3), and should the register of this district establish his office at Los Angeles, as a geographical centre of the congressional district, and undertake there to dispatch the administrative business of the court, without as full and ample powers as are granted to the district judge, so much of the bankrupt law as was intended to relieve the district judges would be in fact a nullity; and if the parties litigant were required to go to the district judge for all orders that the statute authorizes the court to issue, it would be denying justice to compel them to do so; and should the district judge determine that the register has not the power to act in any case when, by the language of the statute, the court is to act, the burden of the administration of the law will fall upon him, and both the debtor and creditors may be put to great inconvenience. But aside from the inference to be drawn from the provisions in section 3, that the district courts are to "appoint one or more registers in bankruptcy to assist the judge of the district court in the performance of his duties under this act," and from the form of reference, prescribed by the judges of the supreme court, that the powers, and duties, of registers are coequal with that of the district judges when there is no contest, such powers and duties are clearly given in all cases in which "the judge of the district court may direct a register to attend at any place within the district, for the purpose of having such voluntary applications under this act as may not be opposed; of attending any meeting of creditors, or receiving any proof of debt, and generally, for the prosecution of any bankruptcy or other proceeding under this act," &c., pursuant to section 5 of this act.

If the register, by special orders of a judge of a district court, can be vested with all of the powers "for the prosecution of bankruptcy or other proceedings under this act," what good reasons can be given why, by a general order of the court, he cannot be vested with like powers and duties? If he has judicial powers in one case, why should he not have it in the other? In the concluding paragraph of section 11, which provides for the issuing of the warrant to the messenger, by the "judge of the district court," or, if there be no opposing party, by the "register of said court," it is provided that a notice shall be given that a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts, and choose one or more assignees of his estate, will be held at the court of bankruptcy, to be holden at the time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same. The supreme court, in prescribing the form of the notice to be given, use the following language: "You are hereby notified that a warrant has been issued," &c., and then "that a meeting of the creditors of said bankrupt, to wit: (then insert the names of the several creditors of bankrupt with their several places of residence and amount of debts, respectively, in the following form:) E. G., A. B., Boston, Mass. $500, to prove their debts and choose one or more assignees of his estate, will be held at a court

of bankruptcy, to be holden on the —— day of ——, A. D. 18—, at —— o'clock — m., at (here insert the place, building, room, or office where the court will be held), before ——, register, and have you then there this warrant, with your doings thereon." It is apparent that both the statute and the supreme court treat the register, acting, in issuing the warrant and holding the meetings of creditors, called pursuant to its mandate, as a court of bankruptcy, and, as such, fully authorized to perform all of the functions of a court, and determine all questions properly cognizable in a court of bankruptcy, subject only to the control of the district judge, when the parties litigant are disposed to have his adjudication reviewed.

A further analysis of the law is not deemed necessary by me, as I herewith hand to the district judge a more elaborate reference to and comment upon its several provisions, prepared and submitted to me by Tully R. Wise, Esq., who is counsel in another case, in which he has filed a petition for the discharge of his client, after this argument, as now submitted by me, had been prepared.

In my opinion, it was the purpose of congress to make the register's acts the acts of the courts, and as "an assistant to the district judge" in bankruptcy proceedings, in all cases referred to him by the rules prescribed by the supreme court, and to vest him with all of the powers of the district court, in relation to all matters about which there is no contest; and that, under the rules of the district court of California, he is to give his opinion upon all questions, points, and matters arising before him, upon which there is a contest, and that his opinion will be final, unless the parties litigant request the question, point, or matter contested to be certified to the district judge: except he is not empowered "to commit for contempt, or to hear a disputed adjudication on any question of the allowance or suspension of an order of discharge," when a party to the proceedings in bankruptcy opposes the allowance, or asks the suspension of an order of discharge. In all such cases it is the duty of the register to immediately certify the question of fact or of law without hearing or determining the same, to the district judge, to be disposed of by him, with or without the aid of a jury, according to the provisions of the bankrupt act.

But, as I have before suggested in the statement of the case (although I have no hesitation in announcing my opinion as here given), I have refused to grant the order asked, that the question may be fully argued and decided. Asher B. Bates, Register.

HOFFMAN, District Judge. Upon reading and considering the foregoing certificate, together with the opinion of the register thereon, and of the brief submitted therewith, it is my opinion that the conclusions of the register upon the points of law therein stated are correct and in accordance with the provisions of the bankrupt act, and so far as this decision is in conflict with rule 17 (in bankruptcy) of the district court of California, it is to be regarded as the rule of this court in the future, by which registers are to be guided. The clerk will certify this decision to the register, Asher B. Bates, Esq.

GETTY (WISE v.). See Case No. 17,909.

GETTY, The ALICE. See Case No. 193.

Case No. 5,374.

GETZ et al. v. FIRST NAT. BANK OF WASHINGTON et al.

[3 Cin. Law Bul. 141.]

Circuit Court, S. D. Ohio. 1878.

PETITION TO ADJUST LIENS AND SELL LANDS.

1. Where the assignee of a mortgagee had brought suit of foreclosure in a state court, to which the mortgagor was made party, and had answered, and the plaintiff had replied, and the cause was ready for hearing, the subsequent bankruptcy of the mortgagor, will not divest the state court of its jurisdiction.

2. But the state court, after the mortgagor has been adjudicated a bankrupt, and before an assignee has been appointed, may proceed to a hearing of the cause, fix the lien of, find the amount due the plaintiff, and order the property sold in satisfaction thereof.

3. In such case where the property is clearly of much less value than the decreed lien thereon, the federal courts will not order the assignee in bankruptcy to sell the same.

In bankruptcy.

Palmer, Headley, Johnston & Colston, for plaintiffs.

Maynard & Hadley, for defendants.

SWING, District Judge. The petition in this case was filed by the plaintiffs [Charles L. Getz and others], assignees of A. C. Johnson, a bankrupt, on the 11th day of May, A. D. 1877, and alleges in substance: That on the 19th day of February, 1878, A. C. Johnson was adjudicated a bankrupt; that on the 19th day of March these plaintiffs were appointed his assignees; that said bankrupt was the owner of several tracts of real estate therein described. The First National Bank of Washington C. H., with others, are made parties defendant. The nature of their interest in or liens upon the property is not set out in the petition, but they are required to set these out in their answers. The defendant the First National Bank of Washington C. H. has filed its answer, setting forth in substance: That on the 22nd day of October, 1875, the bankrupt A. C. Johnson, being indebted to the Fayette County National Bank in $24,000, to secure the payment thereof, executed a mortgage to said bank upon a part of the property described in the petition; that said mortgage was recorded on the 22nd day of October, 1875;

that on the 29th day of October, 1875, the Fayette National Bank for a valuable consideration assigned and transferred said mortgage to said defendant, and that there was due to it at the time of the filing of said answer the sum of $18,000.

The answer further sets forth that on the 6th day of May, 1876, the defendants brought their suit in the court of common pleas of Fayette county, Ohio, to foreclose said mortgage; that the said A. C. Johnson and Laura R. Johnson, his wife, were made parties thereto, and on the 3rd day of June, 1876, filed their answer in said suit; that plaintiffs therein, defendants here, filed their replication to said answer on the 22nd day of July, 1876; that at the February term of said court, begun and held on the 25th day of February, 1877, said court, upon a full hearing of the cause, entered a decree in favor of the plaintiff, adjudging its mortgage a lien upon said property, and ordering the same to be sold in satisfaction thereof.

The decree, a copy of which is attached to the answer, and made a part thereof, contains a proviso that the issuing of the order should be subject to the order of the district court of the United States for the Southern district of Ohio. The answer further states that the property embraced in the mortgage and decreed to be sold, will not pay more than half the amount of the mortgage debt. A motion is filed by defendants asking the court to direct the court of common pleas of Fayette county, to proceed and sell the property. This is informal, but counsel for plaintiffs waive the informality and request the court to dispose of the question upon its merits.

In the case of Frank E. Bixly, assignee of James C. Belman, Bankrupt, v. Indianapolis Ins. Co [unreported], there had been a decree of foreclosure in the state court, and the assignee sought to have an order of sale from this court, but we refused to grant the order and dismissed the petition. In the case of M. M. Gantz, Assignee, v. J. W. King, Receiver [unreported], proceedings had been instituted in the state courts to determine certain rights growing out of transfers and conveyances of property. After the state courts had obtained jurisdiction of all the parties and the subject matter, the party was adjudged a bankrupt, and his assignee filed his bill in this court, asking an examination and determination upon the same matters involved in the suit in. the state courts. The district court dismissed the bill, and the cause was taken by appeal to the circuit court and the decree of the district court was affirmed by Justice Swayne. The question, however, of the jurisdiction of the state courts and the effect of the bankruptcy of one of the parties upon the jurisdiction, has, since that, been so fully settled by the supreme court of the United States, that it is only necessary for me to refer to its decisions. In Eyster v. Gaff, 91 U. S. 521, McClure was the owner of certain lots in Denver which he had mortgaged to one Gaff. Suit to foreclose this mortgage was instituted in the state court. After the commencement of the suit, and before decree, McClure was adjudged a bankrupt, and after his assignee was appointed, decree was taken, the property sold under it, and Gaff became the purchaser thereof and received a deed therefor, which sale was confirmed. Upon this title an action of ejectment was brought against Eyster to recover the possession of the premises. The defendant in ejectment defended his possession on the ground of the invalidity of the foreclosure proceedings after the adjudication of bankruptcy and the appointment of an assignee.

In the very able opinion of the court delivered by Justice Miller, it is held that an assignee as to pending suits to foreclose mortgage, occupies the position of a purchaser pendente lite; that the jurisdiction having attached to it is not ousted by the proceedings in bankruptcy. The learned judge says: "It is a mistake to suppose that the bankrupt law avoids of its own force all judicial proceedings in the state or other courts the instant one of the parties is adjudged a bankrupt." Again: "The court in the case before us, had acquired jurisdiction of the parties and the subject matter of the suit." Again: "It was the duty of the court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject matter of the suit." Applying these general principles to this case, it follows that the application of the defendant A. C. Johnson, a bankrupt, did not divest the court of common pleas of Fayette county of its jurisdiction, and the court had full power to proceed to hearing and final decree after such adjudication, and before the appointment of an assignee.

Upon the general question of the jurisdiction of the state and federal courts in bankruptcy, see Claflin v. Houseman, 93 U. S. 130; Lathrop v. Drake, 91 U. S. 516; Bates v. Tappan, 99 Mass. 376; Lenihan v. Hamann, 55 N. Y. 652. Where the property is of much greater value than the liens for which it was decreed by the state courts to be sold, the assignee might file his petition in this court making the lien holders parties, and obtain an order for the sale thereof, but where the property is clearly of much less value than the amount of such liens, we will not entertain a petition for such purpose. The proviso in the decree that the issuing of the order of sale by the state court is subject to the order of this court can make no difference; it does not affect the jurisdiction in either court, and there being nothing which the assignee could derive from the sale for the benefit of general creditors, we would not interpose our

objections to the issuing of an order of sale by the state court. The petition, so far as it relates to the lands included in the decree of the court of common pleas of Fayette county, is therefore dismissed.

Case No. 5,375.

GEYGER'S LESSEE v. GEYGER.

[2 Dall. 332.]

Circuit Court, D. Pennsylvania. 1795.

PRACTICE—PRODUCTION OF BOOKS, ETC.—SERVICE OF NOTICE ON ATTORNEY.

[Requiring the production of books and papers "on motion and due notice," pursuant to the statute, is a procedure to be kept under the control of the court for the purposes of substantial justice. And where notice to produce deeds is served on the attorney of a party who lives at a distance, and the attorney offers to give references to the pages, etc., where the deeds are recorded, this is sufficient, without service on the party himself.]

[Cited in Rockhill v. Hanna, Case No. 11,979.]

A rule has been obtained by the plaintiff [Geyger's lessee], requiring the defendant to shew cause why an order should not be made for the production of certain deeds and papers on the trial of this cause, agreeably to the provision of the 15th section of the judicial act [of 1789 (1 Stat. 73)], and now, on proof that a copy of the rule was served on the defendant's attorney, it was moved to make the same absolute. But, for the defendant, it was contended, that the notice of the rule should have been given to the party, and not to his attorney. In Rivers v. Walker, 1 Dall. [1 U. S.] 81, notice, in the case of referees, is directed to be given to the party; and the reason is stronger in the present instance, as the defendant lives at a great distance, and the attorney ought not to be put to the trouble and expence of transmitting the notice. Besides, there is no certificate produced that the deeds are not on record; and the fact is that they are recorded; so that the plaintiff might, at any time, procure exemplifications.

Levy & Blair, for plaintiff.

Tilghman & Armstrong, for defendant.

BY THE COURT. The provision contained in the judicial act was intended to prevent the necessity of instituting suits in equity, merely to obtain from an adverse party the production of deeds and papers relative to the litigated issue. The act says, generally, that the court shall have power, "on motion and due notice thereof being given, to require the parties to produce books or writings, &c." without designating to whom the notice shall be given, the party himself, or his attorney. But we will always keep the cause under our control for the purposes of substantial justice, and never suffer either party to be entrapped. If, for instance, notice is served on an attorney, whose client lives at a great distance, this will always be deemed a sufficient reason to postpone the trial, "till a full opportunity has been afforded for the attorney's communicating the rule to the client." If, likewise, the court find that the deeds are actually on record, we will not indulge the party with a rule for producing them, merely as a cheap mode of procuring evidence. The originals may sometimes, indeed, be necessary, for a special reason, detached from the evidence; but, in that case, the special reason must be assigned to the court.

The defendant's counsel offering to refer their opponents to the pages, &c. where the deeds in question are recorded, the court declared that this put an end to the matter; but added, that if it was not satisfactorily done, they would not allow the cause to be brought to trial.

GHEQUIER (RIDGEWAY v.). See Case No. 11,813.

GHEQUIER (RIDGWAY v.). See Case No. 11,816.

GHEQUIERE (POTTS v.). See Case No. 11,346.

Case No. 5,376.

In re GHIRARDELLI et al.

[1 Sawy. 343;[1] 4 N. B. R. 164 (Quarto, 42).]

District Court, D. California. Sept. 16, 1870.

BANKRUPTCY — SUIT AGAINST BANKRUPT IN STATE COURT.

1. On an application for leave to sue the bankrupt in a state court, the court will not enter upon the inquiry, whether the debt be one from which the bankrupt would be relieved by his discharge.

[Cited in Re Mallory, Case No. 8,991; Re Schwartz, Id. 12,502.]

[Cited in Ray v. Wright, 119 Mass. 428.]

2. Semble, that, upon a special showing that the right of the creditor might be lost if a suit were not forthwith commenced, the court might allow the suit to be brought and prosecuted so far as might be necessary to save rights.

[In bankruptcy. In the matter of D. Ghirardelli & Co.]

John B. Felton and A. D. Spivalo, for bankrupts.

Edward J. Pringle, for trustee.

G. Frank Smith, for creditors.

HOFFMAN, District Judge. Certain creditors of the bankrupt, in this case, have applied to the court for leave to prosecute suits against him for debts alleged to have been created by his defalcation, while acting in a fiduciary capacity, to wit: as administrator of the estates of certain parties deceased.

[These debts have been duly proved against the estate.] [2]

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

[2] [From 4 N. B. R. 164 (Quarto, 42).]

The application is opposed by the trustee appointed by the creditors.

The twenty-first section of the bankrupt act [of 1867 (14 Stat. 526)], provides, that "no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined." The case presented is clearly within the terms of this prohibition.

It is urged, however that inasmuch as the debts in question will not be released by the discharge, there can be no reason for restraining suits to enforce them until the happening of an event which can in no way affect the creditors' rights. But to this limitation of the general language of the twenty-first section there are grave objections.

The object of the provision was to prevent the bankrupt from being harassed during the proceedings to obtain his discharge, by suits to recover provable debts. This object would be in a great measure defeated, if, on the mere allegation that the debt was incurred by the bankrupt while acting in a fiduciary capacity, or was created by fraud, the creditor could institute and carry to final judgments suits before the ordinary tribunals.

The only ground for refusing the stay of proceedings, which the bankrupt court is, by section twenty-first, required to grant, would be the fact that the debt is of the character mentioned in the thirty-second section. But that fact might be disputed, and before the court could decide ita protracted and expensive investigation might be necessary. But this investigation would in no respect be a final adjudication, for if a suit in a state court should be commenced after the discharge, to which the discharge should be pleaded as a bar, the truth of the plaintiff's replication, that the debt was excluded from the operation of the discharge would be open to inquiry and would necessarily be passed upon by the court.

So, too, if no discharge should be granted, the investigation by this court, into the nature and origin of the debt, would be wholly useless.

The stay authorized by the statute is but temporary. It terminates with the decision of the court, on the question of the discharge, or sooner, if there be unreasonable delay, on the part of the bankrupt in endeavoring to obtain his discharge.

The attempt to determine in advance, what will be the effect of the discharge upon particular debts, when, as yet, it is not known whether any discharge will be granted, seems premature and unnecessary.

The creditor, the debt to whom was created by fraud, is not more inconvenienced by the temporary suspension of his right to sue, than the ordinary creditor who may know of facts which will prevent the discharge, but yet is prohibited from suing. In neither case will the proceedings in bankruptcy be a bar to a subsequent suit. But in both, the statute requires that a temporary stay of proceedings shall be granted by the court.

The provisions of the 26th section, with regard to the arrest of the bankrupt, have no application to the subject we are considering. That section enacts that "no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil suit, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him."

The 27th general order provides that a bankrupt so arrested may be brought before the district court by habeas corpus, and if it be ascertained that the process on which he is arrested has been issued for the collection of any claim provable in bankruptcy, he shall be discharged.

It would seem that this general order carries the exemption of the bankrupt from arrest further than is warranted by the statute. For the latter by plain implication allows an arrest for a debt or claim from which the bankrupt would not be released by his discharge. In re Glaser [Case No. 5,474].

[The rule was perhaps inadvertently framed, and was intended merely to prescribe the mode in which the immunity given by the act might be secured and enforced, but not to extend that immunity to cases where the act clearly shows that none was to be allowed; or, perhaps the supreme court referred in this rule to cases of preliminary arrest at the commencement of a suit. As the 21st section provides for a stay of all suits for debts provable under the act, the general order requires the discharge of the bankrupt when arrested in any such suit; otherwise the proceedings might be stayed, but the bankrupt would remain in prison. But where the arrest is on final process issued after judgment, the discharge of the bankrupt would depend upon whether the arrest was for a debt from which his discharge in bankruptcy would release him. If this be the true construction of general order No. 27 (and I see no other by which it can be reconciled with the exception contained in the clause of the 26th section relating to arrests), it affords an argument in favor of the interpretation given to the 21st section; for it seems to indicate the opinion of the supreme court that no creditor whose debt is provable under the act, shall be allowed to maintain or prosecute to final judgment any suit therefor, until the question of the debtor's discharge shall have been determined.] [2]

In the Case of Seymour [Case No. 12,684], it was held by the district judge for the Southern district of New York that the provisions of the 21st section do not extend to suits to collect debts from which the bank-

[2] [From 4 N. B. R. 164 (Quarto, 42).]

rupt would not be released by his discharge in bankruptcy. But in the Case of Rosenberg [Id. 12,054], the same learned judge reconsidered this opinion, and held that section 21 must be construed to include all suits to recover debts provable under the act. His reasons are substantially those given in this opinion. His large experience and the great attention he has bestowed upon the bankrupt act and questions arising under it, entitle his mature and well considered opinion, especially where he admits a previous error, to the greatest consideration.

But while the act forbids the maintaining or the prosecution to final judgment of any suit for a debt provable under the act, it does not in terms prohibit the commencement of such a suit. Whenever, therefore, it appears that the suit is one to which the discharge in bankruptcy might be no bar, and that if not commenced forthwith the statute of limitations might run against it, or that service might not be obtained upon the bankrupt, or that testimony might be lost, I am inclined to think the court might permit the suit to be commenced for the purpose of saving the statute, effecting a service, or securing the testimony. When these objects are attained, the suit could be stayed to await the determination of the question of the debtor's discharge, or the expiration of a reasonable time therefor.

But a special showing should in such case be made, and leave to prosecute would be granted only so far as might be absolutely necessary to secure the creditor's rights.

No such showing has been made in this case, and I am, therefore, of opinion that the application should be denied.

Case No. 5,377.

The G. H. MONTAGUE.

[4 Blatchf. 461.] [1]

Circuit Court, S. D. New York. Oct. 3, 1860.

ADMIRALTY — SEIZURE BY STATE OFFICER UNDER STATE STATUTE — APPEARANCE BY AGENT OF OWNER—PUBLIC SALE OF PROPERTY.

1. The provisions of a state statute which authorizes a justice of the peace to issue process to seize a vessel used in navigating the waters of the state, to enforce a claim for damages, must be fully complied with, so far as they require the filing of a verified complaint setting forth the plaintiff's demand in all its particulars, such provisions being jurisdictional facts.

2. Where those provisions are not complied with, the justice acquires no jurisdiction to issue process to seize the vessel, and no title will be acquired to the vessel by a purchaser who buys her on a sale in the proceeding.

3. An appearance by an agent of the owner, and a defence of the suit by him, will not give to the justice jurisdiction over the vessel.

4. A power of attorney authorizing a public sale of property, will not authorize a private sale of it.

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

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

This was a libel in rem, filed in the district court, by persons claiming to own the schooner G. H. Montague, to recover possession of her. The district court dismissed the libel [case unreported], and the libellants appealed to this court.

Erastus C. Benedict and Edwin W. Stoughton, for libellants.

Welcome R. Beebe, for claimant.

NELSON, Circuit Justice. It is not denied that the libellants were the original owners of the vessel, and that the claimant is a bona fide purchaser for value. The question in the case is, whether or not Atwater, who sold and conveyed her to the claimant, had, at the time of the conveyance, obtained the title of the libellants. I agree, that if Atwater possessed the title at the time, though he obtained it through fraud and covin, the claimant, being a bona fide purchaser, is to be protected. And, hence, the libellants are bound to show that they have not parted with the title, or, in other words, that Atwater had not acquired it. It is quite clear, that if the question was simply between the libellants and Atwater, or between Mix and them, Atwater having derived the possession from Mix, there could be no great difficulty in disposing of it, as Mix took possession professedly for the benefit of the libellants, and the proofs show that Atwater is chargeable with notice of the circumstances, and acted in the sale to the claimant in collusion with Mix.

The question of title depends upon two grounds: (1) A sale of the vessel at San Francisco, California, under judgments and executions obtained against her before a justice of the peace; and (2) a sale under a power of attorney executed by the libellants with others.

(1) As to the sale under the judgments and executions. By an act of the state of California, power is conferred on justices of the peace to issue process to seize boats or vessels used in navigating the waters of the state, for, among other things, damages arising from the non-performance of contracts touching the transportation of persons or property. Sections 3 and 12 provide, substantially, that a plaintiff wishing to institute a suit against the vessel, shall file with the justice his complaint against her by name. Section 4 provides, that the complaint shall set forth the plaintiff's demand in all its particulars, and shall be verified by the affidavit of the plaintiff or some other credible person. The weight of the proof in the case is, that these provisions were not fully complied with; and, as they are jurisdictional facts, it is claimed that the justice acquired no jurisdiction over the vessel. I have before me the testimony of the justice, and copies of his

docket. The latter makes no allusion to the complaint, and the evidence of the justice is not explicit, or very full upon the point, especially in respect to the verification of the complaints, for some twenty suits or more were instituted. An attorney for the plaintiff, whose partner instituted the proceedings before the justice, and who, on the return day of the warrants, appeared himself, to conduct the cases, has been examined for the libellants. His testimony is very explicit and full, that the steps required to give jurisdiction to the justice, were not complied with; and, so satisfied was he that the court had acquired no jurisdiction over the vessel, that he withdrew from the cases, to avoid responsibility as a trespasser. He looked into the complaints for the express purpose of ascertaining if the proceedings had been in conformity with the injunctions of the statute.

The jurisdiction conferred is limited and special, and summary and severe in its execution, and parties seeking the benefit of it should be held to a strict compliance with all the preliminary steps enjoined by the statute, before seizure of the property. Not only is this the general principle applicable to courts of inferior jurisdiction, but it should be especially enforced in cases where the seizure and summary disposition of property follows.

It is said that the general agent of the owners, who was present, appeared and made some defence to the suits. But it is a sufficient answer to say, that this could not confer jurisdiction upon the justice over the vessel. That depended upon the statute, and a compliance with its provisions. If the case had been a proceeding in personam, the appearance might have waived any irregularity in the service of the process, or objection to jurisdiction over the person. I am of opinion, therefore, that Mix took no title under the purchase.

(2) Then, as to title under the power of attorney. This power referred to articles of association which these libellants and others had entered into, in which the former had brought in the vessel as stock, at the price of $12,000, and in which it was agreed that, at the termination of the articles, the vessel should be sold for the benefit of the association, at public auction. The power in question was made and executed to carry into effect this provision in the articles; and it is a sale in execution of the power thus given, and for the purpose stated, that the claimant sets up as vesting Mix, and under him Atwater, with the title. The sale under the power was made to Mix without any consideration. I do not, however, place any weight upon this latter fact. The simple question is, whether the power was executed within its terms? I think not. The articles of association referred to in the power, and with notice of which Mix and all persons claiming under him are chargeable, are explicit that the sale was to be a public sale for the benefit of the association, and the power directed it should be made in conformity with the requirement of the articles and not contrary to them. Instead of there being a public sale, Mix went from San Francisco in pursuit of the two persons who held the power, and who were mining in the mountains of California, and persuaded them, by false representations, to sign a bill of sale without any consideration. The sale was a private one, when the power only authorized a public one. I am, therefore, of opinion that no title passed under the power.

There are other questions in the case, such as, whether the act of California conferred or intended to confer jurisdiction over vessels not exclusively engaged in navigating the internal waters of the state, and whether the sheriff or constable, and not the marshal of the city of San Francisco, was the proper officer to execute the processes issued under the statute. But I do not deem it important to notice them, as I am satisfied that the grounds upon which I have placed the case must control the decision. The decree below must be reversed, and a decree be entered that the libellants recover possession of the vessel.

Case No. 5,378.

The G. H. STARBUCK.

[5 Ben. 53.] [1]

District Court, S. D. New York. March, 1871.

MARITIME TORT — AIDING SEAMEN TO DESERT — RATIFICATION.

1. The owners of a ship filed a libel against a tug, alleging that while their ship was lying at anchor, ready for sea, the tug came alongside, against the remonstrance of the ship's officers, and took off eight sailors and their baggage, whereby new men had to be obtained, and the ship was detained; and they sought to recover the demurrage and the advance wages paid to the deserters: *Held*, that, if the facts constituted a maritime tort, cognizable in the admiralty, yet, in order to hold the tug liable, the libellants must show knowledge or notice to those in charge of the tug that they were committing a wrongful act.

2. Such knowledge or notice was not shown in this case.

3. The bonding of the tug by her owners, when seized under process in this cause, was not an adoption by them of the acts of those on board the tug at the time.

In admiralty.

E. C. Benedict, for libellant.

Beebe, Donohue & Cooke, for claimants and respondents.

BLATCHFORD, District Judge. The libel in this case, which is filed by the libellant as owner of the British ship Perseverance, alleges, that while the ship was lying in the port of New York, on or about the 29th of June, 1864, ready for sea, bound to Liverpool, England, and fully loaded, with her crew on

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

board, her master being temporarily on shore, the steamtug G. H. Starbuck, about four o'clock, p. m., came alongside of the ship, against the prohibition, warning and remonstrance of the officers in charge of her at the time, and took from on board of her eight of her crew, with their things or baggage, and took them ashore and landed them, and aided them to desert from the ship, so that the libellant was not able to retake them; that said crew were necessary to the ship, and without them, or others in their places, she could not go to sea on her said voyage; that the libellant was compelled to find and ship men, in the place of such eight men, at very high prices, and to lose the sums paid for advance wages and for shipping such eight men, they having been previously shipped, and each paid $100 advance; that the ship was detained by reason thereof for several days, for which delay the libellant is entitled to proper demurrage, and to the expenses incurred thereby; that he is also entitled to the expense of procuring and shipping new men, and to the damage caused by the wrong of the steamtug and those in charge of her for her owners; and that he claims $3,000, or thereabouts. The prayer of the libel is for a recovery against the steamtug and her owners.

The answer of the claimants of the tug, who are the respondents sued, avers that the respondent Mills was at the time the master of the tug; that her business was that of towing vessels, and nothing else; that, at the time mentioned in the libel, her master was absent from her on shore; that she was on that day engaged in towing mud scows, laden with mud, from the Atlantic dock, Brooklyn, to near Bedlow's Island; that the pilot who was left temporarily in charge of her had no right to employ her in any other business; that while on the trip and when passing near the ship, which was lying at anchor (but whether bound in or out, or whether ready for sea or otherwise, those on board of the tug had no knowledge), the tug was hailed by some person from the quarter-deck of the ship, stating that there were two persons on board who desired to get on shore, and wanted the tug to take them; that the pilot, without any right so to do, did, without any objections or remonstrance on the part of any one on board of the ship, round to alongside of the ship, when four men, with some baggage, jumped on to the steamtug, and were carried to the shore; that no objections were made to the said parties going on shore, and only one other man and a woman were seen on board of the ship; and that those on board of the tug had no knowledge, or notice, or information that there was any claim upon the men, and acted in good faith. The answer denies the jurisdiction of the court, and alleges that if the facts averred in the libel are true, the claim does not create any lien on the tug.

If it be conceded that the facts set forth in the libel constitute a marine tort, cognizable in the admiralty, within the principles laid down in Plummer v. Webb [Case No. 11,233], Sherwood v. Hall [Id. 12,777], and Philadelphia, W. & B. R. Co. v. Philadelphia & Havre de Grace Steam Towboat Co., 23 How. [64 U. S.] 209, still, in order to make the owners of the steamtug, and, through them, the tug herself, liable to respond in this case, it is necessary that the libellants should show knowledge by or notice to those in charge of the tug at the time, that they were committing a wrongful act. Sherwood v. Hall, above cited; Cutting v. Seabury [Case No. 3,521]; The Platina [Id. 11,210]. The libel alleges no other knowledge or notice except that what was done by the tug was done against the prohibition, warning and remonstrance of the officers in charge of the ship at the time; and the libellants have, by testimony, sought to prove such allegation as to prohibition, warning and remonstrance. The gist of the action is that the seamen were withdrawn from the power of the officers of the ship, by the tug, by abduction. This requires that a wrongful purpose should be brought home to those in charge of the tug. I think the libellants have failed to make out affirmatively such wrongful purpose, or to show knowledge by or notice to the persons managing the tug, that the departure of the seamen was against the will of those in charge of the ship. Even if it be conceded to be proved that the tug was hailed from the ship not to come to the ship, still, it is not shown that the hail was understood by the tug, or that any reply was made to it, indicating that it was understood.

I do not think a case like the present falls within the classes of cases where a vessel and her owners are held responsible, as in cases of collision and injuries from negligent acts and omissions of duty, for the torts of those placed in charge of the vessel, in acts relative to the service of the vessel, and within the scope of their employment. It is an essential element of a case like this, that there should be wilfulness and a wrongful purpose, and not merely negligence, inferable more or less from the consequences of the act or omission alleged.

The fact that the owners of the tug procured her release from seizure by bonding her after her arrest in this suit, is urged as an adoption and approval by them of the acts of those in charge of the tug. It can have no such effect, even though the bonding took place after the libel was filed. The exercise of the right or privilege of bonding a vessel seized, in no manner concludes or prejudices the owner in respect to the merits of the cause of action. And, in this case, even if the acts were to be regarded as those of the owners as personally present, such acts would equally have to be shown to have been done wilfully and with a wrongful purpose.

The libel is dismissed, with costs.

Case No. 5,379.

GIANT POWDER CO. v. CALIFORNIA POWDER WORKS.

[3 Sawy. 448; 2 Ban. & A. 131.][1]

Circuit Court, D. California. Sept. 22, 1875.[2]

ORIGINAL PATENT FOR PROCESS — RE-ISSUE FOR COMPOUND—RE-ISSUES VOID — RE-ISSUE, WHEN AUTHORIZED—MACHINE PATENTS — RE-ISSUE OF PATENTS OTHER THAN FOR MACHINES — CHANGE OF SPECIFICATIONS AND RE-ISSUES — CONSTRUCTION OF ORIGINAL AND RE-ISSUED PATENTS — RE-ISSUES UNDER ACT OF 1836—NOBEL'S PATENT WITHIN THE RULE.

1. Where the specifications in a patent particularly describe four different modes of exploding nitro-glycerine: 1. By exploding gunpowder confined in a waterproof tube in contact with it; 2. By an electric spark or current; 3. By inserting in the liquid a thin case containing some substance evolving heat; 4. By a fuse; and claimed as his invention "the use of nitro-glycerine or its equivalent substantially in the manner and for the purposes described:" *Held*, that the patent is for a process and not for a compound. (Per Mr. Justice Field.)

2. The original patent having been surrendered, there were re-issues in several divisions; one for a compound of nitro-glycerine and gunpowder; one for a compound of nitro-glycerine and gun-cotton; and one for a compound of nitro-glycerine and rocket powder: *Held*, that each of these re-issues is a patent for a compound, not for a process. (Id.)

3. The original patent being for a process and the three re-issues mentioned being for compounds, they were not embraced in the invention originally described and patented, and the re-issues are void. (Id.)

4. Under section 53 of the act of 1870 (16 Stat. 205), a re-issue is not authorized unless the original patent is inoperative or invalid from a defective or insufficient specification, or the claim of the patentee exceeds his right. (Id.)

5. In determining the propriety of a re-issue no new matter can be introduced except in cases of machine patents. (Id.)

6. If the patent does not relate to a machine, the specification, if defective, may be made more definite and certain, so as to embrace the claim made, or the claim may be so modified as to correspond with the specification; but this is the extent to which modifications can be made in such cases. (Id.)

7. Nobel's original patent was neither inoperative nor invalid by reason of any defect or insufficiency of the specifications of the patent set out in the statement of the case. The specification was unambiguous and covered all that was claimed; but, if otherwise, no new matter not relating to the process claimed, but relating to compounds made by uniting nitro-glycerine with other substances, could be added to the specifications. (Id.)

8. Re-issues under the statute must be for the same invention which was embraced in the original patent, or if re-issued in divisional parts, each division must be for some distinct and separate part of that invention. (Id.)

[See note at end of case.]

9. Where the inventor originally filed specifications embracing both compounds and cognate processes, but afterwards filed amended specifications omitting the compounds, and the patent issued upon the amended specifications which were alone attached thereto, upon an application for re-issues in divisions, the commissioner of patents is limited in his re-issues to the invention embraced in the amended specifications attached to the original patent, and cannot look at the specifications first filed, and afterwards abandoned, to ascertain what the invention sought to be patented was. (Id.)

10. Where a patent is surrendered and a re-issue obtained, a second re-issue on surrender of the first, must be limited to the invention embraced in the first re-issue. (Id.)

11. Where upon a comparison of the original and the re-issued patents, it appears upon the face of the patents that the latter is not for the same, or some part of the same invention as that embraced in the former, it will be adjudged void on the ground that it was issued without authority. (Id.)

12. On an application for a re-issue of a patent under the act of 1836 [5 Stat. 117], the commissioner was not authorized to look beyond the patent as originally granted with the specifications and diagrams thereto annexed, and the models deposited in the patent office, for the purpose of ascertaining what invention was intended to be patented. (Per Sawyer, Circuit Judge.)

13. Nobel's patent having been issued in 1865, his rights accrued and they must be determined under the provisions of the act of 1836, and there being no model, upon an application for a re-issue made prior to the passage of the act of 1870, he would be limited in the re-issue to the invention as described, substantially indicated or suggested in the original patent, and the specifications and drawings appended thereto.

Demurrer to bill to enjoin the infringement of a patent. In addition to the facts stated in the opinion of the court the following bearing upon the points decided were alleged in the bill:

Alfred Nobel on the sixteenth day of September, A. D. 1865, duly filed in the United States patent office an application for a patent addressed to the commissioner of patents, praying for letters-patent for his invention; and with said petition said Nobel filed in said patent office a power of attorney appointing and constituting Henry Howson his attorney and agent to alter and modify the specifications and drawings in his said application, to receive the patent, etc. With said application for a patent, said Nobel duly filed his specifications and drawings describing his invention, a copy of which specifications and drawings marked "Exhibit A" is made a part of the bill. That part of the specifications set out in "Exhibit A" necessary to illustrate the points of the decision is as follows, to-wit:

"Exhibit A.

"Memorandum relating to Alfred Nobel's invention for the use of nitro-glycerine and analogous substances as substitutes for gunpowder.

"There is a class of substances long known, but not applied as yet to technical purposes, in consequence of practical difficulties in promoting their explosion; such are nitro-glycerine, the nitrates of ethyl and methyl, nitro-mannite, etc. The peculiar property

[1] [Reported by L. S. B. Sawyer, Esq., reprinted in 2 Ban. & A. 131, and here republished by permission.]

[2] [Reversed in 98 U. S. 126.]

which distinguishes this class of substances is that fire may be applied to them without their exploding. Thus nitro-glycerine, if ignited in an open space, is slowly decomposed with a bluish flame, but the fire goes out when the match is withdrawn; hence nitro-glycerine cannot, under ordinary circumstances, be looked upon as a ready explosive agent, for while gunpowder and other explosive substances hitherto used, always explode when fire is set to them, nitro-glycerine, on the other hand, and analogous substances, must be heated to the degree of their detonation in order to explode. If a drop of nitro-glycerine is poured upon an anvil, the blow of a hammer, through the heat developed by compression causes it to explode, but only that part which has received the blow, so that the explosion in this case is only a local one.

"A chief point in my invention consists in overcoming this difficulty. According as nitro-glycerine is to be used for firearms or for blasting, I adopt two different methods for promoting its explosion, viz.:

"1. By mixing it with gunpowder, gun-cotton, or any other substance developing a rapid heat, nitro-glycerine being an oil, fills the pores of gunpowder and is heated by the latter to the degree of its explosion. Gunpowder treated in this way can take up from ten to fifty per cent. of nitro-glycerine, and develops a greater power with a lesser quickness of explosion. Where the only object in view is to reduce the quickness of explosion of gunpowder, I mix it with or make it absorb common non-explosive oil from one to ten per cent. of its weight.

"2. When nitro-glycerine is to be used for blasting, where quickness of explosion is of great importance, I submit it to the most rapid source of heat known, viz., that developed by pressure. To effect this I make use of the pressure developed by heating a minute portion of nitro-glycerine, or by the detonation of any other violently exploding substance. Nitro-glycerine being a liquid, if it cannot escape, as for instance in a bore, receives and propagates the initial pressure through its whole mass, and is by that pressure instantaneously heated; hence the first impulse of explosion decomposes the rest.

"There are many means of attaining this impulse of explosion, such as—(1) When nitro-glycerine in tubes is surrounded by gunpowder, or vice versa. (2) By the spark or heat developed by a strong electric current, when the nitro-glycerine is inclosed on all sides, so as not to afford an escape to the gas developed. (3) By a capsule. (4) By any chemical agents developing a gradual heat, through which the initial explosion of nitro-glycerine or some other violently exploding substance may take. (5) Simply by a fuse. This will do in a closed space and under sufficient resistance, but if the gases of decomposed nitro-glycerine are enabled to escape before they accumulate to such a pressure as to effect the requisite impulse of explosion, the nitro-glycerine is slowly decomposed, and the fire generally goes out before the whole is consumed. (6) By what I call 'igniters.' They may be greatly varied, but in their simplest form they consist of a wooden cylinder, hollow inside and filled with gunpowder, being corked at one end and connected with a fuse at the other. When the nitro-glycerine has been poured into the bore this cylinder is let down with its fuse until the former swims in the blasting oil; then the upper part of the bore is filled with loose sand, and nothing remains but to ignite the fuse. The fuse in its turn fires the gunpowder contained in the wooden cylinder, the hot gases of the gunpowder make their escape, and rush in streams into the blasting oil, of which they heat a minute part; a local detonation takes place, which as the oil cannot escape, heats it by pressure to about 360° Fahrenheit, when it explodes through the whole mass. These igniters are the instruments of which I chiefly make use for causing the nitro-glycerine to explode."

* * * * * * *

(Here was inserted a diagram representing the mode of exploding nitro-glycerine in conjunction with gunpowder, not material to be shown in this case.)

"In consideration, therefore: (1) That nitro-glycerine and analogous substances, to which fire can be applied without causing their explosion, are known for many years without having been applied to any practical use in consequence of practical difficulties in promoting their explosion; (2) that they can be fired without exploding, therein differing from all other explosive substances hitherto used; (3) that even the blow of a hammer causes only a local explosion; (4) that I have introduced these substances from the domain of science into that of practical life; and, (5) that explosive substances, liquid at the ordinary temperature, have not as yet been applied to any technical use,—I claim as my invention: (1) The use of gunpowder or similar substances when mixed with nitro-glycerine or analogous substances. (2) The reduction of the quickness of explosion of gunpowder by mixing it with oily, explosive or non-explosive substances. (3) The effecting the detonation of nitro-glycerine or analogous substances (which can be ignited without exploding) by the heat developed by pressure, promoting an impulse of explosion which decomposes the rest. (4) The exclusive use of nitro-glycerine and the class of substances described above, or mixtures of such as far as their application may be classed under any of the methods indicated in this memorandum."

Afterwards, but on the same day, said Howson filed in the patent office amendments to said specifications and drawings, which amendments were made in part by striking out a portion of the said specifications filed by Nobel. On October 24, 1865, upon said

application, Nobel obtained letters patent [No. 50,617] for his invention, with the said amended specifications annexed thereto. The original specifications, as set forth in said Exhibit A, were not annexed to the patent. The amended specifications annexed to, and made a part of the patent so issued, are as follows, to wit:

"The schedule referred to in these letters-patent and making part of the same.

"To all whom it may concern: Be it known that I, Alfred Nobel, of the city of Hamburg, have invented the use of nitro-glycerine, or analogous substances, as a substitute for gunpowder, and I do hereby declare the following to be a full, clear and exact description of the same, reference being had to the accompanying drawing and to the letters of reference marked thereon. My invention consists in the use, as a substitute for gunpowder, of nitro-glycerine, or its equivalent, substantially in the manner described hereafter, so that the said liquid, which, when exposed, cannot be wholly decomposed and exploded, shall, by confinement, be subjected to heat and pressure, by which its total and immediate decomposition and explosion is effected. In order to enable others to make and use my invention, I will now proceed to describe the method of carrying it into effect.

"On reference to the accompanying drawing, which forms a part of this specification, figure 1 is a view, partly in section, of one apparatus by means of which I render nitro-glycerine, or its equivalent, available as a substitute for gunpowder; and figure 2, a plan view. (A cut was given for illustration.)

"There is a class of explosive substances composing nitro-glycerine—the nitrates of ethyl and methyl, and nitro-mannite—which have long been known, but have never been practically applied as explosive agents. When a flame is applied to gunpowder or gun-cotton, the whole mass is instantaneously decomposed; this sudden decomposition taking place both when the substance is unconfined and when it is ignited under pressure.

"On the application of heat or flame to nitro-glycerine, or other of the liquids above mentioned, when the latter is unconfined, only that portion of the liquid is decomposed which is directly acted on by the heat or flame, so that it is practically impossible to instantaneously explode the entire mass; hence, under ordinary circumstances, such substances cannot be looked upon as explosive agents. I have found, however, that when glycerine, mannite, or other of the materials mentioned is confined, and a portion of the same is heated to decomposition, the gases evolved are at such an intense heat, and subject the material to such an excessive pressure, that the whole mass is decomposed almost instantaneously. The chief point of my invention consists in overcoming the difficulty of igniting the entire mass of the materials mentioned, so that the same can be practically used as explosive agents. * * *

"If the material (nitro-glycerine properly prepared) is to be used for blasting, it may be poured directly into the opening drilled into the rock, the opening above the liquid being closed in any suitable manner; for other purposes, however, the material can be best used when confined in cases.

"The material when thus confined may be exploded: Firstly. By exploding a quantity of gunpowder, or other substances in contact with the liquid (the powder being confined in a waterproof tube or case), the heated gases evolved from the powder being distributed throughout the mass of the liquid, raise the temperature of the latter sufficiently to decompose the same. When powder is used for this purpose, the case containing it may be immersed in the liquid, the powder being ignited by means of a fuse, or by an electric spark. If desirable, however, the liquid may be placed in a tube and inserted in a mass of powder, which is then ignited in any suitable manner. Secondly. By an electric spark, or by passing a powerful current of electricity through a fine wire immersed in the liquid. An apparatus for thus effecting the explosion of the fluid is shown in the accompanying drawing, A being the case containing the fluid; BB, two wires which pass through glass tubes aa, or through other insulating substances into the interior of the case; and c, a fine platina wire which connects the ends of the wires BB together within the case. The platina wire is heated by an electric current, the material in contact with the wire being thus decomposed, and the remaining portion subjected to the heat and pressure necessary to instantaneously decompose the whole mass, as already described. Thirdly. By inserting in the liquid a thin case containing lime and water, or any substances which in combining evolve heat. Fourthly. By a fuse. This will do in a closed space, and under sufficient pressure, but if the gases of the decomposed liquid are enabled to escape before they accumulate to such a pressure as to effect the requisite impulses of explosion, the liquid is decomposed but slowly, and the fire expires before the whole mass is consumed.

"I claim as my invention, and desire to secure by letters-patent the use of nitro-glycerine, or its equivalent, substantially in the manner and for the purpose described."

Nobel having assigned his said patent to the United States Blasting-Oil Company, his said assignee in 1869, surrendered the original patent, and procured re-issues in several divisions, one of which is re-issue No. 3389, division D. The specifications annexed to this re-issue, so far as they tend to illustrate the points decided, are as follows, to wit:

"Be it known that Alfred Nobel, of the city of Hamburg, Germany, has discovered or invented, a new and useful improvement

in the sciences and arts pertaining to the use and manufacture of nitro-glycerine. This specification having special references to improvement in the use of nitro-glycerine."

The said Nobel does not claim to have discovered or invented nitro-glycerine, as that was due to Sobrero. After the simple discovery and chemical analysis that glycerine was capable of giving, when mixed with nitric and sulphuric acids, a substance analogous to gun-cotton, Sobrero abandoned further research with the declared opinion that its combustion or explosion could not be managed. In this condition the discovery or invention remained utterly useless to men of science and to artisans, until the discoveries and inventions of Nobel brought it into practical service in the useful arts. He discovered: First. That in order to explode the whole, or even a large proportion of a mass of nitro-glycerine, it was necessary to subject it to confinement or restraint, and that when so confined it could be exploded in any desired quantity, by the application of heat and pressure, or of either of those agencies. Second. That it could be used for practical blasting, and disrupting material substances generally. And the said Nobel invented * * *. Second. The appliances or contrivances necessary to successfully explode nitro-glycerine, in any desired quantity, under the management of miners or men of practical intelligence.

We now proceed to make a clear and concise description of the said discoveries and inventions of the said Nobel, in order to enable others skilled in the sciences and arts to which they belong, to make use of and understand the same.

First. The nitro-glycerine, when under conditions of confinement, can be exploded in any desired quantity. There is a class of explosive substances, comprising nitro-glycerine, the nitrates of ethyl and methyl, and nitro-mannite, which have long been known, but have never been practically applied as explosive agents. When 578° Fahrenheit of heat is applied to granulated gunpowder, the whole mass is exploded. Gun-cotton will explode in proportion to the degree of confinement, igniting at 266° Fahrenheit. Fulminates, ordinarily used in percussion-caps, will explode when subjected to 340° Fahrenheit. Nitro-glycerine will explode at 360° Fahrenheit. The decomposition of the above and other analogous substances, however, take place at a much lower temperature, when subjected to pressure.

Gunpowder will explode to a certain extent, when not confined, but on the application of heat or flame to nitro-glycerine, or other of the liquids above mentioned, when unconfined, only that portion of the liquid is decomposed which is acted on directly by the heat or flame, so that it is practically impossible instantaneously to explode the entire mass. Nobel discovered that when nitro-glycerine, mannite, or other of the materials mentioned, is confined, and a portion of the same is heated to decomposition, the gases evolved are at such an intense heat, and subject the material to such an excessive pressure, that the whole mass is decomposed almost instantaneously. The degree of confinement must be sufficient to allow a pressure upon the nitro-glycerine to an extent that 360° Fahrenheit will be realized, or to hold it in the presence of a percussion-cap, or other highly explosive agent, so that decomposition will take place before the liquid can escape the force or heat of the evolved gases of the said cap, etc. In this manner and by other methods Nobel discovered or invented that nitro-glycerine could be exploded in any desired quantity.

Second. That nitro-glycerine could be used for practical blasting and disruption of material substances generally. Having discovered that nitro-glycerine could be exploded in any desired quantity, at the will of the manipulator, Nobel then proceeded to adapt it to the useful arts, such as blasting rock, earth, and material substances generally. To effect this object, he invented the mode or method hereinafter described, in substance as follows: Placing the nitro-glycerine in a drill-hole or canister, and then exploding in the midst of the said nitro-glycerine a charge of gunpowder, gun-cotton, or injecting an electric flame into the mass of nitro-glycerine, or the heating to red heat of a metallic wire placed within the nitro-glycerine; the necessary heat will be effective in the decomposition of an atom or more of the nitro-glycerine, when confined, which will cause the explosion of the whole mass. * * * Second. The appliances or contrivances necessary to successfully and practically explode or decompose nitro-glycerine in any desired quantity, under the management of miners, or men of practical intelligence. The processes or contrivances invented by Nobel for exploding nitro-glycerine, etc., are of several kinds, all and each calculated to produce the required heat or percussion: First, by an electric spark, or current of electricity, illustrated and explained as follows: * * * (Here follow references to drawings.) Secondly, by exploding a quantity of gunpowder or other substance in contact with the liquid (the powder being confined in a waterproof tube or case), the heated gases evolved from the powder being distributed throughout the mass of the liquid, raise the temperature of the latter sufficiently to decompose the same. When powder is used for this purpose, the case containing it may be immersed in the liquid, the powder being ignited by means of a fuse, or by an electric spark. If desirable, however, the liquid may be placed in a tube, and inserted in a mass of powder, which is then ignited in any suitable manner. * * * (Illustrations follow.) Thirdly, the nitro-glycerine placed in a drill-hole or canister * * * may be exploded by a train fuse of fulminate powder, or composition; for example, the ordi-

nary fulminate powder used in percussion-caps may be put in a tube, or casing of fibre, gutta percha, and made to fire, explode, or spit into the nitro-glycerine. This will do in a closed space and under sufficient pressure, but if the gases of the decomposed liquid are enabled to escape before they accumulate to such a pressure as to effect the requisite impulses of explosion, the liquid is decomposed but slowly, and the fire expires before the whole mass is consumed. Fourthly, by inserting in the liquid a thin case containing lime and water, or any substance, which, when combining, evolves heat. Also, by the liberation of substances or matter, either with the nitro-glycerine, in the presence of the nitro-glycerine, or in the midst of nitro-glycerine, by which process or processes, mixing, engaging, or forming gases may be evolved of sufficient heat to produce decomposition, or explosion of the nitro-glycerine.

Having thus fully described the discoveries and inventions of the said Alfred Nobel, with sufficient clearness and distinctness to enable others skilled in the sciences and arts to which they belong, to make and use the same, what we claim as the discoveries or inventions of the said Nobel, and desire to secure by letters-patent, in the name of the United States Blasting-Oil Company, aforesaid, as the assignee of the said Nobel, is as follows: "The application and use of nitro-glycerine, simple or compounded, as an explosive for blasting, or for disrupting purposes, in the manner, and substantially as hereinbefore described."

In 1872, the company surrendered re-issue No. 3380, division D, and procured [on March 19th] further re-issues on that in two divisions, designated re issue No. 4818, division D, and re-issue No. 4819, division E. The specifications annexed to said re-issue No. 4818, so far as they are important in this case, are as follows, to wit (after stating the difficulty in exploding a body of nitro-glycerine, he proceeds):

"A principal object of Nobel's invention consists in the removal of this obstacle to the use of nitro-glycerine and the analogous substances before named as explosives. For this end two different methods have been invented by Nobel for promoting the explosion of nitro-glycerine. One method, which forms the subject of this patent, relates to a compound with nitro-glycerine of other more easily explosive substances; and the other method, which is described in a separate specification, relates to the means of effecting the explosion. Nobel discovered that the difficulty experienced in effecting the explosion of nitro-glycerine, and the analogous substances before mentioned, could be overcome by mixing or combining them with gunpowder, gun-cotton, or other similar substances. This mixing may be effected in any convenient manner, and the proportions in which they are to be combined may be varied to suit the pleasure or convenience of the user or manufacturer. The nitro-glycerine may be mixed with gunpowder or gun-cotton, either of which will absorb a considerable quantity of nitro-glycerine—say thirty per cent., more or less—in such proportions as to make the compound either wet or comparatively dry. If mixed with gunpowder, it may be either absorbed with it, by pouring the nitro-glycerine on the mass of gunpowder, or the two may be mingled together by trituration, the powder in the nitro-glycerine.

"The effect of these combinations will produce an explosive especially suitable for certain blasting purposes—for example, in crevice-rock—and greatly superior either to gun powder or gun-cotton in explosive force, and quite readily exploded, so that it may be fired and exploded by means of a match or electric spark, in like manner as gunpowder or gun-cotton alone. By means of this combination with gunpowder, gun-cotton, or other similar readily explosive substances, of nitro-glycerine, and the analogous substances before named, which are liquid at the ordinary temperature, these substances which had not at the date of Nobel's invention been applied to any technical use as explosives, owing to their difficulty of explosion, have been introduced from the domain of science into that of practical use in the arts, and have rendered of commercial value what was previously known as a mere chemical curiosity.

"We therefore claim as the invention of said Alfred Nobel, and desire to secure by letters-patent, in the name of the United States Blasting-Oil Company, as assignees of said Nobel: (1) The utilization, as explosives, of nitro-glycerine, and the analogous substances hereinbefore mentioned, by combining therewith gunpowder, gun-cotton, or other similar substances developing a rapid heat on combustion, substantially as hereinbefore described. (2) The combination of gunpowder with nitro-glycerine, substantially as and for the purposes hereinbefore described. (3) The combination of gun-cotton with nitro-glycerine, substantially as and for the purposes hereinbefore described."

The important parts of the specifications of No. 4819 are as follows:

"The principal object of Nobel's invention consists in the removal of this obstacle to the use of nitro-glycerine as an explosive. For this end two different methods have been invented by Nobel for promoting the explosion of nitro-glycerine. One method which forms the subject of this patent, consists in a compound with nitro-glycerine of a readily-ignitable substance; and the other method, which is described in a separate specification, relates to the means of effecting the explosion.

"Nobel discovered that by mixing nitro-glycerine with rocket powder, which is a mere loose, mechanical mixture of nitre, charcoal and sulphur, the difficulty in effecting the explosion of nitro-glycerine was effectually overcome. Rocket powder is almost non-explosive, but readily burns and defla-

grates on contact with a spark of fire, while nitro-glycerine, on the other hand, as before stated, is hard to explode, but when the explosion is obtained is extremely violent in its effects. By the mixing of these substances a compound is produced which is a very powerful explosive, and is easily exploded by means of the simple contact with fire. The mixing may be effected in any convenient manner, and the proportions in which they are combined may be varied to suit the pleasure or convenience of the user or manufacturer. What, therefore, we claim as the invention of Alfred Nobel and desire to secure by letters-patent is: The mixture of nitro-glycerine and rocket powder, substantially as and for the purpose herein before described."

The complainant in the bill insisted that under section 53 of the act of 1870 [16 Stat. 205], cited in the opinion, the commissioner of patents in granting re-issues was entitled to look at the original specifications filed by Nobel, set out in Exhibit A, for which the annexed specifications filed by Howson were substituted in the original patent, for the purpose of ascertaining what the entire invention was, for which Nobel himself desired a patent; and that these specifications embraced the matter covered by the several divisional re-issues. It was also claimed on behalf of complainant that these specifications having been filed in the patent office with the application of Nobel, although not annexed to the patent, are still a part of the record of the patent in the patent office, and as such part of the record the commissioner was entitled to consider them for the purpose of ascertaining what the entire invention was, for the purposes of the re-issues, independent of the provision of the statute authorizing him to receive extraneous proofs in cases where there is no model or drawing. These propositions were denied on the part of the defendant.

[Re-issues were again granted March 17, 1874, numbered 5,798 and 5,800.]

Hall McAllister, M. A. Wheaton, and John B. Felton, for complainant.

C. R. Greathouse and W. W. Cope, for defendants.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

FIELD, Circuit Justice. This is a suit for an alleged infringement of three letters-patent, with a prayer that the defendants be decreed to account for and pay to the complainant the gains and profits derived by them from the manufacture, use or sale of the invention patented, and be restrained from further infringement. All of these patents are re-issued letters. They purport to be founded, two of them upon an original patent issued to Alfred Nobel, in October, 1865, and the other one upon an original patent issued to an assignee of Nobel in April, 1868. Upon the validity of the latter re-issue no question is made. The validity of the other re-issues is assailed upon the alleged ground that they describe and claim a different invention from that described and claimed in the original patent, and their validity is the question presented by the demurrer.

The several patents, original and re-issued, are referred to in the bill and made part of it, so that the question raised as to the validity of the re-issues is distinctly presented. It appears from inspection of the schedule annexed to the original patent to Nobel of October, 1865, giving a description of his alleged invention, and which constitutes a part of the patent, that he declares that he has "invented the use of nitro-glycerine or analogous substances as a substitute for gunpowder," and then proceeds to indicate the manner in which the nitro-glycerine can be used so that the "liquid, which when exposed cannot be wholly decomposed and exploded, shall by confinement be subjected to heat and pressure by which its total and immediate decomposition and explosion" may be effected. There is no mention in the schedule of any mixture of the nitro-glycerine with other substances so as to form a new compound. The only reference to any mixture is in a paragraph which, in describing the manner of using the nitro-glycerine, states that it should be first prepared by adding a mixture of sulphuric and nitric acids. The schedule then gives in detail four modes in which the explosion of the nitro-glycerine can be effected. The first is by exploding in contact with it a quantity of gunpowder confined in a waterproof tube or case; the second is by an electric spark, or by passing a powerful current of electricity through a fine wire immersed in the liquid; the third is by inserting in the liquid a thin case containing lime and water, or any substances which in combining evolve heat; and the fourth is by a fuse. The schedule closes by a declaration that what the patentee claimed as his invention and desired to secure by letters-patent was "the use of nitro-glycerine or its equivalent substantially in the manner and for the purpose described."

It is plain from this statement that the patent was for a process and not for a compound. It was for modes of using the liquid and not for any new compound of known or unknown ingredients.

In the following year, in June, 1866, Nobel, whose letters-patent extended for seventeen years, assigned his interest in them, and the invention secured, for the residue of that period, to the United States Blasting-Oil Company, a corporation created under the laws of New York. In April, 1869, this company surrendered the original letters, and obtained in their place four new divisional letters-patent for the residue of the period then unexpired, designated respectively as re-issue No. 3377, division A.; re-issue No. 3378, division

B; re-issue No. 3379, division C; re-issue No. 3380, division D.

In March, 1872, the company surrendered this last divisional re-issue, designated No. 3380, division D, and obtained for it two new divisional letters-patent, numbered and designated as re-issue No. 4818, division D, and re-issue 4819, division E. It is with reference to the validity of these two last re-issues that the contention in this case arises. No. 4818 is for two compounds, one consisting of nitro-glycerine and gunpowder, and the other of nitro-glycerine and gun-cotton. No. 4819 is for a compound consisting of nitro-glycerine and rocket powder. Neither of these re-issued patents is for any process, or mode of exploding nitro-glycerine, or for any particular use of the liquid. Both of them are for new compounds, made by uniting old and well-known substances. There is no connection or relation between the inventions or discoveries covered by them and the invention or discovery described and claimed in the original patent. If, therefore, we are restricted in our examination to the original patent and the schedule annexed, the re-issues cannot be sustained. Can we look beyond that patent and schedule, which is a part of the patent, to ascertain what the original patentee had, in fact, at the time invented or discovered, though not described in his specifications or covered by his claim?

The statute of 1870, under which these re-issues were granted, provides that "whenever any patent is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specifications to be issued to the patentee;" and the commissioner is authorized in his discretion to cause several patents to be issued for distinct and separate parts of the thing patented upon demand of the applicant. But the act declares that "no new matter shall be introduced into the specifications, nor in case of a machine patent shall the model or drawing be amended, except each by the other, but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid."

It is by this law that the last re-issues must be determined. As here provided, no re-issue is permitted, unless the original patent is inoperative or invalid from a defective or insufficient specification, or the claim of the patentee exceeds his right; and then only in case the error committed has arisen in the manner indicated. In determining the propriety of the re-issue no new matter can be introduced into the specification, except in case of a machine patent, to which class the one under consideration does not belong. It is only with respect to patents of that character where no model or drawing exists, that, in our judgment, any notice can be taken, by the commissioner, of matter outside of the original specification and claim. Tarr v. Webb [Case No. 13,757]. In machine patents, models and drawings can be examined in connection with the specification, and the latter changed, restricted, or enlarged so as fully to describe the actual invention made. If the patent do not relate to a machine, the specification, if defective, may be made more definite and certain so as to embrace the claim made, or the claim may be so modified as to correspond with the specification. But this is the extent, in our judgment, to which modifications can be made in such cases.

Judged by the law, there can be, in our opinion, no reasonable doubt as to the invalidity of the re-issues. The original patent to Nobel was neither inoperative nor invalid by reason of any defective or insufficient specification. That specification was unambiguous, and covered all that was claimed. And if this were otherwise, no new matter not relating to the process claimed, but relating to a compound made by uniting glycerine with other substances could be added to the specification. This is the explicit provision of the statute.

If Nobel had made other inventions or discoveries—compounds of nitro-glycerine with other substances or different modes of using the liquid (as it would seem, from the memorandum annexed to the bill that he had), he might have applied for and obtained separate patents for them. Sarven v. Hall [Case No. 12,369]. But such compounds or different modes of use cannot be included in a re-issued patent when the original never embraced them, without sanctioning a doctrine which would open the door to all sorts of extortion and fraud, and impose an oppressive burden upon the industries of the country.

By the terms of the statute, a re-issue must be for the same invention which is embraced by the original patent, or if the re-issue be in divisional parts, each division must be for some distinct and separate part of that invention. The two letters-patent under consideration in the present case are not only for inventions not embraced by the original patent, but are not embraced by the first re-issue, upon the surrender of which they were re-issued, designated as re-issue No. 3380, division D. That re-issue was only for a process, a mode of applying and using nitro-glycerine, simple or compounded, and not for any new explosive compounds, as inaccurately stated in the bill. This will be seen by examination of the letters referred to and

made part of the bill. The two letters issued upon the surrender of that re-issue are, therefore, invalid within the ruling of Chief Justice Taney, in Knight v. Baltimore & O. R. Co. [Case No. 7,882], and might have been disposed of without showing, as we have done, that they were invalid because they were for inventions not covered by the original patent.

We do not question the doctrine so earnestly pressed by counsel upon the argument that all presumptions in support of the action of the commissioner in granting the re-issues must be indulged, and that his ruling upon all matters not apparent upon the face of the patents themselves cannot be collaterally assailed. We rest our judgment upon a comparison of the original and the re-issued patents, and hold as a matter of construction that the latter are not on their face issued for the same invention, or any distinct and separate part thereof; and that for this reason the commissioner exceeded his authority in issuing them. Seymour v. Osborne, 11 Wall. [78 U. S.] 544.

The defendants must have judgment on the demurrer, with leave to the complainant to amend the bill by striking out all such parts as relate to the re-issued patents No. 4818 and No. 4819.

SAWYER, Circuit Judge, concurring specially. Upon a careful consideration of the case of Seymour v. Osborne [supra], I am satisfied that the supreme court intended to lay down the rule broadly, that on an application for the re-issue of a patent the commissioner, in ascertaining the invention intended to be patented, and for which a re-issue may be granted, has no authority to look beyond the patent as originally granted with the specifications and drawings thereto annexed, and the models deposited in the patent office, "except in certain special cases as provided in a recent enactment," referred to and cited by the court, viz.: 16 Stat. 206 (11 Wall. [78 U. S.] 544, 545). The enactment referred to is found in the last clause of section 53 of the act of 1870, and is in the following words: "But when there is neither model nor drawings, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident or mistake as aforesaid." This is the only exception the court recognizes to the rule as broadly and specifically stated, and repeated in different forms in the course of the opinion; and the exception is referred to "as provided by a recent enactment"—that is to say, the exception depends upon that provision of the statute. The provision was not in the act of 1836. As the exception is held to depend upon this enactment, it, of course, did not exist under the act of 1836; and under that act there was, in the opinion of the supreme court, no exception to the rule as laid down by that tribunal. The original patent to Nobel was issued in 1865, under the provisions of the act of 1836; and he could only obtain such rights as were secured to him by that act. On an application for a re-issue at any time during the five years intervening between the issue of the original patent and the passage of the act of 1870, under the rule established by the supreme court, there being no model, he would have been limited in the re-issue to the invention as described, suggested, or substantially indicated, or shown in the original patent and the specifications and drawings appended thereto. Beyond this he could not go, and nowhere in the original patent and the specifications and drawings annexed to it is the subject-matter of the re-issued patents numbers 4818 and 4819 in any way suggested. These re-issues, therefore, could not have legally been made under the act of 1836. The rights of the parties must be determined under the provisions of that act, and the right to patents for these inventions, if it ever existed, lapsed by a failure to perfect it while that act was still in force. The proceeding for obtaining a re-issue since the passage of the act of 1870, so far as form is concerned, must be in accordance with the latter act. But to allow a party under the provision cited to go outside of the evidence recognized under the act of 1836 to establish a right to a re-issue of a patent for an invention made and patented under that act, would be going beyond the mere forms and modes of proceedings, and would be to grant him a new right by restoring a right to a patent, if one ever existed, which had once been lost either by carelessness or design under the laws then in force, and after the public had acquired a right in the subject-matter by several years unobstructed legal use—the right to an original patent having been lost by lapse of time, and to a re-issue by failure to indicate the whole invention in the specifications finally adopted and annexed to the patent first issued. The last clause of section 53 of the act of 1870, so far as granting a new right is concerned, in my judgment has no retroactive operation; and it can only apply to re-issues of patents originally issued since the passage of the act.

This is as far as it is necessary to go in this case, and I prefer not to consider or determine the extent of the exceptions made by that provision until a case arises under a patent originally issued under the act of 1870. On these grounds I concur in the judgment ordered.

[NOTE. Upon complainant's appeal the supreme court reversed the decree of the circuit court dismissing the bill upon demurrer, and remanded the cause, with directions to enter a decree dismissing the bill as to the relief sought therein in respect to reissued patents numbered respectively 4,818 and 4,819, and as to the residue of the bill overruling the demurrer and directing the defendants to an-

swer in accordance with the rules and practice of the court. This decision was based upon a holding that the reissues in question are not for the same inventions for which the original patent was granted, and hence are void, but as nothing is shown in the statements of the bill which affects the validity of the third patent sued upon, the bill should not have been dismissed as a whole. The opinion of the court was delivered by Mr. Justice Bradley. 98 U. S. 126.

[For other cases involving this patent, see Giant-Powder Co. v. California Powder Works, 98 U. S. 126; Atlantic Giant-Powder Co. v. Mowbray, Case No. 624; Giant-Powder Co. v. California Vigorit Powder Co., 4 Fed. 720, 5 Fed. 197; Giant-Powder Co. v. Safety Nitro-Powder Co., 19 Fed. 509; Atlantic Giant-Powder Co. v. Hulings, 21 Fed. 519.]

GIBB (GRIFFIN v.). See Case No. 5,819.

Case No. 5,380.

GIBB v. WASHINGTON.

[1 McAll. 430.] [1]

Circuit Court, N. D. California. July Term, 1858.

CUSTOMS DUTIES—EXAMINATION BY APPRAISERS—SELECTION OF SAMPLES — OFFICIAL REPORTS — COSTS OF TRANSPORTATION TO PLACE OF EXPORT.

1. An examination of goods by the appraisers is indispensable.

2. Personal examination of each article not necessary. A fair selection of samples sufficient.

3. The official report of the appraisers, is prima facie evidence as to examination. Appraiser under the acts of congress is a quasi judge. His acts, as such, are not purely ministerial. If such an office has been colorably created, and one commissioned under it who has discharged de facto its duties, his acts so far as the public or third parties are concerned, are as valid as those of one acting de jure would be.

4. The additional charges authorized by law, to be added to the appraised value of dutiable merchandise, may be added by the appraisers, with the sanction of the collector.

5. Costs of transportation of goods from the interior to the place of exportation, are not included in those charges under the act of 3d March, 1851 [9 Stat. 629].

[Cited in Hutton v. Schell, Case No. 6,961; Tomes v. Redfield, Id. 14,085; Bartels v. Redfield, 16 Fed. 340.]

The present action is brought for the recovery of moneys alleged to have been illegally received by the defendant as collector of the port of San Francisco, and paid by the plaintiff, under protest. A jury was waived by the parties, and the case submitted to the court on the law and facts for its judgment.

Cyril V. Grey, for plaintiff.

P. Della Torre, for defendant.

McALLISTER, Circuit Judge. To sanction the defense, establish the illegality of the proceedings, and that the appraisement of the goods, on which the duties were levied, is void, plaintiff's counsel have presented the following grounds: 1st. That there should have been a personal examination of the goods by the appraisers. 2d. That the board of appeals who appraised the goods was not legally constituted. 3d. That additional charges unauthorized by law, have been made by the appraisers.

To sustain the first ground, reference has been made to the case of Greely v. Thompson, 10 How. [51 U. S.] 225. There is no doubt the goods should have been examined. The oath of the appraisers imposes on them the duty of examination. But no form is prescribed, nor is it requisite that every article should be examined; a fair selection of samples or specimens is sufficient. 3 Stat. 735. In the case cited by counsel for the defendant (10 How. [51 U. S.] 225), the record shows that one of the appraisers never examined nor inspected the merchandise appraised, and the other never saw any portion of it. In the case at bar, in their report the appraisers state expressly, that they had examined the goods. In the absence of any counter-testimony, the official action of the appraisers must be taken as evidence of the fact of examination.

The second ground is, that the appraisement of the board of appeals was void, because one of their number was not authorized to act. The objection is in these words: "The appraiser general, who sat as one of the appraisers at large, under the act of 1851, is appointed under a clause in the general appropriation bill of March, 1853 [10 Stat. 201]. His name, and style, and compensation are different. The appropriation of $6,000 made, if it could be considered as creating by implication the office, is only for a year, and has never been renewed."

The facts as developed by the evidence are, that by an act of congress of 3d March, 1851 [supra], it was enacted that four appraisers should be appointed, who should be employed in visiting such ports under the direction of the secretary of the treasury as may be deemed useful by him, for the security of the revenue, and at such ports to afford aid and assistance in the appraisement of merchandise; and wherever practicable, in cases of an appeal from the decisions of the United States appraisers, under the provisions of the seventeenth section of the tariff act of 30th August, 1842 [5 Stat. 548], the collector shall select one discreet merchant, who shall be appointed with one of the appraisers appointed by this act, and their decision shall be final as to the value of the goods appraised. The appraisers (four in number) were appointed under this act, and were generally known and designated "general appraisers," or "appraisers at large." On the 3d March, 1853 [supra], congress passed the following enactment, in the appropriation act of that year: "For the compensation of an additional ap-

[1] [Reported by Cutler McAllister, Esq.]

praiser-general, to be appointed by the president, with the advice and consent of the senate, and to be employed on the Pacific coast, six thousand dollars." Subsequently, a commission was issued to Richard Roman, appointing him appraiser-general during the pleasure of the president for the time being, under the act of 3d March, 1853, to be employed on the Pacific coast. By virtue of this commission, Major Roman entered upon the duties prescribed by the act of 3d March, 1851, and has continued those duties down to the present time.

An appraiser is said to be "a quasi judge or legislative referee." Hoyt v. U. S., 10 How. [51 U. S.] 109. If such an office has been even colorably created, and the present incumbent has discharged de facto its duties, then any irregularity which does not not render the creation of the office void, cannot be availed of in this collateral proceeding. His acts as appraiser de facto, so far as the public or third parties are concerned in interest, are as valid as if they were the acts of an appraiser de jure. People v. Stevens, 5 Hill, 617; People v. Covert, 1 Hill, 674; McInstry v. Tanner, 9 Johns. 135. One of the judges of this court, in view of the acts of congress, the commission issued to Major Roman under them, and his acting as appraiser de facto, came to the conclusion that it was unnecessary to go into a minute examination of the creation of the office, and the party having acted as appraiser de facto, the validity of his acts could not be assailed in this collateral proceeding. But as his associate deemed it proper that the creation or not of the office should be discussed and decided, and as both judges concur in the same conclusion, after such examination, it is unnecessary to place the decision of the case on the ground above stated. I proceed, then to that examination.

It is contended, that no such office as the one claimed by defendant to exist, has been created in fact; that the incumbent is not authorized to act under the act of 3d March, 1851, under which he has assumed to act; that his style and compensation are different from those appraisers who were appointed under that act; that if any office was created, the incumbent was not authorized to discharge the duties prescribed by that act; and, lastly, the appropriation for his compensation being temporary, his office would, by the terms of the act of 3d March, 1853, expire with the current fiscal year, necessarily with the appropriation.

The question, then, is, was an office, and what office, created by the act of 3d March, 1853? It is a familiar rule in the construction of statutes, that where there are several acts of the legislature in pari materia, they are to be construed together when a construction is to be placed upon one of them the language of which is obscure, with a view to ascertain the intention of the legislature in passing the one under consideration. In this case, therefore, the court must look to other legislation of congress on the same subject, when it undertakes to interpret their language in the act of 3d March, 1853. It is true, the officer whose acts are now assailed, was named and commissioned by the official delegation, "appraiser-general," whereas the four officials appointed under the act of 3d March, 1851, are called in the act "appraisers." But they are generally known as, and called, "general appraisers," or "appraisers at large," and are designated so in the brief of the plaintiff's attorney. They have been, doubtless, so called to distinguish them from the local appraisers appointed under other acts of congress, and because their duties under the act of congress under which they were appointed, were of a general character, and did not limit them to one locality in the appraisement of merchandise. Congress themselves have recognized this distinction; for by the 5th section of the act of June 14, 1858 [11 Stat. 337], entitled "An act making appropriations for the expenses of collecting the revenue," when reducing the salaries of officers, it mentions the "general appraiser" (meaning the one whose duties are of a general nature), and the "appraiser" (meaning the local one confined to a particular place or occasion). That the act of 3d March, 1853, designated the person to be appointed "appraiser-general," and the appropriation for this compensation would, if not renewed, expire with the fiscal year 1853, are admitted facts. The influence they should exert in the construction of the act, will be hereafter considered. When this latter act was passed, there were in existence a certain number of appraisers known as "general appraisers," appointed under act of congress approved 3d March, 1851, with duties defined of a general nature, which characterized them and caused them to be designated as appraisers at large, or as general appraisers, to distinguish them from local appraisers, appointed under other acts of congress, or special appraisers; merchants, whom the collector was authorized by existing laws to appoint pro hac vice. On the 3d March, 1853, congress, desirous to increase the number of these appraisers, and provide for the wants of the revenue laws on the Pacific coast, enacted that an additional appraiser-general should be appointed. It is a rule of construction in the interpretation of statutes, that no word which is significant is to be repudiated, but to such word its full and appropriate meaning is to be given, and the whole of the language must be so construed "ut magis valeat quam pereat." This rule would be violated should this court strike the word "additional" from the statute, and fail to give it a meaning. Such violation would be gross in this case, where its repudiation would attribute to the legislature an apparent absurdity. Whereas, by giving it an appropriate meaning, and reasonable application, the act of congress can be

made intelligible by the application to it of the maxim, "Id certum est quod certum reddi potest."

It is urged, and strongly relied on, as a circumstance which disaffirms the idea that any office was created, that no duties were defined by the act of 3d March, 1853, under which the appointment of Major Roman was made. This court will not lightly impute to congress an absurdity. The fact that they have directed the appointment of an appraiser, and appropriated $6,000 for his compensation, confirms the conclusion to which the court is arrived. That the appointee had some work to do, is indicated by the language of the act, for by its terms "he is to be employed on the Pacific coast." Congress evidently intended to impose some duties upon him. It is reasonable to consider they were acting from some intelligent impulse, for some practicable purpose; and a fair interpretation and reasonable application of the language of the act show what their purpose was. They were aware, there were at that time in existence, under the act of 3d March, 1851, a certain number of appraisers, discharging the duties prescribed in that act, known generally as general appraisers. When, therefore, they deemed it expedient to add to their number, they considered it sufficient to direct the appointment of an "additional appraiser." Additional to whom? Certainly to the four appraisers already in existence, with duties defined. The only difference being, that the sphere of the duties of the additional one should be on the Pacific coast. To what other body of appraisers could he be added? There was no other of the kind known under existing laws. Shall the position of the word "general" after that of "appraiser," annul the appointment in face of the plain intention of the legislature indicated by a reasonable construction of their language; and this, by disregarding the meaning, import, and application of one of the most significant words of the act? That fact simply distinguishes him from the local appraisers, and characterizes the general nature of his duties. The second ground taken by plaintiff's counsel cannot be sustained.

The third proposition is, that the appraisers have added charges unauthorized by law. There is only one item obnoxious to this objection. After fixing the market or wholesale value of the goods, in the manner prescribed by law, the appraisers have added £43. 15s. charged as "transportation to Liverpool and shipping charges;" and the question is, "whether this item constitutes a dutiable charge, which can be added to the market price." No distinction has been made between the "costs of transportation" and "shipping charges." No means, therefore, are afforded to the court to separate the two, and they must be treated, as they have been by the appraisers, as a unit. Commenting on the act of 3d March, 1851, under which the duties in this case were laid, the supreme court say, it "embraces all importations of goods that are subject to an ad valorem duty, and directs that the value, or wholesale price, shall be ascertained by the wholesale price at the period of exportation to the United States, in the principal markets in the country from which they are imported." The time and place are distinctly stated, to which the appraisers are to look. Stairs v. Peaslee, 18 How. [59 U. S.] 525. Prior to the passing of this law, former acts of congress had made the country of production or manufacture the place to which the appraisers were to look; but the act of 1851 will admit of but one construction, and that is, that the appraisement must be made by the value of the goods in the principal markets of the country from which the goods are imported, at the time of the exportation of them to the United States. Id. 526. "What markets within that country," (say the supreme court), "were the principal ones at the time of exportation, for an article of this description, was a question of fact, not of law, and to be decided by the appraisers, not the court. . . . And as the appraisers are by law the tribunal appointed to determine this question, their decision is conclusive upon the importer as well as the government." Id. 527.

In the case at bar, the appraisers have fixed the value of the goods in the manner prescribed by the act of 1851, and added to that value the item objected to. The latter clause of that act directs "that to such value or prices shall be added all costs and charges except insurance, and including commissions, &c.," and concludes by declaring "that the aggregate amount shall be deemed the true value at the port where the goods may be entered, upon which duties shall be levied." This language is similar to that used in pre-existing tariff-laws; but it will be found on examination of the tariff-act of 3d March, 1851, it differs essentially in other respects from these laws, and calls for a different construction. The interpretation placed upon the laws regulating the collection of duties, has induced the heads of the treasury department to authorize an addition to the value of the goods appraised,—their costs of transportation from the interior of the country to the place of exportation from it. In 1846, a distinguished gentleman then at the head of the treasury department issued circulars, giving his construction of the then existing tariff laws. The collectors were instructed to include in the "costs and charges," and add to the appraised value "the transhipment, with all the expenses included, from the place of growth, production, or manufacture, whether by land or water carriage, to the vessel in which shipment is made to the United States." The able view of the author of that circular, in favor of his construction of the then existing tariff-laws, has induced his official successors to adopt that construction.

It is more than doubtful, if the learned secretary could have had before him in 1846 the subsequent act of 3d March, 1851, that he would have placed upon it a similar construction. It is now the duty of this court to construe it. However great its respect for the views of the heads of the treasury department, it cannot substitute their opinions for what it believes the law to be. "Though as between the custom-house officers and the department, the latter must by law control the course of proceeding, yet, as between them and the importer, it is well settled, that the legality of all their doings may be revised in the judicial tribunals." Greely v. Thompson, 10 How. [51 U. S.] 234. Whether the construction placed by the treasury department on laws existing in 1846, and followed by that department since, is correct, is not a question before us. The single inquiry is, whether a fair interpretation of the act of 3d March, 1851, authorizes the appraisers to add to the market price assessed under that act, the costs of transportation of an article from the place of growth, manufacture, or purchase, in the interior of a country, to the place on the sea-coast whence it is exported? This cost may have been incurred long before the period of exportation. Can such be added to and included in the charges incidental to the shipment of the goods occurring at the "period of exportation," or as it is expressed by the supreme court in the case above cited, at the time of exportation? When, in 1851, congress passed the act under consideration, they intended, and did actually change the manner in which merchandise was to be appraised. Formerly, the appraisers were to look generally to the country of manufacture or growth. By the act of 3d March, 1851, a totally different mode was prescribed, and time and place were distinctly stated. After referring to the provisions of this act, the supreme court say, in Stairs v. Peaslee, 18 How. [59 U. S.] 526, "And so far as these provisions are inconsistent with previous laws, they show that congress had changed its policy in this respect, and intended to repeal the laws by which it had been established." The policy indicated by this last act, is to make the value of the goods what it was in the principal markets of the country at the time of the exportation of them. Congress considered that ordinarily, all costs and expenses which had been incurred by placing the goods at a place of exportation, would, by a natural law of trade, enter into the wholesale price of the same kind of goods, in the principal markets of the country; and to get that value, they designated the last moment, the time of exportation. This court does not intend to decide, that charges incurred at the period of exportation, or about that time, incidental to the shipment of the goods, such as port-charges, drayage, &c., may not be added. This question is not directly before the court; but it is united in the conclusion, that charges for the transportation of goods from the interior of the country, by railroad or water-carriage, incurred prior to the time of exportation, cannot be added to the value of goods to be ascertained in the mode prescribed by the act of 3d March, 1851.

Since coming to this conclusion, there has been brought to the notice of this court, a case reported in one of the gazettes of Boston, involving the point under consideration. It has not been authoritatively enunciated; but as far as it is entitled to credence, it is parallel with this case. As reported, it is entitled Forman v. Peaslee [Case No. 4,941]. It appeared, that plaintiff entered into a contract with T. & Co., for the transportation of iron from Wales to the United States; in pursuance of which, T. & Co. employed coasting vessels to bring it from Wales to Liverpool, whence it was transhipped on board their packets for Boston. The court held, "the period of exportation," at which the market value was to be ascertained under the act of 3d March, 1851, was the time when the goods left Liverpool for the United States; that the cost of transportation from Wales to Liverpool is not a dutiable charge, which can be added to the market price. The only difference between that case and the one at bar is, that in the one, the interior transportation was along the coast by water, in the latter, it was by land-carriage from the interior to Liverpool. It is difficult to perceive, how the mode of transportation can alter the application of the principle as to its cost. The secretary of the treasury distinguished no difference when in his circular in 1846, he directed "that the costs of transportation from the interior to the place of exportation should be added, whether by land or water."

Another objection urged by plaintiff's counsel is, that the costs and charges in this case were made by the appraisers, and not by the collector. The act of congress requires in general terms they should be added; but does not state by whom. Now, if added by the appraisers, under the authority and approval of the collector, it is a sufficient compliance with the law. But it is unnecessary to decide this question, as we place the disallowal of the charges on the ground that the costs of interior transportation which accrued previously to the period of transportation, are not dutiable under the existing act.

The next proposition relied upon by plaintiff is, that the appropriation for compensation of the incumbent of the new office was temporary, and for the fiscal year 1853; and that the tenure of the office expired with the appropriation. If the office was, as this court has decided, created, it has not been vacated even if it be admitted that the appropriation was not renewed; though it must be admitted that most aspirants look to salary as the most important part of the

office. But the tenure of office depends upon the nature, character, and extent of its duties, upon the language of the act which creates it, and the terms of the commission held under it. The act, in this case, directed the appointment to be made by the president, with the advice and consent of the senate; and the law annexed to it by implication a like term with those held by similar officers. The commission prescribed the tenure of the office to be during the pleasure of the president for the time being. The act directed the appointment of an additional appraiser general, and the use of the word "general" clearly indicates the general nature of his duties. When he was appointed as additional appraiser, he became one of the body already created, and stands on an equal footing with them as to tenure of office. There is a class of cases in which a temporary appointment might be inferred, on the ground that a temporary compensation had been made; and that inference would be aided by the nature and character of the duties to be discharged. When, for instance, a special mission was created to accomplish a particular object, which, from its nature, it was reasonably to be supposed was to be accomplished forthwith, or not at all; the fact that a specific sum was appropriated with the character of the service, might indicate that the office was to expire with the appropriation. The principle of such a class of cases is not applicable to the case at bar.

The only ground taken by the plaintiff in this case, which the court can sustain, is the objection made to the item of additional charges. A judgment, therefore, will be entered for the plaintiff for the amount of the rejected item, and submitted to the court for its inspection and approval.

GIBBES, The J. C. See Case No. 7,248.

GIBBONEY (CLARK v.). See Case No. 2,821.

GIBBONEY (DORR v.). See Case No. 4,006.

GIBBONEY (KAIN v.). See Case No. 7,595.

GIBBONEY (PRESTON v.). See Case No. 11,396.

Case No. 5,381.

GIBBONS v. MARTIN et al.

[4 Sawy. 206.] [1]

Circuit Court, D. Oregon. March 12, 1877.

JOINDER OF CAUSES OF ACTION—WHERE DEFENDANTS MERE TRESPASSERS.

1. Under the Oregon Civil Code (section 91) a plaintiff in an action to recover the possession of a particular tract of land is not entitled to join parties as defendants, who occupy in severalty distinct parcels of said tract; and if he does so join them, and the fact does not appear upon the face of the complaint, the defendants may plead it in abatement of the action.

2. The rule in such cases at common law.

3. Semble, if the defendants are mere trespassers or squatters without color of right or definite claims to distinct parcels or established and visible boundaries, they may be joined in one action.

Action [at law by B. M. Gibbons against P. J. Martin and others] to recover possession of real property.

W. W. Page and G. W. Yocum, for plaintiff.

Walter W. Thayer and William H. Effinger, for defendants.

DEADY, District Judge. This action is brought by the plaintiff as a citizen of Illinois, against the defendants as citizens of Oregon, to recover the possession of donation claims numbered 38 and 58, containing 578.60 acres, situate in the county of Columbia, state of Oregon. The complaint alleges that the plaintiff is the owner in fee-simple of the premises, and entitled to the possession of them; and "that the defendants wrongfully and unlawfully withhold the possession of the same from the plaintiff to his damage $200."

The defendants, answering the complaint jointly, plead in abatement of the action that the defendants "derive their respective titles from different sources, and have no joint or common occupancy or possession of any part of the premises;" that the defendant, Miles, occupies a "distinct parcel" of the premises (describing it) in severalty, and the defendants, Martin and Cornelius, the residue thereof jointly.

The plaintiff demurs to the answer as being insufficient "to constitute a defense." No authorities were cited by counsel upon the argument of the demurrer, the defendants relying upon the provisions of the Oregon Civil Code, hereafter specified.

At common law, in the case of an ejectment for premises of which distinct parcels were in the several occupation of different persons, no direct objection could be made to the misjoinder, as by a plea in abatement, but the parties were entitled, upon application to the court, to enter into the consent rule, and plead separately. See In re Girard [Case No. 5,457]. In such case, the parties were entitled to separate trials, and practically there were as many actions as defendants. Potter v. Scoville, 5 Wend. 96; Burkhart v. Row, 4 Yeates, 134. But even when the parties entered into the consent rule, and plead jointly, it appears that evidence might be given on the trial to show that the defendants occupied distinct parcels, and in such case, if the plaintiff was otherwise entitled to recover, there was a verdict and judgment against the defendants severally, for the parcels occupied by them respectively.

Yet, in Jackson v. Hazen, 2 Johns. 441, it was held that the plaintiff could not recover in such a case against the defendants occupying in severalty, because the issue was upon the allegation that the defendants jointly withheld from the plaintiff the possession of the whole premises. But in Jackson v. Woods, 5 Johns. 278, it was held, in the same court, that where five defendants occupied

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

separate parts of the premises in severalty, but entered into the consent rule, and pleaded not guilty, jointly, and the jury found against each defendant as to the parcel occupied by him, that the plaintiff was entitled to judgment against each defendant, according to the verdict. See, also, to the same effect, Bayard v. Colefax [Case No. 1,130]; Camden v. Haskill, 3 Rand. [Va.] 462; White v. Pickering, 12 Serg. & R. 435.

Practically, the only plea allowed in ejectment was the general issue, not guilty, and this the party in possession was not entitled to make until he appeared and entered into the consent rule, agreeing to confess on the trial the lease, entry and ouster as alleged in the declaration. The plea in abatement, except to the jurisdiction of the court, was not allowed (Adams, Ej. 270), and the only mode of objecting to the misjoinder of causes of action, as where different persons occupying distinct parcels of the premises were sued jointly, as joint occupants withholding the possession of the whole of such premises, was, as has been said, to apply to the court for leave to enter into the consent rule, and plead separately as to so much of the premises occupied by each, and then demand a separate trial.

In Greer v. Mezes, 24 How. [65 U. S.] 268, the action was brought against a number of persons jointly for the possession of the tract of land called "Las Pulgas." The defendants pleaded the general issue, but no one of them defended for any particular part of the premises. The jury, under the instructions of the court, found separate verdicts against such of the defendants as appeared to be in the possession of distinct parcels of the premises, and a general verdict against the rest. This instruction was affirmed by the supreme court. In commenting upon it, Mr. Justice Greer said: "In the action of ejectment, a plaintiff will not be allowed to join in one suit several and distinct parcels, tenements or tracts of land, in possession of several defendants, each claiming for himself. But he is not bound to bring a separate action against several trespassers, on his single, separate and distinct tenement, or parcel of land. As to him, they are trespassers, and he cannot know how they claim, whether jointly or severally; or, if severally, how much each one claims; nor is it necessary to make such proof in order to support his action. Each defendant has a right to take defense specially for such portion of the land as he claims, and by doing so, he necessarily disclaims any title to the residue of the land described in the declaration; and if, on the trial, he succeeds in establishing his title to so much of it as he has taken defense for, and in showing that he was not in possession of any of the remainder disclaimed, he will be entitled to a verdict. He may also demand a separate trial, and that his case be not complicated or impeded by the issues made with others, or himself made liable for costs unconnected with his separate litigation."

Practically, this exposition of the rule allows the plaintiff in ejectment to unite causes of action which do not affect all the parties to the action, with a right in any defendant who claims only a portion of the premises to make defense therefor, and demand a separate trial. But it appears that the Code has done away with this anomaly; and permits defendants, who are improperly united in an action, to recover the possession of real property to plead that fact, when it does not appear upon the face of the complaint, in abatement of the action. Section 91 of the Civil Code provides that "the plaintiff may unite several causes of action in the same complaint, when they all arise out of * * * claims to recover real property with or without damages for the withholding thereof; * * * but the cause of action so united * * * must affect all the parties to the action * * *."

From the answer, which is admitted by the demurrer, it appears that the defendants are not tenants in common of the premises, but that Miles occupies a distinct portion of them in severalty, and Martin and Cornelius the remainder in common. There is then no joint occupation or withholding of the premises sued for by the defendant. The alleged wrong upon the right of the defendant is several—being committed by Miles as to one particular tract, and Martin and Cornelius as to the remainder. The fact that these tracts are contiguous, or that they are both owned by the plaintiff as a single close or body of land, does not of itself make the injury or withholding by the defendants a joint one and co-extensive with the whole premises for which they may be joined as defendants. Upon this view of the matter, it appears from the answer that there are two causes of action united in this complaint, neither of which affect all the parties to the action. It is, therefore, contrary to the statute, and a plain case of misjoinder of cause of action.

Section 66 of the Civil Code authorizes a demurrer to a complaint, when it appears upon its face that "several causes of action have been improperly united" therein; and by section 69 thereof, if such misjoinder does not appear upon the face of the complaint, "the objection may be taken by answer." This seems to be conclusive of the question raised by the demurrer.

The only case arising under the modern code pleadings and bearing upon this question, to which my attention has been attracted, is Fosgate v. Herkimer Manuf'g & Hydraulic Co., 12 N. Y. 580. In that case several persons were joined as defendants in an action to recover the possession of a small parcel of land with a dwelling-house thereon. The answer was joint, and denied the withholding of the premises as alleged, and set up ownership in one of the defendants. On the trial, it was proved, subject to

objections, that the defendants occupied distinct parcels of the premises. It was ruled and affirmed on appeal that the evidence was immaterial and irrelevant to the issue, and that the plaintiff was entitled to recover against all the defendants jointly. Referring to the provisions of the New York Code, similar to those above cited from the Oregon Code, the court say: "If the complaint shows a misjoinder of defendants, a demurrer is the appropriate remedy. If the defect does not appear upon the face of the complaint, the defendants must set it up in their answer. And if no such objections be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same. These provisions of the Code were intended to meet cases like the present."

True, the only point directly ruled in this case is, that an objection that defendants jointly sued in ejectment hold distinct parcels of the premises in severalty must, if the fact does not appear upon the face of the complaint, be made by answer or otherwise, it will be disregarded; and Marvin, J., closes a concurring opinion with the remark: "The question is not presented in this case, whether the owner of land, entitled to its possession, can maintain an action against two or more persons who occupy distinct parcels of it, claiming under the same right." But the reasonable implication from the opinion of the court is, that it regarded the objection to the action as a valid one if it had not been waived, and that the provisions of the Code cited in the opinion were intended to enable defendants improperly joined in an action of ejectment to plead that fact in abatement of the same.

Upon the whole, I think the plea is good, and the defendants must have judgment, unless the plaintiff elects to amend his complaint by striking out the defendant Miles, or the defendants and co-tenants Martin and Cornelius, and proceed against the other.

But it must not be understood that what is here said applies to a case where a number of apparent trespassers or mere squatters go upon and occupy a particular tenement or tract of land without color of right, or definite claims to distinct parcels or established and visible boundaries. In such cases, as was said in Greer v. Mezes [supra], as to the plaintiff, the occupants are mere trespassers, and he cannot know how they claim or to what extent.

Case No. 5,382.

GIBBONS v. SLOANE.

[6 McLean, 273;[1] 4 Am. Law Reg. 187.]

Circuit Court, D. Ohio. Oct. Term, 1854.

SLAVERY—POWER OF ATTORNEY TO MAKE ARREST.

This suit was brought [by Charles M. Gibbons against Rush R. Sloane] to recover the value of a slave owned by the plaintiff, who escaped and was rescued at the same time and under the same circumstances, as in the case of Weimer v. Sloane [Case No. 17,363]. The evidence was the same in both cases, except as to the manner of the execution of the power of attorney to Patton, who made the arrest as the agent of Gibbons; and by the consent of the counsel, both cases were submitted to the jury at the same time. In this case, it appeared that Gibbons had executed a power of attorney in the state of Kentucky, as required by the act of congress, in which either no name was inserted as the agent of the plaintiff, or, if any, that of some person other than Patton; and that afterwards and before the arrest of the fugitive by Patton, his name was inserted by the plaintiff or some other person, at Sandusky city, in the state of Ohio, without any acknowledgment of the instrument in that state. The court instructed the jury, that under the act of 1850 [9 Stat. 462], this was not a valid power to Patton, and did not authorize him to make the arrest. The jury returned a verdict for the defendant.

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

GIBBONS, The THOMAS. See Case No. 13,922.

GIBBS (COOPER v.). See Case No. 3,194.

GIBBS (DEVLIN v.). See Case No. 3,842.

Case No. 5,383.

GIBBS v. ELLITHORP.

[1 MacA. Pat. Cas. 702.]

Circuit Court, District of Columbia. Sept., 1859.

APPLICATION FOR DESIGN PATENT—DESCRIPTION—LACHES—DEPOSITIONS IN INTERFERENCE.

[1. In an application for a design for sewing machines in the shape or configuration of the letter G, it was not necessary to describe the working machinery of the sewing machine, which was already well known.]

[2. Failure to give notice of the taking of depositions in interference proceedings, as required by the rules of the office, does not affect the admissibility of such depositions, when the opposite party does in fact appear at the examination; and, having so appeared, he is bound to take notice of an adjournment, and, if he fail then to appear, it is his own fault.]

[3. A delay of not quite two years from the date of perfecting a design before applying for a patent is not such laches as will defeat the inventor's right, when he has not used or sold the invention for profit, or secreted it.]

[Appeal by James E. A. Gibbs from the decision of the commissioner of patents in favor of S. B. Ellithorp in interference proceedings.]

The reasons of appeal were as follows: First. For that the commissioner decided that "the testimony on Gibbs' part, and particularly his own," showed that until July, 1857, the design, which is in contest, "was vague, but an idea, and unreduced to a tan-

gible form;" whereas the testimony, together with the exhibit by which it is illustrated and sustained, fully and clearly give evidence that the design claimed by Gibbs had, long before the period at which the office dates it, been reduced to form quite as tangible and perfect, if regarded only as a design, as that which it received at the period referred to; and therefore his decision was erroneous, and ought to be reversed, and Gibbs' application for a patent granted. Second. For that the commissioner decided that the testimony does not sustain the claim to the invention of the design in question by Gibbs at an earlier date than July, 1857; whereas it appears fully, clearly, and incontestably from the evidence that the said invention, if regarded only as a design, irrespective of the special details of its satisfactory adaptation to actual practice, was complete and reduced to tangible form during the spring of 1856, and therefore his decision was erroneous, and ought to be reversed, and Gibbs' application for a patent granted. Third. For that the commissioner in his decision not only accepted, but relied, and relied wholly, upon a certain affidavit of Francis S. Low; whereas the said affidavit, not being the testimony of a witness duly examined after notice thereof given and received, and opportunity for cross-examination afforded the contesting party—but being a mere affidavit taken without any notice given or received, or any compliance with the rules of the office—is clearly ex parte evidence, not entitled to a reception at the hands of the office, or to any consideration or weight in the decision, still less to reception as a basis upon which alone to rest a decision; and therefore his decision was erroneous, and ought to be reversed, and Gibbs' application for a patent granted. Fourth. For that the commissioner decided that the testimony establishes the claims of Ellithorp to the invention of the design in question "in the fall of 1855 or early in the spring of 1856;" whereas there is no legal testimony in the case which will carry, or even claims to carry back his invention of the said design to an earlier date than about August, 1856; and therefore his decision is erroneous, and ought to be reversed, and Gibbs' application for a patent granted. Fifth. For that the commissioner decided that the testimony established the claims of Ellithorp to the practical reduction of the said design to a tangible form before its reduction to the same stage by Gibbs; whereas it is not claimed by Ellithorp in any testimony, admissible or inadmissible, that he so reduced it until some time during the year 1857—the year after it had been so reduced by Gibbs—as testified by a model filed in the United States patent office in December, 1856; and therefore his decision was erroneous, and ought to be reversed, and Gibbs' application for a patent granted. Sixth. For that the commissioner decided that the application of Ellithorp presented the proper subject-matter of a patent; whereas, whatever view may be taken of the alleged invention set forth in said application, it should have been rejected for want of novelty or originality, for want of usefulness, for want of object or result, or for non-compliance with the law requiring a full and sufficient description of that for which a patent is desired; and therefore his decision was erroneous, and ought to be reversed, and Gibbs' application for a patent granted. Seventh. For that the commissioner decided that Gibbs' invention, "instead of being a design within the meaning of the law, was a mechanical contrivance only;" whereas the invention claimed, being of the nature of a configuration, and that only, and neither producing nor aiming to produce any mechanical result, can be regarded only as a design, within the true intent and meaning of the law; and therefore his decision is erroneous, and ought to be reversed, and Gibbs' application for a patent granted. Eighth. For that the commissioner implied or indirectly decided that there was no true interference between the parties in the present case; whereas, if such was the case, the interference should have been dissolved and the patent at once issued to Gibbs, according to the previous decision of the examiner; and if it were not the case, as is contended under the above reason, his decision, so far as based thereon, is erroneous, and ought to be reversed, and Gibbs' application for a patent granted. Ninth. For that the commissioner rejected Gibbs' application for a patent, when the same ought to have been allowed and granted and the letters-patent issued according to law.

A. Pollock, for appellant.
F. S. Low, for appellee.

DUNLOP, Chief Judge. The design under the third section of the act of 29th August, 1842 [5 Stat. 543], sought to be patented by the contending parties in this appeal is the shape or configuration of the Roman letter G for a sewing machine, to which configuration the working machinery of the sewing machine is to be applied; such working machinery so applied, it is said, produces a sewing machine new and useful, and makes this design worthy of a patent. No one, I think, can contend, nor do I understand Ellithorp to contend, that a drawing or casting or pattern of that letter, or of any other letter of the alphabet, is patentable alone as a new design. To give it any novelty or usefulness it must have some purpose in combination with something else. The purpose of both parties here is to apply to this configuration the working machinery of the sewing machine. That working machinery is not new. It has already been patented, and is open to the public on inquiry at the patent office. The declaration of purpose, generally, without specifying the

quo modo, gives value to the design or configuration. Any practical mechanic can then apply the working parts of the sewing machine to this figure. That is mechanical contrivance, and not design. Still, perhaps to perfect the design and make it patentable, the working machinery must be applied, or shown to the office to be capable of application; and accordingly, as the testimony proves, Ellithorp applied it as early as June or July, 1857 (see Fox's evidence), and Gibbs about the 1st of October, 1857 (see Gibbs' own deposition). F. S. Low shows that in the fall of 1857 he introduced Mr. Pollok, the attorney of Gibbs, to Ellithorp at the office of the latter in New York, when Ellithorp exhibited to Pollok one of his (Ellithorp's) sewing machines of the design above named, and illustrated its operation. Mr. Pollok has seen this deposition, by the admission of service of a copy on him, and has not been examined to contradict it.

The above remarks dispose of the objections raised in the sixth reason of appeal to the sufficiency of Ellithorp's specification of his new design. It was not incumbent on him to describe the working machinery of the sewing machine. He did not claim that; in fact, the claims both of Gibbs and Ellithorp, on examination of the papers, are in substance and almost in words the same, being confined to the configuration G as the shape of the sewing machine designed by them.

The eighth reason of appeal has no foundation in fact—the commissioner of patents, as I understand him, maintaining throughout that there is an interference.

The remaining seven reasons of appeal, in substance, raise only the question of priority of invention, and will be considered together. Who, then, first conceived or invented this "design?" Ellithorp's proof is (by F. S. Low) that "in the fall of 1855 or early in the year 1856 Ellithorp exhibited to deponent a drawing of the design, marked 'Exhibit A,' for a sewing machine, and exhibited to him a pattern and casting of the same some time in the early part of the year 1857, and also, in the same year, a completed and working sewing machine of the same design." Though this evidence is certainly vague as to precise day and date, no fair interpretation of it can carry the time beyond the month of March, 1856. The early part of the year must embrace a time before April. When we come to consider Mr. Gibbs' own deposition, it will be found more vague. The force of Low's evidence, relied on by the examiner and commissioner, is felt by Gibbs' counsel, and it is objected to as not taken according to the rules of the office. No notice, it is said, was served on Gibbs, and no proof of service certified by the officer taking the deposition and returning it to the office. The object of notice is to bring the adverse party before the examining officer, and to give him the opportunity to cross-examine the witnesses. But if the adverse party voluntarily comes and is present at the examination, and cross-examines, notice and proof of service of it are of no account. The substance is obtained, and they are mere form—technicality, and nothing more. The ninetieth rule of the patent office applies directly to such a case. When Fox, Marsh, Steenberg, and Brown were examined before Mr. Squere on the 26th of May, 1859, Mr. Pollok, the attorney of Gibbs, was present, and cross-examined these witnesses. Mr. Squere adjourned the examination till the next day, as he certifies, at 11 o'clock a. m. On the 27th, at 11 o'clock a. m., he took Mr. Low's deposition, pursuant to the adjournment. If Mr. Pollok was not present, it was his own fault; he knew of the adjournment, or was bound to take notice of it, and could have been present if he saw fit. There is therefore nothing in the objection to the admissibility of Low's evidence. John M. Fox saw the drawing of Ellithorp's design for a sewing machine before the cold weather of 1856; "it must have been in the month of August or September. Ellithorp claimed the design as his invention to be applied to his sewing machine; he had got it up for that purpose." For, (in answer to ninth cross-interrogatory), "saw a casting a few months after—six or eighth months—like the drawing shown to him by Ellithorp, and saw the casting, in combination with the working apparatus of a sewing mechanism, begun in two weeks after," which would probably bring the completed invention by Ellithorp to about the month of June or July, 1857. Gibbs, by his own account, did not complete his invention till the fall—about 1st of October, 1857. Steenberg "saw the drawing the latter part of August or 1st of September, 1856, shown to him by Ellithorp, who claimed it as his invention for a sewing machine." Brown "saw the drawing about the same time; Ellithorp claimed it as a design to be applied to a sewing machine." Upon looking at the testimony on the other side, Wilcox "saw Gibbs' drawings first in the spring or early in the summer of 1857." Savage "first saw Gibbs' perfected machine, according to his design, in Boston, last of August or 1st of September, 1857." Hannah R. H. Gibbs and Sarah M. Lockridge "saw the drawings first time in June, 1857." It does not appear that Mr. Gibbs ever showed them to anybody before that time or stated to anybody the purpose of them before that time. James E. A. Gibbs himself says: "When I was experimenting on sewing machines in February, 1856, a circular form suggested itself as more appropriate; and wishing to have a design that would distinguish the machine as my own, I adopted the form of the Roman letter G, being the first letter of my name, and a form admirably adapted to the sewing machine. These ideas develop-

ed themselves in my mind during the month of March, 1856. During the month of April or first part of May, 1856, I made various drawings of this design." Very vague this as to day and date; and he does not appear to have shown them to anybody, or to have thought them sufficiently definite or developed. When his revolving-hook patent was issued June 2d, 1857, "I turned my attention to the design letter G again, and during that month made some more sketches, to determine the size and manner of constructing the operating parts of the machine, and in July, 1857, I made a neat set of drawings on drawing paper, from which Rogers Brothers, Philadelphia, made me patterns and castings in September, 1857, and I constructed a machine with this design by the 1st of October, 1857. Exhibits 1 and 2 I know are of the old drawings made in April, 1856. I am not so certain in relation to any particular ones of the others; part of them were made in June, 1857. Exhibits 4, 9, and 10 were made the latter date, and some of the others; I know Exhibit 2 was made the first date, because it was my first idea, and I quit it as too clumsy, and worked on the other idea altogether afterwards. Exhibit 1 was made about the same time." Again, Exhibit 2: "It is of the same form as the others, but was intended to be hollow, with the cam, needle, arm, &c., on the inside, as marked by the dotted lines, the frame forming a shell or cover for the operating parts. I did not adopt this, on account of its being more clumsy, leaving less space for the cloth, and being more difficult to regulate or oil the running parts."

This vague and confused testimony would lead to the conclusion that no definite or settled drawing was made by him before June, 1857; and going back even to his first undeveloped idea would not date his imperfect drawing before the month of April, 1856. But Low dates Ellithorp's drawing before that time, to wit, in the fall of 1855 or early in the year 1856. I think, therefore, the commissioner has properly decided that Ellithorp was the prior inventor of the design in question. Both inventors seem to have perfected the invention in the year 1857—Ellithorp as early as June or July and Gibbs in October, 1857. There is nothing in the lapse of time from 1856 to 1857 to show want of diligence in either of them in perfecting their design. Gibbs made his application to the office for a patent on the 26th of April, 1859, and Ellithorp his application on the 10th of May, 1859, both of them tardily, and both, as to that matter, in pari delicto. As Mr. Gibbs sold his perfected machine on the new design in 1857 and 1858, and thus introduced it to the public, he is protected by the seventh section of the act of 1839, two years not having elapsed between the 1st of October, 1857, when he perfected it, and the 26th of April, 1859, when his application was filed in the office. I had some doubts whether Ellithorp, in delaying his application for a patent for the design from July, 1857, when he perfected his machine on the new design, to the 10th of May, 1859, when he applied to the office for a patent, had not by laches lost the right to it; but as he did not use or sell his invention for gain, and does not appear to have secreted it, I think he is within the equity of the provision of the act of 1839, in favor of the inventor who sells. I refer on this subject to my reasoning in the case of Spear v. Belson [Case No. 13,223], lately decided by me and on file in the office.

Being of opinion that Ellithorp is the first inventor of the design, and that he perfected it in July, 1857, and that more than two years have not elapsed between that date and the 10th of May, 1859, when he applied to the office for a patent, I do this 12th day of September, 1859, affirm the decision of the commissioner of patents, of date the 5th of August, 1859, awarding Ellithorp a patent.

GIBBS (FALES v.). See Case No. 4,621.

GIBBS (FIELD v.). See Case No. 4,766.

Case No. 5,384.

GIBBS v. JOHNSON.

[3 App. Com'r Pat. 255.]

Circuit Court, District of Columbia. Jan. 6, 1860.

PATENTS—PRIORITY OF INVENTION—EVIDENCE OF—RES GESTÆ—ADMISSIONS—EQUIVALENTS—ANTICIPATION.

[1. The declarations and conversations of a person made at the time of exhibiting and explaining his invention are a part of the res gestae, and admissible to prove priority of invention.]

[2. Admissions made by a person in an offer of compromise, voluntarily made without any pending negotiation, and without stating it to be without prejudice, are admissible against him.]

[3. Johnson's invention of a machine chain stitch is substantially identical with Gibbs' invention of machine sewing, and, being prior in time, letters patent are properly awarded to him.]

[4. Gibbs' invention of an automatic or self feeder for sewing machines is not an equivalent of the hand feeder of Johnson.]

Appeal [by James E. A. Gibbs] from the decision of the commissioner of patents, refusing to grant him letters patent for his improvement in sewing machines.

The appellant states his claim thus: "What I claim as my invention and desire to secure by letters patent is: 1st. The sewing by machinery of cloth or other fabric by interlacing a binding thread with the loops of the tambour or chain stitch. 2nd. In combination with an eye pointed needle and suitable feeding mechanism, I claim a discoidal shuttle or thread case, provided with two hooks, both taking separate and successive loops from the needle, when the said parts are arranged in

relation to each other, so as to operate substantially as described, whereby either of the three stitches, herein set forth, may be made, by simply changing the direction of the feed, or omitting the insertion of the secondary thread at pleasure. 3rd. I claim changing the direction of feed by reversing the action of the spring which produces the retracting motion of the feeder." This application was received and filed August 12, 1858, before which time, to wit, on June 15, 1858, the said A. F. Johnson having filed the following application, the first in these words: "What I claim as my invention and desire to secure by letters patent is a rotary hook constructed as described or in any manner equivalent thereto in combination with a needle and a bobbin for the purpose of forming a seam by the interlacing of two threads as set forth. 2nd. I claim the shoulder b, or its equivalent, for the purpose of preventing the point from being entangled with the old loop as set forth. 3rd. I claim passing that portion of the loop that lies in the groove w, or around the periphery of the hook during the first portion of its revolution behind the bobbin as set forth." The claim as set forth in the other application is in these words: "What I claim as my invention and desire to secure by letters patent is the stitch herein described, consisting of a chain stitch, having a binding thread passed through its loops for the purpose described." The said application of Gibbs was put in interference with the said two applications of said Johnson, and on May 6, 1859, the interference was decided on the evidence before the office, when priority of invention was decided and awarded to said Johnson.

In the report of the examiner adopted as the decision of the commissioner, it is stated, that in the application of Johnson, which covered the sewing machine, the claim involved the combination of a needle, rotary hook and bobbin, for the purpose of forming a seam by the interlocking of two threads, as set forth. The second application of Johnson claimed the stitch made by his machine, namely, a chain stitch having a binding thread passed through the loops. With respect to Gibbs' application he says: "James E. A. Gibbs made an application for a patent for improvements in sewing machines on a machine that produced the same stitch as the machine of Johnson, and substantially the same mechanism was employed by him to effect it. He claimed interlacing a binding thread with the loops of the tambour or chain stitch" and the combination of a feeding mechanism, a discoidal shuttle, a thread case and needle by which three different stitches could be made. Of the stitch he says: "Like the well known sewing machine lock stitch, it is composed of two threads, but so far as the office is advised the binding thread thrown into the chain stitch has not before been known or used, and as this stitch possesses advantages over the common double thread stitch for some descriptions of sewing, it was deemed to involve patentable invention." A former interference is alluded to, in which the invention involved embraced only the machine, but (the commissioner says) "some effort was made on the part of Gibbs in that case to show that Johnson was endeavoring by his experiments on what was called 'Exhibit B,' to make 'a fast stitch' and some of the witnesses in speaking of that exhibit said a bobbin was put into the cavity of the rotary hook to make 'a fast stitch' and this machine was made in November, 1856. Gibbs did not in that interference make any attempt to prove that he invented the double thread locked chain stitch now in question; and therefore so far as the stitch is concerned this is all that need be said about that first interference."

The report next takes a view of the testimony of Stephens, from which it is supposed to appear that in June, 1854, Johnson told him of his having invented a stitch by interweaving a binding thread with a chain stitch, and spoke of getting a patent for a hook that would do the work; also that Johnson about that time showed him a bobbin and a hook with a hole or opening in the center to receive the bobbin, saying this was to carry a bobbin thread through the loop of a chain stitch. This witness further thinks the hook and bobbin then shown him by Johnson is quite correctly represented by Exhibits Ab and Bc. The report continues: "It is manifest that if Ab were rotated so that the hook would catch the loop of a needle thread, whilst Bc was in a depression in the center and carried a thread with one end projecting beyond the hook, the stitch produced would, by a mechanical necessity, be a chain stitch with a binding thread in each loop; that the invention of the stitch in question was from this testimony complete in 1854; and the invention at this date was Johnson's." The same witness testifies to other attempts of Johnson to make a double thread fast stitch with a machine like Exhibit O in October or November, 1856. The report further states, that Exhibit O is not presented as a mature invention, nor is it very clear that as shown in the drawings it would make the stitch in question when a shuttle were used as the vehicle of the binding thread. This remark, however, is limited to the automatic operation of this exhibit. This witness refers to the Exhibit B, and says that he saw it in the rooms of Emory, Houghton & Co., in the early part of December, 1856, and in the following August or September he saw a perfectly operating machine at Johnson's shop, making the chain stitch with an interlaced binding thread. The report then proceeds to state the testimony of Johnson and wife. Those two witnesses have been objected to as incompetent. The report further states that Johnson's father-in-law saw something like Exhibits Ab and Bc, several times in the latter part of 1853 or first part of 1854. I. H. Crane made Exhibit B of former interference in the fall

of 1856, and understood Johnson that the bobbin Exhibit S was to carry a thread, a locking thread, to keep the chain stitch from pulling out. Other witnesses prove the existence of Exhibit O sometime between the month of May and November, 1856.

The evidence on the part of Gibbs is then considered in the report, which proceeds:

"The earliest date of the invention of the stitch in question by Gibbs is fixed by the testimony of John H. Ruckman who says that Gibbs described this stitch to him about the last of February, 1856,—stitch like Exhibit J. Joel Polson thinks Gibbs showed him about a stitch like Exhibit J, in April, 1856, the chain stitch with a thread running through each loop. From the testimony here referred to, it appears that the stitch involved in the interference was invented by Johnson in 1854, was described and shown to others by him and made by him in the presence of others in the early part of that year, and I am therefore of opinion that he is entitled to a patent therefor as the first and original inventor.

"As before remarked, Johnson's machine involved the combination of a needle, rotary hook and bobbin. He also claimed minor features not strictly involved in this interference; his needle vibrated in the arc of a circle; his rotary hook had a continuous motion, and carried the bobbin within it, and in operation the rotary hook takes a loop from the needle, thread passes round and takes a second loop from the needle, releasing at the same time the first loop in which the bobbin had left its thread, and the needle retracting draws this first loop around the second, and around the bobbin thread, thus forming the double thread lockchain stitch. Gibbs' machine, with but slight modifications, produced the same result, by the same combination of mechanism organized under an equivalent arrangement to that of Johnson, and this combination is distinctly covered by Gibbs' claim. Gibbs has also minor claims, &c. Conceiving from the testimony that the device shown in Exhibit Bc, and Ab, was made by Johnson in 1854, it is certainly proper to regard the invention it covered as the inception of the invention in question. From all the testimony offered by Johnson it appears that he had steadily in view the making of a fast stitch automatically without relinquishing the tambour or chain stitch. In the progress of his experiments, he tried various means for effecting this purpose without having produced a perfect machine, and in the latter part of the year 1856 he brings out Exhibit B of the former interference, and while yet incomplete he explains and shows this machine to Gibbs. Exhibit B forms an important link in connecting the invention of 1854, as shown in Exhibits Ab and Bc with the machine in the application on which this interference is founded with the machine operating perfectly, seen by Stephens at 332 Washington street, Boston, where Johnson had his shop on the last of August or first of September, 1857; and also with the machine of Gibbs as shown in Exhibit K as shown in his caveat of April 25, 1857; and with the machine in this application. The invention of Johnson as now presented was not complete in 1856, but the combination of a needle, rotary hook and bobbin is clearly shown in Exhibits Ab and Bc, and this combination constitutes the leading invention in question here and clearly presented in the invention of both applicants. The invention of Gibbs as shown in Exhibit L, and seen by Wallace in May or June, 1857, and the caveat of April 25, 1857, both show imperfect machines, and the Exhibit K seen in August or September, 1856, by Ruckman & Polson, and described by them, are but sketches, and all exhibit the leading features of the invention shown in Exhibits Ab and Bc, or rather all these imperfect and immature representations of invention show but the same device as Johnson's invention of January, 1854, so far as any of them involve the combination in question, namely, the needle, rotary hook and bobbin. Besides this, in their efforts to compromise, both Gibbs and his counsel went too far in their acknowledgements to Johnson of his priority of invention on the double thread machine, now wholly to recall their admissions. Even for the sake of peace and a quiet title or possession without molestation, Gibbs was not required to make the direct admission that Johnson was the first to make the stitch with a rotary hook, as he was understood to by Cushman, for such admission is a virtual surrender of all claim to originality of invention on the part of Gibbs.

"For these reasons I am of opinion that A. F. Johnson was the first and original inventor of the stitch he claims in his application No. 2, and of the combination of the needle, rotary hook and bobbin claimed in his application No. 1, both applications having been made at the time first herein stated, and that his is accordingly entitled to a patent, as such original and first inventor on each of the said applications."

MORSELL, Circuit Judge (after stating the facts as above). The appellant, to show the grounds of his appeal from said decision, filed his reasons, twenty in number. Upon examination they appear to be very full, and sufficiently special to show and cover all objections, that said decision may be susceptible of. It will not be necessary particularly to state them, as they will be duly regarded in the consideration which I shall give the case in forming my opinion, and so with respect to the report of the acting commissioner in reply to the reasons of appeal, it is in substance but little more than a reiteration of the principles contained in the reasons as the grounds of the decision. In this state of the case, according to notice

duly given of the time and place of the trial of this appeal, the original papers and documents with all the evidence were laid before me, and the parties, by their counsel, having appeared, filed their arguments in writing and submitted the case.

The issue between these parties is priority of invention, in an interference declared in two applications for patents on the part of Johnson, and one on the part of Gibbs, because, as stated, their inventions are substantially identical. As before stated, Johnson's claim is for the stitch described in his specification, consisting of a chain stitch, having a binding thread passed through its loops for the purpose described, and the rotary hook constructed as described or in any manner equivalent thereto, in combination with a needle and a bobbin for the purpose of forming a seam by the interlacing of two threads as set forth. The claims of Gibbs are, 1st, for "the sewing by machinery of cloth or other fabric by interlacing a binding thread with the loops of a tambour or chain stitch. 2nd. In combination with an eye pointed needle and suitable feeding mechanism, a discoidal shuttle or thread case provided with two hooks, both taking separate and successive loops from the needle when the said parts are arranged in relation to each other so as to operate substantially as described, whereby either of the three stitches herein set forth may be made by simply changing the direction of the feed or omitting the insertion of the secondary thread at pleasure.

The office supposes that the thing claimed by the parties is substantially identical, and if the parties were agreed in this there would be much less difficulty in deciding the question of priority between them, but in this it is supposed there is a material difference. The claim of the one is supposed to be for three elements only, the combination of a needle, rotary hook and bobbin producing a new stitch, the double thread lock chain stitch; the other producing a like stitch mechanically by a peculiar, specific combination of mechanical devices, consisting of four elements, a peculiar mechanical feeding arrangement essentially constituting one of them. That each of the parties had in view an improved change in the sewing machine, so as to produce a better thread, and that they succeeded in attaining that object after various experiments, clearly appears by the results of those now exhibited before the patent office. Johnson dates his discovery in 1853–'54; Gibbs at a later period. The question is, who first conceived the thought? This must depend upon the evidence. Owing to several different stitches then in use, and in some respects resembling the one in controversy, the difficulty in applying the evidence is very much increased. It is suggested by one of the counsel in his argument, that the rule is, "that the mechanical production of the stitch at length brought to perfection by each of the parties as now exhibited to the office cannot be established either by hearsay, opinion or presumption, but only by the testimony of those who saw it so produced by the alleged mechanical agent and proof on mechanical principles of the ability of said machine to produce the stitch in question." This rule is somewhat different from what I think is right. The general rule as applicable to all cases is, that the best evidence which the nature of the case will admit of, must be produced. In questions of priority of invention such as this, where the precise time is to be ascertained, the invention itself being an intellectual operation, and the nature of the case differing very much from ordinary cases, the declarations and conversations of the party himself, where forming a part of the res gestae, are admissible. This point was very fully considered and settled by me in the case of Dietz v. Wade, appeal from the patent office April 12, 1859 [Case No. 3,903], to which I refer, and to the principles as there settled I still adhere.

Preliminary to considering the effect of the testimony on the part of Johnson, it will be proper to notice objections which have been made by the counsel of Gibbs to the reception of: First, that taken at Boston. I do not discover enough in the grounds of the objection to justify my shutting the evidence out of the case. Next, as to the admissibility of the testimony of the witnesses Johnson and his wife. The assignment in this case appears to be bona fide, but Johnson appears at the time of it the sole and real party to the record of the case in the patent office. I am not satisfied that their testimony was admissible, and therefore exclude it from the case. The objection to Stephens' testimony is certainly strong, and if it stood alone, I should feel much difficulty in giving credit to it, but it is corroborated, and must therefore receive such weight as, under such circumstances, may be thought due to it. So also as to the testimony of Cushman and Miss Bennettick, to prove the admission of Gibbs to Johnson of his (Johnson's) right to the thing claimed. The objection is as to the weight which attaches to it, for the purpose of showing the proper rule to be applied. A number of authorities containing adjudged cases are referred to. It will be seen that the decisions in all those cases depend upon the circumstances of each case, and as exceptions to the general rule, which not only makes the admissions or confessions of the party, fairly and seriously made, and relevant, admissible, but of the strongest kind. If the admissions are by way of compromise and without the admission of any particular independent facts, this would be considered as inadmissible, but if the offer be so made voluntarily without any pending negotiation, and without stating it to be made without prejudice the rule does not apply. This latter appears to me to be the predicament under which the admissions were made in this case. The objection is of course overruled.

What then does the legal evidence show the case to be upon the merits? Stephens

says in the year 1854, he thinks in June, Johnson told him he had invented a stitch by interweaving a binding thread with a chain stitch which would take the place of a shuttle stitch, and he intended sometime to get out a patent for a hook which would do the work. He showed him such a hook, about that time; it was an S-shaped hook, with a hole or opening in the center for a bobbin. He also showed him the bobbin. He thinks the bobbin was also made of brass. The Exhibits Ab and Bc shown to him represent the hook and the bobbin quite correctly. Ab is a view of the flat side of the hook. Bc is a sectional view with the bobbin inside. Mr. Johnson said this was to carry the bobbin thread through the loops of a chain stitch. In October, 1856, Johnson showed him Exhibit O as his invention; he said the machine with this device was to make a double thread fast stitch; that the machine was a shuttle machine; that he saw him sew a few stitches with it; that he thought it was a chain stitch with a shuttle thread run through the loops; did not do the work well, but Johnson said he intended to perfect it so that it would do the work; thinks the stitch which this machine made was like the one explained to him by Johnson in 1854; thinks he saw the sewing done in October; that he made some alterations in the machine; it was sent away as a shuttle machine; some of these alterations were made, he thinks in the latter part of November or early in December, 1856; that the last alterations which he made were in February or March, 1857; that while he was making these alterations Johnson told him that he had got a rotary hook machine, or was making a rotary hook machine that would do the same work and make a double thread fast stitch; he saw the hook of this machine; after he first saw this hook, Mr. Johnson kept changing and altering it; he saw this hook applied to a machine; the end of the hook shaft was put into the end of the goose neck of a bag machine; he saw quite a number of bobbins made for it; he thinks some had cases, but he is not positive; he saw some of the bobbins put into the hooks in the experimenting room; he was told that this was to make a chain stitch with an interlaced shuttle thread; he thinks this was in the early part of December, 1856; saw the machine sew a few stitches; did not make it run rapidly; saw the machine in 1857, a perfect operating machine.

If the facts as stated by this witness be true, then the machine Ab, Bc, was constructed in the years 1853–54, and the object and intention as declared by Johnson was to invent a machine which would produce a stitch as claimed by him, that is, a chain stitch having a binding thread passed through the loops, and that these declarations were made at the time that the machine was shown to him by Johnson, explaining to him the nature of the same. These declarations and conversations under such circumstances formed a part of the res gestae, as before stated, and must be received as legal evidence, for the purpose of ascertaining who was the first and original inventor, in an issue like the present of priority. The doubt of the object and intention of this instrument, in its imperfect state at that time, and at other times by said declarations connected therewith, became obviated. The testimony of this witness is corroborated by Samuel W. Hall, and other witnesses in the substance of the facts as stated above. This witness testifies also to a series of experiments by Johnson for the purpose of perfecting his invention, until finally he accomplished it and made an application for a patent. This will also appear from the testimony of a number of witnesses on behalf of Johnson. Furthermore the admissions of Gibbs to Johnson in the year 1857, middle of May, amounts to a full confirmation of the right of Johnson as the first and original inventor, as claimed by him and proved by the evidence given on his behalf, and the commissioner's decision as to the claim of the said Johnson as made by him is hereby ratified and confirmed.

The above decision is not intended to embrace the claim of the appellant so far as relates to the mechanical device; that is, the mechanical feeding arrangement. The commissioner supposed that Gibbs' machine, with but slight modifications, produced the same result by the same combination of mechanism organized under an equivalent arrangement to that of Johnson, and this combination is distinctly covered by Gibbs' claim if he means a mere equivalent. I think in this there is error, because I consider it more than an equivalent. The one is a feeder by hand; the other automatically or a self feeder. The one a mechanical feeder of a peculiar construction; the other not. The one is a new and superior mode of arriving at the same object, and a labor saving instrument. It accomplishes some other advantages beyond that of Johnson's, and ought therefore to be considered an improvement of that of Johnson's, and as to this branch of the commissioner's decision I am of opinion, and so decide, that the same be and is hereby reversed, and that the said appellant may, if he thinks proper, reform his claim, so as to be limited according to the aforegoing principles.

GIBBS (MATERN v.). See Case No. 9,273.

GIBBS (STODDARD v.). See Case No. 13,468.

Case No. 5,385.

GIBBS v. The TEXAS.

[Crabbe, 236.] [1]

District Court, E. D. Pennsylvania. Jan. 7, 1839.

BOTTOMRY BOND—WHAT WILL AUTHORIZE.

1. To authorize a bottomry bond by a master, it must be given to enable the vessel to proceed on her voyage, and to leave a port where she is detained for necessary repairs, or for claims upon her, and has no funds, credit, or other means of getting money.

2. An anticipated necessity for funds will not justify a bottomry bond.

This was a libel [by C. & J. Gibbs against the schooner Texas] for bottomry. It appeared that the Texas was enrolled as a coaster; that, in April, 1838, being then at Charleston, the captain [Small] took out a new register, and sailed for Mantanzas and a market; that the instructions given to the captain, by the owners, were to take freight from port to port in the United States; that, before sailing for Mantanzas, the captain gave to the libellants a bottomry bond for $538.62; that the items which made up this amount were as follows: Lumber, loaded on board, $485.36; insurance and policy, $9.94; stores furnished, $43.32; and that the Texas had subsequently changed owners. It was alleged that the sale of lumber, which was the principal item of the account, was a mere speculation of the captain and the libellants, and which would not sustain a bottomry bond. As to the charge for insurance, there was no evidence. It was also alleged in answer to the defence, that the lumber was taken on board in order to raise money, by its sale, to pay the port charges in Cuba. The libel was filed on the 13th December, 1838.

Mr. Waln, for libellants.

The defence consists of two parts: First, it is said that there was no necessity for the supply; and, second, that the libellants have forfeited all claim by their delay. As to the first defence, the facts are, that the lumber was necessary to meet the port charges in Cuba. Milward v. Hallett, 2 Caines, 77; The Aurora, 1 Wheat. [14 U. S.] 96; Parmeter v. Todhunter, 1 Camp. 541. As to the delay, it is not such as to work a forfeiture. Wilmer v. The Smilax [Case No. 17,777].

G. M. Wharton, for respondent.

It appears that this bond was not for the loan of money, which a bottomry bond must be for; and we have evidence tending to show the whole transaction to have been a speculation. As to the item of $43.32, alleged to be for stores, it is forfeited. A lien by bottomry will be postponed to subsequent bona fide purchasers or claimants, if the holder of the bond has delayed, unreasonably, to prosecute his claim. Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 328. The charge for insurance is totally unsupported by evidence, and must be abandoned.

HOPKINSON, District Judge. The necessity that gives authority to a master to hypothecate his vessel, must be to enable her to proceed on her voyage, to leave a port where she is detained, either for necessary repairs, or for claims upon her. Patton v. The Randolph [Case No. 10,837]. There must be no funds there, and no credit, or other means of getting money. There was no money or credit necessary to get this vessel from Charleston. The bond was given for lumber, which was to be applied—taking the libellant's own statement—to be sold in Cuba, to meet expected expenses there. It was not an existing but an anticipated necessity for funds; and the necessity was produced by the captain's going to Cuba, for which there was no necessity.

I cannot doubt, either from the preponderance of testimony, or from the attending circumstances, that this purchase of lumber was, in truth, a trading speculation, either for the captain alone, or for the joint account of the owners; and neither would constitute a good cause for bottomry. As to the small claim for stores furnished the vessel, I do not think that there has been any such delay, or want of diligence, as to forfeit it. We have no evidence whatever of any opportunity but this of proceeding against the schooner. Decree for libellants for $43.32, and costs.

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

Case No. 5,386.

GIBBS v. The TWO FRIENDS.

[Bee, 416.] [1]

Admiralty Court, Pennsylvania. 1781.

SHIPPING—CLEARING FOR ONE PORT WITH DESIGN TO PROCEED TO ANOTHER—CAPTURE—LIABILITY OF CAPTORS.

1. Clearing out as for one legal port, but with a design to go to some other legal port, in order to conceal the real voyage, for mercantile purposes, is never deemed an offence, nor have the papers found on board a vessel under such circumstances, been considered as double papers, such as should induce a condemnation.

2. If such a vessed be captured, the owner may libel against the capturing vessel and her captain, for reparation of the loss and damage sustained by such capture.

HOPKINSON, District Judge. The brig Susannah, belonging to George Gibbs, cleared out from the naval office in the port of Rhode Island, and sailed with a cargo on board, as for Hispaniola, but in fact for Turk's Islands. Being on her voyage she was discovered, pursued, and captured by Josiah Crane, master of the brigantine Two Friends, belonging to subjects of the United Netherlands, and furnished with letters of marque and reprisal

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

against the subjects of the king of Great Britain. Holland had not at this time entered into any treaty with, or acknowledged the independence of, the United States of America. Captain Crane took out part of the crew of the Susannah, and put a prizemaster on board, and ordered her for Philadelphia; but the Susannah was again captured during her voyage to Philadelphia by a British privateer, taken to New-York, and there condemned. The Two Friends arrived at Philadelphia, where Gibbs the owner of the Susannah libelled against her, and against Captain Crane for reparation of the loss and damage sustained.

In considering this case, two obvious points present, viz.: 1st. Hath the brig Susannah so offended by her intended voyage to Turk's Islands as to afford probable cause of capture and confiscation? 2d. If not, who ought to satisfy the owner for the loss of his vessel and cargo?

On the first point the question occurs, whether Turk's Islands, may, or may not, be considered as property under the dominion of Great Britain? Whatever might have been the situation of these islands in the years 1778 and 1779, it is evident that at present they are abandoned by every nation, there having been no officer who hath exercised civil or military powers there under the authority of any government whatever for at least these two years past. If the British ever had legal dominion over these islands they have abandoned their right, and released the inhabitants from all allegiance by withdrawing all protection. So that those people may truly be said to be in a state of nature, unless they have formed some government of their own. What offence then can arise from trading with those islands? It is plain, from the clearances and entries in our own naval offices, that this trade hath not been deemed unlawful: and it is also in evidence, that American, French, and Spanish vessels constantly go to these islands for salt, and nobody hath heretofore questioned the legality of this commerce. But it is said, that the variance between the office clearance and an invoice found on board, marking the real destination of the voyage, affords probable cause of capture, and even a sufficient ground for confiscation. I find, however, that it is not an unusual practice for merchants to clear out as for one legal port, but with a design of going to some other legal port, in order to conceal the real voyage, for mercantile purposes. Nor hath this practice ever been deemed an offence, or the papers found on board a vessel under such circumstances been considered as double papers, such as should induce a condemnation.

The next question is, who ought to be answerable for the injury done? the captain, or his owners, or both? The relation between the owners and master of a vessel hath, to many purposes, been considered as that of master and servant; and the law is clear, that the master is bound by whatever the servant doth by his order, under his authority, or in the prosecution of his service. See [Vance v. Campbell] 1 Black [66 U. S.] 429. It has been contended, however, that Captain Crane was not in the prosecution of his owners' service, when he made this capture, the object of the voyage being merely mercantile, and not to take prizes. But as this vessel was duly commissioned to take prizes, and the owners and captain would have shared the produce of a legal capture, this distinction cannot be admitted, but the owners and captain must be considered as jointly answerable. Judgment in favour of the libellants for £1305 specie, with costs.

NOTE.—An appeal, and the judgment confirmed. [Case unreported.]

Case No. 5,387.

GIBBS v. USHER et al.

[Holmes, 348.] [1]

Circuit Court, D. Massachusetts. March, 1874.

CIRCUIT COURTS—JURISDICTION TO RESTRAIN MARSHAL—REPLEVIN FOR WRITINGS AND DOCUMENTS.

1. The circuit court has jurisdiction in equity on bill or petition filed, and proper case made, to restrain the use of its process by the marshal in a manner contrary to law.

[Cited in Re Sabin, Case No. 12,195.]

2. Under the General Statutes of Massachusetts, replevin lies in that state, and therefore by the practice act of 1870 (17 Stat. 196), in the circuit court for the district of Massachusetts, for writings or documents of value unlawfully detained.

[Cited in Hower v. Weiss Malting & Elevator Co., 55 Fed. 359.]

Motion for preliminary injunction. The bill of complaint charged that Mr. Joy, an attorney, pretending to act for one David Bowlas, of England, sued out a writ of replevin in this court, in the name of said Bowlas, against [W. H.] Gibbs, the complainant, residing at Clinton, Massachusetts; that said Joy went to the house of the complainant, with the defendant Shaw, a deputy of the marshal (the defendant [Roland G.] Usher), and others, and asked in a friendly way to see certain papers, without saying that Shaw was an officer, or that they had a writ; and that when the papers were shown them, they seized them, and afterwards fraudulently altered the writ by adding a description of some papers already seized; that the papers seized were the private papers of the complainant, and that neither said Bowlas, nor any one else except the complainant, had any right or title thereto; that they related to the private transactions of the complainant with other persons in matters of business, which he was bound not to make public, and the publication of which might work great injury to the business interests of the complainant

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

and others; that he believed the pretented plaintiff in replevin to be dead, and that the object of the seizure was to obtain for the said attorney and others an inspection of the complainant's private papers; that the publication of the papers would be an irreparable injury to the complainant; that the papers were not subject to be replevied; and that the writ was void for several other reasons. The prayer of the bill was, that the marshal and his deputies be restrained from exhibiting or delivering the papers to any person but the complainant, and be ordered to deliver them to him; and that the further prosecution of the writ of replevin be stayed. Upon the motion for a preliminary injunction, affidavits were filed tending to support the charges in the bill as to the mode in which the papers were obtained, and the charge that the writ was altered after the seizure. On the part of the defendants, it was contended, and there were affidavits tending to show, that the David Bowlas, plaintiff in replevin, was living, and was the only son of the David Bowlas mentioned in the bill, and carried on his business; that David Bowlas (the elder) was the owner of a certain English patent by assignment from the original inventors; that certain persons were sued in this court for an infringement of this patent, taken out in this country in the names of the original patentees; that the defence, or part of it, was, that the supposed infringers bought the infringing machines from Bowlas, the owner of the patent; that Gibbs had been intrusted by Bowlas (the elder) with the original assignment and some other papers, and had refused or neglected to return them to the son, though requested; that they were needed in the defence of the suits above mentioned, and that Mr. Joy had an order for them from Bowlas, the younger; that when the parties called on the complainant they exhibited to him the order from Bowlas; and that, although some alteration was made in the writ, it was before they considered the writ to have been served.

H. F. French, for plaintiff.

1. The writ of replevin is void for not alleging the citizenship of the parties, and for other imperfections.

2. Private papers are not repleviable. Brent v. Hagner [Case No. 1,839]; Maxham v. Day, 16 Gray, 213; Mack v. Parks, 8 Gray, 517; Oystead v. Shed, 12 Mass. 510.

3. If the seizure was fraudulent, the court will not allow the defendants to derive any advantage from it. Deyo v. Jennison, 10 Allen, 410; Parsons v. Dickinson, 11 Pick. 352.

B. F. Butler and A. K. P. Joy, for defendants.

1. The court has no jurisdiction of this bill.

2. The plaintiff has proved no title to the papers. Clapp v. Shephard, 23 Pick. 228.

3. Replevin lies for writings. Sawyer v. Baldwin, 11 Pick. 492.

LOWELL, District Judge. The jurisdiction of the circuit courts, in equity, of a bill or petition to restrain the marshal from attaching on a writ out of this court, B's property in a suit against A, though both the marshal and the complainant live in the same district, is clearly laid down in Freeman v. Howe, 24 How. [65 U. S.] 460; and is almost a necessary corollary from the law of that case, which was, that no other court had any right to interfere with the marshal's possession. The principle will extend to any case in which the process of the court is made use of contrary to law, if the judgment in the action at law will afford no adequate redress. For example, if it were proved that the marshal, under color of a precept of this court, was about to inflict an injury not warranted by his writ, and yet one which could not be compensated for in damages, the court might, on bill or petition, and perhaps on motion, interfere to arrest the evil.

That a court of equity may restrain the service of a writ, I think equally clear, as a general proposition. I once brought a bill in the supreme judicial court of Massachusetts, to restrain the service of a writ of personal replevin, by which it was sought to release a patient from a lunatic asylum. The case was of novel impression; but I proved that the injury might be irreparable, and I tendered the same issue in the bill that would be raised by the writ, that is, the issue of sanity. I had already a prima facie case, because the same court had refused to release the patient on habeas corpus; and, under the Massachusetts practice, issues can always be ordered in an equity suit to be tried by jury. Under these circumstances, I obtained the injunction, although a writ of personal replevin is undoubtedly a writ which issues as a matter of course in ordinary cases.

It is argued that replevin does not lie for private papers, the statute only mentioning "goods." Gen. St. c. 143, § 10. How extensive the meaning of the word "goods," or "goods and chattels," is to be understood in any instance, must depend on the subject-matter and the context. "Goods" may include every thing but what descends to the heir. Com. Dig. "Biens," C, D; Dane, Abr. c. 13, art. 3, § 1. Choses in action may pass by that name. Ford & Sheldon's Case, 12 Rep. [Coke] 1; Ryall v. Rowles, 1 Ves. Sr. 348. That replevin is the remedy in Massachusetts, if there be any at all, is clear, because detinue long since fell into disuse; and since 1852 there have been only three forms of personal action, contract, tort, and replevin. One of the reasons for the change was, that replevin was so administered as to take the place of detinue. See Badger v. Phinney, 15 Mass. 362; Baker v. Fales, 16 Mass. 154; Esson v. Tarbell, 9 Cush. 407. By the act of 1823, c. 140 (9 Stat. 399), jurisdiction in equity was given to the supreme judicial court to compel

delivery to the owner of any goods, chattels, deed, bond, note, bill, specialty, writing, or other personal property, that was so taken or detained that it could not be replevied. When the statutes were revised, all the description of property after the word "chattels" was omitted, not to narrow, but to enlarge, the meaning, the commissioners reporting that "goods and chattels" would cover more than any possible or practicable enumeration. Rev. St. c. 81, § 8, and report of commissioners thereon; Gen. St. c. 113, § 2.

It is clear, then, that replevin will lie in this state whenever detinue might have been brought at common law. Some remarks of text-writers seem to imply that detinue only lies for deeds that attend the inheritance. 1 Chitty, Pl. 122; 1 Saund. Pl. & Ev. (2d Ed.) 987. But Fitzh. Reg. Brev. 159b, mentions deeds, writings obligatory, &c., and any "cyrographum," which, Du Cange says, means "chirographum," and that means, I suppose, any writing. One meaning is a note of hand. Valpy, Etym. "Chirog." That such is the scope of detinue at present, and of replevin in Massachusetts, hardly needed so much argument: the cases are decisive. See Myers v. Friend, 1 Rand. [Va.] 12; Todd v. Crookshanks, 3 Johns. 432; Cummings v. Tindall, 4 Stew. & P. 357; Sawyer v. Baldwin, 11 Pick. 492; Parish in Sudbury v. Stearns, 21 Pick. 148; Mills v. Gore, 20 Pick. 28; Clapp v. Shephard, 23 Pick. 228; School Dist. v. Lord, 44 Me. 374; Savery v. Hays, 20 Iowa, 25. The authorities cited for the complainant show that such writings cannot be attached on mesne process; but that is not germane to the question whether the owner can recover them by replevin.

It was assumed by both parties that the late practice act of the United States adopts the forms of action now in force in the state, and if so, replevin, and not detinue, is certainly the true form in the circuit court. I therefore proceed to consider the merits of the motion for a preliminary injunction. Two questions are to be answered: 1. Did the plaintiff in replevin, or his attorney, obtain possession of the papers in such a way that equity will not permit him to hold them? 2. Are they papers clearly belonging to the defendant in replevin the publication of which might be scandalous or injurious?

Taking the latter point first:—The only paper which is held under the writ is an indenture which purports to be signed and sealed by Ellis & Sladdin, and to assign to David Bowlas certain letters-patent, and the invention itself therein mentioned, and all other patents and extensions which the grantors may obtain on account thereof. I do not find Mr. Gibbs's name mentioned in this deed, nor is there any evidence connecting him with it, excepting affidavits which tend to show that it was lent him for some purpose, perhaps for a like purpose to that for which it is now needed by other persons. There is nothing in the paper itself, nor in the evidence, to bear out the assertions of the bill, that the paper is his property, that it is a private paper in any sense except that it is the private property of some one, and apparently of Bowlas, or that its publication can injure Mr. Gibbs, or any one else. On the contrary, it seems to be of record in England, and to be intended for publication. All the evidence tends to show that the equities set up in the bill are untrue in fact, and there is nothing which proves, or tends to prove, that any of the asserted mischiefs can attend the execution of the writ.

On the other point, I am relieved from some part, and the least agreeable part, of the inquiry; because, if the writ was altered after the service, it was to insert some papers which the marshal, as I am informed, has returned to the complainant in equity: at all events, they are not in his possession, and were not so when this bill was brought. The indenture was fully described in the writ, and the only evidence which applies to this paper is that Gibbs was not notified of the writ before he was induced to produce the paper. This is not a sufficient reason for a court of equity to interfere, without something more to complain of. The evidence tends to show that the attorney had an order for the papers from the true owner, and had a right to see them, and to carry them away. No false statement was made to Gibbs; and the suppression of truth does not seem to be any thing like a fraud. I agree entirely with the cases cited, which hold that an attachment made by fraud or force shall be void; but in these cases positive rights were infringed, and the title set up by the creditor was derived through his own wrong. Here Mr. Gibbs has shown no title beyond the fact of possession, which is explained by the affidavits, and a bare assertion that these are his private papers, whose publication will be very injurious, an assertion which the indenture itself refutes. If he had refused to deliver the indenture on demand, I suppose a bill in equity would lie to enforce the delivery; and a court of equity will not dismiss a suit at law when the only result will be to require a new suit for the same cause in equity, the courts having concurrent jurisdiction, and there being no special reasons for the interference of equity rather than law. Motion denied.

Case No. 5,388.

Ex parte GIBERSON.

[4 Cranch, C. C. 503.] [1]

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

ATTORNEY AND CLIENT—FIDELITY OF ATTORNEY.

Fidelity to his client is one of the first requisites in the character of an honorable practitioner at the bar. That fidelity requires that he should maintain all the just rights of his client; but it extends no further. It will not justify any attempt to evade the fair operation

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

of the law or to impede the administration of justice. A fault on either side of the true line of honorable professional conduct will equally meet the decided reprehension of the court.

In the case of Thornton v. Davis [Case No. 13,998], which was a petition for freedom, upon a motion for attachment against the defendant for disobeying an injunction, H. B. Robinson and Madison Jeffers, two of the constables of this county, having been charged, in argument, by Mr. Brent, with assisting the defendant in violating the injunction, were permitted to speak in their own justification; and, among other things, stated facts implicating the purity of the professional character of G. L. Giberson. Whereupon Mr. Key, district attorney, filed certain allegations against him, and obtained a rule to show cause why he should not be dismissed from the bar, or be otherwise dealt with as to the court should seem proper.

Upon the hearing, Mr. Robinson, Mr. Dandridge, and Mr. Jeffers were examined as witnesses in support of the rule; and Mr. B. K. Morsell, Mr. Brice, Mr. W. L. Brent, and Mr. Smallwood, against it.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). The substance of the charge stated in this rule against Mr. Giberson, is infidelity to his client; a charge, if true, of the gravest import, and which would deserve severe reprehension from the court. The specifications, in effect, are: 1st. That Mr. Giberson, after filing a petition for freedom for his client, and obtaining a subpoena and injunction to the master to prevent him from taking the petitioner out of the jurisdiction of this court; and believing that such was the intention of the master if he could find the petitioner; and knowing that Robinson and Jeffers were employed by the master to take him for that purpose; and knowing that the subpoena had been served on the master, instructed them that they might lawfully take him and deliver him to the said Davis. 2d. That he assented to a proposition made by the said Robinson and Jeffers, or one of them, to receive twenty-five dollars in case the petitioner was found and apprehended. 3d. That he promised them that if the petitioner came to his office he would give them notice so that he might be apprehended.

1. The bill which Mr. Giberson filed for an injunction is sufficient evidence that he believed that Mr. Davis intended to remove the petitioner out of the jurisdiction of this court, if he could take him, notwithstanding the subpoena which had been served upon him to answer the petition for freedom. It seems also to be proved that he knew that Robinson and Jeffers were employed by Davis to take the petitioner for that purpose; or, at least, to discover where he was, so that Davis might take him. It seems also to be proved, by the testimony of Robinson and Jeffers, that he told them that as the injunction had not been served there was no danger on their part in apprehending him, or taking him up. This opinion, so far as it regards the danger arising from a violation of the injunction, was, perhaps, just; but he ought to have informed them further, that an injunction had been granted, although not served; and that if they, knowing that it had been issued, and that a subpoena to answer the petition had been served, should proceed to apprehend and deliver the petitioner to Mr. Davis, with a view to prevent the effect of the injunction, or to deprive the petitioner of the benefit of his suit, they would be guilty, if not of a contempt of court, yet of a misdemeanor for which they might be punished. If they had no reason to believe that Davis intended to take the petitioner away from the jurisdiction of this court, so as to deprive him of the benefit of his suit, their apprehending him as a runaway slave, and delivering him to his master would not be unlawful, even if they knew of the service of the subpoena and injunction; for the master is still entitled to the possession of the negro until his freedom shall be established, upon complying with the rules of the court. The omission of Mr. Giberson to give Robinson and Jeffers the additional caution which the case seemed to require, may have been the effect of a misapprehension of the law, or an imperfect view of the whole case; and will not justify us in saying that it proceeded from infidelity to his client, or any other corrupt motive.

2. The second specification is, that he assented to a proposition to receive twenty-five dollars in case the petitioner should be found and apprehended. Mr. Giberson's assent to this proposition, is not proved by any positive evidence of the fact. Mr. Robinson and Mr. Jeffers, however, were suffered by him to go away in the belief that he would give the information they wanted, and would take the bribe; but Mr. Giberson did not give them the necessary information, although it seems, from Mr. B. K. Morsell's testimony, that he possessed it. On the contrary, it is proved by Mr. Morsell and Mr. W. L. Brent, that he mentioned to them the offer and expressed great indignation that it should have been made. Mr. Morsell also testifies that Mr. Giberson gave the petitioner notice that Robinson and Jeffers were seeking for him to deliver him up to Mr. Davis, and cautioned him against exposing himself. Mr. Giberson, believing it to be the intention of Mr. Davis to carry the petitioner out of the jurisdiction of this court, notwithstanding the subpoena and injunction, might have deemed it his duty to deceive Robinson and Jeffers with a view to give notice to the petitioner. The petitioner was, in fact, taken and carried out of this district by Davis, but not by Robinson and Jeffers, nor does it appear to have been through any information furnished by them, or by Mr. Giberson. We must, therefore, acquit him of this part of the charge.

3. The third specification is, that he promised that if the petitioner came to his office, he would give Robinson and Jeffers notice, that he might be apprehended. It appears, by their testimony, that Mr. Giberson did promise them that if the petitioner came to his office he would let them know it. But it also appears, by the testimony of Mr. Morsell and Mr. Brent, that he cautioned the petitioner against Robinson and Jeffers, and against coming to his office. His subsequent conduct, when pressed to dismiss the suit, upon receiving the costs, appears to have been perfectly correct; and he expressed great indignation against Robinson and Jeffers when he supposed they had assisted Mr. Davis in carrying the petitioner beyond the jurisdiction of the court, as appears by his letter to Mr. Robinson.

Upon the whole, we must acquit Mr. Giberson of any intentional infidelity to his client; but we think he ought to have informed Robinson and Jeffers of the danger they would incur by assisting Mr. Davis in removing the petitioner from the jurisdiction of this court, after notice or knowledge of his having filed his petition; and that he ought to have repelled promptly, and with indignation, the unjustifiable offer of the twenty-five dollars. His not having done so, has cast a shade of suspicion over the transaction. Fidelity to his client is one of the first requisites in the character of an honorable practitioner at the bar. That fidelity requires that he should maintain all the just rights of his client; but it extends no further. It will not justify any attempt to evade the fair operation of the law, or to impede the administration of justice. A fault on either side of the true line of honorable professional conduct, will equally meet the decided reprehension of the court. The rule, in this case, may be discharged; but we hope it will induce all concerned, (the officers of justice as well as the member of the bar upon whom it was laid,) to reflect upon, and fix in their minds the true honorable standard of official as well as professional practice.

GIBERSON (STEPHENSON v.). See Case No. 13,372.

GIBERT (UNITED STATES v.). See Case No. 15,204.

GIBNEY v. The WAVERLY. See Case No. 17,301.

Case No. 5,389.

GIBSON v. BARNARD et al.

[1 Blatchf. 388;[1] 1 Fish. Pat. Rep. 238.]

Circuit Court, N. D. New York. Oct. Term, 1848.

PATENTS—CONFLICTING ASSIGNMENTS—FAILURE TO FULFIL AGREEMENT.

1. W., the patentee of a patent which was about to expire, being about to apply for an extension, agreed with R. that he would convey to him a certain right under the extension, on certain terms. R. paid some money and gave some notes, on making the agreement. After the extension was granted, W. assigned to J. all his interest in the agreement with R. and in the right covered by it. R. refused to fulfil his part of the agreement, and, having used the patented thing from the time of the extension, to the extent of the right covered by the agreement, was sued by J. for infringement. During the pendency of the suit, J. granted to B. his interest in the right conveyed to him by W. The decision in the suit was that R. was entitled, aside from his agreement with W., to a portion of the right covered by it. After this decision, B. went on to use the patented thing, to the extent of the right covered by the grant from J., and R. continued to use it to the same extent. G., being the owner of the exclusive right to the extension for the territory in which both B. and R. were using the patented thing, with the exception of the right covered by the agreement between W. and R., by the assignment from W. to J., and by the grant from J. to B., filed a bill against B., praying for a perpetual injunction against him: *Held*, that the failure of R. to fulfil his agreement with W. did not of itself operate to annul and cancel the agreement, as the contract was partly executed and R. was in the use of the patented thing.

2. Although a court of equity might have decreed a surrender of the contract, and its cancellation on terms, yet, until then, R. must be deemed to have been in the lawful use and enjoyment of the right under the extension, and that an injunction should issue.

3. Even assuming the contract to have been annulled and the parties to have been remitted to their original rights, J. had power to grant to B. but a portion of the right he assumed to grant, as a part was awarded to R. in the suit between him and J.

This was a bill in equity [by John Gibson against Frederick J. Barnard, Samuel W. Barnard, and Henry Q. Hawley] to restrain perpetually the use of two of Woodworth's planing machines in the town of Watervliet in the county of Albany and state of New-York. The original term of the patent, fourteen years, expired on the 27th of December, 1842. On the 19th of May, 1842, an extension of the patent for seven years by the board of commissioners was in contemplation, and the plaintiff, John Gibson, became possessed of and then owned the exclusive right under such extension, if granted, for the city and county of Albany, with the exception of the right to two machines for the town of Watervliet in said county. The right thus belonging to Gibson he derived from William W. Woodworth, the administrator of William Woodworth, the patentee, who died in 1829. The two excepted machines consisted, first, of a machine then in use in the town of Watervliet by Louis Rousseau and Charles Easton, the right to use which during the original term of the patent had been conveyed to them by the administrator, and the right to continue to use which during an extension of the patent they claimed they would possess by virtue of the mere extension, and second, of a machine the right to use which in said town during the extension, Gibson conveyed to the administrator on the 19th of May, 1842. On the same day, the administrator agreed with

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

Rousseau & Easton, that in case the patent should be extended, he would execute to them an assignment by which they would become vested more fully with the right of running in the town of Watervliet, during the extension, the machine they were then using, and also conveying to them the right for the extension to the machine that day conveyed to him by Gibson. Rousseau & Easton paid the administrator $200 down, and agreed, if the extension should be obtained and the assignment be made as provided for, that they would pay him the further sum of $2000 in four equal annual installments. In November, 1842, an extension of the patent was granted, to run for seven years from the 27th of December, 1842. On the 26th of April, 1843, the agreement between the administrator and Rousseau & Easton, of the 19th of May, 1842, was modified by a mutual stipulation, which recited that the latter had that day given to the former eight promissory notes, for $250 each, payable at different periods, the last one July 1st, 1846, and agreed that on payment of the notes as they became due, the administrator should make the assignment provided for by the original agreement. On the 12th of August, 1844, the administrator assigned to James G. Wilson all his interest in said agreement with Rousseau & Easton respecting the right to the two machines, and all his right and title to the use of the same. Rousseau & Easton having refused to fulfil said agreement on their part, Gibson, on the 13th of November, 1844, renounced and released to Wilson all his right or claim, if any he had, to the said two machines. This was supposed to be necessary to enable Wilson to sue Rousseau & Easton for a breach of their contract or for an infringement of the patent as extended, they continuing to use the machines in the town of Watervliet during the extension, although they did not fulfil their agreement. Gibson claimed no right to the use of the two machines in Watervliet, but gave the release for abundant caution and the better to secure to Wilson the rights which he acquired under the assignment from the administrator. On the 5th of December, 1845, Wilson granted to the defendants a license to use two machines in the town of Watervliet during the extension, for which he was to receive $4000 from them, but it was further agreed that if the decision of the supreme court of the United States in a suit then pending before it, between Wilson and Rousseau & Easton, and involving the right to use the two machines, should be against Wilson, so as to exclude him from the use of them, then he was to repay to the defendants $2000 that day paid to him by them, and that if the decision should be in favor of Wilson, and the defendants should be put in possession of the right to use the two machines in Watervliet, then they were to pay Wilson a further sum of $2000. The suit here referred to is the case of Wilson v. Rousseau [Case No. 17,832], 4 How. [45 U. S.] 646, where many facts will be found, important to the more full understanding of this case. The decision of the supreme court was made in March, 1846, and gave to Rousseau & Easton the right to use during the extension, and by virtue of it alone, the one machine which they had in use at the time of the expiration of the original term of the patent. Rousseau & Easton used the two machines constantly from the commencement of the extended term, and were using them when this suit was commenced. Soon after the decision by the supreme court, the defendants constructed and put into use two machines in Watervliet, and Gibson filed this bill to restrain such use. The cause was heard on pleadings and proofs.

William H. Seward, for plaintiff.
Marcus T. Reynolds, for defendants.

NELSON, Circuit Justice. It is quite clear that down to the time of the grant by Wilson to the defendants on the 5th of December, 1845, the plaintiff possessed the exclusive right and title to the patent during the extension, for the county of Albany, with the exception of the two rights in the town of Watervliet, namely, the right to use one machine, claimed by Rousseau & Easton as accruing to them by virtue of the extension and of their having had the right to use it during the original term, and more effectually secured to them by the administrator, and the right sold and assigned by Gibson to the administrator, and by him to Rousseau & Easton. It is clear, also, that Wilson possessed no interest in the extended patent for the town of Watervliet, except as respected the two machines and the interest therein, which he derived by the assignment from the administrator of the 12th of August, 1844, the right to those machines having before been sold by the administrator to Rousseau & Easton, and they being in the actual use and enjoyment of them. Wilson, therefore, could grant his interest in those two rights, whatever it might be, and nothing more, and this was all that could pass to the defendants under the agreement of the 5th of December, 1845. The terms of that agreement also establish the fact that Wilson intended to sell, and the defendants to purchase, his interest in those two rights.

The failure of Rousseau & Easton to fulfil their agreement of purchase with the administrator, the interest in which belonged to Wilson, did not of itself operate to annul and cancel the agreement. It was a contract partly executed. Two hundred dollars of the purchase money had been paid and promissory notes given for the residue. The machines were in operation. And, although a court of equity might have decreed a surrender of the contract, and its cancellation on terms, yet, until then, Rousseau & Easton must be deemed to have been in the lawful

use and enjoyment of the two rights in Watervliet under the extended patent.

Even assuming the contract to have been annulled and the parties to have been remitted to their original rights, it is clear that Wilson had power to grant to the defendants but one of the rights, as the other was secured to Rousseau & Easton by the decision of the supreme court in the suit between Wilson and them. I am of opinion, therefore, that the defendants have failed to establish any right to run the machines in question, and that the plaintiff is entitled to a decree for a perpetual injunction.

[NOTE. For other cases involving this patent, see note to Bicknell v. Todd, Case No. 1,389.

[An appeal was taken by the defendants, but was dismissed by the supreme court, Mr. Justice McClain delivering the opinion, upon the ground that the appeal was not from the final decree; it appearing that the decree of the circuit court had referred the report to a master to ascertain the amount of damages, and that in the meantime the bill had not been dismissed, nor a decree rendered for costs. 7 How. (48 U. S.) 650.]

Case No. 5,390.

GIBSON v. BETTS et al.

[1 Blatchf. 163;[1] 1 Fish. Pat. Rep. 91.]

Circuit Court, N. D. New York. June Term, 1846.

PATENTS—PROVISIONAL INJUNCTION—VALIDITY OF PATENT—INFRINGEMENT.

1. On a motion for a provisional injunction under Woodworth's patent for improvements in the method of planing boards, as re-issued July 8th, 1845, no question as to the originality of the invention, or as to the validity of the re-issued patent, will be entertained by the court.

2. A machine which had only a planing cylinder, and no tonguing or grooving wheels; in which the planks were moved forward by a carriage, instead of by friction rollers, the carriage being moved by an endless chain; and in which the planks were kept down on the carriage by springs, adjusted on frame-work near the planing cylinder—was decided, on a motion for a provisional injunction, to be an infringement of Woodworth's re-issued patent.

In equity. This was an application for a provisional injunction. The plaintiff [John Gibson] was assignee, for the city and county of Albany, for the extended term of seven years from December 27th, 1842, to December 27th, 1849, of letters patent to William Woodworth for an improvement in the method of planing, tonguing and grooving boards and plank, as re-issued July 8th, 1845. See the letters patent, specification, &c., set forth at length in the case of Wilson v. Rousseau, 4 How. [45 U. S.] 658–668. The defendants [Richard D. Betts and Rufus K. Viele] were using a machine for planing, called "Andrews' Planing Machine." It differed from Woodworth's, as ordinarily arranged, in these respects: (1) It had a planing cylinder, but no tonguing or grooving wheels; (2) it had a carriage, instead of friction rollers, to move the planks forward, and the carriage was moved by an endless chain; (3) the planks were kept down on the carriage by springs adjusted on framework near the planing cylinder. Models of the two machines were produced and the defendants introduced affidavits denying the originality of Woodworth's invention. They also denied the validity of the re-issued patent.

William H. Seward, for plaintiff.
Daniel Cady, for defendants.

NELSON, Circuit Justice, decided, that after the adjudications on Woodworth's patent, he would not, on a motion for an injunction, entertain any question as to the originality of Woodworth's invention, or as to the validity of the re-issued patent. He also decided that the defendant's machine was an infringement of Woodworth's. Injunction granted.

[For other cases involving this patent, see note to Bicknell v. Todd, Case No. 1,389.]

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

Case No. 5,391.

GIBSON v. CINCINNATI ENQUIRER.

[2 Flip. 88;[1] 5 Reporter, 135; 5 Cent. Law J. 446; 2 Cin. Law Bul. 268.]

Circuit Court, S. D. Ohio. Nov., 1877.

MOTION FOR NEW TRIAL—VERDICT—INTEREST.

Verdict rendered in favor of plaintiff, but judgment delayed because of motion for new trial: *Held*, that on overruling the motion the plaintiff is entitled to judgment for the amount of the verdict and interest from the day it was rendered. And the rule applies as well to actions of torts as to those founded upon contracts.

[Cited in Griffith v. Baltimore & O. R. Co., 44 Fed. 585.]

At law.

SWING, District Judge. The plaintiff brought his action for libel against the defendant, and on the 16th day of November, 1876, the jury rendered a verdict in his favor for the sum of $3,875. On the 17th day of November, 1876, the defendant filed a motion for a new trial. This motion was argued by counsel, and submitted to the court at the February term, 1877, and on the 15th day of October the court overruled the motion for a new trial, and ordered judgment to be entered upon the verdict for the amount thereof, with interest from the 3d day of October, 1876, being the first day of the term at which the verdict was rendered. See [Case No. 5,392] for a report of the opinion on that motion. On the 17th day of October, 1877, the defendant filed a motion to modify the judgment, for the reason that no in-

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terest should have been allowed upon the verdict until judgment was entered thereon.

It is insisted by the defendant that interest is the creature of the statute, and that this case does not come within its provisions; that the cause of action was not founded upon contract, but was an action for a tort, and that in such cases interest is only recoverable from the date of the judgment. I think the supreme court of Ohio in Hogg v. Manufacturing Co., 5 Ohio, 416, settled the doctrine that interest may be allowed as well in actions of tort as in those upon contracts. In that case, it is said that a jury may calculate interest upon the amount of damage actually sustained, and add it to their verdict. If the jury in fixing the amount due from the defendant to plaintiff, may give to him interest, certainly the law should give him interest upon the sum which they have returned in his favor, from the date of their verdict. And the supreme court of Virginia, in Lewis v. Arnold, 13 Grat. 464, hold that in regard to interest upon the verdict there is no difference, in principle, between verdicts in actions for torts and upon contracts.

Upon the question of the right of the plaintiff to interest upon the verdict, I can see no difference between a verdict in an action for tort, and a verdict in actions sounding in contract—the verdict in either case fixed the amount due at the time of its rendition, and that amount the party is entitled to have paid him as of that date—and if the payment is delayed him by the act of the defendant, he ought to have interest. Such has been the practice of this court, and such seems to be the current of authority.

In Sproat v. Cutler, Wright, N. P. 157, interest was allowed upon an award from its date, and the court say: "And if it were the verdict of a jury, and judgment had been delayed, we should allow interest if asked." By the statute of Maine in relation to occupying claimants, it is provided that the court shall render for the sum estimated by the jury, but the supreme court of the state, in Winthrop v. Curtis, 4 Greenl. 297, held that the party was entitled to interest from the date of the verdict. The statute of New Hampshire, as ours, allows interest upon judgments without distinction as to the nature of the action in which the judgment is rendered; and the supreme court of that state, in Johnson v. Atlantic & St. L. R. Co., 43 N. H. 410, say: "No solid reason can be given for withholding interest between the finding of the jury and the rendering of the judgment," but inasmuch as the court below had refused interest, and no exception had been taken to the ruling, the writ of review was dismissed. The rule of the supreme court of Connecticut in relation to motion for new trials, is, in substance, that where execution is stayed by reason of reserving a cause on motion for new trial, if judgment be not reversed, interest shall be added to the judgment from the time of the stay. 18 Conn. 575. In Weed v. Weed, 25 Conn. 494, a verdict was rendered in favor of the plaintiff for $745.85. A motion for a new trial was made by the defendant. Some time afterward the court granted the motion unless plaintiff would remit $117. Plaintiff remitted and the court rendered judgment upon the verdict for the balance, including interest from the date of the verdict. The case was taken to the supreme court, and the judgment was affirmed. In Bull v. Ketchum, 2 Denio, 188, the court recognize the doctrine that at common law the plaintiff was entitled to interest on the verdict where delay of the entry of the judgment was occasioned by the defendant. The same doctrine is held in Vredenbergh v. Hallett, 1 Johns. Cas. 27; People v. Gaine, 1 Johns. 343; Lord v. New York, 3 Hill, 430. In Rheim v. Robbins, 20 Iowa, 45, the court held that the interest should have been computed upon the verdict from the time when judgment should have been rendered, thus recognizing the right to interest before judgment. In Kintner v. State, 3 Ind. 86, the court say that judgment upon an award may properly include interest from the date of the award to the date of the judgment. In Buchman v. Davis, 28 Pa. St. 211, the award was filed May 17, 1856, judgment was rendered upon it at the December, term, 1856, and execution issued for judgment with interest from date of filing the award. The court say, "The award made pursuant to the submission, would, like a verdict, draw interest from the date of filing its entry, and is, therefore, no objection to the fi. fa."

I am aware that a different doctrine was announced by that court in Kelsey v. Murphy, 30 Pa. St. 340, but Judge Strong in delivering the opinion of the court in the subsequent case of Irvin v. Hazleton, 37 Pa. St. 465, reviews the decision of the court in Kelsey v. Murphy, and says that it decides nothing more than that "a judgment entered generally operated from the day of its entry, so as to carry interest only from that time," and holds in the case before the court that there was not error in the court below in entering judgment with interest from the date of the verdict.

In North Carolina, in Devereux v. Burgwin, 11 Ired. 491, it was held that interest was not allowable on an award; and in Louisiana, in Bonner v. Copley, 15 La. Ann. 504, it was held that in actions for damages, interest could not be allowed either upon verdicts or judgments. But these cases are certainly against the weight of authority; and I think, both upon principle and authority, that whenever judgment upon the verdict has been delayed by the action of the defendant, the plaintiff is entitled to interest from the date of the verdict.

The judgment, however, in this case is wrong in this, that it is for interest from the first day of the term, when it should have been only from the day of the rendi-

tion of the verdict. It is true that for many purposes the term is regarded as but one day, and in all actions sounding in contract, interest, in this court, is computed to the first day of the term only, so that it is entirely proper that the verdicts and the judgments should draw interest from the first day of the term. But in actions of tort, such as the present, where the jury were not directed to compute the amount which they should find in favor of the plaintiff as of the first day of the term, the judgment should have been for the amount of the verdict with interest from the date of its rendition. The judgment will be modified in accordance with this opinion.

Case No. 5,392.

GIBSON v. CINCINNATI ENQUIRER.

[2 Flip. 121;[1] 5 Cent. Law J. 380; 23 Int. Rev. Rec. 392; 2 Cin. Law Bul. 244.]

Circuit Court, S. D. Ohio. Oct. 15, 1877.

NEWSPAPER ARTICLE—LIBEL—ADMISSIBILITY IN EVIDENCE OF OTHER ARTICLES.

1. Libellous publications from the same paper and relating to other parties, may be put in evidence, in an action for libel, in order to prove that the paper showed a want of care in guarding its columns against the insertion of such articles. If such or similar articles were frequent it would be a ground for increasing the damages, as it would show a recklessness of conduct.

[Cited in Post Pub. Co. v. Hallam, 8 C. C. A. 204, 59 Fed. 534.]

2. The words "crim. con." and "flagrante delicto" defined.

[Cited in State v. Baldwin (Kan.) 12 Pac. 329.]

3. A verdict for $3,875 against a newspaper, having a large circulation, for libel in charging plaintiff with adultery, is not excessive.

This was action for publishing in the Cincinnati Enquirer, a paper of large circulation and influence, the following libel:

"Still Another.—The new city of Huntington, up the river, is now enjoying one of the juiciest crim. con. scandals of the day. The parties are one Gibson, a Republican editor, and the wife of a railroad official at Huntington, West Virginia, who were caught in flagrante delicto on the steamer Bostonia, and hustled ashore at midnight by Captain Bryson."

Evidence showed that plaintiff was a person of good reputation, having a wife and children; that he was engaged in publishing a newspaper in Huntington, which had a circulation in several states; that defendant's paper had a daily circulation of 15,000 or thereabout, and 300 within limits of plaintiff's paper. The defendant gave evidence tending to show that the article was not published maliciously; that it was taken from a printed slip received in an envelope from Huntington, West Virginia, without any name or address; that he had no knowledge of the plaintiff, and that a correction was published in the Enquirer. The jury returned a verdict for the plaintiff, fixing his damages at $3,875. Defendant moved for a new trial upon the several grounds stated in the opinion.

T. D. Lincoln, for plaintiff.

Hoadly, Johnson & Colston, for defendant.

BROWN, District Judge. The first error assigned is in the admission of the article immediately preceding the libel in question, and in permitting the same to be read to the jury. I am informed by the learned judge who presided at the trial, that in fact only the caption of the article was read to the jury as explanatory of the words "Still Another"; but it is claimed that even this was erroneous, unless the words "Still Another" were aided or explained by an innuendo, referring to the preceding article, which was entitled, "Terrible Charge against a Methodist Preacher." I think the defendant has mistaken the province of an innuendo. There is here no ambiguity of language of which it is the function of the innuendo to point out the meaning, but a mere reference to something which evidently preceded the libel in question, and to which it was not an error to direct the attention of the jury.

But I am inclined to think the entire article, which was also libellous in its nature, was admissible as bearing upon the question of damages. While it is doubtless true that the commission of one grave offense cannot be proven by evidence of another offense committed at a different time and place, there is a class of cases holding that where the knowledge or intent of the party is in issue, evidence of other acts of a similar nature, done at or about the same time, is competent evidence of his method of doing business; for instance, in prosecutions for passing counterfeit money, evidence that the prisoner made efforts to pass counterfeit money upon other persons than those set forth in the indictment is always competent as bearing upon the question of scienter. Whart. Cr. Law, § 1457; 1 Phil. Ev. 768, 769. So also in prosecutions for frauds upon the revenue, evidence that the party has committed other frauds of a similar character is constantly admitted as bearing upon the question of intent. Allison v. Matthieu, 3 Johns. 235; Hennequin v. Naylor, 24 N. Y. 139; 1 Phil. Ev. 750, 753, 758, 759. So also in action against a railroad company for damages occasioned by fire from locomotives, evidence that other locomotives belonging to the same road were in the habit of throwing sparks beyond where the fire took place is competent as showing the general character of the equipment used by the road. Sheldon v. Hudson River R. Co., 4 Kern. [14 N. Y.] 220; Pittsburgh, Ft. W. & C. R. Co. v. Ruby, 38 Ind. 311, 312; Aldridge v. Great Western Ry. Co., 3 Man. & G. 515; Field v.

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

New York Cent. & H. R. R. Co., 32 N. Y. 339. The same rule has also been applied in actions for libel, and evidence of other articles of a libellous nature, has been held competent as showing a want of care in guarding the columns of the paper against the insertion of such articles. Pearson v. Lemaitre, 5 Man. & G. 700; Chubb v. Westley, 6 Car. & P. 436.

In the case of Detroit Daily Post & Tribune Co. v. McArthur, 16 Mich. 454, the court observe: "The employment of competent editors, the supervision by proper persons of all that is to be inserted, and the establishment and habitual enforcement of such rules as would probably exclude improper items, would reduce the blameworthiness of the publisher to a minimum, for any libel inserted without his privity or approval, and should confine his liability to such damages as include no redress for wounded feeling, beyond what is inevitable from the nature of the libel. * * * If, on the other hand, it should appear, from the frequent recurrence of similar libels, or from other proof tending to show a want of solicitude for the proper conduct of his paper, that the publisher was reckless of consequences, then he would be liable to increased damages, simply because by his own fault he had deserved them. By such recklessness he encouraged fault or carelessness in his agents, and becomes in a manner in complicity with their misconduct." This rule has very recently been affirmed by the same court in the case of Scripps v. Reilly [35 Mich. 371]. In this case it was also claimed that the court erred in admitting certain publications relating to other parties. It was made a question whether the paper was conducted with sufficient care to save the plaintiff in error from punitory damages, in case the jury should find the article libellous, and no actual malice. "If such mode of proof was proper, these articles tended to show the want of such care." The McArthur Case is here cited as plainly imputing the right to show the recurrence of similar libels, and implying distinctly that particular instances may be adduced to make out the fact of general recklessness in the conduct of the paper.

In the charge to the jury in this case the learned judge laid the exemplary damages before them in the following words: "So that before you can go beyond the general damages indicated by the pleadings in the case, and give exemplary damages, you must find either that it was willful, or that there was that active want of care which would raise the presumption of conscious indifference, not gross negligence, but a conscious indifference to the rights of the plaintiff." In this view of the case it seems to me that no error should be predicated upon the admission of this article.

Secondly. It is claimed that the court erred in defining to the jury the meaning of the abbreviation "crim. con." There is nothing in this objection. Courts take judicial notice of the meaning of words and idioms in the vernacular of the language (1 Greenl. Ev. § 5), and no colloquium or innuendo is necessary to point out their meaning. Where the meaning of the words is well settled by common usage, there is no use of calling persons to testify as to what was meant by them at the time they were uttered, or to explain their meaning if published in a newspaper. The words "crim. con." are usually understood as an abbreviation for "criminal conversation," and these words have of themselves acquired a fixed and universal significance.

Third. Equally unobjectionable was the translation by the court of the words "flagrante delicto." While a libel published in a foreign language would, ordinarily, be interpreted by witnesses skilled in the knowledge of both languages, there is a class of foreign words that have been so far anglicized by common use as to have become, substantially, a part of the language. Instances of these are "habeas corpus," "bona fide," "prima facie," "a fortiori," from Latin, and a large number from the French and other modern languages. Wherever such words occur, it is clearly within the province of the court to define them to the jury. Townsh. Sland. & L. 160, note 2; Homer v. Taunton, 5 Hurl. & N. 661, 667; Barnett v. Allen, 3 Hurl. & N. 376; Hoare v. Silverlock, 12 Adol. & El. (N. S.) 624. It is only where the words are ambiguous, obscure, or used in a local or technical sense that an innuendo is necessary. Indeed, if the whole libel had been published in a foreign language, and the court had assumed to translate and define its meaning to the jury without the aid of experts, it is difficult to see how this error could be made the ground for a new trial. It is only error that prejudices which justifies setting aside the verdict; and if the translation is in fact correct, it is difficult to see wherein the prejudicial error lies. Certainly the definition given by the learned judge of the words "in flagrante delicto," if any definition were necessary to an ordinarily intelligent jury, was undoubtedly correct. There is no ground here for a new trial.

Fourth. It was insisted with great earnestness, that the court should set aside the verdict upon the ground of excessive damages. Nothing is more difficult than to determine in an action of tort, for injury to person or reputation, what damages are excessive. In actions upon contract they can, ordinarily, be computed with some degree of certainty. Frequently they are the subjects of mere mathematical calculation. In such cases a slight excess might justify the court, if not in setting aside the verdict, at least in making the refusal of a new trial conditioned upon a reduction; but in actions of tort an exact computation is not only impossible, but there is frequently an entire absence of data from which the amount of damages can be approximately estimated,

and especially is this so in regard to injuries to person or to reputation. In actions for libel so much depends upon the relative situation of the parties, the character of the language used, and the amount of publicity given to the libel, that it is scarcely too much to say there is no rule beyond the discretion of the jury. I find the law upon this subject thus stated in Townshend on Libel (section 293): "As the amount of damages in an action for slander or libel is always a subject for the exercise of the sound discretion of the jury, who may give more or less, according to their conclusions from the whole case respecting the motives of the publisher, a verdict in such an action will not be set aside for excessive damages, unless there is some suspicion of unfair dealing, or unless the case be such as to furnish evidence of prejudice, partiality or corruption on the part of the jury. The case must be very gross and the damages erroneous to justify a new trial on the question of damages." A few instances where applications have been refused, will show the general reluctance of courts to set aside verdicts in actions of this kind upon the ground of excessive damages. In McDougal v. Sharp, First City H. Rec. 73, the charge was perjury, and the verdict $3,500, which the court refused to disturb. In Tillotson v. Cheetham, 2 Johns. 63, the court refused to set aside a verdict for $1,400 for accusing the plaintiff of political corruption: "A case must be very gross and the recovery enormous to justify our interposition on a mere question of damages in an action for slander." In Ryckman v. Parkins, 9 Wend. 470, a verdict in slander of $7,000 was sustained. In Trumbull v. Gibbons, Jud. Repos. (N. Y.) 1, a verdict of $15,000, and in Fry v. Bennett, 4 Duer, 247, one of $10,000 for publishing charges against the plaintiff as manager of an opera company were also held insufficient to justify the interference of the court. In Duberley v. Gunning, 4 Term R. 651, the court refused to disturb a verdict of £5,000 in an action for criminal conversation, and in Coffin v. Coffin, 4 Mass. 1, the court sustained a verdict of $2,500 for slander spoken in the house of representatives. The case was tried in 1808, when the purchasing value of $2,500 was at least twice what it is to-day. In Letton v. Young, 2 Metc. [Ky.] 558, the supreme court of Kentucky refused to set aside a verdict of $4,000 in an action of slander.

The cases of this character, in which the courts have granted new trials upon this ground are not only very rare, but will always be found to be accompanied by strongly mitigating circumstances. In Nettles v. Harrison, 2 McCord, 230, the defendant said of the plaintiff that he kept a house of prostitution; verdict $5,000. A new trial was granted, as the words were uttered but once, and were induced by plaintiff encouraging defendant's son to visit his house, having daughters of none the best characters, with whom his son had been too intimate. In Freeman v. Tinsley, 50 Ill. 497, a verdict of $2,500 was set aside in an action for slander, where the words were spoken in high excitement, provoked by the plaintiff; and under a plea of justification it was shown the plaintiff had been indicted for the crime with which he was charged, and in connection with proof of doubtful associations and suspicious character. In the case of Scripps v. Reilly, above cited, a libel was published in a newspaper having about the circulation of the Enquirer, imputing a charge of adultery to a prominent citizen of Detroit; the jury returned a verdict for $4,000, and although a new trial was finally obtained, the fact that the damages were excessive was not suggested by the astute counsel who defended the case. Upon the re-trial the verdict was increased to $5,000. In Neal v. Lewis, 2 Bay, 204, the supreme court of South Carolina refused to set aside a verdict for $3,000 for calling the plaintiff a rascal, a villain, a swindler and thief.

While if the language used in the case under consideration had simply been spoken of the plaintiff in the presence of a few persons, or had been published only in a letter or other private communication, the damages might be excessive enough to justify the interposition of the court, a very different rule obtains where the publicity given to the charge is so great. While there was no evidence of express malice, there is certainly testimony tending to show that the steamer Bostonia, on which the crime was charged to have taken place, made frequent trips to Cincinnati, and that very slight diligence on the part of the defendant in sending a messenger to the steamer would have shown the falsity of the charge.

The disagreeable feature of the case was the fact that the plaintiff and defendant were publishers of newspapers of opposite politics, but as the instructions to the jury were characterized by great fairness and temperateness of language, as they were strictly cautioned against political influence, and as the amount of the verdict was entirely consistent with the absence of such influence, I see no reason for taking this into consideration. While juries are very apt to be biased, more or less, by their political or religious opinions, it would be very unsafe for courts to assume that a verdict was dictated by those considerations, without clear proof of the fact. The charge made against the plaintiff was one very likely to injure him severely in his social relations, and to impair his reputation among his neighbors as a good citizen. The publicity given to it in defendant's paper was very great. The amount of the verdict suggests a compromise of conflicting opinions, and I think it quite within the discretionary limits of the jury. The motion for a new trial must be denied.

[Subsequently decision was rendered modifying the judgment. See Case No. 5,391.]

GIBSON (CLAGETT v.). See Case No. 2,778.

Case No. 5,393.

GIBSON v. COOK.

[2 Blatchf. 144;[1] 1 Fish. Pat. Rep. 415.]

Circuit Court, N. D. New York. Nov. 21, 1850.

PATENTS—ASSIGNEE—EXTENSION—RECORDING ASSIGNMENTS.

1. To enable an assignee of a patent to derive any benefit from a subsequent extension of the patent by act of congress, there must be an express provision in the assignment looking to such renewal.

[Cited in Hodge v. Hudson River R. Co., Case No. 6,559; Jenkins v. Nicolson Pavement Co., Id. 7,273.]

2. Under section 11 of the patent act of July 4, 1836 (5 Stat. 121), the assignment of an exclusive right in the patent within a given territory must not only be in writing, but must be recorded within three months after its execution, to defeat the title of a subsequent purchaser without notice and for a valuable consideration.

[Cited in Perry v. Corning, Case No. 11,004; American Solid Leather Button Co. v. Empire State Nail Co., 47 Fed. 743; Empire State Nail Co. v. Faulkner, 55 Fed. 822.]

3. Within the three months, an unrecorded prior assignment would prevail; but it must be an assignment in writing, that may be recorded within the time limited.

[Cited in Perry v. Corning, Case No. 11,004.]

4. An interest in a grant of a future term of a patent not yet in esse, is not the subject of assignment at common law, or within the sense of section 11 of the act of July 4, 1836, and the right to such an interest, when stipulated for, rests only in contract.

5. As between the right of a person holding a contract for such an interest, and the right of a bona fide purchaser, for a valuable consideration and without notice, of the same interest in the future term, after its grant, the latter must prevail.

6. The party setting up such a contract by way of equitable defence to the legal title to the same interest, must deny that the plaintiff is a bona fide purchaser for a valuable consideration without notice, and must assume the burthen of impeaching the legal title.

[Cited in Woodworth v. Cook, Case No. 18,011.]

This was an application [by John Gibson] for a provisional injunction against the defendant [William W. Cook] for an alleged infringement of the Woodworth patent, in using six Woodworth machines, without license, since the 27th of December, 1849. The plaintiff was the assignee of the re-issued patent of July 8th, 1845, for the congressional extension of seven years from the 27th of December, 1849 (see Wilson v. Rousseau, 4 How. [45 U. S.] 646), for the county of Washington, New York, within which the alleged infringement took place. The patentee's rights to the territory in question were assigned by him to James G. Wilson, on the 9th of July, 1845, and by Wilson to the plaintiff, on the 12th of November, 1846.

In opposition to the motion, the defendant relied upon an assignment or license to him from the patentee, William W. Woodworth, administrator, &c., executed on the 4th of July, 1843, by which he was authorized to construct and use six Woodworth machines in the county of Washington. The question in the case involved the operation and effect of this license.

The license was given during the running of the seven years' extension of the patent, granted under the 18th section of the patent act of July 4th, 1836 [supra], and which prolonged its term from December 27th, 1842, to December 27th, 1849. See Wilson v. Rousseau, 4 How. [45 U. S.] 646. The license recited the issuing of the original patent, and its extension for seven years from the 27th of December, 1842, and then, in apt and proper words, granted to the defendant and his assigns the right to construct and use, during the said extension, six planing machines in the said county of Washington, but in no other place within the United States or their territories. It authorized him and his assigns to prosecute parties guilty of an infringement by constructing or using the Woodworth machine within the assigned territory; and mutual stipulations followed, by which Woodworth vested the defendant with an exclusive right to construct and use the six machines, during the term aforesaid, and the defendant bound himself not to exceed that number. The license wound up with the following provision: "It is understood that the said Cook has all the rights I have in the county of Washington, under said patent, to use six machines, and no more."

Besides the question arising on the face of the license, the defendant set up that there was a mistake in not inserting in the license a provision looking to a further extension of the patent by act of congress, the parties having actually agreed that the assignee should have the benefit of any such further extension. The facts in relation to this point sufficiently appear from the opinion of the court.

Azor Taber and Rodman L. Joice, for plaintiff.

Samuel Stevens, for defendant.

NELSON, Circuit Justice. It is quite obvious, from a perusal of the provisions of the written instrument of the 4th of July, 1843, under which the defendant derived his right to use the machines in question, that the position taken in opposition to the motion for an injunction has no foundation in that instrument. That, in express words, limits the grant to the period of the extended term then running, which was all the right that belonged to Woodworth at the time within the given territory. Even the additional or contingent right of extension under the 18th section of the act of 1836, no longer remained, as but one extension is provided for by that

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section. The possibility of a renewal of the patent by act of congress existed; but, for the purpose of enabling the assignee to derive any benefit in that event, an express provision should have been inserted in the grant or assignment, looking to such a renewal. Wilson v. Rousseau, 4 How. [45 U. S.] 646, 685, 686. Unless there be such a stipulation, showing that a renewal was contemplated, the court is bound to construe the instrument, and each and all of its provisions, as relating to the existing right in respect to which the parties were contracting with one another. This is the natural presumption, arising from the usual and ordinary course of dealing, and should govern in the construction of the contract, unless it is otherwise clearly expressed.

Assuming, however, that the written instrument imports no grant of a right to the use of the machines beyond the extended term, still the defendant insists that such was the actual agreement and understanding of the parties; that the omission to insert the stipulation arose out of a mistake or misapprehension of the purport of the instrument; that he is entitled to have it reformed and a clause to the effect claimed inserted, so that he may be protected in the enjoyment of the right during the term as renewed by act of congress; and that, being entitled to the relief in equity, on a direct application for that purpose, it is competent for him to set up this ground by way of equitable defence to the motion for an injunction. Hunt v. Rousmaniere, 8 Wheat. [21 U. S.] 174; Joynes v. Statham, 3 Atk. 388; Garrard v. Grinling, 2 Swanst. 244; Clark v. Grant, 14 Ves. 519; Gillespie v. Moon, 2 Johns. Ch. 585, 598; Clowes v. Higginson, 1 Ves. & B. 524; 1 Story, Eq. Jur. § 161; Newl. Cont. 344.

Upon this view of the law, the defendant has produced his own affidavit, and another by Mr. Boyd, who was present when the contract was made with Woodworth for the use of the six machines, and was consulted in respect to it, going to show that it was the understanding of the parties at the time, that the defendant's right to the use of the machines was to continue, notwithstanding a second extension of the patent should take place.

Whether this ground may or may not be set up by way of equitable defence to the relief sought by the plaintiff, is a question I do not intend to examine; for, in my view of the case, conceding the position to be well founded, it will not avail the defendant.

The 11th section of the act of July 4, 1836 (5 Stat. 121), provides, that every patent shall be assignable in law, either as to the whole interest or any undivided part thereof, by an instrument in writing; and that the assignment, and also every grant and conveyance of the exclusive right to make and use, &c., the thing patented, within any specified part of the territory of the United States, shall be recorded in the patent office within three months from its execution. The 4th section of the act of February 21, 1793 (1 Stat. 322), contained substantially the same provision. The 4th section of the act of April 10, 1790 (1 Stat. 111), strongly implies that the assignment must be in writing, as otherwise it is declared to be no defence to an action for an infringement; though there was no provision in that act for recording the assignment.

Under the 11th section of the act of 1836, the assignment or grant of an exclusive right in the patent within a given territory, must, therefore, not only be in writing, but must be recorded within the three months, to defeat the right of a subsequent purchaser without notice and for a valuable consideration. In order to guard against an outstanding title of over three months' duration, the purchaser need only look to the records of the patent office. Within that period, he must protect himself in the best way he can, as an unrecorded prior assignment would prevail; but it must be an assignment in writing, that may be recorded within the time limited.

That the chief object of the section requiring the assignment to be recorded is the protection of bona fide purchasers, is manifest, though not specially declared, as is usual in registry acts; as it cannot readily be perceived that any other benefit can be derived from the requirement. No reason can be given why the assignment should not be valid as between the parties, without being recorded. It is only when the rights of third persons are concerned, that the step becomes important, in guarding against frauds. Brooks v. Byam [Case No. 1,948]; Pitts v. Whitman [Id. 11,196]; Curt. Pat. § 190.

The instrument containing the grant in in this case falls within a class required to be recorded, as the grant conveyed an exclusive right under the patent to construct and use, and to grant to others to construct and use, the six machines, within a specified territory. It was a grant to this extent to the grantee and his assigns, clearly importing, therefore, not only an exclusive right to construct and use the machines himself, but to vend to others the right to construct and use them, as he might think most advisable for his interest.

Now, the assignment from Woodworth to Wilson, which was after the surrender of the patent and its re-issue on an amended specification, was made on the 9th of July, 1845. Wilson's assignment to the plaintiff was made on the 12th of November, 1846, and embraced the territory within which the defendant sets up a prior contract of assignment of the exclusive right to use his six machines. If this assignment to the defendant had been in writing, it would not have defeated the right of the plaintiff, unless recorded within the three months; and surely, not being in writing, and therefore not in a condition to be recorded, it cannot help the

case out of the difficulty. The defendant's title is in the predicament of that of a grantee of land, where there has been an omission or misdescription of a portion of the premises intended to be conveyed. A subsequent bona fide purchaser for a valuable consideration takes the title; and, although the party, as between himself and his grantor, might be entitled to have the deed reformed and the true description inserted, he cannot be thus entitled to the prejudice of the after acquired title.

But, it may be said that the clause omitted in the assignment, having relation to a grant of a future term of the patent, not yet in esse, was not an assignment or grant within the meaning of the 11th section of the act of 1836, that section having relation to an interest in an existing patent; and that, therefore, the stipulation for this future contingent interest, if in writing, need not have been recorded in the patent office. The interest in respect to which the parties were contracting, not being in existence at the time, was doubtless not the subject of assignment or grant at common law, nor within the sense of this section of the act. The right could rest only in contract. Admitting this to be the correct view of the stipulation, still I do not see how it can help the defendant. For, if the court should proceed and reform the contract, and cause the provision to be inserted in the assignment of the 4th of July, 1843, it would not affect the interest in the renewed patent in this territory, which had already passed by assignment to the plaintiff. As the right would rest only in contract, even after the instrument had been reformed, the interest of the assignee would still remain unaffected, until an actual assignment was enforced in equity in pursuance of the agreement. In order to effect this, it would be necessary to make the plaintiff here a party, the legal title being in him, and the question would then be presented between the right of a person holding a contract for the interest in question, and that of a subsequent bona fide purchaser for a valuable consideration. I need scarcely add that, in this posture of the case, the latter must prevail. 1 Story, Eq. Jur. § 64c, and cases there cited. Besides, courts of equity will not interfere to correct a mistake in a written instrument, to the prejudice of a bona fide purchaser, as he has at least an equal right to protection with the party laboring under the mistake. 1 Fonbl. Eq. bk. 1, c. 1, § 7, and notes; Sugd. Vend. c. 3, p. 143; Warrick v. Warrick, 3 Atk. 291; Malden v. Menill, 2 Atk. 8, 13; 1 Story, Eq. Jur. §§ 108, 139, 165.

The defendant, in order to have secured himself against the title of a bona fide purchaser, should have procured a reformation of his contract, and an assignment of it, prior to the assignment to Wilson, under whom the plaintiff claims, and have recorded the same in the patent office within the three months. To reform the contract now, and award to him the benefit of the omitted clause, by directing an assignment, or, what would be equivalent, allowing him to avail himself of this matter by way of equitable defence, would not only contravene the effect of the recording act, but operate as a direct fraud upon the plaintiff. This view alone seems conclusive against the ground of defence set up in answer to the motion.

The mere right to an assignment would be of no avail, whether in writing or otherwise, even though enforceable in equity against the original party and his personal representatives. If it would, greater effect must be given to it as respects the title of a purchaser without notice, than to an actual unrecorded assignment of the interest—a proposition for which no one will contend.

I have assumed all along that the plaintiff is a bona fide purchaser of the interest claimed in the patent. That fact has not been controverted by the defendant; and, as the question in the case is presented by way of equitable defence to the title shown in the bill, the denial was necessary to complete the ground of defence. Otherwise, the title stands as averred in the bill, the burthen lying upon the defendant to impeach it.

I am satisfied, therefore, that the ground set up in opposition to the motion for an injunction cannot avail the defendant, inasmuch as the equity shown is not superior to that of the plaintiff. And besides, if it were admitted, it would, in effect, override the rights of the parties as settled by the provision of the act of 1836 requiring the recording of exclusive grants in a given territory, and of assignments of the whole or portions of the interest in the patent.

Injunction granted.

[For other cases involving this patent, see note to Bicknell v. Todd, Case No. 1,389.]

GIBSON (CORBETT v.). See Cases Nos. 3,221 and 3,222.

Case No. 5,394.

GIBSON v. DOBIE et al.

[5 Biss. 198;[1] 14 N. B. R. 156.]

Circuit Court, E. D. Wisconsin. July, 1871.

PREFERENCE—CONVEYANCE TO WIFE.

1. A conveyance by an insolvent debtor of his real estate to his wife, without consideration, she giving a mortgage thereon to creditors who knew the debtor to be insolvent, is a preference under the bankrupt act [of 1867 (14 Stat. 517)], and void as against creditors.

2. The mortgage of the wife is the same, in legal effect, as the mortgage of the husband.

In equity. Bill by [N. S. Gibson] the assignee against John N. Dobie, Hannah R. Dobie, his wife, John T. Burhyte and Henry

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

N. Glening, to set aside conveyance as fraudulent under the bankrupt act.

J. W. Pinter, for complainant.
J. M. Jillett, for defendants.

MILLER, District Judge. John N. Dobie, as guardian of Andrew B. Cary, his step-son, became indebted to his ward about seventeen hundred dollars, early in the spring of 1868, and embarrassed pecuniarily. Burhyte, his surety on the guardianship bond, demanded security or indemnity. Dobie gave Burhyte a mortgage on his homestead. By a subsequent arrangement, Dobie was discharged as guardian, and his wife, Hannah R. Dobie, the mother of the child, was appointed guardian in his stead. In April, 1868, Dobie and wife conveyed two tracts of land to the defendant Glening, who, with his wife, conveyed the same premises to Hannah R. Dobie. These conveyances were made for the purpose of vesting the title to the two tracts of land in Mrs. Dobie, and enabling her to secure Burhyte, her brother, as the surety of Dobie. The mortgage of Dobie to Burhyte on the homestead was satisfied of record, and Mrs. Dobie gave him a mortgage on the two farms in lieu of the former mortgage. Dobie also assigned to Burhyte a mortgage of three hundred dollars on other property.

Proceedings in bankruptcy against Dobie by his creditors were instituted in July, 1868. Prior to such proceedings, on the 14th of July, 1868, Dobie assigned to Burhyte the three hundred dollar mortgage, and also, on the same day, Mrs. Dobie gave him the mortgage. Burhyte had abundant reason to believe that Dobie was insolvent at the time he accepted these securities, and he also knew that Mrs. Dobie became the alienee of the lands without any consideration, and that Dobie, at the date of these conveyances, was largely indebted.

The mortgage of Mrs. Dobie to Burhyte is the same in legal effect as if Dobie and his wife had given it directly to him. The mortgage of Mrs. Dobie was a mere device to relieve the homestead of the debtor, and to shift the lien upon the land. These collaterals were given and accepted by Burhyte as a preferred creditor, in disregard of the provisions of the bankrupt act. A decree is ordered for the complainant.

Case No. 5,395.

GIBSON v. GIFFORD.

[1 Blatchf. 529;[1] 1 Fish. Pat. Rep. 366.]

Circuit Court, N. D. New York. June Term, 1850.

PATENTS — RIGHTS OF ASSIGNEES UNDER EXTENSION—ACT OF FEBRUARY 26, 1845.

1. Prior decisions of this court as to the originality and novelty of the Woodworth patent, the validity of its re-issue, and the identity of the invention covered by the original and re-issued patents, re-affirmed.

2. There being in the special act of February 26, 1845 (6 Stat. 936), extending the patent for seven years from 1849, no reservation in favor of assignees under the two prior terms, they have no rights in the third term, and cannot even continue in the use of machines lawfully constructed before the third term, and actually existing and in use when the second term expired.[2]

[Cited in Fire Extinguisher Manuf'g Co. v. Graham, 16 Fed. 551.]

3. Although it be alleged that the act of 1845 was procured by fraud and misrepresentation, this court will regard it as the law of the land, till it is repealed; and so far, at least, as a motion for a preliminary injunction, founded upon the act, is concerned, the law will be regarded as conclusive evidence of the extension of the patent.

[Cited in Goodyear v. Providence Rubber Co., Case No. 5,583.]

In equity. This was an application for a provisional injunction. The plaintiff [John Gibson] was the grantee of the exclusive right to the Woodworth patent for the county of Onondaga, N. Y., for the congressional extension of seven years, commencing on the 27th of December, 1849. See Wilson v. Rousseau, 4 How. [45 U. S.] 661, 662. The bill was founded on the re-issued patent of July 8, 1845, and alleged that the defendant [Henry Gifford] was infringing the plaintiff's rights by running a Woodworth machine in the county of Onondaga, without authority. The defendant opposed the application, on an answer and affidavits, and, among other defences, which are alluded to in the opinion of the court, set up that he had a valid license to use the same machine for the original term of the patent ending December 27, 1842, and for the first extension of seven years ending December 27, 1849, and had the machine in actual use on the last named day. On that ground he claimed the right to continue its use during the second extension.

Azor Taber and Rodman L. Joice, for plaintiff.
Charles B. Sedgwick, for defendant.

NELSON, Circuit Justice. 1. Several of the objections taken by the counsel for the defendant to the motion for an injunction have been before us heretofore and been considered and disposed of—such as the novelty of the invention; whether Woodworth was the first and original inventor; the surrender

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

[2] This same point was decided in the same way by Mr. Justice Woodbury and Judge Pitman in Mason v. Tallman [Case No. 9,254]; by Mr. Justice McKinley and Judge McCaleb in Bloomer v. Vaught [Id. 1,560]; by Judge Ware in Woodworth v. Barbour [Id. 18,010]; and by Judge Sprague in Woodworth v. Curtis [Id. 18,012].

of the patent. and its re-issue with an amended specification on the 8th of July, 1845; and whether the amended specification embraces a different invention or discovery from that attempted to be described in the first patent. We have since seen no grounds for revising the conclusions at which we then arrived; and subsequent examinations have but confirmed them.

2. The question whether an assignee under the first term of the patent, or one under the second term as granted by the commissioner of patents under the 18th section of the patent act of July 4, 1836 (5 Stat. 124), is entitled to the enjoyment of a like interest under the act of February 26, 1845, entitled "An act to extend a patent heretofore granted to William Woodworth" (6 Stat. 936), or to continue in the use of a machine or machines lawfully constructed under the first or second term in pursuance of an interest acquired under either, and existing and in use at the termination of the second term, we regard as conclusively settled by the case of Wilson v. Rousseau, 4 How. [45 U. S.] 646. The decision of that case proceeds upon the ground, that but for the proviso in favor of assignees in the 18th section, their rights acquired under the first term would have expired with its termination, and the exclusive right to the use and enjoyment of the invention during the second term would have become vested in the patentee. Whatever was saved to assignees, was saved by the proviso and by that alone. If the extension for the second term had been absolute, that is, if there had been no reservation in the general act of 1836, in favor of assignees, as there is not in the special act of 1845, the court would not have entertained a doubt that the exclusive right to the invention during the second term would have been vested in the administrator. The whole argument in favor of the right of the assignee to continue to use machines existing and in use at the expiration of the first term rested upon the proviso to the 18th section, and could have been maintained upon no other ground. There is no proviso or reservation in the act of 1845, and, consequently, the principles of the case referred to are decisive against the claim of the assignee here.

3. As to the allegation that the act of 1845, extending the patent, was procured by fraud and misrepresentation, we must, so long as it is permitted to exist in the statute book, regard it as the law of the land governing the rights of the parties, so far as it applies. The appropriate remedy, if the supposed allegation be true, is a repeal of the statute. So far, at least, as this preliminary motion is concerned, we shall regard the law as conclusive evidence of the extension of the term for the period mentioned. Injunction granted.

[For other cases involving this patent, see note to Bicknell v. Todd, Case No. 1,389.]

Case No. 5,396.

GIBSON v. HARRIS.

[1 Blatchf. 167;[1] 1 Fish. Pat. Rep. 115.]

Circuit Court, N. D. New York. Oct. Term, 1846.

PATENTS—EFFECT OF EXTENSION—"ORIGINAL PATENT"—REISSUE—PROVISIONAL INJUNCTION.

1. After an extension of a patent under the 18th section of the patent act of July 4, 1836 (5 Stat. 124), the original patent becomes virtually a patent for the term of 21 years.

2. On a surrender and re-issue of the patent, under the 13th section of the same act, after such extension, "the residue of the period then unexpired for which the original patent was granted," specified in that section, is the residue of the 21 years. The patent for 21 years is, in such case, to be regarded as "the original patent" within the meaning of that section.

3. The patent to William Woodworth, for a planing machine, granted December 27, 1828, when extended by the act of congress of February 26, 1845 [6 Stat. 936], became a patent for the period of 28 years from its original date, and a surrender and re-issue of it after such extension stand on the same footing as if they were made in the case of a patent for 21 years.

[Cited in Hussey v. Bradley, Case No. 6,946.]

4. Where, in such case, the re-issued patent was granted "for the term of 28 years from the 27th day of December, 1828," *held*, that it was not invalid, but was in legal effect a patent for the residue only of the 28 years unexpired at the time of the re-issue.

5. Where the defendant substituted, in Woodworth's planing machine, two smooth plates of iron, operated upon by a screw and a spring, instead of Woodworth's pressure rollers, to keep the board to its bed, *held*, that this was not a substantial departure from the contrivance of Woodworth, and that a provisional injunction must issue to restrain the use of the machine.

[Applied in Gibson v. Van Dresar, Case No. 5,402.]

In equity. Letters patent of the United States were granted, on the 27th of December, 1828, to William Woodworth, for 14 years from that day, for "a new and useful improvement in the method of planing, tonguing and grooving, &c., plank, boards, &c." On the 16th of November, 1842, under the 18th section of the patent act of July 4, 1836 (5 Stat. 124), the patent was, on the application of William W. Woodworth, administrator of the patentee, extended for seven years from the 27th of December, 1842. By an act of congress, passed February 26, 1845, the patent was further extended for seven years from and after the 27th of December, 1849, and the act directed the commissioner of patents to make a certificate of such extension in the name of the said administrator, and to append an authenticated copy thereof to the original letters patent, whenever the same should be requested by the said administrator or his assigns. On the 8th of July, 1845, the original patent was, under the 13th section of the said act of July 4, 1836, surrendered

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

and cancelled, on account of a defective specification, and a new patent, with an amended specification, was issued "to the said William W. Woodworth, in trust for the heirs at law of the said W. Woodworth, their heirs, administrators or assigns, for the term of twenty-eight years from the 27th day of December, 1828." The plaintiff [John Gibson], an assignee under the re-issued patent, for the county of Herkimer, in the state of New-York, for the term ending December 27, 1849, moved for an injunction to restrain the defendant [Albert G. Harris] from using, in that county, a planing machine, of which a sufficient description is given in the opinion of the court. The specification of Woodworth's patent is set forth at length in Wilson v. Rousseau, 4 How. [45 U. S.] 664–668.

William H. Seward and Ira Harris, for plaintiff.

Arphaxed Loomis, for defendant.

NELSON, Circuit Justice. 1. An objection has been taken on this motion to the validity of the new patent, issued on the 8th of July, 1845, on the surrender of the original one, on the ground that the commissioner of patents had no authority to issue it for the term of 28 years. The extension of a patent in pursuance of the 18th section of the act of July 4, 1836, is made by endorsing a certificate thereon to that effect; and the act of February 26, 1845, granting the last extension, has directed substantially the same thing to be done. The 18th section provides that after the endorsement of the certificate on the original patent, "the said patent shall have the same effect in law, as though it had been originally granted for the term of twenty-one years." The act of congress providing for the additional extension of seven years in this case, is not so explicit in its language, but the legal operation and effect of the grant come to the same thing.

The 13th section of the act of July 4, 1836, providing for the surrender of a patent and its re-issue with an amended specification, authorizes the commissioner to issue the new patent "for the residue of the period then unexpired for which the original patent was granted." The construction of this part of the 13th section was involved in the tenth question certified to the supreme court of the United States in the case of Wilson v. Rousseau, 4 How. [45 U. S.] 646. It was there contended, upon the peculiar phraseology of the section, that the power of the commissioner of patents to receive a surrender and issue a new patent, was limited to the term of the original patent, the 14 years, and that the surrender and reissue after the expiration of the original patent, were acts wholly unauthorized and void. But the court held otherwise. After an extension under the 18th section, the original patent becomes, as has been shown, virtually a patent for the term of 21 years, and then, on a surrender and reissue, the residue of the period unexpired of the original patent is the residue of this term. The patent for 21 years is, in such case, to be regarded as "the original patent," within the meaning of the 13th section.

Now, if the extension by the act of congress of February 26, 1845, is as effectual and operative as the one granted under the 18th section of the act of 1836 (and it is difficult to see why it should not be), then the patent, when so extended, became a patent for the period of 28 years, instead of 21 years; and a surrender and re-issue after such extension, stand on the same footing as if they were made in the case of a patent for 21 years. There can be no difference in principle or good sense. The patent, in this case, has been issued in form, for the whole term of 28 years, but as it dates and takes effect from the 27th of December, 1828 (the time of the granting of the original patent for the 14 years), it is, in legal effect, a patent for the residue only of the period unexpired at the time it was issued.

2. Another ground set up against the motion for an injunction, is, that the planing machine of the defendant is substantially different in its construction and mode of operation, and in its combinations, from the machine of Woodworth. Woodworth, as is alleged, uses friction rollers for the double purpose of moving the board against the rotary cutting wheel, so as to be acted upon by the knives or planes, and of pressing it down upon the carriage, so as to keep it close and prevent its being drawn from its bed by the action of the cutters in cutting upwards from the planed surface; whereas the defendant has dispensed with the rollers, and has so constructed his machine that the board or plank is pressed down and retained in its place by means of a screw and a spring, operating upon two smooth plates of iron, one on each side of the rotating planes, by which the board is pressed down upon the moving platform or carriage which carries it forward to the knives. This is the only difference, everything else in the construction of the machine being Woodworth's combination. These smooth iron plates, operated upon by the screw and spring, are substituted in the place of Woodworth's rollers, to keep the board to its bed against the upward tendency given to it by the action of the cutters.

Now, in the first place, Woodworth does not confine his contrivance for moving the board up to the rotary cutters, so that they may act upon it, to the operation of the friction or feeding rollers. The plank, he says, may be moved forward by other means, as by a rack and pinion, by an endless chain or band, by geared friction rollers, or by any of the devices well known to machinists for advancing a carriage or materials to be acted upon, in machines for various purposes; and when the friction rollers are used to move the plank and feed the cutters, the upper one will also operate to keep the plank to its bed, and

may be borne against it by the contrivance of weights or springs, in a manner well known to machinists. The roller may also be used simply as a pressure roller, when the carriage upon which the plank rests is moved by other means, such as a rack and pinion, or an endless chain.

In the second place, Woodworth does not limit his contrivance, to prevent the board from being drawn up by the cutters, to the pressure rollers, but refers to any other device which mechanical skill and ingenuity may readily suggest. The pressure upon the plank, to secure the free action of the rotating planes, is essential to the working of the machine; but as to the particular mode or best mode of accomplishing the end, it is left open to mechanical knowledge. An inventor is not necessarily a machinist. He is often wholly dependent on the skill of this department of knowledge to give embodiment and practical operation to his discovery.

Besides, we are unable to see any substantial difference between the device of the defendant, and the pressure rollers, when used simply to keep the plank in its bed. Change of form will not do, unless a new and useful result is produced. Using a smooth plate instead of a roller, in the same way, for the same purpose, and with a like result, can hardly be regarded as a substantial departure from the contrivance of Woodworth. In the one case the board slides under the plate to the cutters; in the other, under the roller. In the one, the plate is immovable; in the other, the roller turns upon its axis by the moving of the plank, thereby creating less friction, and, for that reason, having probably an advantage over the plate. The object of both is to keep the board or plank in its bed. A flat surface is made to press upon it for this purpose in the one case; a round one in the other. We cannot think that inventors are to be stripped of their property, the fruit, oftentimes, of great toil, ingenuity and expense, by such slight and unimportant alterations of a machine—alterations which the description of the invention would, of itself, naturally, if not necessarily, suggest, without the aid of much ingenuity or skill. An injunction must therefore be issued.

[For other cases involving this patent, see note to Bicknell v. Todd, Case No. 1,389.]

Case No. 5,397.

GIBSON v. JOHNSON.

[Pet. C. C. 44.] [1]

Circuit Court, D. New Jersey. April Term, 1810.

REMOVAL OF CAUSES—FILING PETITION AFTER TWO TERMS.

Motion to docket a cause returned from a state court. The defendant's appearance had been entered September, 1809, and after two terms the petition to remove was filed and granted, in the state court, as of September, 1809. The court refused the motion.

[Cited in Galpin v. Critchlow, 112 Mass. 340.]

Motion to docket a cause removed from the state court. The appearance of defendant was entered September, 1809; and, after passing two terms, the petition to remove was filed in February last, and granted as of September.

BY THE COURT. The agreement of the state court, to consider the petition as filed of a preceding term, when the appearance was entered nunc pro tunc, cannot give us jurisdiction, when we see, that in point of fact, it was not filed until a subsequent term. Motion overruled.

[1] [Reported by Richard Peters, Jr., Esq.]

GIBSON (KIRKPATRICK v.). See Case No. 7,848.

Case No. 5,398.

GIBSON et al. v. LEWIS.

[11 N. B. R. 247; [1] 11 Phila. 476; 32 Leg. Int. 22.]

Circuit Court, E. D. Pennsylvania. 1875.

BANKRUPTCY — PROVABLE DEBTS — UNPAID SUBSCRIPTIONS ON CORPORATE STOCK — BILL COMPELLING COMPANY TO MAKE ASSESSMENTS — INTERLOCUTORY RELIEF.

1. The charter of a railroad company provided that in case of default of any stockholder to pay an assessment on his stock after a prescribed notice, the stock and any payments thereon should be forfeited to the company. This company failed to pay interest accrued on its mortgage-bonds. The holders of the bonds were about to institute proceedings against it to compel an assessment of the necessary and proper contributory payments, on stock which complainants allege has not been properly paid for. In the estate of the bankrupts are included, to large amounts, both certificates of stock of the company and bonds purporting to be secured by its mortgages. The complainants by their bill allege that the company, being insolvent, is a trustee in its corporate capacity for its creditors in the matter of collecting and enforcing the unpaid subscriptions to the capital stock. The bill further alleges that for the unpaid amounts which ought to be contributed on the shares of the stock which were held by the bankrupts, there is a debt provable against their estate by the company; that the principal office of the company is in the state of New York, and complainants are about to institute judicial proceedings there to compel the filing and proof of its claim against the estate in bankruptcy. The bill prays that proof of debt in bankruptcy be allowed, and that the defendant be restrained in the meantime from distributing the estate; and also for a decree against the defendant for an account and distribution. *Held*, that there should be primarily a decree compelling the company to make the necessary and proper assessments upon the stock, and preventing the misuse of any fictive certificates which indicate the stock has been fully paid for.

2. Secondary relief should be to compel the making and allowance of proof in the bankruptcy proceedings of the amount previously

[1] [Reprinted from 11 N. B. R. 247, by permission.]

ascertained as due for the assessment on the shares of the stock which were held by the bankrupts.

3. This court has no proper cognizance of the primary subject, which should be by a suit in equity in the proper court of the state of New York; but after the debt for the assessment shall have been ascertained by the decree of a court of competent jurisdiction, the debt will be provable in the bankruptcy court, and could be made in the name of the corporation by any party interested.

4. An injunction temporarily restraining the defendant from distributing more than the residue of the estate would have been granted under proper proceedings instituted seasonably on the part of the bondholders, but the present application is unreasonably late.

5. The defendant should be temporarily prohibited from disposing of the stock, but no other interlocutory relief can be granted.

The charter of a railroad company provided, that in case of default of any stockholder to pay an assessment on his stock, after a prescribed notice, the stock and any payments made thereon, should be forfeitable to the company. This company had failed to pay interest accrued on its mortgage-bonds. The complainants, holders of such bonds, were about, for themselves and the other creditors of the company, to institute proceedings against it, to compel an assessment on the stock of the necessary and proper contributory payments. The company had issued certificates of the stock which stated that the shares were fully paid for. The complainants alleged that either the certificates were in this respect wholly untrue, or the stock has not been properly paid for. A firm holding such stock had been adjudged bankrupts, and there had been extraordinary delay in the bankruptcy. The purpose of the bill was to restrain distribution of the assets in bankruptcy until proof could be made of the expected assessment on the shares of the bankrupts as a debt in the bankruptcy. The railroad company was not, and could not be made, a party defendant; and the proposed proceedings against it were to be under a competent jurisdiction elsewhere. The right of compelling the assessment, under such proceedings, of any amount which could be prospectively liquidated was not considered unquestionable. For this reason, and in consideration of the delay, a temporary injunction to restrain generally distribution in the bankruptcy was refused. But an injunction to restrain temporarily the disposal of the stock was granted. In the estate [of Jay Cooke & Co.], of which the defendant [Lewis] is the trustee in bankruptcy, are included, to large amounts, both certificates of the stock of the Northern Pacific Railroad Company, and bonds of the same company which purport to be secured by its mortgage, executed under the authority of an act of congress. The complainants allege that they hold other such mortgage bonds, and that the company is unable to pay the accrued and accruing interest on them, and unable to meet its other engagements; and assert that the deficiency ought to be supplied by contributions from stockholders who have not paid for their shares. The bill alleges that the company has not made the assessments upon the stock which are necessary and proper, in order to compel such contributions. On the affidavits, and accompanying exhibits, it is further asserted that the company has, through fictitious credits, or other improper allowances to shareholders, and particularly to the bankrupts, wrongfully issued certificates of the stock as having been fully paid for, where the contrary was the truth. The bill asserts that for the unpaid amounts which ought to be contributed on the shares of the stock which were held by the bankrupts, there is a debt provable against their estate by the Northern Pacific Railroad Company, that the principal office of this company for the transaction of its corporate affairs is in the state of New York, and that the complainants are about to institute judicial proceedings there against the corporation and its proper officers, to compel the filing and proof of its claim against the estate in bankruptcy. It is further alleged and contended that the company "being insolvent, is a trustee in its corporate capacity for its creditors in the matter of collecting and enforcing the unpaid subscriptions to the capital stock," and that the complainants are competent to prove the debt in the company's name, or in their own, on behalf of themselves and of the company's other creditors. The bill prayed that proof of the debt in bankruptcy be allowed, and that the defendant be restrained in the meantime from distributing the estate. As the bill has been amended, it also prays a decree against the defendant for an account and distribution. The present application is for an injunction to restrain distribution.

Mr. West, Mr. Andrews, and Mr. Blandy, for complainants.

Mr. Ashhurst, Mr. Bullitt, and Mr. Dickson, for defendant.

CADWALADER, District Judge. Assuming the truth of the affirmative and negative allegations of the complainants, the relief to which they are entitled, in the proper court or courts, on behalf of themselves and the other creditors of the Northern Pacific Railroad Company, may be considered as twofold. There should be primarily a decree compelling this railroad company to make the necessary and proper assessments upon the stock, and preventing the misuse by shareholders of any fictive certificates which indicate that stock has been fully paid for. The secondary relief should be to compel the making and allowance of proof in the bankruptcy, of the amount primarily ascertained as due for the assessment on the shares of the stock which were held by the bankrupts. The twofold purpose may be attainable in

two successive proceedings; the first, a suit in equity in the proper court of the state of New York, against the railroad company; the second, a suit by bill or petition in this court, or in the court of bankruptcy. The decree in such former suit may include an order to prove in the bankruptcy, or may simply make or direct the assessment.

If the railroad company could be compulsorily made a party defendant in this court, the twofold relief might be attainable here, in two successive stages of one and the same suit in equity. But the order of priority of the two stages could not properly be inverted. It is true, that under proper proceedings in equity, at the suit of a creditor of a corporation against stockholders, the circuity of compelling a formal preliminary assessment by the corporation upon the stock of every delinquent stockholder is not always necessary. In some cases the assessment may be made by the court. In other cases of simple ascertained right, where questions of contribution do not arise, or where they can be safely left open for subsequent adjustment among the proper parties, the form of an assessment may even be wholly dispensed with. In special cases a creditor may thus obtain direct relief. But in all such cases the corporation should be made a party.

In the present case, the railroad company would certainly not be a merely formal or nominal party. What amount of assessment upon the stock is necessary and proper may not be a simple question. If the answer to it were otherwise obvious, the subject may perhaps be complicated with inquiries whether certain bondholders are not themselves defaulting stockholders. The documents which have been exhibited with the affidavits may also suggest inquiries affecting the consideration of mortgage bonds. Whether delinquent stockholders are to any extent liable personally in addition to the forfeiture of their shares, which is provided for in the 16th section of the company's charter, appears, moreover, to be a contestable question. Such a question may arise in either the primary or the secondary stage of litigation.

Now, the railroad company is not suable in this court, either under the 11th section of the judiciary act of 1789 [1 Stat. 78], or under the 2d section of the bankrupt act of 1867 [14 Stat. 517]; and if jurisdiction were otherwise exercisable here, the company could not be served with the process of the court. Therefore, the court has no proper cognizance of the primary subject. But the ulterior subject is peculiarly cognizable here; that is to say, after the debt for the assessment shall have been ascertained, by the decree of the court of competent jurisdiction, the debt will be provable in the court of bankruptcy. Whether the decree in the other court had or had not expressly ordered the corporation to make the proof of bankruptcy, might then be unimportant. This court would, I think, allow it to be made in the name of the corporation by any party interested. This would, in such ulterior stage of litigation, be very different from originally adjudicating the question here as between the corporation and the stockholders. The two subjects have been confounded indiscriminately in the argument for the complainants.

The court having, however, this prospective jurisdiction, the present question is whether the complainants ought not to be allowed a reasonable time to obtain the decision of a court of competent jurisdiction establishing the primary right. If time should be thus allowed, it would seem to follow that an estimated ratable portion of the estate in bankruptcy ought to be set apart for the prospective dividend. If this ought to be done, there should be an injunction temporarily restraining the defendant from distributing more than the residue of the estate. Such an injunction would have been grantable under proper proceedings, instituted seasonably on the part of these bondholders. But the present application is unreasonably late. This might not prevent an injunction if the right of the creditors of the railroad company was clearly ascertained to any amount which could be provisionally liquidated now. But this, we have seen, is not the case. The point for decision, therefore, is whether, after the extraordinary and unexplained delay which has already occurred under this bankruptcy, any time can be reasonably allowed for the institution and prosecution of the primary judicial proceedings at the suit of these complainants in another jurisdiction. They may, perhaps truly, say that the other creditors have not done anything to expedite a dividend, and have not objected to past delay. This observation does not appear to me to furnish a reason for sanctioning further delay. It is said that the trustee is now ready and willing to take the responsibility of making a dividend without a judicial order on the subject. If so, this court may not be able to assist him; but it will not impede him at this late day.

It has been suggested, that although the general injunction asked for should be refused, the court may nevertheless restrain distribution as to the mortgage bonds of the estate in bankruptcy, and as to the shares of stock. So far as the facts have been developed, there appears to be no reason for discriminating, in favor of the present complainants, between the mortgage bonds of the estate and any other assets. To the full extent of all that has been thus far stated, my opinion was definitely expressed at the close of the argument of counsel some days ago.

A single question has been since held under advisement. This question is, whether to restrain the disposal by the defendant of the shares of stock in the railroad company which are subjects of his trust? Upon re-

flection, I think he should be temporarily prohibited from disposing of the stock. The railroad company will, if any payments be hereafter assessed upon the shares, have a security upon them under the 16th section of the charter; and, whether this will prove to be the only security for the assessments or not, it should be retained for the present, at least. But no other interlocutory relief can be granted.

GIBSON (PROUT v.). See Case No. 11,445.

Case No. 5,399.

GIBSON v. RICHARDS.

[Cited in Forbes v. Barstow Stove Co., Case No. 4,923. Nowhere reported; opinion not now accessible.]

Case No. 5,400.

GIBSON v. RICHARDS.

[See Case No. 5,399.]

GIBSON (ROSS v.). See Case No. 12,074.

Case No. 5,400a.

GIBSON et al. v. SCULL.

[Hempst. 36.] [1]

Superior Court, Territory of Arkansas. April, 1826.

ATTACHMENT — PLEADING WITHOUT SPECIAL BAIL.

Defendants in attachment may appear and plead without entering special bail to the action, and then the property attached is considered as a substitute for bail.

In error to Arkansas circuit court.

[This was an action at law by Hewes Scull against James M. Gibson and John P. Brown.]

Before JOHNSON and SCOTT, Judges.

OPINION OF THE COURT. The only question which we have to consider is whether Gibson and Brown, the defendants in the court below, had the right to appear there and plead to the attachment, without first filing special bail to the action. We have no doubt this right is given to defendants in all cases upon attachment. The act of 1823 (Acts [Ark.] 1823, p. 6) provides "that in all cases upon attachment, the defendant may appear and plead the same as in other cases, provided that when such defendant does not enter into special bail as is now prescribed by law, the property shall be and remain in the hands of the sheriff until the final determination of the suit." From the provisions of the above act we think it clear that defendants in attachment may in all cases appear and plead without giving bail, and that the property attached by the sheriff is considered as a substitute for bail. We are, therefore, of opinion that the court erred in refusing to hear the defendants unless they filed special bail to the action. Reversed.

[1] [Reported by Samuel H. Hempstead, Esq.]

Case No. 5,401.

GIBSON v. STEVENS.

[3 McLean, 551.] [1]

Circuit Court, D. Indiana. May Term, 1845.[2]

INDEBITATUS ASSUMPSIT — WHEN IT WILL LIE — FRAUD—TROVER—WAREHOUSE RECEIPT —LIEN—ATTACHMENT.

1. Money fraudulently obtained from a bank may be sued for before the note given to the bank, for the same, becomes due.

2. A forged note to the bank is no payment, and the bank may sue for the money advanced by it.

3. An action of trover for the bank notes, or for the property purchased with them, would have been the proper action. But, in such a case an action of indebitatus assumpsit will lie.

4. A suit for the original consideration, disregarding the fraudulent note, is not, in fact, an affirmance of the contract.

5. A receipt by the warehouse man for property to be forwarded to order and of payment, when assigned to a commission merchant, who makes an advance, does not create a lien on the property, paramount to that of an attachment laid before notice of the assignment.

[See note at end of case.]

6. The money advanced, not being equal to the value of the property, leaves an attachable interest, beyond the lien, if it exist, of the commission merchant.

7. On the attachment all the creditors may come in, under the Indiana statute.

[This was an action of replevin by Edmund J. H. Gibson against Bradford B. Stevens.]

Judah & Baird, for plaintiff.

Morrison & Mason, for defendant.

OPINION OF THE COURT. This cause is submitted to the court, on facts agreed, substantially as follows: M'Queen and M'Kay, of Detroit, Michigan, about the 20th of March, 1844, by false pretences fraudulently procured the bank at Indianapolis, to loan to them the sum of about $11,000 in notes of the bank, payable to bearer. With part of this money M'Queen and M'Kay purchased of Hanna, Hamilton & Co. 350 barrels of mess pork, for the sum of $2,908.50, and received from them the following memorandum: "Fort Wayne, April 4th, 1844. Messrs. M'Queen & M'Kay, bought of Hanna, Hamilton & Co. 350 bbls. mess pork, to be delivered on board of canal boats soon after the opening of canal navigation. Received payment in full. Hanna, Hamilton & Co. We guaranty the inspection of the above pork at Toledo, and the delivery on board of canal boats at this place, (Fort Wayne,) soon after the opening of canal navi-

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

[2] [Reversed in 8 How. (49 U. S.) 384.]

gation. Hanna, Hamilton & Co." At the time of this purchase, the barrels of pork were in the warehouse of the said Hanna, Hamilton & Co., at Fort Wayne, Indiana, on the Wabash and Erie Canal, marked and branded "Mess Pork," together with a large number of other barrels of pork marked "Prime Pork" and "Clear Pork." There were no other barrels at that or any subsequent time marked "mess pork" in said warehouse. The barrels were not seen by M'Queen & M'Kay, they being intermixed with other barrels. At the same time, M'Queen & M'Kay purchased with a part of the money obtained as aforesaid, 200 barrels of flour, and received the following memorandum: "Fort Wayne, April 4, 1844. Messrs. M'Queen & M'Kay bought of D. & J. A. T. Nichols 200 bbls. superfine flour @ $3,56¼, $712.50. Received, Fort Wayne, April 4, 1844, payment in full. D. & J. A. T. Nichols. Received the above flour in store at Fort Wayne, April 4, 1844, which we agree to deliver on board canal boats here, soon after the opening of navigation, subject to the order of M'Queen & M'Kay. D. & J. A. T. Nichols. We guaranty the inspection of the above flour in New York, as superfine flour;" signed as above. This flour, when purchased, was in the warehouse of the said Nichols, at Fort Wayne. On the 17th of April, 1844, M'Queen & M'Kay, on the presentation of the above memoranda to Gibson, the plaintiff, in the city of New York, a commission merchant, procured an advance on the same of $2,787.50, and M'Queen & M'Kay by indorsements thereon of the above date, directed the pork and flour to be delivered to the plaintiff or his order. On the same day, M'Queen & M'Kay wrote and handed to Gibson the following letter: "New York, 17th April, 1844. Messrs. Ludlow & Babcock, Gentlemen: We have this day received an advance from E. T. H. Gibson, Esquire, on the following lots of pork, which you will have the goodness to deliver to his order, and to comply with his instructions relative to shipments, viz: 355 bbls. mess pork; 225 bbls. prime pork, from warehouse of Walker, Rogers & Co.; 11 bbls. mess, at Benbridge & Mix's warehouse; 300 barrels mess at Hamilton & Williams' warehouse; 350 bbls. mess at Hamilton, Hanna & Co.'s warehouse; 200 bbls. flour at D. & J. A. T. Nichols' warehouse." On the succeeding day Gibson enclosed the above letter in one written by himself and directed to Mott & Co., Toledo, Ohio, which was received in the due course of the mail, and the above letter of M'Queen & M'Kay which was enclosed, was received by Ludlow & Babcock, at Toledo. On the same day Gibson wrote to Ludlow & Babcock, that he had made to M'Queen & M'Kay an advance on 1250 barrels of pork and 200 barrels of flour, which were stored at different points on the line of the Wabash Canal, and which they state "is to be shipped to your care and held by you at Toledo, until you receive instruction from them respecting it. They have given me an order on you for it, which I have sent to Mott & Co. I wish you to ship the pork and flour to me immediately on its arrival at Toledo." At the time the memoranda of the purchases were indorsed to the plaintiff, it was usual for commission merchants residing and doing business in the city of New York to make advances on western produce, upon the assignment of proper evidences of title thereto. The plaintiff sent Hoyt, his agent, to Fort Wayne, to superintend the shipment of the pork and flour. He arrived at Fort Wayne the 29th of April, but on the 27th of that month a writ of attachment, issued by the Allen circuit court of the state of Indiana, in the name of the bank, against M'Queen & M'Kay was laid upon the pork and flour, and the sheriff retained possession of the property attached, until it was taken out of his possession by the writ of replevin in this case.

The plaintiff made the advancement under a contract that, as commission merchant, he should sell the pork and flour, and, after paying himself for his advances, commissions and expenses, pay over the balance to M'Queen & M'Kay. The attachment and proceedings thereon are admitted to have been regular, and by the statute of Indiana, goods attached may be replevied. It is admitted that in the obtainment of the loan from the bank, M'Queen & M'Kay were guilty of fraud, and that the bank on that ground might have disaffirmed the contract and brought trover for the bank notes, or for the pork and flour which were the proceeds of the notes, before the credit on the loan had expired; but it is insisted that by suing out the attachment the bank affirmed the contract of loan, and consequently the action cannot be sustained before the expiration of the credit. That trover would have been the better form of action for the bank, as regards the pork and flour now in controversy, there can be no doubt. But it is not probable that an action of trover could be sustained for the notes, as proof of their identity would be required. In Ferguson v. Carrington, 9 Barn. & C. 59, it was held, that where goods were purchased fraudulently, an assumpsit for goods sold and delivered, could not be sustained before the time of credit expired, though the vendor might have treated the contract as a nullity, and have brought trover immediately to recover the value of the goods. The same case is reported in 3 Car. & P. 457. In Hanna v. Mills, 21 Wend. 90, Yale v. Coddington, Id. 175, it was decided "that where goods were sold to be paid for by a note or bill payable at a future day, which is not delivered according to the terms of the sale, the vendor may sue immediately for a breach of the special agreement, and recover, as damages, the whole value of the goods, allowing a rebate of interest during the stipulated credit; but that he could not maintain assumpsit on the common counts, until the credit has expired." But in Corlies v. Gardner, 2 Hall, 345,

the court held that an assumpsit for goods sold, could be maintained under circumstances similar to the above; they say "that the sale and delivery of the goods were conditional, and that the plaintiffs might reclaim their goods, or treat the sale as an absolute one without credit." The decision in the case of Dutton v. Solomonson, 3 Bos. & P. 582, is contra. In Campbell v. Sewell, 1 Chit. 609, and 4 Moore, 532, it was held, "that the plaintiff could not declare in indebitatus assumpsit for goods sold, at least before the expiration of the time at which the bills would have become due, but should have declared specially." Where a bill of exchange, given in payment for goods sold was, upon presentment to the drawee, refused acceptance, it was held, that the holder was not bound to present the bill a second time, nor to return it, and that the holders having declared against the drawer on the bill, and joined counts for goods sold, may treat such bill as a nullity, and recover his demand on the latter counts, although the credit on the bill be not expired. Hickling v. Hardey, 1 Moore, 61; 7 Taunt. 312; Smith v. Hodson, 4 Term R. 211; 1 Man. & R. 2.

If a person without authority sell goods belonging to another, and receive a negotiable note in payment, the owner may waive the tort, and maintain an action against him for money had and received, to recover the proceeds of the sale. Whitwell v. Vincent, 4 Pick. 449. An action for goods sold and delivered will lie, although payment was to be made by a note on demand, immediately on a failure to give such note. Loring v. Gurney, 5 Pick. 15. In Manufacturers' & Mechanics' Bank v. Gore, 15 Mass. 75, "the bank finding the security upon which they had agreed to make the loan, had failed by reason of the forgery of the names of the indorsers, and that they had thus been defrauded of a large sum of money, commenced this action, declaring for money had and received, although the term of credit agreed upon for the loan had not expired." "It is a case," the court say, "as respects the plaintiffs, of money obtained from them by misrepresentation and fraud; and we think the only question is, whether upon a loan thus obtained, although upon credit, the bargain may not be disaffirmed by the lender, and an action presently commenced for money so obtained, as had and received, in a legal view, to his use; and upon this we have no doubt." And they observe, "There can be no question of the soundness of the principle, or of its applicability to this action. Here the credit was obtained upon an offer of adequate security. The security was wholly worthless. The consideration for the credit, therefore, failed, and the money thus wrongfully obtained, could not for an instant be conscientiously retained. Ex aequo et bono, then it ought to be returned; and that is the foundation of the action for money had and received."

"Indebitatus assumpsit lies to recover the price and value of goods which the defendant, by fraud, procured the plaintiff to sell to an insolvent, and then got into his own possession; for he could not set up the sale, because his own fraud had procured it; and the mere possession of the plaintiff's goods, unaccounted for, raises an assumpsit to pay." Hill v. Perrott, 3 Taunt. 274; Smedley v. Gooden, 3 Maule & S. 191; Bennet v. Francis, 4 Esp. 28. When a sale is fraudulently procured by the vendee, he may be sued by the vendor for the value of the goods, even before the expiration of the credit agreed to be given. De Symons v. Minchwich, 1 Esp. 430; Arden v. Sharpe, 2 Esp. 523, 524; Seaver v. Dingley, 4 Greenl. 306. In Willson v. Foree, 6 Johns. 110, the plaintiff sold a horse and gig to the defendant for a note on Whaley, which was not due for several months. Whaley was represented by the defendant as good, when he knew him to be insolvent. Plaintiff afterwards offered to return the note and demanded payment, which evidence, under the count for goods sold, the court overruled, and on that ground the supreme court reversed the judgment; and in their opinion said, "If the special contract was void on account of fraud, the plaintiff may disregard it, and bring assumpsit for the goods sold. That the note was no payment." The same doctrine is found in 1 Com. Cont. 38. In Stedman v. Gooch, 1 Esp. 3, Lord Kenyon said, "If in payment of a debt, a bill or note is taken, payable at a future day, the creditor cannot legally commence an action, until such note or bill become payable, or default be made in the payment; but if such bill or note be of no value, as if, for example, drawn on a person who has no effects, and who, therefore, refuses it, the creditor may consider it as waste paper, and resort to his original demand, and sue the debtor upon it." It appears when the goods were purchased in that case, the notes were taken in payment. The same principle is sanctioned in Puckford v. Maxwell, 6 Term R. 52. To this doctrine is opposed the case of Ferguson v. Carrington, above cited, and some other cases. These cases rest upon the simple ground that an action for goods sold and delivered, or money had and received, affirms the contract. Now this assumed ground is unfounded in fact and in law. An action brought before the credit expires, cannot be said to be brought in affirmance of the contract, but in disaffirmance of it. The action is maintainable only upon the ground that the note given in payment being of no value on account of the fraud, may be treated as void, and an action brought immediately for the goods or money obtained through its instrumentality. And in such case, the only defence that could be set up would be the fraud through which the credit was obtained. Is this admissible? Such a position

would be absurd. In this case M'Queen & M'Kay by a gross fraud obtained the money from the bank, the security given to the bank being of no value; and although they have appropriated the money as admitted in this case, yet they contend they are not liable to an action for money had and received, until their credit, fraudulently obtained, shall have expired. Had the bank claimed the pork and flour specifically, by an action of trover or replevin, as the proceeds of the money fraudulently obtained from it by M'Queen & M'Kay, its right to the whole of the property would have been clear, but having issued an attachment, it can claim only as a general creditor, and under the statute other creditors may file their claims. But the only point now under consideration is, has the action been prematurely commenced?

In the case of Cary v. Curtis, 3 How. [44 U. S.] 255, Mr. Justice Story says, "It is an entire mistake of the true meaning of the rule of the common law, that the action of assumpsit for money had and received is founded upon a voluntary express or implied promise of the defendant, or that it requires privity between the parties, ex contractu, to support it. The rule of the common law has a much broader and deeper foundation. Whenever the law pronounces that a party is under a legal liability or duty to pay over money belonging to another, which he has no lawful right to exact or retain from him, there it forces the promise upon him, in invitum, to pay over the money to the party entitled to it. It is a result of the potency of the law, and is in no shape dependent upon the will or consent or voluntary promise of the wrongful possessor." I think the suit may be sustained, there being fraud in the security, though the credit had not expired. An action of trover for the bank notes, without proving the notes, could not be sustained; and this could not be done in one case in a hundred.

It is admitted there was no sale of the property by M'Queen & M'Kay. They indorsed to Gibson, in New York, a commission merchant, the receipted bills of parcels, showing the purchase and payment by them for the pork and flour, and a guarantee that both should pass inspection, &c., and the great question in the case is, whether the advance made by Gibson creates a lien on the pork and flour paramount to the lien of the attachment. There is no evidence that the plaintiff, when he made the advance, had any notice of the fraud of M'Queen & M'Kay. He must then be considered as having acted fairly; and it is admitted that it was usual for commission merchants, in New York, to make advances on Western produce upon the assignment of the proper evidence of title thereto. Whether this "proper evidence of title," consists of such memoranda of purchase as were transferred to the plaintiff in this case, is not stated. From the letters of M'Queen & M'Kay, to Ludlow & Babcock, commission merchants of Toledo, Ohio, handed to the plaintiff the day he made the advance, and which is made a part of the case, it appears the advance was made on the pork and flour above stated; and nine hundred other barrels of pork "stored at different points on the Wabash Canal." This also appears from a letter written on the same day by the plaintiff, and directed to the same persons, which is also in evidence. It seems, however, to have been the intention of the parties to the agreement, to raise the legal question on the pork and flour attached. No letters were written to Hanna, Hamilton & Co., or D. & J. A. T. Nichols, of whom the pork and flour now in controversy were purchased, informing them of the orders given to the plaintiff; nor had they any knowledge of such orders until after the attachment was laid. The memorandums of purchase with their indorsements have been compared, in their effect, to indorsed bills of lading. A bill of lading possesses many of the qualities of a bill of exchange. In the language of Lord Ellenborough, if a consignee "indorse a bill of lading for a valuable consideration, and without notice by the indorser of a better title, it passes the property." This deprives the owner of the right to stop the goods in transitu. When the indorsement is made in blank, it may be filled up as on a bill of exchange. 6 East, 21, 22; Wright v. Campbell, 4 Burrows, 2046; Tucker v. Humphrey, 4 Bing. 522; Caldwell v. Ball, 1 Term R. 205; Hibbert v. Carter, Id. 745; 3 Kent, Comm. 207.

The memorandums in question are neither in form nor effect, like bills of lading. Have they the character of warehouse receipts? These instruments take their form and effect from usage; consequently, they vary in both these particulars, as usages differ at different places. In Akerman v. Humphery, 1 Car. & P. 54, it was held, that a consignee of goods delivering over to a third person, the shipping note of such goods, and a delivery order on the wharfinger to deliver such goods as soon as they arrive, does not pass the property in them, so as to prevent a stoppage of them in transitu by the consignor. In his opinion in that case, Burrow, Justice, said, "I do not think that the giving the shipping note and delivery order to the plaintiff, made a change of the property." The acceptance of a delivery order by the vendee is not equivalent to an actual acceptance of the goods within the meaning of the statute of frauds. The court say "They" (the warehouse men) "held it originally, as the agent of the vendors; and as long as they continued so to hold it, the property was unchanged." It has been said, "that the London Dock Company were bound by law, when required, to hold the goods on account of the vendee. That may be true, and they might render themselves liable to an action for refusing so to do; but if they did wrongfully refuse to

transfer the goods to the vendee, it is clear that there could not then be any actual acceptance of them by him until he actually took possession of them." After a contract for the sale of goods and a written order on the wharfinger for delivery, communicated to the wharfinger, and assented to by him, though no actual transfer be made on his books, the property passes to the vendee. Assignees of Doorman v. Groning, 7 Taunt. 164. In Hervey v. Liddiard, 1 Starkie, 123, it was held, that where "A, shortly before his bankruptcy, draws a bill, and having procured it to be discounted, gives B, a creditor, an order to receive the amount which he directs C, who discounted the bill, to transmit to B; whilst the money is in the hands of the carrier, A commits an act of bankruptcy, B, who afterwards receives the money, is liable to A's assignees." "An order by A to B, directing the latter to pay over to C, a creditor of A's, the proceeds of a cargo consigned by A to B, creates no lien in favor of C." Assignees of Holland and Humble v. ——, 1 Starkie, 143. A shipping note and delivery order make no change of property; they do not amount to a bill of lading, which is exactly like a bill of exchange, and the property mentioned in it passes by indorsement. Tucker v. Humphrey, 4 Bing. 516. A merchant in London had been in the habit of selling goods to B, resident in the country, and of delivering them to a wharfinger in London, to be forwarded to B by the first ship. In pursuance of a parol order from B, goods were delivered to, and accepted by, the wharfinger to be forwarded in the usual manner. Held that this not being an acceptance of the buyer, was not sufficient to take the case out of the statute of the 29 Car. II. c. 3. Hanson v. Armitage, 5 Barn. & Ald. 557. In Barrett v. Goddard [Case No. 1,046], it was held that where goods were sold, lying in the vendor's warehouse, on credit, and they are sold by marks and numbers, so that no further designation is necessary, and it is a part consideration of the bargain that they may remain there rent free, at the option of the vendee, and for his benefit, until the vendor shall want the room; there is in point of law a complete delivery of the goods.

To constitute a lien there must be an actual or constructive possession of the thing, by the party asserting it; for a lien is a right to retain a thing, which presupposes a lawful possession, which can arise only from a just possession under the owner or other party against whom the claim exists. If the thing has not yet arrived at the possession of the party, but is still in transitu, or if he has only a right of possession, the lien does not attach thereon. Story, Ag. § 361. Chancellor Kent, in the second volume of his Commentaries (page 638), says, possession of the goods is necessary to create the lien; and the right does not extend to debts which accrued before the character of factor commenced; nor when the goods of the principal do not, in fact, come to the factor's hands even though he may have accepted bills upon the faith of the consignment, and paid part of the freight. Kinloch v. Craig, 5 Term R. 119, 783. A sale of goods without delivery of possession is invalid as against an attaching creditor of the vendor. Lanfear v. Sumner, 17 Mass. 110; Shumway v. Rutter, 7 Pick. 56; Parsons v. Dickinson, 11 Pick. 352. On their face the bills of parcels do not show and do not purport an actual delivery of the flour and pork, and there was in fact no formal delivery of either. The papers show an obligation by the warehouse keepers to deliver the pork and flour soon after the canal shall open, and that they shall both pass inspection. But in regard to the pork, the agreed case admits that the barrels of pork were in the warehouse. A formal delivery of personal property is not necessary to change the title. A part, in the name of the whole, may be delivered; and frequently the delivery of the evidence of the transfer is considered a symbolical delivery of the thing sold. This question is controlled by commercial usages in reference to the nature and condition of the property. 1 East, 194; Atkinson v. Maling, 2 Term R. 462.

The receipted bills of parcels and guarantees were not assignable as bills of lading. They contained evidence of the articles purchased, of payment and the guarantees, and as such were important to the purchasers; but whether the evidence of the articles purchased, the payment and guarantees, were contained on one or several papers, was immaterial. No usage is known or proved in Indiana or New York, which gives to these papers any other effect than as evidence of the above facts. There was no condition expressed or understood that the pork and flour were to be delivered to the holder of the papers, or that their production was necessary to obtain the property. A simple order for the pork and flour of Gibson, would have had the same effect, as the indorsement of the above papers. If M'Queen & M'Kay had given an order to the warehouse men to deliver the property to any one, they would have delivered it, without incurring any liability to Gibson, they having no knowledge of his claim. Had M'Queen & M'Kay taken the property into their own possession, they would not have been responsible to Gibson for the value of the property, but only for the advance, including interest and damages for a violation of the contract. There having been no sale, and the property not having passed into the actual possession of Gibson, he could not have recovered the property by any legal process, even from the possession of M'Queen & M'Kay. Had the property passed into the possession of Gibson after notice, he could not, as the factor of M'Queen & M'Kay, have sold more of it than would refund his advance, interest and charges. But not having possession of the property, he could not, in equity, enforce

against it his claim to any thing beyond an indemnity.

But the case does not turn upon this principle. Before any notice was given, the bank laid an attachment on the property. Neither the warehouse men or the bank knew any thing of the advance of Gibson, or of the order, until after the attachment. But suppose there had been notice, M'Queen & M'Kay had an attachable interest in the property. The first cost of the pork and flour exceeded the advance about a thousand dollars. M'Queen & M'Kay, then, to this extent, at least, were interested in the property, and that interest was attachable. By the 383d section of the execution laws (Rev. Code 1843), all the interest of a mortgagee, pledgee, or assignee of personal property is liable to be levied on and sold by execution. And in the case of Evans v. Darlington, 5 Blackf. 320, the court held there, the same interest may be reached by an attachment. If the lien asserted by Gibson be good to the extent as contended, it withdraws the property from the state of Indiana, and compels the creditors of M'Queen & M'Kay who reside in the state, to follow it to the state of New York. And the principle would be the same, had an advance of one thousand dollars been made on ten thousand dollars worth of property. So careful is the law of the rights of creditors, that an executor under a foreign jurisdiction cannot withdraw the property of the deceased from the local jurisdiction, to that of the domicil of the deceased, to the prejudice of creditors. Much more, it would seem, cannot this be done in the case under consideration; a case where in fact there has been no sale; and where, if the lien of the commission merchant attached, it could only extend to the advance made.

In Black v. Zachara, 3 How. [44 U. S.] 511, the supreme court held, that an attachment of bank stock in Louisiana, which had previously been assigned by the owner in South Carolina, of which the plaintiff in the attachment had notice, before the writ was issued, could not be sustained. The court say, "Now in the case before us, there is plenary evidence that the assignment was valid and effectual by the laws of South Carolina, when and where it was made, to pass the right to the property in controversy; and that the attaching creditors had notice thereof before their attachment was made." And so in a late case in the supreme court of Louisiana, where the effects of the United States Bank were attached in that state, after a due assignment of them had been made in the state of Pennsylvania, of which the attaching creditors had notice, it was held the attachment could not be sustained. This case, and the one above cited, are made to turn on the fact of notice. And if in the case under consideration, before the attachment was laid upon the property, the plaintiff had had notice of the order, the lien of Gibson to the extent of his advances would have been protected. In Babcock v. Maltbie, 7 Mart. (N. S.) 137, the court say, the true test in cases of assignment is, "that where the owner of the property has lost all power over it and cannot change its destination, the creditors cannot attach." This rule is apparently sanctioned by the supreme court of the United States in the case above cited; but it is not true, except upon the supposition that the whole transaction was bona fide. For if a man fraudulently transfer his goods, he has lost all power over them, but his creditors may attach them. In the case of Gibson, M'Queen and M'Kay, before the notice, had power to sell the property and transfer a good title.

In Story, Confl. Laws, § 416, it is said, "Neither is it true, that even the voluntary conveyances of parties in all cases are to be held valid, where they are prejudicial to the rights and remedies of our own citizens. In Massachusetts, for instance, it has been held, that a voluntary assignment by a debtor of all his property, made in Pennsylvania, for the benefit of creditors generally, shall not prevail over a subsequent attachment of the funds of the debtor, made after the assignment, because such an assignment would be void by the laws of Massachusetts, if made in that state, as being in fraud of creditors; and it is unjust and unequal in its effects, and prejudicial to the citizens of the state." "In such a case, therefore, the party who shall by process first attach the debt or seize the property, ought to prevail, whether creditor or assignee." Ingraham v. Geyer, 13 Mass. 146; Olivier v. Townes [2 Mart. (N. S.) 97]; 6 Pick. 286, 307. And Chancellor Kent (2 Comm. 406) says, "It may be considered as part of the settled jurisprudence of this country, that personal property, as against creditors, has locality, and the lex loci rei sitae prevails over the law of the domicil with regard to the rule of preference in the case of insolvent estates." In Lanfear v. Sumner, 17 Mass. 110, the court held, "A conveyance made in Philadelphia to plaintiff of a quantity of tea on board a ship bound to Boston, which was afterwards attached by a creditor in Boston, that the defendant must prevail, as there was no legal delivery before the attachment. That it was a case of two creditors, each endeavoring to secure his debt out of the same fund; he who first acquires possession will hold the goods."

In the case of Hoffman v. Noble, 6 Metc. (Mass.) 68, the court very properly held, that where a consignee had made an advance to the full value of the goods, in good faith, and they having come into his possession, he stood in the light of a purchaser. It is supposed that a decision against the paramount lien of the plaintiff, as here asserted, may tend to prevent the customary advances on the shipment of produce. Factors or commission merchants must be cautious to whom they make advances. The legal right of the bank grow-

ing out of the fraud, to the pork and flour, if asserted by an action of trover, is not disputed. And this shows that the case turns mainly upon a mere technicality. But on the other side, the rights of creditors are involved, and the assertion of those rights under the jurisdiction where the property is found. If by a small advance on a large amount of property, by a factor, a fraudulent purchaser may remove the property to a foreign jurisdiction, beyond the reach of his local creditors, frauds of the greatest magnitude may be practised. The facts of the present case strongly illustrate this, and show under such a rule with what facility and impunity such frauds may be committed.

This is probably the first case involving some of the precise questions, above considered. I have felt an uncommon solicitude on the subject, and took occasion, at the last term of the supreme court attended by my lamented Brother Story, to consult him on the points ruled, and I was gratified to find that he coincided with the opinion as now expressed. Upon the whole, we direct a judgment of de retorno habendo.

[NOTE. This judgment was reversed by the supreme court—8 How. (49 U. S.) 384—in an opinion by Chief Justice Taney, who held there was but a single question involved in it, viz. whether the property in dispute was transferred to the plaintiff and vested in him by the indorsement and delivery of the warehouse documents in the manner stated in the case. "This mode of transfer and delivery has been sanctioned in analogous cases by the courts of justice in England and this country, and is absolutely necessary for the purposes of commerce." This symbolical delivery was fully sustained in Conard v. Atlantic Ins. Co., 1 Pet. (26 U. S.) 445. No formal assignment in such transactions is necessary, as the technical rules of common-law conveyances and transfers of property have never been applied to mercantile contracts made in the usual course of business.]

Case No. 5,402.

GIBSON v. VAN DRESAR et al.

[1 Blatchf. 532;[1] 1 Fish. Pat. Rep. 369.]

Circuit Court, N. D. New York. June Term, 1850.

PATENTS—ANALOGOUS DEVICES — COLORABLE IMITATIONS—INFRINGEMENT—VALIDITY—PROVISIONAL INJUNCTION.

1. Rotary guides, so arranged and adjusted as to press, by means of weights, against the edges of the board, while it is undergoing the operation of the plane or cutter, and placed obliquely to the motion of the board, so as to produce, as they revolve against the edges, a constant tendency to keep the board to its bed, are a mere analogous device, when substituted for pressure rollers in the combination for planing covered by Woodworth's patent. The difference between the rotary guides and the pressure rollers is one of form, not of substance.

2. The case of Gibson v. Harris [Case No. 5,396], cited and applied.

3. A revolving cutter-wheel, having bevels or offsets around its face, as patented to John Levy, assignee of Hazard Knowles, April 10th, 1849, is a colorable imitation of the rotary cutters of Woodworth.

4. Such cutters were involved in the cases of Woodworth v. Wilson, 4 How. [45 U. S.] 712, and of Van Hook v. Pendleton [Case No. 16,851].

5. A planing machine containing a combination of such rotary guides with such cutters is an infringement of Woodworth's patent.

6. The validity of Woodworth's patent being fully settled, and the court being entirely satisfied that the defendants' machine was substantially identical with Woodworth's, a provisional injunction was granted.

[Cited in Green v. French, Case No. 5,757; McWilliams Manuf'g Co. v. Blundell, 11 Fed. 422.]

[2] [Motion for provisional injunction.

[Suit brought [by John Gibson against Stephen Van Dresar and Daniel Stearns], on letters patent for an improvement in the method of planing, tonguing, and grooving, and cutting into moldings, or either, plank, boards, or other material, and for reducing the same to an equal width and thickness, etc., granted to William Woodworth, December 27, 1828, extended in the name of his administrator, William W. Woodworth, for seven years from December 27, 1842, reissued July 8, 1845, and again extended by act of congress for seven years from December 27, 1849.

[The plaintiff, who was assignee of said reissue under the second extension, claimed that a machine which the defendants were operating in Oneida county, state of New York, was an infringement of the Woodworth patent. Those parts of the specification and the claims of said reissue which are material to the present case are as follows:

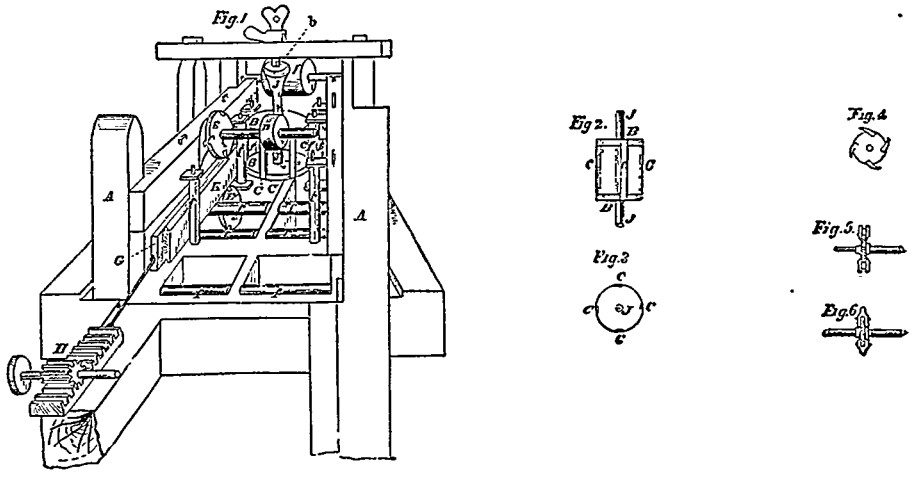
When the planks or boards have been thus prepared (on separate machine), they may be placed on or against a suitable carriage, resting on a frame or platform, so as to be acted upon by a rotary cutting or planing and reducing wheel, which wheel may be made to revolve either horizontally or vertically, as may be preferred. The carriage which sustains the plank or board to be operated upon may be moved forward by means of a rack and pinion, by an endless chain or band, by geared friction rollers, or by any of the devices well known to machinists for advancing a carriage or materials to be acted upon in machines for various purposes. The plank or board is to be moved on toward the cutting edges of the cutters or knives, on the planing cylinder, so that its knives or cutters, as they revolve, may meet and cut the plank or board in a direction contrary to that in which it is made to advance.

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

[2] [From 1 Fish. Pat. Rep. 369.]

[2] [William Woodworth.

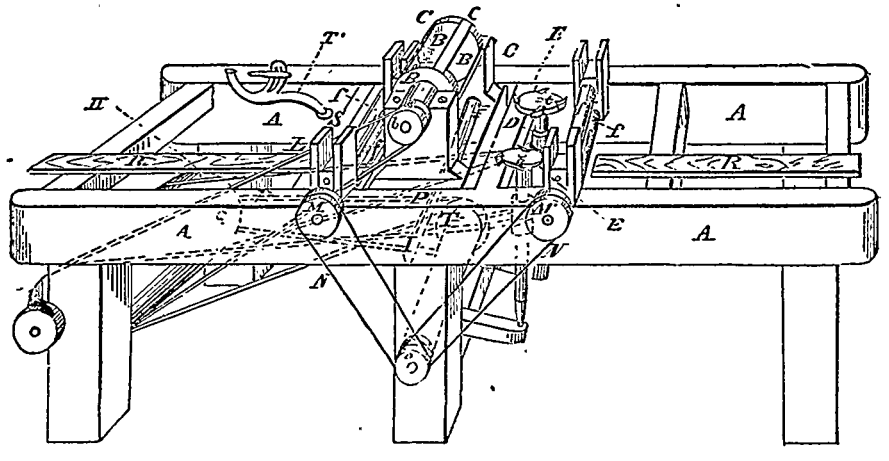
[Planing Machine,[3] Patented Dec. 27, 1828. Extended Dec. 27, 1843; and Dec. 27, 1849. Reissued July 8, 1845.



[Wm. Woodworth.

[Planing Machine,[3] Patented Dec. 27, 1828. Extended Dec. 27, 1842, and 1849. Reissued July 8, 1845.

Fig. 7.



[2] [From 1 Fish. Pat. Rep. 369.]

[3] [Planing Machine.

[Fig. 1 is a perspective representation of the principal operating parts of the machine. A A is the frame of the machine; it may be either of wood or iron, and vary in size according to the work to be done. B B, heads of the planing cylinder; and C C, the knives or cutter which extend from one to the other of said heads, to the peripheries of which they are attached by screws. The knives, C C, may be placed in a line with the axes, J, of the cylinder, or obliquely thereto, as may be preferred: in the latter case the edge should form the segment of a helix. b represents a pulley near the upper end of the axes, J. I represents a pulley or drum made to revolve by horse, steam, or other motive power, from which a belt may extend around the pulley b, to drive the planing cylinder and other parts of the machinery. G is the carriage, represented as being driven forward by means of a rack and pinion, H; against this carriage the plank K, which is to be planed, tongued, and grooved, is placed and made to advance with it.

[Fig. 2 is a separate view of the planing cylinder with its knives or cutters, and Fig. 3 an end view of one of the heads. E E are the revolving cutters or tonguing and grooving wheels; and D D, wheels upon their shafts which may be driven by bands or otherwise, in order that said wheels may revolve in the proper direction. Fig. 4 is a side view of one of these wheels; Fig. 5 is an edge view of the tonguing wheel, and Fig. 6 is an edge view of the grooving wheel—the latter being each shown with two cutters in place.]

[See note at end of case.]

In the accompanying drawing, figure 1 is a perspective representation of the principal operating parts of the machine, when arranged and combined for planing, tonguing, and grooving, and when so arranged as to be capable of planing two planks at the same time, the axis of the planing wheel being placed vertically. A A is a stout, substantial frame of the machine, which may be of wood or of iron, and may be varied in length, size, and strength, according to the work to be done. B B are the heads of the planing cylinder, and C C, the knives or cutters, which extend from one to the other of said heads, to the peripheries of which they may be attached by means of screws. The knives, C C, with the faces forming a planing angle, may be placed in a line with the axis, J, of the cylinder, or they may stand obliquely thereto, as may be preferred; but in the latter case the edge should form the segment or portion of a helix. b represents a pulley near to the upper end of the axis, J, and J, a pulley or drum, which may be made to revolve by horse, steam, or other motive power, and from which a belt may extend around the pulley b, to drive the planing cylinder and other parts of the machinery. G is the carriage which is represented as being driven forward by means of a rack and pinion, H. Against this carriage, the plank K, which is to be planed, tongued, and grooved, is placed, and is made to advance with it. It will be manifest, however, that the plank may be moved forward by other means, as, for example, by an endless chain or band, passing around drums or chain wheels, or by means of geared friction wheels, borne up against it. To cause the carriage and plank to move forward readily, there may be friction rollers, f f f, placed horizontally, and extending under them. The rollers, f f f, which stand vertically, are to be made to press against the plank and keep it close to the carriage, and thus prevent the action of the cutters from drawing the plank up from its bed in cutting from the planed surface upward. They may be borne against it by means of weights or springs, in a manner well known to machinists. In the single horizontal machine, the horizontal friction-rollers may be geared, and the pressure-rollers placed above them to feed the board with or without the carriages, a bed-plate being used directly under the planing cylinder. Figure 7 represents the same machine, with the axis of the planing-cylinder placed horizontally, and intended to operate on one plank only at the same time. A A is the frame; B B the heads of the planing cylinder; C C the knives or cutters attached to said heads. To meet the different thicknesses of the planks or boards, the bearings of the shaft or cylinder may be made movable, by screws or other means, to adjust it to the work; or the carriage or bed-plate may be made so as to raise the board or plank up to the planing cylinder. E and E' are the revolving cutters, or tonguing and grooving wheels, which are placed upon vertical shafts, having upon them pulleys, D D, around which pass belts or bands from the main drum, I, to which a revolving motion may be given by any adequate motive power.

From the drum, I, a belt, L, passes also around the pulley, b, on the shaft of the planing-cylinder, and gives to it the requisite motion. There may in this machine be a horizontal carriage, moved forward by a rack and pinion, in a manner analogous to that represented in figure 1; but in the present instance the plank is supposed to be advanced by means of one or two pairs of friction or feed-rollers, shown at f f'. The uppermost, f' f', of the pairs of rollers, may be held down by springs, or weighted levers, which it has not been thought necessary to show in this drawing, as such are in common use. The lowermost of these rollers may be fluted or made rough on their surfaces, so as to cause friction on the under side of the plank. R R are guide-strips, used in place of the rollers used for the same purpose, and also for bearing or friction-rollers, when the machine is vertical, to direct one edge of the plank, and against its opposite edge. Any pressure may be used equal to the weight of the board or plank, when worked in a vertical position. One of the cutter-wheels should be made adjustable, to adapt it to stuff of different widths.

The planing cylinder, and likewise the cutter or tonguing and grooving wheels, may be constructed in the manner represented in figures 2, 3, 4, 5, and 6, and hereinbefore fully described. One of the heads of the planing-wheel may be made movable, to accommodate its width to the width of the boards or plank to be planed.

What is claimed therein as the invention of William Woodworth, deceased, is the employment of rotating planes, substantially such as herein described, in combination with rollers, or any analogous device, to prevent the boards from being drawn up by the planes when cutting upward, or from the reduced or planed to the unplaned surface, as described.

And also the combination of the rotating planes, with the cutter wheels for tonguing and grooving, for the purpose of planing, tonguing, and grooving boards, etc., at one operation, as described. And also the combination of the tonguing and grooving cutter-wheels for tonguing and grooving boards, and at one operation, as described. And finally, the combination of either the tonguing and grooving cutter-wheel, for tonguing and grooving boards, etc., with the pressure-rollers, as described, the effect of the pressure-roller in these operations being such as to keep the boards, etc., steady, and prevent the cutters from drawing the boards toward the center of the cutter-wheels whilst it is moved through by machinery

[H. Knowles.

[Planing Machine. Patented Apr. 10, 1849.

Fig. 1.

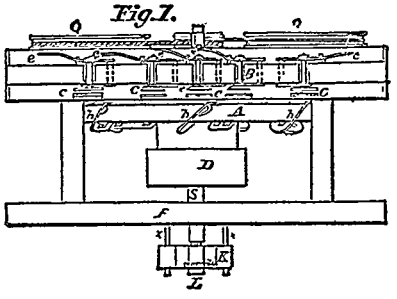


Fig. 5.

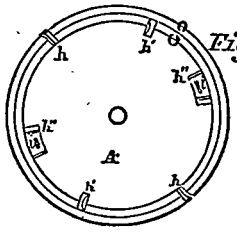


Fig. 2.

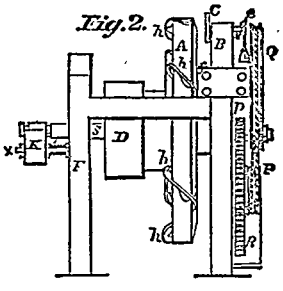


Fig. 6.

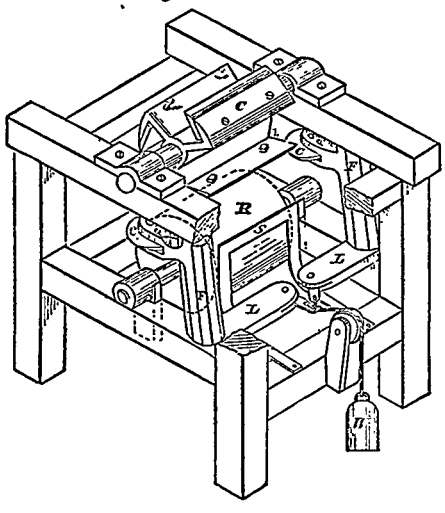


Fig. 3.

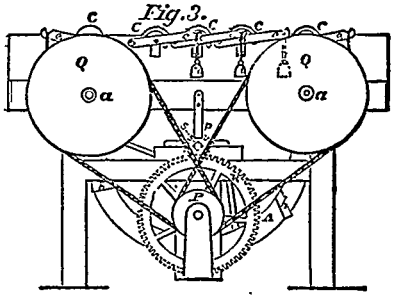


Fig. 4.

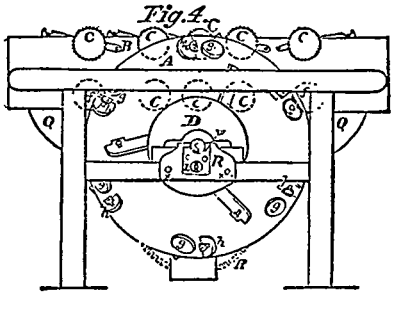
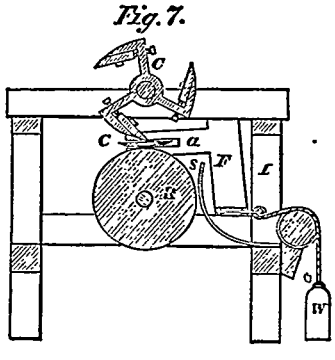


Fig. 7.



In the planing operation, the tendency of the plane is to lift the boards directly up against the rollers; but in the tonguing and grooving, the tendency is to overcome the friction occasioned by the pressure of the rollers.

[4] [The defendants resisted the motion, principally on the ground that the machine used by them was substantially different in construction and operation from that of Woodworth, and, therefore, no infringement. Their machine was constructed in accordance with letters patent for an improvement in planing machine granted to John Levy, assignee of Hazard Knowles, April 10, 1849. They held under Levy. Those parts of the specification and claims of the Levy patent, involved in the present controversy, were as follows:

["My second improvement is more particularly applicable to the cutter-wheel of Bramah. That improvement consists in forming one, two or more offsets, or in lieu thereof one or more bevels, near the outer periphery of the cutter-wheel. Upon the circuit of the outer or deeper of these offsets is set a series of reducing cutters, marked h, h, fig. 5. These cutters may project a short distance beyond the periphery of the wheel A. The purpose of the offsets or bevels is, to allow a board thicker than the finished work is intended to be, to enter between the edge of the wheel and the face of the bench or support. The side or projecting corner of the reducing cutter is made sharp, as well as the lower edge, as represented at h, h, fig. 5. Entirely within the outer circumference of the wheel are set, through inclined mortices of appropriate form, the second series of plane irons or jack cutters, h,' h.' The plane irons here used are concave on their faces, by which conformation the corners precede a little the center portion of the cutter. These cutters stand further out towards the plane of the wheel than the reducing cutters. Still nearer to the axis of the wheel is another series of cutters, called smoothing cutters, the edge of each of which is ground straight, and made sufficiently broad to cover the whole face of the board to be planed. Two of these cutters are seen at h," h," in front of each of which is an adjustable gauge-plate i, having a set-screw passing through a countersunk slot, by means of which it is capable of being set nearer to or more remote from the edge of the cutter, in order to limit the feed or hold taken of the timber by the smoothing plane."

[The claims were: 1. The method of holding the board firmly against the bearing bench or roller of the planing machine, by means of obliquely placed rotary guides, firmly pressed against the edge of the board, and drawing it to the bed. 2. The oblique rotary guides in combination with a cutter-wheel, having bevels or offsets around its face, and with the adjustable plates in front of the smoothing cutters.

[The defendants' cutter-wheel was a very flat cone, set upon a leaning shaft, and made a long shaving cut.][4]

Azor Taber and Rodman L. Joice, for plaintiff.

Charles B. Sedgwick, for defendants.

NELSON, Circuit Justice. 1. The particular parts of the defendants' machine relied on to make out a substantial difference between it and Woodworth's, and to distinguish it from the same in the sense of the patent law, are: (1) The rotary guides used for keeping the board firmly to its bed while under the process of planing; and (2) the construction of the planing cutters used in connection with the rotary guides.

The rotary guides are so arranged and adjusted as to press, by means of weights, against the edges of the board while it is undergoing the operation of the plane or cutter; and, being placed somewhat obliquely to the motion of the board, their position produces, as they revolve against the edges, a constant tendency to keep the board to its bed.

In the Woodworth machine, the board is kept to its bed by means of pressure rollers, which act upon the face instead of upon the edges of the board, and are made to press upon the face by means of weights or springs. In the Woodworth specification as amended, in setting forth the claims of the patentee, it is stated, among other things, that he claims the employment of rotating planes, as described, in combination with rollers, or any analogous device, to prevent the boards from being drawn up by the planes when the machine is in operation.

In the defendants' machine, the pressure rollers are placed upon the edges of the board; in Woodworth's, upon its face. They are arranged and adjusted by a somewhat different mechanical contrivance in the former; but in both they are used for the same purpose, and lead to the same result. Some mechanical ingenuity is doubtless displayed in transferring the pressure from the face of the board to the edges, and in combining it with the planes or cutters. But that is not always enough to distinguish the new from the old machine. If it were, a patent would not be worth the money paid for the parchment upon which it is written. A given mechanical power is frequently essential to enable an inventor to carry his improvement into operation and effect. For this he is indebted to another department of knowledge—mechanical experience and skill; and such is the proficiency in that department, that an ingenious mechanic will furnish him with the necessary power in various ways, and by different combinations of machinery. This fact was well known to Woodworth, and is recognized and referred to in his specification, already recited, where he

[4] [From 1 Fish. Pat. Rep. 369.]

[4] [From 1 Fish. Pat. Rep. 369.]

claims his combination with the pressure rollers, or any analogous device, to keep the board to its bed.

I have heretofore had occasion to examine this question in the case of Gibson v. Harris [Case No. 5,396]. The defendant had constructed his machine by dispensing with the rollers, and by substituting in their place a screw and a spring operating upon smooth plates of iron placed on each side of the rotating planes, by which the board was pressed down upon the moving platform that carried it forward to the knives. I then remarked that "Woodworth does not limit his contrivance, to prevent the board from being drawn up by the cutters, to the pressure rollers, but refers to any other device which mechanical skill and ingenuity may readily suggest. The pressure upon the plank, to secure the free action of the rotary planes, is essential to the working of the machine; but as to the particular mode or best mode of accomplishing the end, it is left open to mechanical knowledge. An inventor is not necessarily a machinist. He is often wholly dependent on the skill of this department of knowledge to give embodiment and practical operation to his discovery."

In my judgment, the view above taken affords a complete answer to the claim set up by the defendants, that their machine is substantially different from Woodworth's in the sense of the patent law. It is simply an analogous device of the skillful mechanic, to produce the effect to be found in Woodworth's combination. The contrivance applies the pressure upon the edges of the board instead of upon the face. That is all—an application of the pressure to a different part of the board—a difference in form not in substance.

2. The revolving cutters used in the machine of the defendants, (in combination with the rotary guides above examined,) have heretofore been frequently before me, at chambers, on motions for injunctions; and were, among other models, produced on the argument of the case of Wilson v. Rousseau, 4 How. [45 U. S.] 646. They were also more especially involved in the case from Kentucky, of Woodworth v. Wilson, Id. 712. They have been before Judge Betts and myself, sitting in the circuit court for the Southern district of New-York, in the case of Van Hook v. Pendleton [Case No. 16,851], in which the machine was enjoined as an infringement of Woodworth's patent. Since the first examination of cutters of this description, I have not been able to bring my mind to doubt, that they were colorable imitations of the rotary cutters of Woodworth; and such has been the uniform determination in this circuit for the last four years. I am satisfied, therefore, that the plaintiff is entitled to the injunction prayed for.

The counsel for the defendants expressed a desire, if the court should be against them, that, instead of their being enjoined, security should be taken for the damages accruing to the plaintiff in case of an ultimate recovery in his favor, leaving the defendants to the use of their machine in the meantime. This course might properly be adopted, if the question was new, or in the least doubtful. But here the plaintiff's machine has been in operation for twenty years and upwards; and the right to its enjoyment has been established by the highest court in the Union, after a protracted and expensive litigation. I regard the validity of the patent as fully settled, and all rights arising under it as beyond dispute. The only open question in the case is, whether or not the defendants' machine is substantially identical with the plaintiff's. Being entirely satisfied that it is, I am bound to enjoin it.

Injunction granted.

[5] [NOTE. Amended Specification of Woodworth's Patent of July 8, 1845.

[The plank or boards which are to be planed, tongued, or grooved, are first to be reduced to a width by means of circular saws, by reducing wheels, or by any other means. When circular saws are used for this purpose, two such saws should be placed upon the same shaft, on which they are to be capable of adjustment, so that they may be made to stand at any required distance apart; under these the board or plank is to be forced forward, and brought to the width required; this apparatus and process do not require to be further explained, they being well understood by mechanicians.

[When what has been above denominated reducing-wheels are used, these are to consist of revolving cutter-wheels, which resemble in their construction and action the planing and reducing wheel to be presently described; these are to be made adjustable like the circular saws, but the latter are preferred for this purpose. The plank may be reduced to a width on a separate machine.

[When the plank or boards have been thus prepared (on a separate machine), they may be placed on or against a suitable carriage, resting on a frame or platform, so as to be acted upon by a rotary cutting or planing and reducing wheel, which wheel may be made to revolve either horizontally or vertically, as may be preferred. The carriage which sustains the plank or board to be operated upon may be moved forward by means of a rack and pinion, by an endless chain or band, by geared friction-rollers, or by any of the devices well known to machinists for advancing a carriage or material to be acted upon in machines for various purposes. The plank or board is to be moved on toward the cutting edges of the cutters or knives, on the planing cylinder, so that its knives or cutters, as they revolve, may meet and cut the plank or board in a direction contrary to that in which it is made to advance; the edges of the cutters are, in this method, prevented from coming first into contact with its surface, and are made to cut upward from the reduced part of the plank toward said surface, by which means their edges are protected from injury by gritty matter, and the board or plank is more evenly and better planed than when moved in the reversed direction.

[After the plank or board passes the planing-cylinder, and as soon, or fast, as the planing-cylinder has done its work on any part of the board or plank, the edges are brought into contact with two revolving cutter-wheels, one of which wheels is adapted to the cutting of the groove, and the other to the cutting of

[5] [Published in 1 Fish. Pat. Rep. 629, as a note to Hogg v. Emerson, 11 How. (52 U. S.) 587.]

the two rebates that form the tongue. When the axis of the planing and reducing wheel stands vertically, the grooving and tonguing wheels are placed one above the other, with the plank edgewise between them; when the axis of the planing-wheel stands horizontally, these wheels are on the same horizontal plane with each other, standing on perpendicular spindles.

[The grooving wheel consists of a circular plate fixed on an axis, and having one, two, three, four, or more cutters, which are to be screwed, bolted, or otherwise attached to it, the edges of which cutters project beyond the periphery of the plate to such distance as is required for the depth of the groove; their thickness may be such as is necessary for its width; they are, of course, so situated as to cut the groove in the middle of the edge of the board, or as nearly so as may be required. The tonguing-wheel is similar in form to the grooving-wheel, but it has cutters on each of its sides, or otherwise, so formed and arranged as to cut the two rebates which are necessary to the formation of the tongue.

[The grooving and tonguing cutters, at the same time by the same operation, reduce the board or plank to an exact width throughout. When the axis of the planing-wheel is placed vertically, the knives or cutters may be made to plane two planks at the same time, the planks being in this case moved in contrary directions, and so as to meet the edges of the revolving knives or cutters. When the machine is thus constructed, a second pair of grooving and tonguing wheels may be made to operate in the same way with those above described. A machine to operate upon a single plank or board, and having the axis of the planing-wheel placed horizontally, will however be more simple and less expensive than that intended to operate on two planks simultaneously.

[In the accompanying drawing, fig. 1 is a perspective representation of the principal operating parts of the machine when arranged and combined for planing, tonguing, and grooving; and when so arranged as to be capable of planing two planks at the same time, the axis of the planing-wheel being placed vertically. A A is a stout, substantial frame of the machine, which may be of wood or of iron, and may be varied in length, size, and strength, according to the work to be done. B B are the heads of the planing-cylinder, and C C, the knives or cutters, which extend from one to the other of said heads, to the peripheries of which they may be attached by means of screws. The knives C C, with the faces forming a planing angle, may be placed in a line with the axis J, of the cylinder, or they may stand obliquely thereto, as may be preferred; but in the latter case the edge should form the segment or portion of a helix; b represents a pulley near to the upper end of the axis J; and I a pulley or drum, which may be made to revolve by horse, steam, or other motive power, and from which a belt may extend around the pulley b, to drive the planing-cylinder and other parts of the machinery; G is the carriage, which is represented as being driven forward by means of a rack and pinion, H; against this carriage, the plank K, which is to be planed, tongued, and grooved, is placed, and is made to advance with it. It will be manifest, however, that the plank may be moved forward by other means, as, for example, by an endless chain or band, passing around drums or chain-wheels, or by means of geared friction-wheels borne up against it. To cause the carriage and plank to move forward readily, there may be friction-rollers, f f f, placed horizontally, and extending under them; the rollers f f f, which stand vertically, are to be made to press against the plank and keep it close to the carriage, and thus prevent the action of the cutters from drawing the plank up from its bed in cutting from the planed surface upward; they may be borne against it by means of weights or springs, in a manner well known to machinists. In a single horizontal machine, the horizontal friction-rollers may be geared and the pressure-rollers placed above them to feed the board with or without the carriages, a bed-plate being used directly under the planing-cylinder.

[Fig. 2 is a separate view of the planing-cylinder, with its knives or cutters; and fig. 3, an end view of one of the heads. E E are the revolving cutters, or tonguing and grooving wheels, and D D, whirls upon their shafts, which may be driven by bands, or otherwise, so as to cause said wheels to revolve in the proper direction.

[Fig. 4 is a side view of one of these wheels; fig. 5 is an end view of the tonguing-wheel; and fig. 6 an edge view of the grooving-wheel; the latter being each shown with two cutters in place. The number of cutters on these wheels may be varied, but they are represented as furnished with four. The cutters may be fixed on the sides of circular plates, with their edges projecting beyond the periphery of said plate.

[The edges of the plank, as its planed part passes the planing-cylinder, are brought in contact with the above-described tonguing and grooving wheels, which are so placed upon their shafts as that the tongue and groove shall be left at the proper distance from the face of the plank, the latter being sustained against the planing cylinder by means of the carriage or bed-plate, or otherwise, so that it can not deviate, but must be reduced to a proper thickness, and correctly tongued and grooved.

[In fig. 1, above referred to, only one carriage and one pair of cutter-wheels are shown, it not being deemed necessary to represent those on the opposite side, they being similar in all respects.

[Fig. 7 represents the same machine, with the axis of the planing-cylinder placed horizontally, and intended to operate on one plank only at the same time. A A is the frame; B B, the heads of the planing-cylinder; C C, the knives or cutters attached to said heads. To meet the different thicknesses of the planks or boards, the bearings of the shaft or cylinder may be made movable, by screws or other means, to adjust it to the work; or the carriage or bed-plate may be made so as to raise the board or plank up to the planing-cylinder. E and E' are the revolving cutters, or tonguing and grooving wheels, which are placed upon vertical shafts, having upon them pulleys, D D, around which pass belts or bands from the main drum, I, to which a revolving motion may be given by any adequate motive power.

[From the drum, I, a belt, L, passes also around the pulley, b, on the shaft of the planing-cylinder, and gives to it the requisite motion. There may in this machine be a horizontal carriage moved forward by a rack and pinion, in a manner analogous to that represented in fig. 1; but in the present instance the plank is supposed to be advanced by means of one of two pairs of friction or feed rollers, shown at f f'; the uppermost, f' f', of the pairs of rollers, may be held down by springs, or weighted levers, which it has not been thought necessary to show in this drawing, as such are in common use. The lowermost of these rollers may be fluted or made rough on their surfaces, so as to cause friction on the under side of the plank. M M' are pulleys on the axles of these lower rollers, which are embraced by bands, N N', which also pass around a pulley, O, on a shaft which crosses the frame A A, and has a pulley, T, on it, which is embraced by the belt, P, on a pulley, Q, on a shaft of the main drum, I; these bands and pulleys serve to give motion to the feed-rollers, as will be readily understood by inspecting the drawing. R R are guide-strips, used in place of the rollers used for the same purpose, and also

for bearing or friction rollers, when the machine is vertical, to direct one edge of the plank, and against its opposite edge; any pressure may be used equal to the weight of the board or plank, when worked in a vertical position. One of the cutter-wheels should be made adjustable, to adapt it to stuff of different widths.

[The planing-cylinder, and likewise the cutter or tonguing and grooving wheels, may be constructed in the manner represented in figs. 2, 3, 4, 5, and 6, and hereinbefore fully described. One of the heads of the planing-wheel may be made movable to accommodate its width to the width of the boards or plank to be planed.

[The respective parts of this machine may be varied in size, as may also the velocity of the motion of the planing-cylinders and cutter-wheels; but the following has been found to answer well in practice: The planing-cylinder, having four knives or cutters, may be twelve inches in diameter, and may make two thousand and upward revolutions in a minute. In a machine like that shown in fig. 7, the main drum, I, may be two feet in diameter, and may be driven with the speed of five hundred and upward revolutions in a minute. The pulleys on the planing-cylinder, and on the cutter-wheels, may be six inches in diameter. The plank should be moved forward at the rate of about one foot for every hundred revolutions of the cutter-wheel; and, of course, the diameter of the feed-rollers and of the pulleys by which they are turned must be so graduated as to produce this result. The size and speed of the above parts of this machine may be in some degree varied; but the above have been found to work well.

[Having thus fully described the parts and combinations of parts, and operation of the machine for planing, tonguing, and grooving boards or plank, and shown various modes in which the same may be constructed and made to operate without changing the principle or mode of operation of the machine, what is claimed therein as the invention of William Woodworth, deceased, is the employment of rotating planes, substantially such as herein described, in combination with rollers, or any analogous device, to prevent the boards from being drawn up by the planes when cutting upward, or from the reduced or planed to the unplaned surface, as described.

[And also the combination of the rotating planes with the cutter-wheels for tonguing and grooving, for the purpose of planing, tonguing, and grooving boards, etc., at one operation, as described, and also the combination of the tonguing and grooving cutter-wheels for tonguing and grooving boards, and at one operation, as described.

[And, finally, the combination of either the tonguing or the grooving cutter-wheel for tonguing or grooving boards, etc., with the pressure-rollers, as described, the effect of the pressure-rollers in these operations being such as to keep the boards, etc., steady, and prevent the cutters from drawing the boards toward the center of the cutter-wheels, whilst it is moved through by machinery. In the planing operation, the tendency of the plane is to lift the boards directly up against the rollers; but in the tonguing and grooving, the tendency is to overcome the friction occasioned by the pressure of the rollers.

[William W. Woodworth,
[Adm'r of William Woodworth, Deceased.
[Witnesses:
[James Milholland,
[Chas. M. Keller.] [5]

[For other cases involving this patent, see note to Bicknell v. Todd, Case No. 1,389.]

[5] [Published in 1 Fish. Pat. Rep. 629, as a note to Hogg v. Emerson, 11 How. (52 U. S.) 587.]

Case No. 5,403.

GIBSON et al. v. WILLIAMS.

[Brunner, Col. Cas. 19; [1] 2 Hayw. N. C. 281.]

Circuit Court, D. North Carolina. 1803.

HEIR—LIABILITY FOR DEBTS OF ANCESTOR.

If an heir pay debts of his ancestor, so much of the land which descended to him, as is equal to such payments, shall be deemed to have been purchased by the heir. The surplus of such land shall be charged to him at its value at the time he sold it; not what it was worth at the time it descended to him. The heir is not liable to other creditors of the ancestor for interest on such surplus.

This was a scire facias [against the heir of Williams] to subject him to the payment of a debt recovered against the executor of Wm. Williams, his ancestor. He pleaded that he had nothing by devise, and as to what he had by descent, that he had in 1796 mortgaged the lands descended, to certain creditors of his ancestor for eighteen hundred dollars, and had paid bond debts besides to the value of the lands. It appeared he had in 1801 sold the equity of redemption, and these questions arose as to the value above the debts paid for his ancestor—First, shall he pay interest for the surplus? and it was held by MARSHALL, Circuit Justice, and POTTER, District Judge, that he should not; secondly, as to the value, shall it be estimated at its worth at the death of the ancestor, or at the time of the mortgage, or at the time of sale in 1801?

PER CURIAM. So much of the lands, as the money secured by the mortgage was worth, shall be deemed to have been purchased by the heir, by payment of the debts of the ancestor; the surplus of the land shall be estimated at its worth at the time of sale in 1801. It must not be valued at its worth at the time of descent to the defendant, for the intermediate profits are a recompense for the expenses incident to holding the land, such as taxes and the like. Verdict and judgment accordingly.

Case No. 5,404.

Ex parte GIDDINGS.

[2 Gall. 55.] [2]

Circuit Court, D. Massachusetts. May Term, 1814.

SEAMEN—SHIPPING FOR PRIVATEER CRUISE—DISABILITY—SHARE IN PRIZES.

If a mariner ship for a cruise on board of a privateer, and afterwards, before the departure from port on the cruise, he is disabled from duty, and leaves the privateer by common consent, he is not entitled to share in the prizes made during the cruise—aliter, if the disability occurred during the cruise.

[Cited in Nevitt v. Clarke, Case No. 10,138; The George Burnham, Id. 5,331; Neilson v. The Laura, Id. 10,092.]

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

[2] [Reported by John Gallison, Esq.]

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

In this case a petition was filed by John E. Giddings, praying to be allowed a seaman's full share of the prizes made by the privateer America, John Kehew commander, during her cruise, the proceeds of which prizes remained in the court for distribution. From the allegations and testimony in the case it appeared, that Giddings shipped as a seaman on board the ship America, in March, 1813, for a four months' cruise. That he went on board the ship and did duty, but before the cruise was actually begun, and while the ship lay in Salem harbor, in the course of his duties on board, he froze both his hands, by which accident he was wholly disabled from going on the cruise, and with the consent of all parties immediately left the ship.

Mr. Putnam, for petitioner, contended, that the enterprise had commenced, and that Giddings having been, without his default, prevented from proceeding on the cruise, was, by the ordinary rules of maritime law in regard to wages, entitled to a full share of the prize money.

Mr. Pitman, contra, admitted, that had the petitioner been on board after the commencement of the cruise, and been permitted or compelled to go, and to remain on shore, he would have been entitled; but he contended, that the cruise had not commenced, when the petitioner left the ship.

STORY, Circuit Justice (after briefly reciting the facts). The general question upon these facts is, whether a seaman, who has shipped for a cruise, and before the departure of the privateer from the port of equipment becomes disabled from proceeding on the cruise by inevitable accident, is entitled to share in the prizes taken during the cruise. No authority has been produced to support the claim, and, at the argument, it was mainly rested on the general position that the contract is not divisible, and that the performance having been prevented by inevitable casualty, the party is entitled to the benefit of the maxim, that the act of Providence does not in law prejudice any man's right. If the disability had occurred during the cruise, and the party had remained on board, or had been landed at any intermediate port, there would have been little difficulty in applying the maxim in his favor. By the settled law of the admiralty, a seaman, disabled on board a merchant ship, would, under like circumstances, have been entitled to his full wages for the whole voyage. Chandler v. Grieves, 2 H. Bl. 606. Upon principle, there does not seem any substantial reason for a different rule in the case of a seaman hired for a cruise on board of an armed ship. And this doctrine of the admiralty seems conformable to the maritime law of the most enlightened nations. See Laws of Oleron, art. 7; of Wisbuy, art. 19; and of the Hanse Towns, art. 45; Cleirac, Us. et Cout. 17, 84, 104; Ord. de la Mar. lib. 3, tit. 4, arts. 11, 13; 1 Valin, 721, 746; Kurick, Jus. Mar. Hans. p. 678, tit. 14, art. 2. There is, however, an obvious distinction between the case of a disability, before and after the voyage is begun. The great object of the contract is to perform the voyage; and the labor done in port is considered as merely auxiliary to the enterprise. If a disability then happen before the voyage is begun, all that equity seems to require is, that the mariner should be paid a reasonable sum for services actually rendered. In cases where the mariner is wrongfully dismissed before the voyage is begun, there may be perfect justice in deciding in conformity with the rule of the Consolato del Mare (chapter 124), and of Roccus (De Nav. et Nau. note 43), that the wages shall be paid in the same manner, as if he had performed the whole voyage; yet in a similar case, the Ordinances of the Hanse Towns (article 41), and of France (lib. 3, tit. 4, art. 10), give the mariner only one-third part, and the Ordinance of Wisbuy (article 3), one-half part, of his wages, although, in case of dismissal after the voyage is begun, the whole wages are allowed. Cleirac, Us. et Cout. Oler. l. 5, § 19. And I take the settled rule in England to be, that if, after the seamen are hired, the voyage is broken up, or they are wrongfully dismissed before the voyage is begun, they are entitled to their wages during the time of their retainer, and if they have sustained any special damage, to a reasonable compensation for that also. But, if the seamen are wrongfully dismissed after the voyage is begun, they are entitled to their wages for the whole voyage. Wells v. Osman, 2 Ld. Raym. 1044; Abb. Shipp. pt. 4, c. 2, §§ 1, 5; 2 Brown, Adm. Law, 533; Robinet v. The Exeter, 2 C. Rob. Adm. 261; The Beaver, 3 C. Rob. Adm. 92; Hulle v. Heightman, 2 East, 145.

If, in a case of a wrongful dismissal so striking a distinction is made between the occurrence before and after the voyage is begun, it should seem, that upon principle it ought to prevail, where the dismissal has been by consent, and without the fault of either party. Under such circumstances the casualty ought not to be applied to the injury of either party. The Consolato del Mare (chapter 124) provides, that if a mariner shall have labored three days, and shall fall sick, the master of the ship shall pay half of the hire or wages (del salario), and if he is found in a situation not to go on board of the ship, to the knowledge of the other mariners, the master may leave him; and the same is ordered to be done, if the mariner falls sick in foreign parts. There is nothing in this regulation so intrinsically equitable, that it ought to be adopted as a general rule of law, and I have not been able to find that it is incorporated into the maritime code of any country. Neither Cleirac, nor Valin, nor Cas-

aregis speaks of it, as such, in commenting upon articles in pari materia in the respective codes under their consideration. See Cleirac, Jugemens d'Oleron, p. 17, § 7; Casaregis, Spiegazione del Consolato, p. 116, c. 124; 1 Valin, Comm. p. 74, art. 11.

On the whole, I am of opinion, that the disability having occurred before the cruise had begun, the petitioner cannot, under the circumstances, be entitled to share in the prizes taken during the cruise, in the capture of which he neither actively nor constructively assisted. If it had been necessary in this case to resort to other grounds, I should have thought, that having voluntarily gone on shore, with the consent of all parties, from inability to perform the cruise it ought to be deemed a voluntary abandonment of the contract of shipment. In this opinion the district judge concurs, and therefore the claim must be dismissed.

Case No. 5,405.

GIDDINGS v. DODD et al.

[1 Dill. 116;[1] 4 N. B. R. 657.]

Circuit Court, E. D. Missouri. 1871.

BANKRUPT ACT—THIRTY-FIFTH SECTION—ILLEGAL PREFERENCES.

1. Creditors who receive an illegal preference are liable to the assignee of the bankrupt; and the intent of the debtor to give, and of the creditor to secure an unauthorized preference, may be shown by circumstances.

[Cited in Strain v. Gourdin, Case No. 13,521; Alderdice v. State Bank of Virginia, Id. 154.]

2. Facts establishing an illegal preference stated.

This cause comes before the court on a writ of error, to the district court for the Eastern district. Giddings, the bankrupt, in October, 1869, was a country merchant, owing $6,000, and having assets to the amount only of $2,400. In that month he sold his entire stock of goods to one Pendleton, for $1,800, who executed two notes to Giddings therefor, one for $1,373, the other for $392. In January, 1870, Dodd, Brown, & Co., to whom Giddings owed $1,400, on a business note long past due, having failed to obtain payment or security from Giddings, commenced an attachment suit against him on the ground that he had made a fraudulent disposition of his property, and attached the goods sold to Pendleton, and garnished him with respect to the note he had executed to Giddings. The note for $392 had been turned out by Giddings to another creditor. Shortly after the attachment was served, this arrangement was made at the instance of Pendleton, to wit: Pendleton was to procure Giddings to agree to turn out the note for 1,373, which he held against Pendleton, to Dodd, Brown, & Co. Pendleton was entrusted by Giddings, with this note. Defendants agreed to receive it in payment pro tanto and did so, and surrendered it, cancelled, to Pendleton, on receiving in substitution for it his indorsed and secured note for the same amount, and payable at the same time, and the $1,373 was indorsed by the defendants as a credit on their debt against Giddings, and the attachment released. Within four months thereafter, Giddings was forced into bankruptcy, and the plaintiff, as his assignee, brings this action under the 35th section of the bankrupt act, to recover the sum of $1,373, on the ground that it was paid and received as a preference under circumstances which made it void, against the other creditors of the bankrupt. In the district court a jury was waived, and the plaintiff recovered. [Case unreported.] The defendants sue out a writ of error to this court, and complain of the legal propositions which the district court held to be applicable to the case.

Among other things the court (Treat, District Judge) declared the law applicable to the case as follows: "If a debtor is insolvent a payment by him to one of his creditors is, by presumption of law, made with a view to give a preference, and consequently is a fraud upon the provisions of the bankrupt act, inasmuch as the natural and necessary consequence is the payment of one creditor without the means of like payment to the other creditors, whereby the equality among creditors of an insolvent intended to be secured by the act is defeated. Hence, if Giddings was insolvent, and the defendants received payment from him, having at the time reasonable cause to believe him insolvent, the payment was made with a view to give a preference and in fraud of the provisions of the act, and the defendants had reasonable cause to believe such to be the debtor's intent. The same rule of law obtains whether the debtor made the payment under such circumstances with or without pressure from the creditor—willingly or otherwise."

Rankin & Hayden, for plaintiffs in error.

Thomas A. Russell, for defendant in error.

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

DILLON, Circuit Judge. The 35th section of the bankrupt act [of 1867 (14 Stat. 534)] makes payments to creditors in violation of its provisions void and gives the assignee the right to recover the amount of the illegal preference. The only questions which can be now reviewed are those arising on the declaration of law above mentioned.

It correctly states the elements which must concur to invalidate a payment made with a view to give a preference. But it is objected by the defendants that the rule of law declared may be abstractly correct, yet it was inapplicable to the circumstances of this case, since the evidence negatived any intent on the part of Giddings to give a preference,

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

as he was either passive on the matter, or acted only at the instance of Pendleton, and the argument is, that if Giddings had no intent to give a preference then it is not possible that the defendants could have "had reasonable cause to believe that such payment was made (by him) in fraud of the provisions of the bankrupt act."

But it is undeniable that Giddings did consent to and did turn out the note against Pendleton to the defendants. He owed in all about $6,000, and the note he thus gave in payment to the defendants constituted the bulk of his available assets. What could he have meant but to give them a preference? By the payment to them the defendants secured a preference,—the lion's share of his assets, and this, too, when they knew he was insolvent, and had made acts which are acts of bankruptcy grounds for their attachment against him.

If under the circumstances these defendants can retain the advantage they sought to derive from the attachment and through that agency secured, manifestly the purpose of the bankrupt act, which is intended to prevent preferences and put all general creditors upon an equal footing, is subverted. See Linkman v. Wilcox [Case No. 8,374].

Affirmed.

Case No. 5,406.

GIER v. GREGG et al.

[4 McLean, 202.] [1]

Circuit Court, D. Illinois. June Term, 1847.

PRACTICE—STATUS OF CAUSE ON REMOVAL—AMENDATORY ANSWER.

1. A case removed from a state court, to the circuit court of the United States, stands, in the latter, as it did at the time of the removal in the former.

[Cited in Wolf v. Connecticut Mut. Life Ins. Co., Case No. 17,924; Moynahan v. Wilson, Id. 9,897.]

2. If an amendatory answer repeat what was said in the answer filed before, without varying the defense, it may be considered as impertinent, and will be referred to a master, etc.

In equity.

Mr. Butterfield, for plaintiff.

Mr. Chickering, for defendants.

OPINION OF THE COURT. This case was brought here from the circuit court of the state, and it is now before the court on exceptions to the answer. Leave was given at the last term to amend the answer. The counsel for the defendants [Gregg & Wald] contends that nothing is brought from the state court into this court, under the act of congress, but the process. The case, when removed from the state court to the circuit court of the United States, stands in the latter court as it stood in the former, before the removal. The objection to the answer to the amended bill is, that it repeats what was said in the answer previously filed. In Story, Eq. Pl. § 868, it is said, that an answer to an amended bill is considered a part of the answer to the original bill. Therefore, if a defendant, in a further answer, or in an answer to an amended bill, repeats any thing contained in a former answer, the repetition, unless it varies the defense, in point of substance, or is otherwise necessary or expedient, will be considered as impertinent; and on reference to a master, such parts will be struck out. In section 875a the author says, "It may well be suggested whether the plaintiff has a right to dispense with the oath, and yet to make the answer evidence in his own favor as to all the facts which it admits, and exclude it as evidence as to all the facts which it denies." It would seem that the whole answer should be taken together, at least so far as one part may be explanatory of another, or have a direct bearing upon it. The court referred the answer back to the master, to state what part of the former answer, if any, is a full answer to the interrogatories in the amended bill.

[See Case No. 5,799.]

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

GIER (GREGG v.). See Case No. 5,799.

Case No. 5,407.

In re GIES.

[12 N. B. R. 179; 7 Chi. Leg. News, 379; 21 Int. Rev. Rec. 310; 1 N. Y. Wkly. Dig. 101.] [1]

District Court, E. D. Michigan. 1875.

BANKRUPTCY — ATTORNEYS OF BANKRUPT AS PREFERRED CREDITORS.

Attorneys of a voluntary bankrupt are not entitled to payment from the assets as preferred creditors for their services in preparing petition and schedules, but may prove their debt in the usual manner.

[Cited in Re Thompson, Case No. 13,938; Re Carstens, Id. 2,469.]

[In bankruptcy. In the matter of Frederick Gies.]

Petition for allowance from the bankrupt's estate of an attorney's fee of one hundred dollars for services in preparing debtor's petition and schedules in a case of voluntary bankruptcy; also for reimbursement of thirty dollars and seventy cents marshal's fee, advanced by petitioner.

BROWN, District Judge. The primary object of a debtor's petition being to obtain a discharge, the expenses of preparing petition and schedules have not been usually allowed as a preferred debt. Such seems to be the settled practice in most of the districts.

[1] [Reprinted from 12 N. B. R. 179, by permission. 1 N. Y. Wkly. Dig. 101, contains only a partial report.]

Bump, Bankr. (7th Ed.) p. 225. It was so held in an early case in the Southern district of New York (In re Hirschberg [Case No. 6,530]), and the same principle was afterward applied to claims for services in preparing schedules in a case of involuntary bankruptcy (In re Bigelow [Id. 1,397]). See, also, In re New Lamp Chimney Co. [Id. 10,168]; In re Evans [Id. 4,552].

The question was fully discussed by the late Judge Hall in the case of In re Jaycox [Case No. 7,240], in which it was held that attorneys of the bankrupt were general creditors, and must prove their debt in the usual form for all services rendered prior to adjudication.

A contrary rule seems to have been adopted in Re Kennedy [Case No. 7,700]; but I am unable to say upon what ground this decision is placed, as the authority is not obtainable here. I have no doubt that an attorney may demand and receive a reasonable compensation before rendering his services, and that the payment therefor would be valid. I think he may also take a mortgage or other security for the payment of his fees, notwithstanding the contrary decision in the case of In re Evans [supra], provided that the claim be reasonable in amount and the security be taken before or at the time the services are rendered. In the case of In re Comstock [Case No. 3,074], the learned judge of the Western district decided that the debtor had a right to appear and defend himself against a petitioner in bankruptcy, and although unsuccessful in his defense the court had a right to allow him such expenses as might be just and proper, including attorney's fees, to be paid from the assets; but with the single exception of In re Kennedy, above cited, I know of no case where it has been held that the attorney of a voluntary bankrupt was entitled to payment from the estate for his services in preparing petition and schedules. So far as I am acquainted with the practice in this and other districts such claims have been almost universally disallowed. The clerk informs me that in two cases in this district an attorney was allowed his charges from the estate with the written assent of the assignee, but as these are the only instances, among some hundreds of voluntary petitions, and no decision was rendered upon the question, I do not think they ought to be regarded as precedents.

Whatever doubts, however, might have existed prior to the adoption of the new rules, with respect to such allowance, I think the practice is now put at rest by general order No. 30, which expressly states that "no allowance shall be made against the estate of the bankrupt for fees of attorneys, solicitors, or counsel, except when necessarily employed by the assignee, when the same may be allowed as disbursements." This rule is very broad, apparently embracing involuntary as well as voluntary cases, and I think should be applied to cases pending at the time of its adoption as well as claims thereafter accruing. Meigs v. Parke, 1 Morris (Iowa) 378; Ellis v. Whittier, 37 Me. 548; Billings v. Segar, 11 Mass. 340; McMasters v. Vernon, 4 Duer, 625. I am compelled, therefore, to disallow the claim for attorney's fees, although it is conceded in this case to be reasonable in amount.

I think, however, the court may make an order for the reimbursement of the amount paid to the marshal for his fees in giving the notices required by law (Bump, Bankr. p. 226), and it is so ordered.

Case No. 5,408.

In re GIFFORD.

[16 N. B. R. 135.][1]

District Court, W. D. Michigan. Aug. 4, 1877.

BANKRUPTCY—RIGHT TO DISCHARGE — CONSENT—INVOLUNTARY BANKRUPTCY.

1. In the absence of consent by creditors in voluntary cases, no matter when commenced nor when the debts were contracted, the assets must pay thirty per cent., or there can be no discharge.

[Cited in Re Townsend, 2 Fed. 562.]

2. In compulsory cases, if otherwise entitled thereto, the bankrupt is entitled to a discharge irrespective of the assent of creditors or the amount of his assets.

[In bankruptcy. In the matter of Haviland Gifford.]

Arthur Brown, for bankrupt.

Edwards & Sherwood, for creditor.

WITHEY, District Judge. Sept. 26, 1876, a voluntary petition was filed and an adjudication followed. Debts have been proved upon which the bankrupt is liable as principal debtor, all contracted prior to January, 1869. There were no assets. Under such a state of facts a discharge is asked. The law now in force applicable to the question is the 9th section of the act of June 22, 1874 [18 Stat. 178], which declares: "In cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number, and one-third in value; and the provision in section 33 of the act of March second, eighteen hundred and sixty-seven [14 Stat. 533], requiring fifty per centum of such assets, is hereby repealed." Section 21 of the same act repeals all acts and parts of acts inconsistent with the provisions of this act.

Nevertheless, it is contended for the bankrupt that the previous condition of the law, which gave a discharge as to all debts contracted prior to 1869, whether the assets pay anything or not, entitles this applicant to a

[1] [Reprinted by permission.]

discharge. Original section 33 (14 Stat. 533); amendment of 1868 (15 Stat. 227, § 1); additional amendment of 1870 (16 Stat. 276, § 1).

We know of no decided case that sustains such proposition, and if any was cited we could not follow it unless it was rendered by a court whose decision would be binding on this court. In re Sheldon [Case No. 12,747] is cited; also In re Francke [Id. 5,046]. In both those cases the petition and adjudication were prior to the passage of the act of June 22, 1874, and it was therefore held they were governed, as to the question of discharge, by the condition of the law as it existed prior to the change in 1874.

First. We have to say that the cases, if correctly decided, are not applicable or authority in the case at bar. They were cases pending prior to the passage of the act of 1874, and therefore held not to be governed by it. This case was commenced subsequent to the en actment of 1874, and therefore is governed by it.

Second. Mr. Justice Miller, at the circuit, in Re King [Case No. 7,781], holds the opposite view to that expressed by Judge Blatchford. See, also, Judge Lowell, in Re Griffiths [Id. 5,825]. The cases referred to were all involuntary, but the point decided in each is alike applicable to voluntary cases. It is simply a question as to the application of a remedial statute. We fully agree with the views expressed in the last-named two cases. The act of 1874 governs in both voluntary and involuntary cases. As to involuntary cases we have so held in several instances, in none of which has an opinion been written.

As the law now stands we hold that in the absence of consent by creditors in voluntary cases, no matter when commenced nor when debts were contracted, the assets must pay thirty per cent., not fifty per cent., or there can be no discharge; whereas in compulsory cases the bankrupt, if otherwise entitled thereto, is entitled to a discharge irrespective of the assent of creditors or the amount of his assets.

We have prepared this brief opinion in order to promulgate the conclusions of this court on the questions and points stated, and thus avoid having them again argued before us.

GIFFORD (GIBSON v.). See Case No. 5,395.

Case No. 5,409.

GIFFORD v. KOLLOCK.

[3 Ware, 45;[1] 19 Law Rep. 21.]

District Court, D. Massachusetts. Jan., 1856.

SEAMEN—MINOR SHIPPING FOR WHALING VOYAGE — CONSENT OF PARENTS — CONTRACT WITHOUT TERMINATION OF TIME OR PLACE — USAGE OF PORT—TRADING VOYAGE—DESERTION — FORFEITURE OF WAGES—PALLIATING CIRCUMSTANCES.

1. Where a minor shipped for a whaling voyage, under the direction of his father, who furnished his outfit of clothing, the libel was rightly brought in the father's name.

2. A description of a whaling voyage, "to the North Pacific Ocean and elsewhere," is a defective description. A contract for a voyage that has no termination of time or place, is a void contract.

[Cited in Slocum v. Swift, Case No. 12,954.]

3. If the usage of a particular port, or a particular trade, authorizes an interpolation of the port of departure as the port of termination, this must be qualified by another implied term, that the return of the vessel to her home port shall be within a reasonable time.

4. A whaling voyage is properly a cruise for taking whales, and does not include a trading voyage to dispose of the cargo after it is obtained.

5. If the master undertakes such a voyage, it seems that men engaged for the whaling voyage are not bound to continue in the vessel

6. By the ancient maritime law, constituting the common law of the sea, desertion by seamen, during the voyage, works a forfeiture of all wages previously earned. But the law is not imperative. The court may take into consideration palliating circumstances, not amounting to a justification, and mitigate the penalty to a reasonable indemnity to the owners.

[Approved in Coffin v. Shaw, Case No. 2,952. Cited in Swain v. Howland, Id. 13,661; The Balize, Id. 809.]

7. The only case of desertion in which the forfeiture is absolute of the whole wages, is when all the requisites of the statute have been strictly observed. St. July 20, 1790 [1 Stat. 133].

In admiralty.

Mackie and Cushman, for libellant.

Eliot and Stetson, for respondent.

WARE, District Judge. This is a libel filed by Benjamin R. Gifford, against Lemuel Kollock, of New Bedford, owner of the ship Alice Frazier, for the lay or share earned by his son, a minor in a whaling voyage. The description of the voyage in the shipping articles, it is agreed, was a whaling voyage to the North Pacific Ocean and elsewhere. Young Gifford shipped September 10, 1851, being then between fifteen and sixteen years of age, and continued in the ship till March 9, 1855, three years and seven months. On that day the ship being at Melbourne, in Australia, and it being the day before she sailed on her return to her home port, he deserted. During the whole period up to the time of his desertion, it is admitted that he performed his duties in an unexceptionable manner, and that his deportment was uniformly satisfactory to the master. Indeed, so well satisfied was the master with his conduct, as well as with his ability and fidelity as a seaman, that he was promoted from a foremast hand to be a boat-steerer, an office which, according to the usage of this trade, entitled him to an increased compensation.

The first objection to the libel made by the respondents is, that the suit is not rightly brought by the father, but that it should be in the name of the son, and that the recov-

[1] [Reported by George F. Emery, Esq.]

ery, if any be had, should be for his benefit. My opinion is, that this objection cannot prevail. The shipping articles are not produced, but it is proved that the son signed them, and that the father witnessed his signature. It further satisfactorily appears, that the father made the contract and all the arrangements for the voyage, furnishing his child with an outfit of clothing for a three years' voyage. There is no pretence of evidence that he renounced his paternal authority or rights, nor is there any show of proof that the son claimed to be an emancipated minor, and entitled to his earnings, but the contrary is clearly inferable from the whole evidence. A parent is not, on slight circumstances, to be presumed to abandon his right of control over his children during their minority; and while he performs his parental duties of providing for their support and education, he is entitled to the proceeds of their labor. My opinion is that the suit is rightly brought in the parent's name.

The second objection relied on, and this is the important question involved in the case, is, that whatever lay or share, which is in the nature of wages, might be otherwise due to the parent, all his son's earnings were forfeited by his desertion at Melbourne. It is not claimed that the statute forfeiture has been incurred. But then it is said that, independent of the statute, a forfeiture is incurred under the common and ancient maritime law. It is certainly true, that desertion does, by the maritime law, work a forfeiture of all wages previously earned in the course of the voyage.[2] The reply of the libellant to this is in substance, a denial of the fact. It is contended that the voyage, according to the just interpretation of the contract, terminated de facto at Melbourne, and there can be no desertion after the voyage is at an end.

It is admitted that the voyage described in the shipping articles, was "a voyage to the North Pacific Ocean and elsewhere." Whatever objection there may be to the vagueness of the term elsewhere, in the description of a common trading or freighting voyage, it does not seem to apply with so much force to a whaling voyage. Such a voyage may, perhaps, be properly enough described as a cruise on the high seas in search of whales. They must be sought where they are to be found, and, from their migratory habits, they are not always to be found in the same parts of the sea. The nature and object of the voyage does not admit of any particular description of the localities intended to be visited. But the objection in this case is of a different character. The voyage described contains no terminus. The enterprise for which young Gifford engaged, may be said to have been completed when the vessel was filled with oil. But the contract does not say when or where the voyage shall end. An engagement for a voyage that has no termination in time or place, cannot be a binding contract. Now, it is not denied that the cruise for whales, the enterprise for which Gifford engaged, terminated at Melbourne. Nothing remained to be done but to dispose of the cargo. But this constituted no part of the service for which the crew engaged. When the cargo is brought into port, it is the part of the owners to convert it into money and distribute the proceeds.

After the cruise was ended the vessel went to Sydney and Melbourne, in Australia, and at the latter port disposed of part of her cargo. It does not distinctly appear from the evidence, whether the object in going to these ports was to sell her cargo or to obtain supplies, but it seems that, at least in part, the object was trade. It is on this ground argued that the voyage properly terminated there. The enterprise, the object of the voyage, so far as the engagement of the crew extended, was accomplished.

It was stated at the argument that, in shipping papers of vessels engaged in the whale fishery, it is an understood term of the contract, that the voyage terminates on the arrival of the ship in her home port. If it is so, it ought to be so expressed. But supposing this term to be interpolated, it must in all fairness be qualified by another understood term; that is, when the vessel is full, and a return cargo is obtained, the vessel shall return to her home port with no unnecessary delay. If, on her return, she should touch at one or more ports on her way, and dispose of a part of her cargo without materially prolonging the voyage, a court might not readily hearken to a complaint on the part of the crew. But it is to be remembered that when the cruise is at an end, the seamen cease to earn wages; and that it belongs to the owners to dispose of the cargo for the common benefit of all interested. If the master deviates from his course home, and goes to a foreign port to seek a market for his oil, this is a departure from the voyage for which the seamen engaged. It is the commencement of a trading voyage. If he may deviate to seek a market in one port, it is difficult to say that he may not in two or more, and the period of service for the crew be indefinitely prolonged, without any addition to their compensation. This, it seems to me, would be such a breach of the contract on the part of the master, as would liberate the crew from their obligation to continue in the ship. But the evidence with regard to their stopping at the ports of Sydney and Melbourne, whether it was a deviation from the course of the return voyage, and whether it was exclusively or mainly for the

[2] In all times since the revival of commerce in the middle ages, desertion has been held to incur a forfeiture of wages. Consulate de la Mer (Transl. of Baucher) c. 268. It appears from several chapters of the Consulate of the Sea, that in early ages the service of seamen was considered as in part, at least, a military service. Chapters 169–178. And by some of the old ordinances, desertion is punished with the severity of military law.

purpose of trade, is not so full and clear that I feel prepared to place the decision of the cause on this point.

But even in this question, admitting the construction of the contract contended for, that the termination of the voyage was the arrival of the vessel at her home port; and further, that there was no deviation that would excuse the seaman for leaving her, are the owners in a condition to enforce the forfeiture against the parent, under the general maritime law? The statute appears to be peremptory. If there is a wilful absence of more than forty-eight hours, and all the requisites of the statute are exactly complied with, the forfeiture is absolute. It is declared that the wages shall be forfeited, and it seems to leave no discretion to the court. Nothing short of a justification of the desertion, such as extreme severity or cruelty on the part of the officers, it seems, will authorize the court to decline to apply the forfeiture. But it is admitted that this case is not brought within the statute.

But the maritime law, as I understand it, is less imperious, and trusts more to the conscience and discretion of the court. Desertion, that is, leaving the vessel with the intention of abandoning it and not returning, works a forfeiture. Such is the general rule. But after a desertion, if the seaman repent and returns, the law is indulgent. It is then considered, not as a case of total forfeiture, but as one for compensation and indemnity to the owners for the loss of service; and the seaman is punished and the owners indemnified by a proper deduction from his wages. The law looks with indulgence on the faults of seamen when they are free from malignity, and arise from thoughtlessness, improvidence, and that want of consideration which is so characteristic of them as a class. In such cases it inflicts its penalties with gentleness and reluctance; and in so doing it will look to the conduct of the officers towards the men, as well as make some allowance for the habitual improvidence of the men. And this it will especially do, when such conduct may in any way have tended to produce the fault which it is sought to punish.

The libellant, the father, has, I think, just cause of complaint in regard to the conduct of the master towards this boy, in two particulars. The first is, that after the desertion, though he remained in port a day before sailing, he made no effort to find him and bring him on board. He knew him to be a minor, intrusted by a parent to his care, and whose conduct is admitted to have been exemplary through the whole of three years and seven months' service. Yet, so far as the evidence goes, he not only made no attempt to find the boy and bring him back, but did not even inquire for him.

The second fault of the master was in the unreasonable advances he made to the boy during the voyage. He knew, or ought to know that he was not earning wages for himself; or if he was ultimately to have them, that they were claimed by the father, if not for his own use, at least in trust for his son. Young Gifford was furnished with an outfit of clothing for three years, and he remained in the vessel but seven months longer. He could need but little for clothing, and yet the master has charged against him three hundred and fifty dollars. One hundred was paid to him at one time, and fifty at another. What reasonable cause could there be for such advances? It was quite impossible that they could be required for necessaries. And it should be further observed, that the very witnesses whom the owners rely upon to prove the desertion, that is, that Gifford left the vessel with the intention of not returning, also prove that the cause of it was, that he was afraid to go home and meet his father with such advances charged against him.

Whether advances to this amount are legally chargeable on the wages, in a suit by the parent or natural guardian, without some evidence to show that under the circumstances they were reasonable and proper, need not be considered in the present stage of the case.

The only question now to be determined is, whether, there having been an admitted desertion under the general maritime law, but not brought by the proof within the conditions of the statute, the court is bound to visit the offence with the penalty of a forfeiture of the entire wages; or whether, by the maritime law, this court has authority to take into consideration circumstances of palliation, not amounting to a justification, and mitigate the penalty to a reasonable and proper indemnity to the owners, for any damage they have sustained from the delinquency of the seaman. My opinion is, that the court has that power; and that the facts in proof make this a proper case for exercising it.[3] It seems to me to be unconscionable and unjust to mulct this boy, supposing him to have a substantial, though not a legal and technical interest in his wages, of the entire earnings of more than three years and a half laborious and dangerous service, for a fault, blamable indeed, but which was induced mainly, if not exclusively, by the improper conduct of the master. If, in consequence of the desertion, the owners have

[3] Since this opinion was delivered, I have been favored through the politeness of the authors with the first volume of Blatchford and Howland's Reports, just issued from the press, containing the admiralty decisions of Judge Betts. It is an addition to our books of admiralty jurisprudence of very great value. The extensive learning and great experience of Judge Betts, give to his opinions a commanding authority. I find that the principal question involved in this case, has been repeatedly decided by him, that the only case in which it is imperative on the court to pronounce for an entire forfeiture of wages, is when the desertion is proved precisely according to the requirements of the statute. The Cadmus [Case No. 2,280]; The Martha [Id. 9,144]; The Elizabeth Frith [Id. 4,361]; The Union [Id. 14,347].

sustained any damage, as is suggested, the proof being produced, it should be deducted from the wages.

GIFFORD (SWIFT v.). See Case No. 13,696.

GIFFORD, The F. W. See Case No. 5,166.

Case No. 5,410.

In re GILBERT.

[1 Lowell, 340;[1] 3 N. B. R. 152 (Quarto, 37).]

District Court, D. Massachusetts. July, 1869.

BANKRUPTCY—EXAMINATION OF BANKRUPT — SECOND ORDER—TESTIMONY OF BANKRUPT'S WIFE —EXAMINATION OF THIRD PERSONS.

1. It is the intent of section 26 of the bankrupt act [of 1867 (14 Stat. 529)] that the bankrupt should be fully examined as to all his dealings, &c., but not that he should be examined by each creditor separately. It is therefore the practice to require the assignee to see to it that the first examination is thorough and complete, and it is not the practice to grant a second order for examination except for cause.

[Cited in Re Vogel, Case No. 16,984.]

2. And for like reason the order is not passed before the appointment of the assignee without special cause.

3. The bankrupt's wife may be required to testify to all facts and transactions to which she was either a party or a witness, but not to mere confessions or admissions of her husband concerning his dealings with third persons.

4. Third persons are required to submit to examination only on cause shown by affidavit.

A creditor having applied for leave to examine the bankrupt [Joseph F. Gilbert] and his wife, the practice of the court was thus stated by

LOWELL, District Judge. The twenty-sixth section of the act gives the court power to require the bankrupt to attend and be examined at any time, on reasonable notice, upon the application of the assignee or of any creditor, or without any application. This devolves upon the court not merely a power, but a duty, to order the examination when it shall be shown to be proper, for the due administration of the estate. Our practice is to order one examination of the bankrupt, as of course, upon the application of the assignee or of any creditor who has proved his debt. But that the bankrupt may not be harassed by vexatious applications, the rule is, that this first examination shall extend to all matters concerning which any person interested wishes to inquire. To this end, if a creditor makes the application, he is to notify the assignee of the time and place appointed, and the assignee is to notify all other creditors who, so far as he is informed, have any wish to examine the bankrupt, and is to see to it that this hearing is thorough. Any person interested has the right to take up the examination when the person who first makes it has finished, and so throughout, subject to the supervision and control of the register as to the details. No other application will be granted, except for cause. For a like reason, an examination will not be ordered before the appointment of the assignee, excepting for cause. These rules have been found to work well for all parties, and will be adhered to.

The same section authorizes the court to require the attendance of the wife, and her examination as a witness, for good cause shown. It has been a matter of considerable doubt with me what cause is sufficient for the passage of such an order. Without professing to have fully resolved this doubt, I have determined upon the whole that the statute intends to make the wife a witness to facts within her own knowledge, and more especially to transactions in which she has been a party, but not to mere confessions or admissions of her husband, made in the confidence of the conjugal relation, concerning his dealings with third persons. I cannot bring myself to believe that congress intended to destroy this most sacred of all confidences. I have therefore passed the order only when it has appeared by affidavit that the wife has been a party or a witness in the matters proposed to be inquired about; and the subject-matter is to be set forth in the order for the guidance of the parties in the examination.

A like practice prevails in respect to the examination of third persons under the general words of section twenty-six. It must be shown by affidavit that there is cause to believe that they can disclose something beneficial to the creditors, and they are to be examined only on the subjects specified.

In this case, it is shown that the wife professes to be a creditor of the estate, and she may therefore be examined as fully in regard to her supposed debt as any other creditor might. This I consider the true purpose of the statute. Order accordingly.

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

Case No. 5,411.

In re GILBERT et al.

[1 N. Y. Leg. Obs. 327.]

District Court, N. D. New York. 1843.

BANKRUPTCY—PARTNERSHIP.

It is too late after parties have been declared bankrupts as partners, to allow objections to be filed disputing their being partners at the time of their application.

One of the objections to the discharge in this case was, that the bankrupts [Gilbert and Lamphier], who had petitioned for the benefit of the act as partners in trade, as such had been decreed bankrupts without objection on this ground, were not in fact part-

ners at the time of their application, but had ceased to be such several years before. Depositions had been taken in support of other objections, and also of this: and there was strong evidence tending to show that the bankrupts were not entitled in law to be considered partners at the time of their application.

Mr. Myers, for bankrupts.
Mr. Newton, for creditors.

CONKLING, District Judge. It is too late to urge this objection. The question, whether the petitioners were partners, was directly involved in their application to be declared bankrupts. In their petition they averred that they were so, and no one appeared to contest the fact. They were therefore adjudged to be so, and were declared bankrupts accordingly, and the point must now be considered as settled. Besides, it would be highly mischievous, after a decree of bankruptcy has been entered, and the effects of the petitioners have gone into the hands of the assignee, and been wholly or in part converted into money, to allow objections which, if they should prevail, would render the whole proceeding void.

GILBERT (BENCHLEY v.). See Case No. 1,291.

GILBERT (CLARK v.). See Case No. 2,822.

GILBERT (CUTTING v.). See Case No. 3,519.

Case No. 5,412.

GILBERT et al. v. GAUGAR et al.

[8 Biss. 214;[1] 10 Chi. Leg. News, 340.]

Circuit Court, N. D. Illinois. June, 1878.

TIME CONTRACTS—STATUTE CONSTRUED — ADJUSTING DIFFERENCES—LIABILITY OF CUSTOMER TO BROKER.

1. The Illinois statute (Rev. St. c. 38, § 130) was not intended to prohibit sales of grain or other commodities for future delivery where the seller reserves to himself a simple option as to the time of delivery within certain limits.

2. If one makes a contract to deliver grain during a future month at a fixed price, and by reason of the adverse aspect of the market, directs his brokers to settle with the purchasers before the maturity of the contract, this does not make the contract void as a gambling transaction, and he is liable for the differences paid by the brokers in his behalf as well as for their commissions.

[Cited in Ward v. Vosburgh, 31 Fed. 15.]

[Cited in Wall v. Schneider, 59 Wis. 359, 18 N. W. 446.]

Plaintiffs [George I. Gilbert and others], who were brokers and commission men on the Chicago Board of Trade, composing the firm of Gilbert, Wolcott & Co., brought this action to recover from defendants [William T. Gaugar and others], their principals, for commissions earned, and losses paid by plaintiffs in settlement of time contracts for the sale of grain by plaintiffs for account of defendants. The facts, about which there was no dispute, were, that during the year 1874, plaintiffs were engaged in business as commission merchants and brokers, in this city, and members of the Board of Trade. The defendant, Gaugar, was engaged in business at Kankakee, in this state, as a buyer and shipper of grain; defendant Holmes also resided in Kankakee. Prior to August, 1874, plaintiffs had made several transactions on the board of trade for Gaugar, some of the contracts to sell for future delivery being filled by shipments of grain from Gaugar, and others being settled by adjusting the differences with the purchasers. A short time prior to August, 1874, Gaugar requested plaintiffs to sell some corn on the board, for future delivery, and stated that defendant Holmes would take a half interest in the transaction. On the 3d of August, Holmes was in Chicago, and, pursuant to the arrangement made with Gaugar, ordered plaintiffs to sell for the joint account of himself and Gaugar, ten thousand bushels of corn for delivery in the month of September, the seller having the option to deliver at any time during the month of September. The plaintiffs on the same day, pursuant to direction, sold to Hurlbut & Co., ten thousand bushels of corn for September delivery, at 63⅛ cents per bushel. This transaction was afterward, by consent of all parties, changed to a sale for October delivery, and on the 9th day of September, plaintiffs, by order of defendants, sold to W. E. Furness another ten thousand bushels of corn for October delivery, at 78⅞ cents. The market continued to advance, and on the 18th of September, plaintiffs, by order of defendants, closed the transaction by buying from Hurlbut & Co. ten thousand bushels of corn, of Trego & Smith, 5,000 bushels, and 5,000 bushels of McDermid & Oertel, all for October delivery; and with the corn so bought filled the contracts of sale theretofore made. At the time of the sale to Hurlbut & Co., plaintiffs had no corn on hand representing that transaction, and it does not appear that Hurlbut & Co. delivered any corn to plaintiffs on the September purchase. The loss on the two transactions was $1,856.25, and plaintiffs charged for their commission $100, making a total loss by defendants, for differences paid by plaintiffs and plaintiffs' commissions, of $1,956.25. Of this amount, defendants repaid plaintiffs $825, leaving a balance of $1,131.25 unpaid, for which this suit was brought. No corn was ever shipped by Gaugar to plaintiffs to fill either sale, but plaintiffs were ordered by defendants to close out the transaction on the Board of Trade on the best terms they could. The contracts of sale were substantially in the following form:

Grain contract: "Chicago, Aug. 3, 1874.—We have this day bought of George I. Gilbert & Co., ten thousand bushels No. 2 corn,

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

in store, at 63⅛ cents per bushel, to be delivered at sellers' option during the month of October, 1874, in lots of five thousand bushels each. This contract is subject in all respects to the rules and regulations of the Board of Trade of the city of Chicago. Hurlbut & Co."

Grain contract: "Chicago, Aug. 3, 1874.—We have this day sold to Hurlbut & Co., ten thousand bushels No. 2 corn, in store, at 63⅛ cents per bushel, to be delivered at sellers' option, during the month of October, 1874, in lots of five thousand bushels each. This contract is subject in all respects to the rules and regulations of the Board of Trade of the city of Chicago. George I. Gilbert & Co."

J. L. High, for plaintiffs.
C. H. Wood, for defendants.

BLODGETT, District Judge. The fair conclusion from the admitted facts, I think, is that one transaction was made to settle and adjust the other. In other words, the differences between the prices at which the sales were made and the prices of the purchases, were settled, and the plaintiffs paid the losses to the buyers.

The sole defense made, is, that the transaction falls within the option contract law of this state (Rev. St. c. 38, § 130), and is void as a gaming contract. The language of the statute is: "Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain, etc.," shall be fined. "And all contracts made in violation of this section shall be considered gambling contracts, and shall be void."

This statute has been several times before the supreme court of this state for construction, and the uniform ruling, so far as I have been able to learn from adjudged cases brought to my notice, has been that the statute was not intended to prohibit sales of grain or other commodities for future delivery. The statute prohibits "options to sell or buy"—not sales where the seller reserves to himself a simple option as to the time of delivery within certain limits: Wolcott v. Health, 78 Ill. 433; Pixley v. Boynton, 79 Ill. 351; Logan v. Musick, 81 Ill. 415; Corbett v. Underwood, 83 Ill. 324. Rumsey v. Berry, 65 Me. 570, gives the same construction to a statute similar to ours, by the supreme court of Maine.

Lyon v. Culbertson, 83 Ill. 33, and Pickering v. Cease, 79 Ill. 328, would seem at first to hold a different doctrine, but a careful examination of those cases shows that the court proceeded upon the fact found, that neither party expected, at the time the contracts were made, to deliver any wheat, but only to adjust or settle differences. These two cases also differ from this in other important features. In both those cases the suits were directly between the parties to the contracts, and the court held them to be gaming contracts, because it was found as a fact that neither party intended to sell or buy the wheat, but only to speculate in differences, transactions which the court held were contrary to public policy, and therefore void. And while it may be well, as a matter of public policy, to prevent parties from gambling by refusing to enforce gambling contracts between them, yet it is at least doubtful whether they should be allowed to gamble at the expense of others, and not pay those whom they employ to do the work, and who advance money for them.

The obvious intent of the Illinois statute is to prohibit dealing in what are familiarly called "puts" and "calls," which are mere options to sell or buy; a class of contracts which the district court of this district had held void before the statute was enacted. Ex parte Young [Case No. 18,145]. But in that case the court took pains to say: "I do not intend to be understood as holding that every option contract for the delivery of grain or stock, or that every 'put' is necessarily void, but only that all these contracts, in the light of the testimony before the court, were, in their essential features, gambling contracts. The parties, when they made them, did not intend to deliver the grain, but only at the utmost to settle the differences," thus clearly distinguishing that case from this. But even under the English acts for the prevention of stock jobbing, it was held that when a broker had paid money on defendant's account, to compromise or settle differences for not delivering stocks, the broker could recover from the principal. Faikney v. Reynous, 4 Burrows, 2069; Petrie v. Hannay, 3 Term R. 418; Knight v. Cambers, 15 C. B. 563, 80 E. C. L. 561; Jessopp v. Lutwyche, 10 Exch. 614; Rosewarne v. Billing, 15 C. B. (N. S.) 316, 109 E. C. L. 316.

As early as 1857 the learned circuit judge of this circuit held that a contract substantially like the ones under consideration was valid: Porter v. Viets [Case No. 11,291]. So in Lenman v. Strassberger [Id. 8,216]; Judge Woods, of the Fifth circuit, sustained a cause of action almost identical with this. But the most full and exhaustive discussion of the question which I have met, is found in the case of Clarke v. Foss [Id. 2,852], by the learned district judge of the Western district of Wisconsin, and the doctrine of that case fully sustains the plaintiffs' right of recovery in this case. To further discuss the questions raised here, after the full examination they have received in the two cases last cited, seems to me unnecessary.

I therefore conclude that the contracts made by plaintiffs, in defendants' behalf, were not options to sell or buy, but lawful contracts to deliver corn at a future day, upon which defendants might have been liable for the difference between the price at the time at which they sold and agreed to deliver, and the market price at the maturity of their contract. And if, by reason of the

adverse aspect of the market, they directed the plaintiff to settle with the purchasers before the maturity of the contract, they are liable for the differences paid by the plaintiffs in their behalf, as well as for plaintiffs' commissions.

GILBERT (PACKARD v.). See Case No. 10,651.

GILBERT (PEABODY v.). See Case No. 10,868.

GILBERT (POTTS v.). See Case No. 11,347.

Case No. 5,413.

GILBERT v. PRIEST.

[See 65 Barb. (N. Y.) 444.]

GILBERT (SISSON v.). See Case No. 12,912.

GILBERT (UNITED STATES v.). See Case No. 15,205.

Case No. 5,414.

GILBERT v. VAN ARMAN et al.

[1 Flip. 421;[1] 7 Chi. Leg. News, 175.]

Circuit Court, E. D. Michigan. Jan. 27, 1875.

THE CAUSE AT ISSUE—WHAT IS MEANT BY RULE 69.

1. Under equity rule 69 "the cause" includes the parties to the suit and all of them, as much as it does the subject matter of the suit; and therefore until it is at issue as to all the defendants, where there are more than one, or is at issue as to one or more, and an issue has been waived by the others allowing the bill to be, and it has actually been, taken as confessed as against them, "the cause" cannot be said to be at issue within the meaning of said rule.

2. Where complainant unreasonably delays compelling an issue as to the defendants or any of them, or taking the bill as to those not answering for confessed, the defendants, as to whom the cause is at issue and being injured by the delay, may have an order on proper application and showing, to compel complainant to speed the cause or have his bill dismissed.

In equity. On motion of the complainant [Mary Gilbert] to appoint an examiner and assign the times within which the parties shall take their proofs under equity rule 69 and amendments, and for a reference to ascertain and compute the amount due upon the bond and mortgage described in the bill of complaint.

John J. Speed, for complainant.
Wm. H. Brown, in pro. per.

LONGYEAR, District Judge. The bill in this cause was filed to foreclose a mortgage July 24, 1872. The defendant, Wm. H. Brown, put in his separate answer May 26, 1873, to which a replication was duly filed June 10, 1873. No further proceedings were had until July 11, 1874, when the bill was duly taken as confessed by the remaining defendants, John and Amanda S. Van Arman, by an order pro confesso entered on that day. Thirty-four days after the last-named day, to-wit, August 14, 1874, complainant moved for the appointment of an examiner, and to assign the time for taking proofs, etc. That motion was denied, but with leave to complainant to renew the same, which was done January 18, 1875, and the latter motion is the one now under consideration.

By equity rule 69 it is provided that "three months and no more shall be allowed for taking of testimony after the cause is at issue, unless the court or judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing."

The objection made to granting the motion on both occasions, when first made and now upon the renewal of the same, was that the same was not made within three months after the cause was at issue as to the defendant Brown, and was therefore too late under the said rule 69, the time for taking proofs not having been enlarged as provided by that rule.

The motion, when first made, was within three months after the bill had been taken as confessed by the defendants other than defendant Brown, but more than that time after the cause was at issue as to him. The present motion, although made more than three months after the bill was so taken as confessed, yet being a renewal of the former motion by leave of the court, it must be considered as made at the time of the making of the former motion. The objection to the motion, therefore, raises the question as to when a cause in equity is to be considered at issue within the meaning of rule 69, where, as in this case, there are several defendants, as to some of whom there is an issue on answer and replication, and as to some of whom the bill is taken as confessed.

The limitation of rule 69 is, three months after the cause is at issue. Can the cause be said to be at issue when an issue has been formed as to only one or more of several defendants, but not as to the others? If it can be so held for the purpose of taking proof within the meaning of rule 69, then there can be no good reason why it must not be so held for the purposes of final hearing, but it is well settled that such a holding would be erroneous. "The cause" includes the parties to the suit, and all of them, as much as it does the subject matter of the suit; and therefore until it is at issue as to all the defendants, where there are more than one, or is at issue as to one or more, and an issue has been waived by the others by allowing the bill to be and it has actually been taken as confessed as against

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

them, "the cause" can not be said to be at issue within the meaning of the rule 69.

If, after one or more of the defendants have answered, and the cause is at issue as to him or them, the complainant unreasonably delays compelling an issue as to the other defendants, or taking the bill as confessed as to them, the defendants as to whom the cause is so at issue, if the delay is injurious to them, may undoubtedly have an order, on proper application and showing, to compel the complainant to speed the cause or have his bill dismissed. But the three months within which the proofs must be taken, under rule 69, do not begin to run until the cause is at issue as to all the defendants, or at issue as to some, and taken as confessed as to all the others.

It results that the motion must be granted, and the time be enlarged for that purpose.

Ordered accordingly.

Case No. 5,415.

GILBERT v. WARD.

[4 Cranch, C. C. 171.] [1]

Circuit Court, District of Columbia. May Term, 1831.

SLAVERY—PETITION FOR FREEDOM.

On a petition for freedom under a will, the burden of proof is on the respondent to show that the petitioner was more than forty-five years of age, or that the manumission was in prejudice of creditors.

Petition for freedom [by Emanuel Gilbert, a negro], under the will of Peter Dejean.

Mr. Tabbs, for defendant [Horatio Ward], objected, at the trial, that there was no evidence that the petitioner was "under the age of forty-five years," when his title to freedom accrued. If he was over forty-five, he is not entitled to his freedom. It is a necessary part of his title, and he must prove it. See Act Md. 1796, c. 67, § 13, by which it is enacted, "that no manumission, hereafter to be made by will, shall be effectual to give freedom to any slave or slaves, if the same shall be in prejudice of creditors, nor unless the said slave or slaves shall be under the age of forty-five years, and able to work and gain a sufficient livelihood at the time the freedom given shall commence."

Mr. Wallach, contra. In the case of creditors, this court has decided that the burden of proof is on them to show that the circumstances of the estate of the deceased are such as that the manumission would be to their prejudice.

Mr. Tabbs, in reply. The cases are different. Here the age is part of the plaintiff's title.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion, that under the 13th section of the act of Maryland of 1796, c. 67, the manumission is prima facie valid; and that the defect of age, which by the proviso is to render the manumission ineffectual, must be shown by the party who claims the petitioner as a slave.

Verdict for the petitioner.

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

Case No. 5,416.

GILBERT & BARKER MANUF'G CO. v. BUSSING.

[12 Blatchf. 426; 1 Ban. & A. 621; 8 O. G. 144.] [1]

Circuit Court, S. D. New York. Jan. 20, 1875.

PATENTS—SECURITY FOR DECREE — INJUNCTION—EFFECT OF PAYMENT OF DECREE FOR INFRINGEMENT.

1. The plaintiffs, in a suit in this court against T., for manufacturing and selling gas machines, in infringment of a patent, obtained a decree requiring T. to account for his gains and profits from such manufacture and sale, and for all damages sustained by the plaintiffs from such infringement by T. No final decree had been entered. The plaintiffs then brought this suit against B., for infringing the patent by the use of a machine purchased by him from T., and applied for a provisional injunction to restrain the further use of the machine: *Held*, that B. ought to be allowed to give security for the payment of any decree that might be rendered against him, and that, if he would do so, the injunction ought not to be granted.

[Cited in Kelley v. Ypsilanti Dress-Stay Manuf'g Co., 44 Fed. 21.]

2. The payment of an amount awarded for such damages by a final decree in the suit against T. would, it seems, as to the particular machines made and sold by T., vest in the purchasers a right to the further use of such machines.

[Cited in Perrigo v. Spaulding, Case No. 10,994; Allis v. Stowell, 16 Fed. 787.]

3. But, until such payment, no such right can vest.

[Cited in Fisher v. Consolidated Amador Mine, etc., 25 Fed. 202.]

[This was a bill in equity by the Gilbert & Barker Manufacturing Company against Abraham Bussing for the alleged infringement of patent No. 93,267, granted to C. N. Gilbert and J. F. Barker, August 3, 1869, for an "improved apparatus for carburetting air."]

Edwin W. Stoughton, for plaintiffs.

Edmund Wetmore, for defendant.

WOODRUFF, Circuit Judge. The complainants heretofore filed their bill in this court against Oakes Tirrell, in which they charge him with infringing their patent, by the manufacture and sale of gas machines, the exclusive right to the manufacture and sale of which they claim under their patent.

[1] [Reported by Hon. Samuel Blatchford, District Judge; reprinted in 1 Ban. & A. 621; and here republished by permission.]

The decision in that case [Case No. 5,417] sustained the complainants' patent [No. 93,268], and held Oakes Tirrell an infringer. Thereupon, an interlocutory decree was entered, requiring the said Oakes Tirrell to account to the complainants for all gains and profits made by him by the manufacture and sale of such infringing machines, and for all damages sustained by the complainants from the infringement of their patent by the said Tirrell. That interlocutory decree is in full legal force, and may be carried into execution, so that the complainants may have a final decree for such gains, profits and damages. I am inclined to think that, if that final decree were made, and the amount which should thereby be awarded to the complainants should be paid, it would be held an indirect affirmance of all sales made and accounted for, or a satisfaction of the damages resulting from such sales, so that, as to the particular machines so made and sold, there would result to the purchaser a right to hold and take the benefit of his purchase. Possibly, the question, whether demanding and receiving from Tirrell the mere profits of the manufacture and sale, would include the profits of the use of the machine, might arise; but, in general, the sale of a machine to a purchaser for use carries with it the right to use it, the presumption being, that whatever license fee or compensation for the use is due to the vendor, is included in the price. So, when a patentee claims and recovers, not only the actual gains and profits of the manufacture and sale, but all the damages which he has sustained therefrom, it is, at least, to be presumed, that such recovery embraces all the profit which the patentee would have received had he made and sold the machine to such purchaser with the like incidental or consequential right to use it. I do not, however, mean to affirm that a patentee may not have a decree against him who manufactures and sells an infringing machine, and also, a decree against the purchaser thereof, enjoining such manufacture and sale, and, also, enjoining the future use of the infringing machine; but, only, that the patentee cannot take compensation for the infringement, including manufacture, sale, and use, and thereafter enjoin that use for which he has taken compensation. The patentee, in such last supposed case, would stand very much in the condition of one who sues in trover for the value of his property wrongfully converted, and recovers and receives such value, in compensation for his damages. He thereby so far affirms the conversion that his title to the property is gone. But, to effect this, something more than the bringing of the action, and more than a verdict assessing damages, is necessary. There must be satisfaction.

An analogous rule, I think, applies to this case. The complainants brought their suit, and have established their title, as against Oakes Tirrell, to full compensation; but they have not received such compensation, Non constat they ever will. On the contrary, the proof, on this motion, is, that he is insolvent; and, if so, a final decree against him may be of no value. Such interlocutory decree ought not, therefore, to be regarded as any defence to the purchaser from Tirrell. Upon the case made by the bill, both Tirrell and the defendant were tort-feasors. Nothing has occurred, by reason of which the defendant is enabled to say, that he has acquired a right to use the infringing machine. Until the complainants have received some compensation or satisfaction which will operate to vest such right in the defendant, he stands undefended—assuming, of course, the validity of the patent. On the other hand, I think the complainants can be fully protected without an unqualified injunction pendente lite. The defendant is not engaged in manufacturing and selling, and does not, therefore, interfere with the business of the complainants, by competition or otherwise. He is not injuring their business, or impairing the present value or profits which they derive from their monopoly. He has a single machine, connected with, and used for lighting, his private residence. It would be a great inconvenience to him, and, so far as I can perceive, of no legitimate advantage to the complainants, to compel him to discontinue that use while this suit is pending, especially as the decree which the complainants may, if they so elect, have against Tirrell, may be fully paid and satisfied, in such wise that it might operate as satisfaction of the entire wrong in which both Tirrell and the defendant are participators. The complainants may be secured ample indemnity, and so the order of the court will work no hardship.

I do not mean to intimate, that, on the final hearing, the complainants may not be entitled to a perpetual injunction against the defendant. The complainants cannot be compelled, against their will, to permit the defendant to use their invention. All that I mean to hold now is, that the complainants can be fully indemnified for that use pending this suit, and I am of opinion that such indemnity will protect them, without subjecting the defendant to needless inconvenience and expense, until his rights can be considered and decided on a final hearing.

Neither the moving papers, nor those used in opposition to the motion, give much information as to the amount of security which should be required; and, if the complainants deem the amount which I suggest an insufficient protection, I will hear the parties on the settlement of the order, which will be, that an injunction issue, unless the defendant, within twenty days after service

of the order on his solicitor, files a bond to the complainants, with two sufficient sureties, in the sum of fifteen hundred dollars, conditioned for the payment of whatever decree may be rendered against him in this suit.

GILBERT GREEN, The (BUCKNOR v.). See Case No. 2,099.

GILBERT & BARKER MANUF'G CO. (CLOUGH v.). See Case No. 2,906.

GILBERT & BARKER MANUF'G CO. (MUNSON v.). See Case No. 9,934.

Case No. 5,417.

GILBERT & BARKER MANUF'G CO. v. TIRRELL.

[12 Blatchf. 144; 1 Ban. & A. 315; 8 O. G. 2 Merw. Pat. Inv. 214.] [1]

Circuit Court, S. D. New York. June 10, 1874.

PATENTS—NEW ARRANGEMENT—PATENTABILITY—VALIDITY OF CLAIM.

1. The chief feature of the improvement set forth in the letters patent granted to J. F. Barker and C. N. Gilbert, August 3d, 1869, for an "improved apparatus for carburetting air," is in the placing of the carburetter under ground, in a vault separate from the building to be lighted, at any desired or convenient distance therefrom, while the power and the motor, by means whereof atmospheric air is forced through pipes leading into the carburetter, are placed in an apartment in the building, or near thereto, conveniently accessible, with or without a light, as occasion may require, whenever, for adjusting the motive power, or the machinery thereof, it is desired to do so. Such isolation of the carburetter avoids danger from the explosion of the gas which escapes from it, and secures an even, regular supply of gas, from the carburetter, unaffected by changes of temperature above ground, and secures a preliminary condensation before the gas enters the distributing pipes. In this view, the new arrangement was patentable, and the claim, namely, "The arrangement of the carburetter with a meter-wheel, said wheel being driven by a descending weight, or other equivalent mechanical power, applied to force the air through the carburetter to the burners, said carburetter being placed within a vault, by itself, separate from the building to be lighted, the whole arranged and connected with pipes substantially as herein described and set forth," is valid.

2. The arrangement is not merely a change in the location of an old device. The vault described in the patent has surrounding walls, and a removable opening above, but the essence of the structure is not changed by placing the carburetter in a cavity below the ground, and surrounding it with earth in direct contact therewith, and making a communication, by a pipe from above, with the carburetter.

[This was a bill in equity by the Gilbert & Barker Manufacturing Company against Oakes Tirrell praying for an injunction and account.]

[1] [Reported by Hon. Samuel Blatchford, District Judge; reprinted in 1 Ban. & A. 315; and here republished by permission. Merw. Pat. Inv. 214, contains only a partial report.]

Edwin W. Stoughton and William Stanley, for plaintiff.

Edmund Wetmore, for defendant.

WOODRUFF, Circuit Judge. The bill herein is filed to restrain the infringement of letters patent [No. 93,268] granted to J. F. Barker and C. N. Gilbert, on the 3d August, 1869, for an "improved apparatus for carburetting air." By means of this apparatus it is claimed that gas is produced from petroleum and similar volatile oils employed for carburetting atmospheric air, thus rendering it combustible, light-producing, and suitable for lighting houses, manufactories, &c. Neither the process, nor the chief parts of the apparatus, are claimed to be new. The claim in the patent, which the defendant is charged with infringing, is in these words: "The arrangement of the carburetter with a meter-wheel, said wheel being driven by a descending weight, or other equivalent mechanical power, applied to force the air through the carburetter to the burners, said carburetter being placed within a vault, by itself, separate from the building to be lighted, the whole arranged and connected with pipes, substantially as herein" (i. e., in the specification) "described and set forth."

It appears, by the proofs, that, prior to the invention of the patentees, attempts to produce and bring into general use gas manufactured by forcing atmospheric air through or in contact with volatile oils, under such pressure that it was suitably impregnated or carburetted, were liable to two difficulties. The chief of these was, that, under any already devised arrangement, the danger of explosion, as an incidental result of the escape of gas from the carburetter, was very great; and this not only, per se, hindered its use, but made it difficult or impossible to procure insurance upon buildings so lighted. Another difficulty lay in the fact, that, on passing the gas from the carburetter through the distributing pipes, whenever the temperature of the pipes was lower than that of the carburetter, condensation occurred, which produced in the pipes not an obstruction merely, but a highly inflammable liquid, greatly inconvenient and dangerous. If an attempt was made to obviate these objections by locating the apparatus in apartments separate from the building lighted, there was a necessity to provide for the changes of temperature in our ever-varying climate, which was liable to cool the carburetter to a degree which made it practically inoperative, or, if the apartment was artificially heated, the danger of explosion was not avoided.

I shall not enter very fully or minutely into a discussion of the details of the patented apparatus, since most of them are confessedly old. The chief feature of the improvement is in the placing of the carburet-

ter under ground, in a vault separate from the building to be lighted, at any desired or convenient distance therefrom, while the power and the motor, by means whereof the atmospheric air is forced through pipes leading into the carburetter, are placed in an apartment in the building or near thereto, conveniently accessible, with or without a light, as occasion may require, whenever, for adjusting the motive power or the machinery thereof, it is desired to do so. Such apartment being thus wholly separated by walls or intermediate earth, or both, no gas from the carburetter pervades it, and no danger of explosion arises. Besides this result, which may be claimed to be purely incidental and, perhaps, not novel, because it would result from any mere separation of the two parts of the apparatus by placing them in different apartments, a most important result is effected in making such separation practicable, and, at the same time, providing an even, regular supply of the gas, by the carburetter, unaffected by changes of temperature above ground, and effecting, also, a preliminary condensation before the gas enters the distributing pipes, which relieves the operation of the apparatus from the objection secondly above named.

Three questions are hereupon raised. Was this new arrangement patentable? Was it new, and were the patentees the first inventors? Does the defendant infringe?

1. Upon the first question, it is insisted, that the patentees merely changed the location of the carburetter, and that the mere change in the location of an old device is not patentable. In Marsh v. Dodge & Stevenson Manuf'g Co. [Case No. 9,115], I had occasion to say, that "mere change of location is not invention." But it was also held, that "where change of location involves the employment of new devices to adapt an apparatus for use in the new position, and a beneficial result is produced, then this location, in its connection with such new devices —that is, the means by which the result is produced, and not the result itself—is patentable. And, where such change of location brings into existence a new combination of devices, operating, by reason of such new combination, to produce a new and useful result, such new combination is patentable." This illustrates the nature and patentable character of the arrangement described in the patent in this case. By the new arrangement, the patentees bring into contributory and effective co-operation with a carburetter, and the machinery for supplying atmospheric air thereto, the earth and its even temperature below the surface, and obtain protection from the efflux of gas from the carburetter, and its accumulation in the frequently visited location of the meter, and from the danger of consequent explosion, and also secure, by the passage of the gas from the carburetter through a cooler medium, the preliminary condensation which makes the use of the gas in the building, and its passage through the distributing pipes, safe, convenient, and valuable. It is no impeachment of the patent to say that this is only making use of the natural state of the ground, or the natural laws which, operating below the surface, make such new location desirable, as a matter of mere judgment. It is more than that. It brings into conjoint operation and effect new elements, working actively, and also operating passively to produce the result, and to produce the ultimate and final result in a better manner—in a manner which combines safety with convenience and utility, as had never before been done. The most important inventions ever made consist in subordinating natural elements, or controlling natural laws, to the production of useful results. I cannot doubt that the invention of the patentees was patentable, as truly so as it is abundantly proved to be greatly useful and valuable.

2. The questions of fact—was this arrangement new, and were the patentees the first inventors—must be answered in the affirmative. I cannot, in a brief opinion, review in detail the evidence. I must content myself with saying that, after a careful examination of the testimony, and attention to the very full arguments of the counsel, the conclusion seems to me clear, that no prior devices or arrangement anticipated the patentees.

3. Does the defendant infringe? It was but feebly, if at all, insisted, that, if the arrangement of devices by the patentees was entitled to be called invention, and was patentable, as above explained, the defendant did not employ its distinguishing features or characteristics. The details in the construction of his carburetter were not precisely like those used by the complainant, but those specific features were not claimed. The substantial operation of his carburetter, and the mode of impregnating the atmospheric air, are alike in both. The difference between the apparatus of the defendant and that of the patentees, chiefly relied upon, is, that, whereas the latter make the cavity below the ground a vault having surrounding walls, the defendant, having inserted his carburetter in the cavity, surrounds it with earth in direct contact therewith, and carries up to the surface a pipe through which to replenish the carburetter with oil, instead of having a removable opening to the vault below, employed by the patentees. The substance of the invention, the defendant uses. The means of its effective useful operation are the same. The even, moderate temperature of the earth, the underground passage of the gas, and the effect thereof, are alike used in both. The difference in the construction of the carburetter used by the patentees, as described in the drawings, may make a more permanent opening about its sides desirable, but I cannot regard these details as of the

substance of the invention. The apparatus of the defendant does substantially operate by the same means, in the same way, and to produce the same result.

The complainant must have a decree for an injunction and account, in the usual form.

[For another case involving this patent, see Gilbert & Barker Manuf'g Co. v. Walworth Manuf'g Co., Case No. 5,418].

Case No. 5,418.

GILBERT & BARKER MANUF'G CO. v. WALWORTH MANUF'G CO.

[2 Ban. & A. 271; 9 O. G. 746; 1 Law & Eq. Rep. 420.] [1]

Circuit Court, D. Massachusetts. April 4, 1876.

PATENTS—PATENTABILITY OF INVENTION—CHANGE OF LOCATION OF PARTS.

1. The patent for an improved apparatus for carburetting air, No. 93,268, dated August 3, 1869, *held* invalid for want of patentability in the alleged invention.

2 Mere change of location of parts is not patentable except where such change of location brings into existence a new combination of devices, operating by reason of such new combination to produce a new and useful result.

In equity.

E. W. Stoughton and William Stanley, for complainants.

Causten Browne and Jabez Holmes, for defendants.

SHEPLEY, Circuit Judge. The complainants are the owners of letters patent of the United States, dated August 3, 1869, No. 93,268, for an improved apparatus for carburetting air. The invention is described in the specifications as relating to the apparatus used for carburetting air in the manufacture of illuminating-gas for dwelling-houses and factories, and as consisting in the arrangement of the carburetter with the meter-wheel or pump for driving the air through said carburetter to the burners, and the coil and heating-pipes for evaporating the oil within the carburetter, whereby the whole apparatus is rendered perfectly safe with regard to life and property in the building lighted, the carburetter being situated in a vault or house away from the building to be lighted, while the heating-apparatus and the pump or meter-wheel are within the building to be lighted, and where they can be easily and quickly reached, and under perfect control of the occupant of the house. There was nothing novel in the meter-wheel or the carburetter, or the combination of a meter-wheel with a carburetter, or their connection with a gas-pipe, air, or heating-pipes, except so far as their location and arrangement was claimed to be new, by placing the carburetter in a vault or house by itself, separate from the building to be lighted, and arranging the meter-wheel and the heating-coil in the building to be lighted, where they could be easily reached, and under control of the occupant of the house, without exposure to explosion consequent upon frequent access to the room in which the carburetter is placed, and connected by pipes passing through a wall or the ground, so as to cut off any communication of gas or flame between the room in which the carburetter is placed and the building to be lighted.

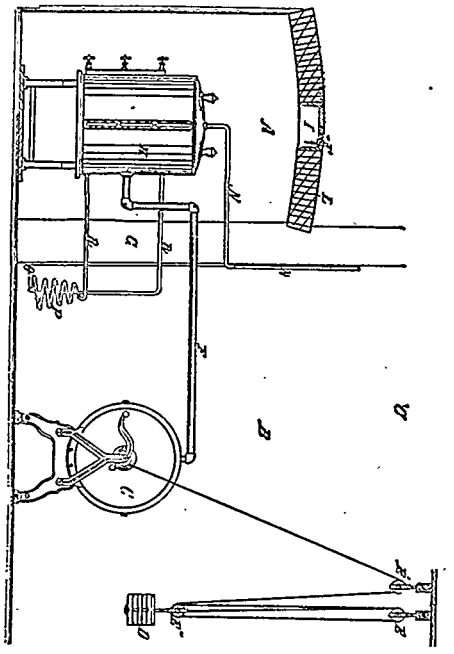
It is denied on the part of the defendants that there is any patentability in such a change of location of parts, all of which are confessedly old. Mere change of location is not patentable; but where change of location brings into existence a new combination of devices operating by reason of such new combination to produce a new and useful result, such new combination is patentable. Woodruff, J., in Marsh v. Dodge & Stevenson Manuf'g Co. [Case No. 9,115].

I am not prepared to say that the new arrangement and location constituting a new form or mode of combination, as described in the patent, taking into consideration the new and useful result claimed for it, was not patentable, if it was novel at the time claimed as the date of plaintiffs' invention. The combination and arrangement of the respondents embrace all that is claimed in the first claim of the patent. No issue of infringement need, therefore, be considered. The only material question left for consideration is whether what is claimed in the first claim of the patent was new in the sense of the patent law. The determination of this question requires a careful and critical analysis of the supposed invention and of the first claim of the patent, and a careful comparison of the claimed invention with the prior existing combinations and arrangements claimed as anticipating it.

The invention described and claimed is "The arrangement of the carburetter" (that is, any carburetter, for no new form of carburetter is claimed or was invented) "with a meter-wheel, said wheel being driven by a descending weight, or other equivalent mechanical power, applied to force the air through the carburetter to the burners" (this allows the use of an equivalent for the weight to drive the meter-wheel, and embraces the use of "other equivalent mechanical power applied to force the air through the carburetter to the burners," as, for instance, an hydraulic blower, an air-pump, a pump with a gas-holder, known generally as a gasometer, a bag weighted, or other well-known equivalents, for this purpose, of a meter-wheel pump), "said carburetter being placed within a vault" (i. e., an arched or vaulted appartment, especially a subterranean room) "or house" "by itself, separate from the building to be lighted, the whole arranged and connected with pipes, substantially" as therein (in the patent) "described and set forth."

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. 1 Law & Eq. Rep. 420, contains only a partial report.]

[Drawings of patent No. 93,268, published from the records of the United States patent office.]



This arrangement and connection embraces —First, pipe A, the air-pipe, which, running through the wall of the building, and, also, when required, the ground between the walls of the building to be lighted and the carburetter-room, connects the meter-wheel pump, or its equivalent, inside the building with the carburetter in its "vault or house," furnishing a conduit for the air from the pump to the carburetter; second, the heating-coil P and pipes R R connecting a heating-coil in the building with a carburetter in the vault or house; third, the pipe N, the gas-pipe leading through the wall or ground, or both, as the case may be, from the carburetter in its vault or house into the building to be lighted, furnishing a conduit from the gas in the carburetter to the distributing-pipes and the burners. The first claim in the patent is for all this combination and arrangement (exclusive of the heating-coil P and heating-pipes R R). The second claim is for the heating-coil and its connections with the heating-pipes, and the carburetter with reference to their respective locations. As the defendants use no heating-coil or pipes, no question arises in this case on the second claim, and its only importance is in aiding in the construction of the first claim.

Having now definitely stated the invention described and claimed in the patent, we pass to the consideration of the function and purpose of the patented combination and arrangement. This is clearly set forth by the patentees. They describe their invention as consisting in an arrangement "whereby the whole apparatus is rendered safe with regard to life and property in the building lighted, the carburetter being situated in a vault or house away from the building to be lighted, and where they can be easily and quickly reached, and under perfect control of the occupant of the house."

Without instituting a comparison between the patented invention and all the other prior existing forms of apparatus for carburetting air for illuminating purposes, which have been proved to have existed, I have selected the Meriden machine for the reasons that it is proved to have been constructed and operated successfully in the fall of 1864, while the invention of Gilbert & Barker is not even claimed to have been before June, 1867, and also because this apparatus appears to me to have embodied in 1864, in successful and practical and public use, every element of the first claim of the complainants' patent of August, 1869.

The Meriden apparatus was used for carburetting air for illuminating a factory. It consisted of an air-pump and air-receiver, a well-known equivalent for the meter-pump wheel, a carburetter, the equivalent of complainants' carburetter, placed in a brick vault built on the surface of the ground, ninety-three feet from the main building to be lighted. This was actually both a vault and a house, and, therefore, identical with complainants' vault or house. There was an air-pipe, which connected the pump inside of the building to be lighted with the carburetter in the vault, passing underground and furnishing a conduit from the air in the pump to the carburetter, being thus the equivalent of complainants' pipe A. There was a gas-pipe leading from the carburetter in the vault through and underground, and furnishing a conduit for the carburetted air or gas from the carburetter to the building to be lighted. This is identical with complainants' pipe N. There was also a steam-pipe with its connections, but that is not material to the inquiry involved in this case, because the defendants do not use any artificial heat, and the complainants do not make their heating-coil and pipes a part of the arrangement and combination claimed in the first claim. The Meriden apparatus contained every element of location, arrangement, and combination claimed in the first claim of complainants' patent.

I have carefully examined and considered the learned opinion of Judge Woodruff, of the second circuit, in the case of these same complainants against Oakes Tirrell [Case No. 5,417]. It is not without much diffidence and great reluctance that I am forced to arrive in this case at conclusions which may appear to be at variance with the opinion of that learned, upright and able judge. Had the record in this case presented the same or substantially the same state of facts as was presented in the record before Judge Woodruff, I might have been contented to rest my conclusions upon the weight of his high authority, leaving the responsibility of revision, if revision were necessary, to the

supreme court of the United States; but the additional evidence in this record, not found in the case before him, compels me to make an independent and critical comparison of the invention claimed, with prior existing combinations and arrangements. Such examination and comparison force upon me the conclusion that the assignors of the complainants were not the first and original inventors of what is claimed in the first claim of their patent. I cannot find, upon the most careful examination of this patent, what Judge Woodruff seems to have found in it, any claim or description of an invention of such an arrangement of the gas-pipe as would effect a preliminary condensation before the gas enters the distributing-pipes, which would relieve the operation of the apparatus from the dangers arising from condensation by reason of the pipes passing through cold apartments in the building to be lighted. I can find nothing in the patent which discloses any such danger. I can find nothing in the patent or drawings which teaches how such danger is to be avoided by preliminary condensation. I can find no statement that by the patented apparatus such danger is obviated, or any statement that it is the purpose of the invention, or the function of the arrangement or combination, to avoid such danger by such preliminary condensation. John F. Barker, one of the patentees, in his testimony says machines are highly dangerous unless condensation in the building is prevented; that this is done by laying the pipe in the ground, about the frost-line in a cooler medium, causing preliminary condensation. The patent is silent as to this danger, and fails to disclose any mode of adjusting such an arrangement to meet the different requirements of different climates and temperatures. On the contrary, the drawings show only a gas-pipe passing through a partition-wall between the building to be lighted and the carburetter-vault, under such conditions that no amount of preliminary condensation would be likely to take place in any degree equal to what took place in the then existing well-known arrangements in common use. The advantages of the arrangement claimed in the patent itself are these, and only these: First, "whereby the whole apparatus is rendered perfectly safe with regard to life and property in the building lighted, the carburetter being situated in a vault or house away from the building to be lighted, while the heating apparatus and the pump or meter-wheel are within the building to be lighted, and where they can be easily and quickly reached, and under perfect control of the occupant of the house;" and again, "so that the possibility of any accident resulting from the escape of the gas from the carburetter shall be entirely removed, as there will then be no vessel containing gas within or near the building to be lighted." There are many other references to the patent and the drawings, and other comparisons between the described invention and arrangements, other than those of the Meriden apparatus, which might be made confirmatory of the views I have taken; but those already stated are so conclusive to my own apprehension, that further illustration would seem superfluous. It follows that the bill must be dismissed.

Bill dismissed with costs.

[For another case involving this patent, see Gilbert & Barker Manuf'g Co. v. Tirrell, Case No. 5,417.]

Case No. 5,419.

GILBOUGH et al. v. NORFOLK & P. R. CO.

[1 Hughes, 410.] [1]

Circuit Court, E. D. Virginia. June, 1877.

BONDS TRANSFERABLE BY DELIVERY—STOLEN AND SOLD TO BONA FIDE PURCHASER—PASSING OF TITLE.

Where coupon bonds of a corporation, transferable by delivery, were stolen, and were afterwards sold in the regular course of business to a bona fide purchaser, before they matured, for their market price, *held*, that the title in them passed to the purchaser, as to the bonds and as to each coupon which had not yet become payable at the date of the sale, but did not pass as to the coupons which were past due.

Among other like property stolen from the state capitol of Virginia, on or about the 3d of April, 1865, at the capture of Richmond, were eight coupon bonds of the Norfolk & Petersburg Railroad Company, for $500 each, dated the 1st of July, 1857, payable to bearer on the 1st day of July, 1870, with coupons at seven per cent., payable to bearer semi-annually, on the 1st day of January and July in each year. They had been held by the state in exchange for a like amount of her own bonds, which had been lent the company about the time of the date of the company's bonds. The theft of the bonds from the state was advertised in the newspapers of Richmond, and was published elsewhere at the time it was discovered. There are now attached to the bonds all the coupons which fell due between January, 1866, and July, 1870, inclusive, that is to say, nine coupons each. Two days before the maturity of the bonds, and of the last coupons, that is to say, on the 28th of June, 1870, these eight bonds were sold to J. W. Gilbough & Co., bankers and brokers of Philadelphia, by a person whom they did not know, calling himself D. M. Taylor, at the market rate of 79.50, then commanded by such bonds in New York, Philadelphia, and Baltimore. The purchasers had no knowledge of the theft which has been spoken of, nor were there any circumstances attending their purchase of these bonds, tending to put them on inquiry as to the validity of the vendor's title to them, except the fact that the per-

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

son offering them for sale was a stranger to them, that eight coupons were overdue, and that the bonds themselves were within two days of maturity. Action of covenant is now brought by J. W. Gilbough & Co. against the Norfolk & Petersburg Railroad Company, for the amount of the bonds, principal and interest, and this company disclaiming property in the bonds, the commonwealth of Virginia, by her attorney general, has been allowed to assert her claim to them, and make defence to the action under section 1, c. 149, of the Code of Virginia.

James Neeson, for plaintiff.
R. T. Daniel, Atty. Gen., for defence.

HUGHES, District Judge. It is useless to pass upon any other question raised in the pleadings except the single one on which the case rests. That question is, assuming these bonds and their coupons to be commercial paper, payable to bearer, transferable by delivery, whether or not the admitted fact that they had been stolen invalidates the title of their bona fide holders by purchase at the market price of such bonds.

It is no longer a question that the bonds of corporations payable to bearer are negotiable paper, at all times after they get upon the market, up to the date of their maturity. This is an elementary principle of commercial law. Nor is there any doubt, since the decision in Mercer v. Hackett, 1 Wall. [68 U. S.] 83, that the interest coupons of such bonds not yet due are also negotiable paper. It may also be assumed, as the settled law of this country, as it is of England, that a bona fide holder, for value, of negotiable paper, in the form of the bonds and coupons in this case, by purchase before their maturity, is entitled to recover his demand from the maker or obligor, even though his vendor obtained them by fraud, or theft, or robbery.

In general, the purchaser of personal property obtains no better title than that of his vendor, unless, in England, he purchase in certain markets overt. But, for the benefit of commerce, this rule is reversed in respect to negotiable paper, and the holder of such paper, though it has been stolen, has title to it if he himself came to it bona fide in the regular course of trade, and the burden of proof is upon the defendant to disprove the bona fides of his purchase. This principle is too thoroughly established by the decisions of the supreme court of the United States in Murray v. Lardner, 2 Wall. [69 U. S.] 110, National Bank of Washington v. Texas, 20 Wall. [87 U. S.] 72, and Hotchkiss v. National Banks, 21 Wall. [88 U. S.] 354, to be questioned here; however strong our inclination may be to protect the state of Virginia from such a theft as these bonds were in part the subject of.

But clear as the principle of these decisions is, as to the principal of the bonds sued upon in this case, and as to the coupons which had not yet matured at the date of the plaintiffs' purchase, it is well-settled law that the eight coupons which were then past due were not such negotiable paper as falls within the scope of the principle. As to those overdue coupons, the plaintiffs took only the title of their vendor, who called himself Taylor, which was no title at all. See Arents v. Com., 18 Grat., at pages 777–780, and numerous cases there cited by Judge Joynes. Judgment may be entered accordingly.

Case No. 5,420.

GILCHRIST et al. v. COLLECTOR OF CHARLESTON.

[1 Hall, Law J. 429; Brunner, Col. Cas. 249; 5 Hughes, 1.]

Circuit Court, D. South Carolina. May 28, 1808.

MANDAMUS — INSTRUCTIONS FROM THE SECRETARY OF THE TREASURY—COLLECTORS.

The circuit court has power to issue a mandamus to a collector, commanding him to grant a clearance. All instructions from the executive which are not supported by law are illegal, and no inferior officer is bound to obey them.

Embargo. A motion was made by Mr. Ward for rule on the collector to show cause why a mandamus should not be issued against him, to compel the granting of clearances for the ship Resource, Moreton; ship Two Pollies, Wilder; ship Navigator, Bowden; ship Rising States, Anderson; and ship Louisa Cecilia, Fowler, founded on the following affidavit: "Adam Gilchrist and J. S. Barker, of Charleston, merchants, being severally sworn according to law, depose, that the American register ship Resource, arrived from a foreign voyage in the port of Charleston about six months since, owned one half by the deponent, J. S. Barker, residing in Charleston, and the other half by American citizens residing in Baltimore; that the deponent representing the owners aforesaid, apprehensive that the bottom of the ship might, by her being detained here during the embargo, be totally destroyed by worms, did for that reason determine on sending her to Baltimore and regularly advertised for freight to said port of Baltimore; that having obtained the promise and actually engaged the freight of about six hundred bales of cotton, it became requisite to ship either ballast or heavy freight, so as to enable the said ship to be navigated with safety; the ballast not being obtainable, these deponents, about three weeks since, agreed to carry to Baltimore about two hundred barrels of rice, freight free; and that the same was shipped by permit from the custom house and under the inspection of a revenue officer about two weeks since; that on application for a clearance of the said ship and her cargo to Simeon Theus, collector of the port of Charleston, duly commissioned and

authorized to exercise and perform the duties of said public officer or collector of the port aforesaid, he hath refused to grant a clearance to said vessel and cargo, alleging that although he hath no suspicion that the clearance demanded is to cover an ostensible voyage to Baltimore, or to infringe or evade the existing laws relative to the embargo, and although he admits that the said ship was laden previously to his receipt of the act of congress, respecting the embargo, under date of the 25th April, ult. yet that he is bound to refuse such clearance, under the directions of the executive of the United States, which he conceives he is bound to obey; that these deponents have just right under the law to obtain from said Simeon Theus, collector as aforesaid, the clearance so withheld and refused to be granted. Adam Gilchrist. J. Sanford Barker. Sworn before me this 24th of May, 1808. John Ward, Q. U."

Upon the return of the rule the defendant showed the following cause: "United States, South Carolina District. Federal Circuit Court. Ex parte Simeon Theus, Esq., Collector of the Port of Charleston. Rule to show cause why a mandamus should not issue, requiring him to grant clearances of certain vessels. Simeon Theus, collector of the port aforesaid, on whom a copy of the above rule has been served for cause, showeth: That in and by a certain act of congress of the said United States, passed the 25th day of April, 1808 [2 Stat. 501], it is, in the 11th sect. thereof, amongst other things, enacted: 'that the collectors of the customs be, and they are hereby respectively authorized, to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever, in their opinion, the intention is to violate or evade any provisions of the acts laying an embargo, until the decision of the president of the United States be had thereupon.' Also, that in and by a certain circular letter from the treasury department of the United States, dated the 6th of May, 1808, and addressed to the said Simeon Theus, as collector aforesaid, he is instructed as follows (here follows the circular instructions of Mr. Gallatin). That the said Simeon Theus, collector as aforesaid, doth not detain the vessels as aforesaid, under the act aforesaid, because in his opinion there is no intention in the parties aforesaid to violate or evade any of the provisions of the acts laying an embargo, but that he detains them under the instructions he has received in the letter aforesaid, and which as a public officer he thinks he is bound to obey. That being unwilling, on the one hand, to injure individuals, and, on the other, equally so, to commit a breach of his duty, he submits the question to the court, upon the cause above shown. Simeon Theus, Collector."

The case was then submitted without argument.

Before JOHNSON, Circuit Justice, and BEE, District Judge.

JOHNSON, Circuit Justice. The affidavit, upon which this motion is founded, states, that the ship Resource is ballasted with 140 barrels of rice, under a load of cotton, and is destined for the port of Baltimore. The collector, in his return to the rule, acknowledges, that he believes the port of Baltimore to be her real destination; and that, if he had no other rule of conduct but the 11th section of the act supplementary to the embargo act, he would not detain her; but urges in excuse, for refusing her a clearance, a letter from the secretary of the treasury. It is not denied that if the petitioners be legally entitled to a clearance, this court may interpose its authority, by the writ of mandamus, to compel the collector to grant it. The only questions, therefore, will be, whether the section of the act alluded to, authorizes the detention of the vessel; and if it does not, whether the instructions of the president, through the secretary of the treasury, unsupported by act of the congress, will justify the collector in that detention. On the latter question there can be no doubt. The officers of our government, from the highest to the lowest, are equally subjected to legal restraint;* and it is confidently believed that all of them feel themselves equally incapable, as well from law as inclination, to attempt an unsanctioned encroachment upon individual liberty. In the letter alluded to, Mr. Gallatin speaks only in the language of recommendation, not of command; at the utmost the collector could only plead the influence of advice, and not the authority of the treasury department in his justification. In the act of congress there is no ambiguity. The object is to prevent evasions of the embargo act, by vessels which sail ostensibly for some port in the United States, when their real destination is to some other port or place. The granting of clearances is left absolutely to the discretion of the collector; the right of detaining in cases which excite suspicion is given him, with a reference to the will of the executive. Congress might have vested this discretion in the president, the secretary of the treasury, or any other officer, in which they thought proper to vest it; but, having vested the right of granting or refusing in the collector, with an appeal to the president only in case of refusal—the right of granting clearances remains in him unimpaired and unrestricted.

It does not appear to us that the instructions from the treasury department are intended to reach this case. The recommendation not to grant clearances on shipments of provisions appears by the context to be restricted by two provisos, evidently pointed at by the reasons assigned for that recommendation. First, if intended for a place where they are not wanted for consumption, or we suppose, where supplies of the same article can be had from the state or neighbourhood in which such place is situated. Secondly, for a port that usually exports that

article. Now with regard to the article of rice, it is impossible to say how much the city of Baltimore will want for its consumption, as they have no internal supplies, and as the three Southern states alone are exporters of that article. Shipments of rice from Baltimore to Charleston might create suspicion, but not such shipments from Charleston to Baltimore. We are of opinion that the act of congress does not authorize the detention of this vessel. That without the sanction of law, the collector is not justified by the instructions of the executive, in increasing restraints upon commerce, even if this case had been contemplated by the letter alluded to; but that from a temperate consideration of that letter, this case does not appear to come within the spirit and meaning of the instructions which it contains.

A mandamus was ordered accordingly, commanding the collector to grant a clearance to the Resource.

Letter from the attorney general to the president of the United States, relative to the proceedings of the circuit court of South Carolina in the case of The Resource:

Sir: I have read and considered the papers and documents referred to me relative to the case of a mandamus, issued by the circuit court of the United States for the district of South Carolina, to compel the collector of the port of Charleston to grant clearances to certain vessels. The first question that naturally presents itself, is, whether the court possessed the power of issuing a mandamus in such a case. A mandamus in England is styled a "prerogative writ," and in that country is awarded solely and exclusively by the court of king's bench. The constitution and laws of the United States establish our judicial system. To these we must refer, in order to ascertain the jurisdiction of the respective courts, the extent of their powers, and the limits of their authority. The "act to establish the judicial courts of the United States," passed the 24th September, 1789 [1 Stat. 73], declares and defines the jurisdiction of the several courts thereby created, and among these the jurisdiction of the circuit courts. Upon a careful and attentive perusal, it will be found to delegate to the circuit courts no power to issue writs of mandamus. In the thirteenth section of that act, this authority is expressly given to the supreme court of the United States. In like manner it is specially provided by the act of the 3d February, 1801, that the supreme court shall have power to issue writs of mandamus. This last act having been repealed and the former revived, the question must rest on the true construction to be given to the original act. The eleventh section defines and limits the jurisdiction of the circuit courts. It is specially appropriated to this single object. There are no expressions in this section which can fairly be interpreted to confer the authority of issuing writs of mandamus; nor can the power be either implied or inferred from any language it contains. It is true, the proceeding by mandamus in England is on the crown side, as it is termed, of the court of king's bench. But it is a prosecution relative to a civil right to enforce it, and to obtain prompt redress; and not to punish criminally as in the case of an offence. The provision therefore that the circuit courts "shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where the act otherwise provides," &c. cannot warrant such a proceeding. Besides, the same act does provide that the supreme court shall issue writs of mandamus. An authority given, perhaps, because its jurisdiction extended all over the United States. The fourteenth section, immediately succeeding that which gives this authority, in plain and positive terms, to the supreme court, solely, if not exclusively, (and the affirmative frequently, and in this case justly, I think, implies a negative) contains the following provision. "All the before mentioned courts of the United States, (including the supreme as well as the circuit and district courts) shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by the statute, which may be necessary for the exercise of their respective jurisdictions." This clause cannot affect the case, I conceive. The mandamus is a writ which, we have seen, is specially provided for by law. This section was evidently not designed to give any additional jurisdiction to either of the courts, but merely the means of executing that jurisdiction already granted to them respectively. The issuing of a mandamus in the case under consideration was an act of original jurisdiction. Precisely as much so, as it would have been in the supreme court, to have exercised the power in the case of Marbury v. Madison [1 Cranch (5 U. S.) 137]. In that case the supreme court declared, that to issue a mandamus to the secretary of state, would be, to exercise an original jurisdiction, not given by the constitution; and which could not be granted by congress. The constitution having enumerated or declared the particular cases in which the supreme court should exercise original jurisdiction, though there were no negative expressions, the affirmative, they considered, implied them. It was on this principle alone they refused to exert their authority.

The practice, I believe, has uniformly been, so far as I can trace it from the books of reports that have been published, or from recollection and experience on the subject, to apply to the supreme court for a mandamus. This court it is true have determined not to issue the writ, when it would be an act of original jurisdiction. But this I apprehend, can afford no ground for the circuit court's assuming an authority which the supreme court have declined, unless by a legislative act the

power be delegated to them. This power is not inherent nor necessarily incidental to a court of justice, even of general jurisdiction. For in England but a single one, of several courts having general jurisdiction, possesses the authority. Neither the chancery, the common pleas, nor the exchequer, though classed among the king's superior courts and having general jurisdiction over the realm, can exercise this power. It is the peculiar privilege of the king's bench alone. Our circuit courts have merely a local and subordinate jurisdiction. Their analogies therefore with the four courts of England, having general and superior jurisdiction, must be very weak, and still weaker their claim to the preeminent distinction of the king's bench, which possesses solely the exclusive authority of issuing the mandamus. For these reasons I am induced to believe from the best consideration I have been enabled to give the subject, that the circuit court of South Carolina had no authority to issue a mandamus to the collector of the port of Charleston.

It is scarcely necessary to remark, that when a court has no jurisdiction, even consent will not give it; and much less will the mere tacit acquiescence of a party, in not denying their authority. Independent of this serious and conclusive objection to the proceeding adopted by the court there are others entitled to consideration. For supposing the court did not err in the exercise of jurisdiction, and admitting the British doctrines on the subject without restriction or limitation could be extended to this country, there are legal exceptions to the course they have pursued, supported by English authority. In the first place, the law gave the collector complete discretion over the subject. According to the opinion he might form, he possessed competent authority to grant or refuse a clearance. And I apprehend where the law has left this discretion in an officer, the court, agreeably to the British practice and precedents, ought not to interpose by way of mandamus. Secondly. In this case there was a controlling power in the chief magistrate of the United States. There was in fact, an express appeal given to the president by the very words of the act of congress, which authorizes the collectors to detain vessels "until the decision of the president of the United States be had thereupon." By the mandamus the reference to the president is taken away; and the collector is commanded to clear the vessel without delay. Agreeably to the English authorities under such circumstances, it is not the course I believe to issue a mandamus. Thirdly. The parties, it seems, had their legal remedy against the collector; and it is not usual if not unprecedented, to grant a mandamus in such a case. Fourthly. A mandamus is not issued to a mere ministerial officer to compel him to his duty. The court will leave the parties to their remedy by action, or even by indictment. In England, in a very late case, they decided that they would not grant a mandamus to a ministerial officer, such as the treasurer of a county; for the proper remedy was by indictment. I am aware of a precedent, in which it seems to be admitted, that a mandamus may issue to the commissioners of excise, to compel them in a proper case to grant a permit. This case is more analogous to the one now before us than any other I have been able to discover, after a diligent research. But in this instance the point was not made, nor the question argued. Besides the commissioners of excise in England form a board for superintending the collection of that branch of the revenue. They constitute in many respects a court of inferior jurisdiction, which in particular cases takes cognizance in a summary way, of offences against the excise laws. A mandamus might be granted to such a tribunal when it would not be issued to a mere ministerial officer, acting under them in the collection of the revenue.

It results from this view of the subject, that the mandamus, issued by the circuit court for the district of South Carolina, was not warranted by any power vested in the circuit courts by statute, nor by any power necessarily incident to courts, nor countenanced by any analogy between the circuit courts, and the court of king's bench: the only court in that country possessing the power of issuing such writs. And it further appears, that even the court of king's bench, for the reasons assigned, would not agreeably to their practice and principles, have interfered in the present case by mandamus. It might perhaps with propriety be added, that there does not appear in the constitution of the United States any thing which favours an indefinite extension of the jurisdiction of courts, over the ministerial officer within the executive department. On the contrary, the careful discrimination which is marked between the several departments should dictate great circumspection to each, in the exercise of powers having any relation to the other. The courts are indubitably the source of legal redress for wrongs committed by ministerial officers; none of whom are above the law. This redress is to be administered by due and legal process in the ordinary way. For there appears to be a material and obvious distinction, between a course of proceeding which redresses a wrong committed by an executive officer, and an interposition by a mandatory writ, taking the executive authority out of the hands of the president, and prescribing the course, which he and the agents of any department must pursue. In one case the executive is left free to act in his proper sphere, but it is held to strict responsibility; in the other all responsibility is taken away; and he acts agreeably to judicial mandate. Writs of this kind if made applicable to officers indiscriminately, and acts purely ministerial and executive in their nature, would necessarily have the effect of transferring the powers vested in one department to another department. If in a case

like the present, where the law vests a duty and a discretion in an executive officer, a court can not only administer redress against the misuse of the authority, but previously direct the use to be made of it, it would seem that under the name of a judicial power, an executive function is necessarily assumed, and that part of the constitution perhaps defeated, which makes it the duty of the president to take care that the laws be faithfully executed. I do not see any clear limitation to this doctrine, which would prevent the courts from compelling by mandamus all the executive officers; all subordinate to the president at least, whether charged with legal duties in the treasury or other department, to execute the same according to the opinion of the judiciary and contrary to that of the executive. And it is evident that the confusion arising will be greatly increased by the exercise of such a power by a number of separate courts of local jurisdiction, whose proceedings would have complete and final effect, without an opportunity of control by the supreme court. So many branches of the judiciary, acting within their respective districts, their courses might be different; and different rules of action might be prescribed for the citizens of the different states, instead of that unity of administration which the constitution meant to secure by placing the executive power for them all, in the same head. What, too, becomes of the responsibility of the executive to the court of impeachment, and to the nation? Is he to remain responsible for acts done by command of another department? or is the nation to lose the security of that responsibility altogether? From these and other considerations, were this branch of the subject to be pursued, it might be inferred, that the constitution of the United States, by the distribution of the powers of our government to different departments, ascribing the executive duties to one, and the judiciary to another, controls any principles of the English law, which would authorize either to enter into the department of the other, to annul the powers of that other, and to assume the direction of its operations to itself.

These remarks are respectfully submitted to your consideration. They are made with due deference to the opinion of the court; with one of the judges constituting which, I am personally acquainted, and for whose character I feel the sincerest regard. Yours, very respectfully, (Signed) C. A. Rodney.

The President of the United States. July 15th, 1808.

Judge JOHNSON'S remarks on the publication of the attorney general's letter to the president, on the subject of the mandamus issued by the circuit court of South Carolina to the collector, in the case of The Resource:

Edgefield District, 26th August, 1808.

In a Charleston paper, received by the last mail, I have perused a letter addressed by the attorney general of the United States to the president, relative to the proceedings of the circuit court of South Carolina, in the case of The Resource. That the president should have consulted that officer upon a legal subject, is perfectly consistent with the relation subsisting between their respective stations; and as long as the result of that consultation was confined to the cabinet, there had occurred nothing inconsistent with the relation between the executive and judicial departments. But when that opinion is published to the world, under the sanction of the president, an act so unprecedented in the history of executive conduct could be intended for no other purpose than to secure the public opinion on the side of the executive and in opposition to the judiciary. Under this impression I feel myself compelled, as the presiding judge of the court, whose decision is the subject of the attorney general's animadversions, to attempt a vindication of, or at least an apology for that decision. So long as its merits were the subject of mere newspaper discussion, I felt myself under no concern about the opinion that the public might form of it. The official acts of men in office are proper subjects for newspaper remarks. The opinion that cannot withstand a free and candid investigation must be erroneous. It is true that a judge may, without vanity, entertain a doubt of the competency of some of the editors of newspapers to discuss a difficult legal question; yet no editorial or anonymous animadversions, however they may have been characterized by illiberality or ignorance, should ever have induced me to intrude these observations upon the public. But when a bias is attempted to be given to public opinion by the overbearing influence of high office, and the reputation of ability and information, the ground is changed; and to be silent could only result from being borne down by weight of reasoning or awed by power. I should regret exceedingly should I err in attributing to the president the publication of the attorney general's letter. I do so because, from the nature of the case, it is impossible to think otherwise. There is no reason to suppose that the attorney general would have published it at all; or at least not without the command or permission of the president. That the attorney general should have formed conclusions differing from those of the court, is the most natural thing imaginable. It proceeds from the assumption of erroneous premises. The writ of mandamus in a case analogous to that of The Resource is not provided for by law. The collector had not an unlimited discretion in granting or refusing a clearance. There was not a general appeal to the will of the chief magistrate. Nor does the court found its right to issue the mandamus upon an analogy drawn from the courts of Great Britain. Upon the affirmation of these propositions the opinion of the attorney general ap-

pears to be predicated. In addition to which he would seem to have misapprehended the purport of the decision of the supreme court in the case of Marbury v. Madison [1 Cranch (5 U. S.) 137], and to have drawn reasons from inconvenience, which may prove a great deal too much for the public security; and which have already met with the disapprobation of the supreme court in the before mentioned case. A concise history of the case of The Resource is indispensably necessary in pursuing the subject.

In order to prevent evasions of the laws prohibiting foreign intercourse, congress found it necessary to grant certain powers to the collectors, by which they might detain vessels, clearing out for a port of the United States, when their real destination was to some foreign port or place. For this purpose was passed the following clause of the act of April 25th of the present year: "Sec. 11. And be it further enacted, that the collectors of the customs be and they are hereby respectively authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever in their opinions, the intention is to violate and evade any of the provisions of the acts laying an embargo, until the decision of the president of the United States be had thereon."

This clause, although from a superficial view it may seem otherwise, really authorizes no restraint whatever upon the commercial intercourse of the several states, or of any state within itself. It is not a vessel really bound from one port or place in the United States to another, that the collector is authorized to detain, for that is no violation of the embargo act; but those which are only ostensibly bound from one port to another, within the United States when their real destination is to some other port or place, or to do some act in violation of the laws imposing an embargo. I assume it as an incontestable proposition, that every inhabitant of the United States has a perfect right to carry on commerce from one port to another, unless restricted by law; that no officer of our government can legally restrict him in the exercise of that right, except in cases specified by law. I would as soon attempt to prove his right to the air that he breathes, or the food that he consumes, as to support these doctrines by a course of reasoning; nor is it less clear, that in all cases of uninterdicted commerce, the collector is bound to grant a clearance whenever the forms imposed by law have been complied with. It is the obligation on him correlative to the right of the citizen. Upon an attentive and candid perusal of the foregoing clause, (which is the only one upon this subject) it is impossible for the mind to refuse its assent to the following propositions: (1) That it gives no power to the president to order a detention in any case. (2) That it authorizes the collectors to detain in one specified case, and that only, viz. whenever, in their opinion, the intention is to violate, and evade any of the acts laying an embargo. (3) That the only case, in which the law authorizes the president to act upon the subject, is, when the collector having detained a vessel, a reference is made to the president for his decision on the correctness of the grounds of such detention. (4) That the discretion in granting clearances is absolute in the collector, in the first instance; and only results to the president in case of the collector's refusal. From which it will follow that the president could not prescribe to him a line of conduct in granting clearances which was inconsistent with his own judgment; and, in fact, it will be found that the only effect in granting the mandamus in the case of The Resource was to secure to the collector the exercise of the power vested in him by the foregoing section, and to the citizen the benefit of the collector's being released from a restraint which the law did not impose on him.

On the 6th May, 1808, the secretary of the treasury addressed to the collector of the port of Charleston the following letter: "Sir: I informed you in my letter of the 28th ultimo, that the president considered unusual shipments, particularly of flour and other provisions, of lumber and of naval stores, as sufficient causes for the detention of the vessel. Pot and pearl ashes and flaxseed, ought to have been added to the list; but he has given it in charge to me, to call your attention still more forcibly to that object; as it was the great and leading object of the legislature in giving the power of detention, he considers it his duty, in the execution of it, to give complete effect to the embargo laws. He recommends therefore that every shipment of the above articles, for a place where they cannot be wanted for consumption, should be detained," &c. &c.

The Resource was one of a number of vessels that were loaded and waiting in the port of Charleston, to sail as soon as the embargo should be raised; her cargo consisted of rice and cotton. About the month of June, it is well known that in that port the worm is peculiarly destructive to vessels' bottoms. This induced the merchants generally, about that time, to adopt the resolution to despatch their vessels to some Northern port, where they might escape the ravages of this destructive insect. Upon the collector's refusing to grant a clearance to any vessel, the cargo of which consisted in any part, however small, of provisions (pursuing the strict letter of his instructions) application was made to the court for a mandamus, on an affidavit stating the above facts; and a rule was granted without opposition. Upon the return of the rule the collector expressly declared that, in his opinion, the Resource had no intention to violate or evade any of the provisions of the acts laying an embargo, but urged the secretary of the treasury's letter to him, as the sole ground of his refusal

to grant a clearance. It is easy to perceive the embarrassment into which this officer was thrown. On the one hand, he must have been sensible of the impropriety of detaining a vessel on pretence of a suspicion which he did not and could not entertain; that the wanton and injurious exercise of even a legal discretion would subject him to damages; and that the amount, to which he must render himself liable in this case, was infinitely beyond any thing he was able to pay; as the merchants threatened to throw their vessels upon his hands. He may also have felt that sentiment of injury which affects the mind of every one upon the undue restriction of the exercise of his own faculties. But on the other hand, as he held his office absolutely at the will of the executive, acquiescence was necessary; although ruin threatened him, and no prospects of indemnity could possibly present themselves. In this situation he made his statement of the foregoing circumstances, and submitted the case to the court, through the district attorney, without argument. Upon the return of the rule, the court particularly called upon the United States' attorney, to say if he contested the power of the court to proceed by way of mandamus in the case before them. He replied that he could make no objection. The high respect in which that gentleman's talents and information are held would be at least an apology for any court's proceeding in that mode, upon his acquiescence. Under these circumstances, when every point was conceded, except whether the instructions of the president could authorize a detention in a case not comprised within the law of congress, the court did not, could not hesitate to decide that, to detain a vessel, because, in his opinion, her intention was to evade the embargo laws, when he avowed his opinion to be otherwise, was an absurdity in terms; that if the act of congress did not authorize the detention of the vessel, the instructions of the president could not sanction it; and as the remedy by an action for damages was very inadequate to the full vindication of the rights of the petitioner, a mandamus should issue. The court went further, and observed that the instructions, upon which the collector relied, did not appear to have been intended to reach the case before them; and if they did, they were only in the language of recommendation and not of command; so as to leave the collector still at liberty to exercise that discretion which the law had given him. But in these latter remarks, there is every reason to think that they misapprehended the intention of the executive; as the publication of Mr. Rodney's letter may be viewed as a full avowal that the case of The Resource was contemplated by the executive; and that a recommendation was expected to operate upon the dependent situation of the collector with the weight of a command. From which it would result, that every power, given to an officer removable at the will of the executive, is given to the executive.

In pursuing my remarks on the attorney general's letter, I feel an embarrassment, resulting from what I hope he will excuse me for denominating a want of precision of language. Jurisdiction in a case is one thing: the mode of exercising that jurisdiction is quite another. That the court possessed jurisdiction over the case between the parties before them, is admitted by the attorney general, when he supposes that the owner of the Resource may have maintained his action against the collector for an illegal detention. The language of his tenth paragraph supposes a total and absolute defect of jurisdiction; while that of some of the paragraphs preceding it seems to imply that the impropriety lay in the mode of process by which the court exercised that jurisdiction. To avoid, however, all ambiguity and the charge of misapprehension or misstatement of the argument, I will direct my observations to three points, which must embrace the whole subject: (1) The jurisdiction of the circuit court. (2) The power of that court to issue the mandamus, in the exercise of that jurisdiction. (3) The propriety of issuing it in the case of The Resource.

The jurisdiction of the court, as is properly observed by the attorney general, must depend upon the constitution and laws of the United States. We disclaim all pretensions to any other origin of our jurisdiction, especially the unpopular grounds of prerogative and analogy to the king's bench. That judicial power, which the constitution vests in the United States, and the United States in its courts, is all that its courts pretend to exercise. In the constitution it is laid down, that "the judicial power of the United States shall extend to all cases in law or equity, arising under this constitution and laws of the United States, and treaties made, or which shall be made," &c. The term "judicial power" conveys the idea, both of exercising the faculty of judging and of applying physical force to give effect to a decision. The term "power" could with no propriety be applied, nor could the judiciary be denominated a department of government, without the means of enforcing its decrees. In a country where laws govern, courts of justice necessarily are the medium of action and reaction between the government and the governed. The basis of individual security and the bond of union between the ruler and the citizen must ever be found in a judiciary sufficiently independent to disregard the will of power, and sufficiently energetic to secure to the citizen the full enjoyment of his rights. To establish such a one was evidently the object of the constitution. But to what purpose establish a judiciary, with power to take cognizance of certain questions of right, but not power to afford such redress as the case evidently requires? Suppose congress had vested in the circuit court a certain jurisdic-

tion, without prescribing by what forms that jurisdiction should be exercised; would it not follow that the court must itself adopt a mode of proceeding adapted to the exigency of each case? It must do so, or refuse to act. One thing, at least, cannot be denied: that the power of congress was competent to authorize the circuit court to issue the writ of mandamus. From this it would follow, that issuing that writ is a mere incident to the judicial power, and not in itself a distinct branch of jurisdiction; for the constitution nowhere expressly vests in the United States the power to issue that writ, or any other. And if a mere incident, I see no reason why it should not follow with the principal jurisdiction, when vested by congress in its courts. If it were necessary to appeal to analogy, to justify any exercise of jurisdiction, it would be easy to show that the supreme court of the United States bears a stronger analogy to the court of exchequer, or that of parliament, than the court of king's bench; and that if there exist any analogy between any of the courts of the United States and those of Great Britain, it is between the court of king's bench and the latter, and the circuit court of the former government; the union of criminal and civil, and of original and appellate jurisdiction, marks the similarity of the latter. But it is wholly unnecessary to recur to any other authority than what is given us by the constitution and laws of the United States, as the constitution defines in what cases, and between what description of persons our courts may exercise jurisdiction; and the form or mode of process is sufficiently settled by acts of congress. That description of cases, under which the present must be arranged, is, cases arising under the laws of the United States. If it be a question of right arising under the laws of the United States, it is one of those to which the judicial power of the United States extends, and for which they were bound to administer a remedy; not one that would mock the hopes and just expectations of the individual, but an adequate and efficient remedy. I deem it unnecessary to enter into a critical examination of the acts of congress on the question, whether jurisdiction in cases arising under the laws of the United States is delegated to the circuit courts. The inveterate exercise of that jurisdiction under the sanction of the supreme court is the authority I appeal to.

2. In considering the power of the court to issue the writ of mandamus in the exercise of its jurisdiction, the attorney general cannot demand greater fairness than to be met on his own principles. His argument is, that the power given to the circuit court relative to the issuing of writs (except as to two particularly named) extends only to writs not specially provided for by law. That the power to issue the writ of mandamus is by law vested in the supreme court, and therefore is provided for by law. Here nothing but my frequent experience of that gentleman's habitual candour prevents me from charging him with unfairness; or perhaps he really misapprehended the purport of the decision of the supreme court in the case of Marbury v. Madison [supra], as upon no other suppositions could he have used this argument. In that case the court did not decide, as the attorney general seems to suppose, that issuing a mandamus was an exercise of jurisdiction not within the scope of the judicial powers of the United States. On the contrary, they expressly declare the power and the propriety of the courts issuing it in many cases which may occur. But except in cases where a foreign minister or a state is a party, the supreme court is restricted to the exercise of an appellate jurisdiction; and its decision was, that the act of congress, so far as it was intended to vest that court with power to issue the writ of mandamus in a case partaking of the nature of original jurisdiction, was unconstitutional and void. A void law I presume is no law; and it would follow therefore that the writ of mandamus, in those cases of original jurisdiction, which cannot constitutionally be submitted to the supreme court, comes fully within the description of a writ not otherwise provided for by law. Certain it is that if the circuit court of this state could not issue this writ in the case of The Resource, there was no legal provision by which the benefit of it could have been extended to her owner. The supreme court could never have exercised jurisdiction over the question of right between the parties in that case, except upon appeal. Whatever suit or action was proper on the occasion, was by the constitution confined to the other tribunals in the first instance. But the right of the court to issue this writ does not wholly rest here. There is another act in force (although not to be found in Graydon's Digest) which appeared to authorize, nay to oblige us to issue the writ of mandamus. The act of congress, commonly called the process law, enjoins on the courts of the United States to conform their practice to that of the several states in which they sit. I am aware that in technical language the term "process" (which is the word used in that law) includes only those acts which take place between the institution and conclusion of an action. But whoever peruses this act, will find on the face of it strong reasons for indulging it with a construction conforming to the vulgar use of the term "process." In fact, it affords incontestable evidence that the legislature understood the term "process," as embracing the whole scope of judicial proceedings. The title of the act is, "an act to regulate judicial process in the courts of the United States"; and the first line of it mentions writs as a proceeding included under this general head. Executions also are objects of the act, as well as proceedings in the equity and admi-

ralty courts. The correct, legal and received construction of this act therefore is, that the forms and modes of administering justice, the remedies to be applied to the rights which are committed to our jurisdiction shall be such as are used and allowed in the supreme courts of the states over which we respectively preside. Now I do assert (and my opportunities of information on this subject will justify my pretending to some authority) that in a case analogous to that of The Resource, the mode of proceeding in the state courts of South Carolina is by mandamus. Thus then stood the case: The owner of the Resource had an unquestionable right to a clearance: a right which is acknowledged by the collector himself (and not even denied by the attorney general). He applies to the court to vindicate this right. That he was entitled to redress could not be doubted. In what form was that redress to be administered? The process law directs our inquiries to the practice of the state of South Carolina. By the practice of that state, the process is by mandamus. It is said, the party may have been left to his action for damages; but would this have been putting him in possession of his right? It would have been an arbitrary substitution of a compensation instead of his right; and both in practice and theory would not have amounted to complete justice. There are rights which perish in the violation. These will admit of no other remedy; nor will the law allow any other redress for the acts of mere individuals. But for rights which continue to exist, notwithstanding their violation, and the violation of which is committed under semblance of sovereign authority, the dignity of the government, as well as the security of the citizens, requires an additional remedy. If in the construction of the act last noticed, it should be thought that I have given it a latitude not intended by the legislature, my reply is, that I can discover no other construction that will not totally annihilate its operation. The act prescribes certain terms and modes of process; but it would be as rational to suppose the existence of form without substance, as that these forms and modes of process could be adopted without relation to the cases in which they are known and practised in the several states. Should the want of technical precision in these acts have involved the court in error, the reply is, that the introduction of philological correctness into our laws at some stage of their progress would save the courts much trouble and much odium. This might be done before they pass from the hands of the executive.

3. In considering the third and last question, viz. the propriety of issuing a mandamus in the case of The Resource, it will be found that the four grounds of the attorney general admit of a brief and very satisfactory answer. The first is, "that the law gave the collector complete discretion over the subject." The fact is otherwise. The discretion of the collector was limited to a particular case: that of his entertaining suspicion which he himself admits could not be entertained with regard to the Resource. Or it may be answered thus: the instructions of the executive deprived him of that discretion. The mandate of the court obliged him to act according to the dictates of his own judgment, to which the law of congress had committed the interest of his fellow citizens, and not surrender a right of judging, which must ever be entirely personal; and which we can never know by what motive congress may have been influenced in vesting in him, instead of any other officer of government. The second argument is, "that there was a controlling power in the chief magistrate of the United States." This is equally incorrect in the extent in which it has been laid down, and in which alone it would answer the purpose of the attorney general. The fact is, as has been before shown, that the power of the president to act upon the subject was confined to the particular case of a reference to him upon a previous detention by the collector; and did not authorize the president to prescribe to the collector in what cases he should detain. In cases where the collector had detained upon suspicion, on the dictates of his own judgment, the president could oblige him to discharge, but was not authorized to control him generally, in the exercise of the right of granting clearances in the first instance. Nothing was easier than for congress to have declared that the president should dictate generally to the collector upon this subject, if such had been their intention. This would have been giving the executive that latitude of power which was necessary to justify their instructions to the collector, but which cannot be extorted from the law under which they acted. With regard to the third argument, "that the parties had their legal remedy against the collector," I can assure the attorney general that it is both usual and precedented for courts to issue the writ of mandamus notwithstanding that circumstance, when that remedy is not adequate to the ends of justice and good government. In some cases, to save a party the necessity of pursuing a remedy in equity, or a remedy in its nature too tedious, this writ has been issued. The Case of Commissioners of Excise in 2 Term R. 381, of which the attorney general is aware (and with his own answer to which I think I perceive that he is not satisfied), might have convinced him that this argument could not be relied on; for there also the action for damages might have been maintained. The total inadequacy of this action to the ends of justice in this case will be strikingly perceived if we reflect on the impossibility of finding any criterion by which to estimate the loss consequent upon the disappointment of a mercantile adventure, and how very incompetent the collector must individually have been to discharge the immense amount

of damages which might have been awarded against him; especially as individuals could derive no indemnity from his bond to the government. Indeed the action for damages is, at best, but a poor dependence and but a substitute for more ample justice. The fourth and last ground relied on by the attorney general is, that the courts of Great Britain will not issue a mandamus to a mere ministerial officer, such as a county treasurer, to compel him to a discharge of duty. This was the case of The King v. Brestow, reported in 6 Term R. 168; but surely in order to point the argument founded on this case it was incumbent on the attorney general to have shown what analogy exists between the two officers of county treasurer and collector of the port of Charleston; and as the reason of the decision in The King v. Brestow was that the treasurer was punishable by indictment, it would seem that it should be shown by what authority this court could have proceeded against the collector in a similar manner. Had such a power existed in the court it would still have been a farce to institute a prosecution for an offence which the president could and most certainly would have pardoned even before conviction. That an office is merely ministerial, is in fact no objection to the issuing of a mandamus; nor is it made, so far as I can recollect (for I have not the case before me), in The King v. Brestow. It would be difficult to find a reason why, if the court can issue this process at all against public officers, it should not compel them to do justice to the citizens in a ministerial as well as a judicial capacity. In cases of direct subordination or accountability to some specified jurisdiction, the court will not interpose the authority of this writ. That circumstance removes the necessity for lending its aid; and it is against the officer of government that it issues, not against the mere agent of that officer, whose acts are the acts of his principal.

As the attorney general lays much stress on the idea of the collector's being a mere ministerial officer, it is to be regretted that this argument was not attended with some analysis or exposition of that term. I know of no precise technical signification attached to the word "ministerial," except in contradistinction to "judicial." In its ordinary meaning it is rendered "attendant, acting at command, acting under superior authority." In neither of these senses is it properly applicable to the office of collector. His functions are among the most important exercised by any officer of the United States, and call for the frequent exercise of his own will, judgment and discretion. He is at least as far from being merely ministerial, as the commissioners of excise. If the office of the collector be merely ministerial (in the sense in which the attorney general appears to use the term) he must be the officer of the president or the treasury department, and not of the United States. The president or secretary of the treasury must be individually and personally responsible for his civil acts. But the contrary is abundantly evident; for his duties are immediately assigned him by law. According to a just construction of that law, he must frame his conduct; and no instructions from the president or secretary of the treasury, (although founded on the attorney general's opinion) can be pleaded by him in justification, except in the single instance of an action on his own bond by the government. At least, so far as his duties are assigned him by law, and not left to be assigned him by the treasury or executive department, his office is not merely ministerial. Some other observations of the attorney general remain to be noticed, viz. that in giving redress by the process of mandamus, the courts may extend their claim to jurisdiction, to a general usurpation of power over the ministerial officers in the executive department; that it is a mode of proceeding which takes away from the government the benefit of appeal, and interferes with the responsibility to which officers of government are subject by impeachment. With regard to the first of these observations, it is evident that the attorney general mistakes the object against which his complaint should be directed. The courts do not pretend to impose any restraint upon any officer of government, but what results from a just construction of the laws of the United States. Of these laws the courts are the constitutional expositors; and every department of government must submit to their exposition; for laws have no legal meaning but what is given them by the courts to whose exposition they are submitted. It is against the law, therefore, and not the courts, that the executive should urge the charge of usurpation and restraint: a restraint which may at times be productive of inconveniences, but which is certainly very consistent with the nature of our government: one which it is very possible the president may have deserved the plaudits of his country for having transcended, in ordering detentions not within the embargo acts, but which notwithstanding it is the duty of our courts to encounter the odium of imposing. Let us take this argument together with that which relates to the liability of officers to impeachment, and some others which are used by the attorney general, into one view; and to what conclusions do they lead us? The president is liable to impeachment; he is therefore not to be restrained by the courts. The collector and every other officer, with equal propriety, who holds his office at the will of the president, are his agents, mere ministers of his will; therefore they are not to be restrained by the process of the courts. The power given to them is power given to him; in subordination to his will they must exercise it. He is charged with the general execution of

the laws; and the security of the citizen lies in his liability to impeachment, or in an action for damages against the collector. This would indeed be an improvement on presidential patronage. It would be organizing a band, which in the hands of an unprincipled and intrepid president (and we may have the misfortune to see such a one elevated to that post) could be directed with an effect, but once paralleled in history. If these arguments have any force at all, as directed against the correctness of the circuit court's issuing the writ of mandamus, they would have equal weight to prove the impropriety of permitting them to issue the writ of habeas corpus; which is but an analogous protection to another class of individual rights, and might be urged to show that the whole executive department, in all its ramifications, civil, military and naval, should be left absolutely at large, in their conduct to individuals. What benefit results to the ruined citizen from the impeachment of the president, could we suppose it in the power of any individual to effect it? or what security from an action against a public officer whose circumstances may be desperate? But such is not the genius of our constitution. The law assigns every one his duty and his rights; and for enforcing the one and maintaining the other, courts of justice are instituted. When a late president took upon him to advise and request an officer of the United States to do an act relating to foreign intercourse, which the people of the United States thought ought to have been left to that officer's own judgment, it is well remembered what a general sensation it excited; yet the general duty of the executive, to superintend the foreign intercourse of the United States, was just as strong a reason to induce the president to think himself authorized to dictate, or at least advise in that case, as the general duty to see the laws executed was in this.

The argument drawn from the liability of the officers of government to impeachment, I cannot help thinking unhappily applied in another view. If an officer attempt an act inconsistent with the duties of his station, it is presumed that the failure of the attempt would not exempt him from liability to impeachment. Should a president head a conspiracy for the usurpation of absolute power, it is hoped that no one will contend that defeating his machinations would restore him to innocence. If, in the present instance, the owner of the Resource had been ordered to be hanged, instead of ordering his vessel to be detained, and the courts of this district had rescued him from executive power, it is presumed that the attorney general would not contend, that the liability to impeachment was done away; although he would find no difficulty in showing that it was a case analogous to that of the mandamus: of the violation of that careful discrimination which is marked betwen the several departments by the constitution. The objection, "that this mode of proceeding takes away the right of appeal," is but slightly touched upon by the attorney general; and probably, because, in revolving the subject, he perceived that it is no objection to the exercise of jurisdiction in the circuit courts of the United States, that there is no appeal from their decisions; as they actually possess and exercise a very extensive jurisdiction without appeal. If congress thought proper, they could prescribe a form of appeal from those courts to a higher tribunal in cases of mandamus, habeas corpus, injunction in equity, or any other summary remedy. I do not know that they could, constitutionally, vest this appellate jurisdiction in the attorney general; but they certainly could in the supreme court. Some may think that this complaint, of the loss of the right of appeal, might more properly have been heard from another quarter. Congress thought that they had given the merchant the security of an appeal in case of unreasonable detention by the collector. But this benefit must, at least, have been impaired when the court to which that appeal was given, not only prejudicated every case, but on the ground of its appellate jurisdiction, swallowed up the power of the court of the first resort.

I will dismiss this subject with two additional remarks. The courts of the United States never have laid claim to a controlling power over officers vested by law with an absolute discretion, not inconsistent with the constitution; for in such a case, the officer is himself the paramount judge and arbiter of his own actions. Nor would they, for the same reason, undertake to control the acts of an officer who is a mere agent of the executive or any other department, in the performance of whatever may be constitutionally, and is by law, submitted to the discretion of that department; for in that case, the process of the court should be directed to the head of the department, or it should not issue at all. In such cases there is an evident propriety in leaving an injured individual to his action for damages; as it is only upon evidence of express malice or daring disregard to propriety, that this action could be maintained. In such a case, the authority to act is complete; but the motive is censurable. The courts will not interfere to prevent the act; because the law authorizes it. But as the law did not authorize it for individual oppression, they will give damages to the individual who suffers by the wanton exercise of a legal power. This subject was very fully considered in the case of Marbury v. Madison [supra]; and to pursue it further, I should do little more than repeat the words of the court in that case. The discrimination between the cases in which a mandamus might, and might not issue to the secretary of state, will point out to those

who consider it, the limitation to this doctrine in the idea of the judiciary.

Had the collector, in his return to the rule of court, made a question of their jurisdiction, the grounds upon which the court assumed it, would have been before the public; and the attorney general would not have had to pass an opinion upon a decision, with the grounds of which he was unacquainted; or, had the collector merely set forth the act of congress, and declared that it was in pursuance of that law, that he caused the detention of the ship in question, the court must have refused the mandamus, because he would then have claimed that exercise of discretion which the law vested in him; and as he was accountable only to the president for his motives, there would have been no difficulty, by due management between those officers, to have eluded the process of the court. With this mode of managing a difficult affair, the collector was not totally unacquainted; for something similar to it had been done in the Case of Bollman the winter preceding. This quiet submission to judicial decision in the first instance had for its object the obtention of a legal sanction for the collector's acquiescence in the recent measures of the executive, or a legal exemption from it. Either way the judiciary had to encounter responsibility and censure. It is very possible that the court may have erred in their decision. It is enough, however, and all that a judge, who has understanding enough to be conscious of his own fallibility, can pretend to, that there existed grounds at least specious for the issuing of the mandamus. Though the laws had not vested the power, the submission of the officers of government would, at least, excuse the act of the court. There never existed a stronger case for calling forth the powers of a court; and whatever censure the executive sanction may draw upon us, nothing can deprive us of the consciousness of having acted with firmness, impartiality and an honest intention to discharge our duty. Indeed there is one remark relative to the attorney general's letter, which cannot have escaped the notice of the most superficial observer. The principal question, that on which it would seem that the executive was most interested to secure the public approbation, viz. the legality of the instructions given to the collector, is completely put aside; while the public attention is fixed upon another more abstruse and admitting of a greater variety of opinion. It may be possible to prove the court wrong in interposing its authority; but certainly establishing the point of their want of jurisdiction will not prove the legality of the instructions given to the collector. The argument is not that the executive have done right, but that the judiciary had no power to prevent their doing wrong. I cannot conclude without noticing the very obliging manner in which the attorney general concludes his letter. I hope he is sensible what a distinguished place he possesses in the esteem of that individual of the judges of this circuit, with whom he is personally acquainted. It is not the giving of his opinion, which has called forth this reply, but the publication of it.

These remarks have been withheld from the press for several weeks, from no cause but the extreme repugnance that I feel at agitating, in this manner, a question which I am sensible might, with much more dignity and relative delicacy, have been disposed of in another mode. William Johnson, Jun.

Case No. 5,421.

GILCHRIST v. LITTLE ROCK.

[1 Dill. 261.] [1]

Circuit Court, E. D. Arkansas. 1871.

MUNICIPAL BONDS ISSUED FOR RAILROAD STOCK.

1. A bona fide holder of the negotiable bonds of a municipal corporation, having express and unrestricted authority to issue them, may recover thereon, although made payable at an earlier date than directed in the ordinance of the city relating to the mode of executing them.

2. The federal court in an action by the bona fide holder of negotiable bonds, issued by a municipality of the state under express legislative authority, declined, under the circumstances and for the reasons stated, to overthrow, at the instance of the defendant, the legislative act, on the ground that it was in conflict with the state constitution.

[Cited in Shelley v. St. Charles County, 17 Fed. 912.]

Action on negotiable bonds and coupons issued by the city of Little Rock in payment for stock subscribed by the city in a railroad company. An act of the legislature of the state authorized the subscription, and the issue of bonds, and did not prescribe the time for which they should run. The bonds are dated June 1, 1859, and contain a recital that they are issued and executed in pursuance of law, and an ordinance of the city passed on the 20th day of March, 1855. The bonds are payable on or before July 1, 1870. The ordinance of March 20, 1855, directed the bonds to be made "payable fifteen years after the date thereof," and seemed to contemplate an immediate issue. But the act of the legislature authorizing their issue was not passed until 1859, whereupon the city (May 19, 1859) passed an ordinance "to revive and put in force" the ordinance of March 20, 1855, and ordering the "mayor of the city to cause to be filled up and executed 100 bonds of this city for $1,000 each as provided in the ordinance of March 20, 1855," &c. The bonds were accordingly issued and sold, but were made payable on or before July 1, 1870, as before stated. The cause was submitted on a demurrer to pleas raising the questions below decided.

Watkins & Rose, for plaintiff.
Mr. Warwick, for defendant.

DILLON, Circuit Judge, delivering orally the opinion of the court. In substance it was

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

held, 1: That the bonds were not void in the hands of the plaintiff, on the ground that they were made payable at a shorter date than fifteen years. This objection does not go to the question of power; but is at most an irregularity or a failure to comply with directory provisions of the ordinance. Since the act of the legislature did not prescribe the time for which the bonds were to run, but left that to the corporation, bonds issued by the corporation payable at a date earlier than that named in the ordinance were binding upon it, certainly so when such bonds had been sold and were in the hands of innocent holders for value.

Held, 2: That in the absence of any decision of the supreme court of the state upon the question of the constitutionality of the legislation authorizing municipal indebtedness and taxation to pay for stock in railway companies, and considering the state of the adjudications upon that subject in the different states, and particularly the course of decision in the supreme court of the United States upon the liability of corporations issuing such bonds, the court, whatever might be their individual opinion on the general question, or as to how it should be decided in the state tribunals, would not (under these circumstances), hold the bonds to be unconstitutional. The court observed that the present weight of the authority was, perhaps, in favor of the power of the legislature, and it was not befitting that the national court should, on a subject respecting which so much doubt exists in the professional and judicial mind, declare to be unconstitutional legislation, and to overthrow a legislative policy which had never been questioned in the tribunals of the state, especially when the question was presented to it in action by a bona fide holder of the bonds.

Judgment for plaintiff.

NOTE. In Ranlett v. Leavenworth [Case No. 11,569] the circuit court of the United States for the district of Kansas, at the May term, 1871 (present Miller and Dillon, JJ.), prior to the decision of the supreme court of Kansas affirming the constitutionality of such bonds, declined for reasons substantially the same as those stated above, to pronounce the bonds held by the plaintiff (a bona fide holder) to be void for the want of authority in the state legislature, under the state constitution, to authorize their issue. As to the other point, it may be observed that the courts, while differing on the constitutional question, concur with great unanimity in holding that there is no implied authority in municipal corporations to take stock in railway or manufacturing enterprises, and to levy taxes, or borrow money to pay bonds or debts thus incurred; power of this kind must be expressly conferred. City of Aurora v. West, 22 Ind. 88; Starin v. Genoa, 23 N. Y. 439, 455; City of Atchison v. Butcher, 3 Kan. 104; City of Bridgeport v. Housatonic R. R. Co., 15 Conn. 475; Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676; Nichol v. Mayor, etc., of Nashville, 9 Humph. 252; City of St. Louis v. Alexander, 23 Mo. 483; Jones v. Mayor, 25 Ga. 610. As to manufacturing and private enterprises: Cook v. Sumner Spinning & Manuf'g Co., 1 Sneed, 698; Clark v. Des Moines, 19 Iowa, 199.

A municipal corporation may successfully defend against a bond, though negotiable in form, and in the hands of innocent purchasers, on the ground that its officers or agents had no power by law to issue it. This sound, safe, and true rule of law has had the uniform approval of the state courts (City of Aurora v. West, 22 Ind. 88, 503; City of St. Louis v. Alexander, 23 Mo. 483; Starin v. Genoa, 23 N. Y. 439; Mercer Co. v. Pittsburgh & E. R. Co., 27 Pa. St. 389; Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 83; Supervisors of Marshall Co. v. Cook, 38 Ill. 44; State v. Commissioners of Hancock Co., 11 Ohio St. 183), and has recently received the express sanction of the supreme court of the United States (Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676).

But no favor is given where bonds, negotiable in form, are in the hands of bona fide holders, to mere irregularities in their issue not going to the question of the power to issue or contract. Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539; Gelepcke v. Dubuque, 1 Wall. [68 U. S.] 175; Moreau v. Commissioners, 2 Black [67 U. S.] 722; Bissell v. Jeffersonville, 24 How. [65 U. S.] 287; Butz v. Muscatine, 8 Wall. [75 U. S.] 575; Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 83; Commissioners of Knox Co. v. Nichols, 14 Ohio St. 260; Myer v. Muscatine, 1 Wall. [68 U. S.] 384, 393; Van Hastrup v. Madison, Id. 291; Butler v. Dunham, 27 Ill. 474. Remedy of holder: Riggs v. Johnson Co., 6 Wall. [73 U. S.] 166; Welch v. Ste. Genevieve [Case No. 17,372]; Chicago, B. & Q. R. Co. v. Otoe Co. [Id. 2,667].

GILCHRIST, The GEORGE. See Case No 5,333.

Case No. 5,422.

In re GILDAY.

[7 Ben. 491;[1] 11 N. B. R. 108.]

District Court, S. D. New York. Nov., 1874.

COMPOSITION IN BANKRUPTCY—CALCULATING A MAJORITY.

In calculating a majority of creditors who approve of a composition, under the 14th section of the bankruptcy amendment act of June 22, 1874 [18 Stat. 178], creditors whose debts do not exceed $50, are to be reckoned in calculating the majority in value, but are not to be reckoned in calculating the majority in number.

[In bankruptcy. In the matter of John B. Gilday.]

Ulman & Remington, for bankrupt.

BLATCHFORD, District Judge. This is a question arising in proceedings for a composition. The bankrupt has 13 creditors whose debts are each over $50, and amount, in all, to $3,345.14. He has 5 other creditors whose debts are each not over $50, and amount, in all, to $146.51. The total debts of the 18 creditors amount to $3,491.65. The resolution for composition was duly adopted by a majority in number and three-fourths in value of the creditors of the debtor assembled at the first meeting. The resolution has been confirmed by the signatures of the debtor, and of 11 of the 13 creditors whose

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

debts are each over $50, the debts of such 11 creditors amounting to $3,155.23. The resolution has also been confirmed by the signature of one of the 5 creditors whose debts are each not over $50, the debt of such one creditor being $34.43. The debts of the 12 creditors who have signed in confirmation amount to $3,189.66.

The statute provides that the resolution "shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor;" and that, "in calculating a majority for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number."

The bankrupt has 18 creditors in number. Two-thirds in number of 18 creditors is 12. To make up the 12 requires the creditor whose debt is $34.43. Therefore, in making up two-thirds in number, taking 18 as the whole, one creditor whose debt does not exceed $50 is counted in the two-thirds. The bankrupt contends, that, if the 5 creditors whose debts do not exceed $50 each are to be reckoned as forming part of the whole number of which two-thirds is to be taken, so that such whole number is 18, then, as such of the 5 as do not sign in confirmation necessarily form part of the minority of one-third, any one of the 5 who signs in confirmation must be reckoned as forming part of the majority of two-thirds. If the 5 are to be excluded altogether, leaving 13 as the whole number, being the 13 whose debts each exceed $50, then, as 11 of those 13 have signed in confirmation, the necessary two-thirds in number of the 13 have signed. The converse of the view contended for by the bankrupt is, that the resolution must be confirmed by the signatures of two-thirds, or 12, of the entire 18, and that each one of the 12 must be a creditor whose debt exceeds $50, in which case this resolution has not been duly confirmed.

In the expressions, "in calculating a majority," and "the majority in value" and "the majority in number," in the statute, the word "majority" refers to and embraces everything previously spoken of in the section as a result to be arrived at by calculation. It embraces the "majority in number" of the creditors assembled at the first meeting. It embraces the "three-fourths in value" of such creditors. It embraces the "two-thirds in number" of all the creditors. It embraces the "one-half in value" of all the creditors. In making all the calculations for the purposes of the composition, whether it be to see whether a majority in number of the creditors assembled at the first meeting have passed the resolution, or whether three-fourths in value of such creditors have passed it, or whether two-thirds in number of all the creditors have confirmed it, or whether one-half in value of all the creditors have confirmed it, "creditors whose debts amount to sums not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number."

But the question remains, as applicable to the present case—what is meant by not reckoning "in the majority in number" (that is, in the two-thirds in number, necessary to confirmation), creditors whose debts do not each exceed $50? There must be two-thirds in number of all the creditors. Does the statute mean, that the creditors whose debts do not exceed $50 each shall not be reckoned in or as part of the necessary two-thirds, such necessary two-thirds being two-thirds of all the creditors, as well those whose debts do not exceed $50 each as those whose debts do? Or does the statute mean, that, "in calculating a majority," that is, in making the calculation to see whether the two-thirds in number of all the creditors have signed the composition, creditors whose debts do not exceed $50 each shall not be reckoned in any part of the process of calculating, whether as part of the whole number of creditors, or as part of the necessary two-thirds in number?

If it should be held, that, in ascertaining the number of all the creditors, those having debts not exceeding $50 each must be reckoned, while in computing the assenting two-thirds of such whole number those having debts not exceeding $50 must not form part of such two-thirds, it might happen that no one of the creditors would have a debt exceeding $50. There would be numerous creditors, but, as no one of them could be reckoned as forming part of the two-thirds, the assent of two-thirds in number could never be obtained. Or, the numbers in the present case might be reversed. There might be 13 creditors with debts not exceeding $50 each, and 5 with debts exceeding $50 each. There would be 18 creditors in all, yet only 5 could ever be counted in the two-thirds, and thus there never could be the assent of two-thirds. The language of the statute is fully satisfied by a construction which avoids such a result. The meaning of the statute is, that, "in calculating a majority," creditors whose debts do not exceed $50 each shall be reckoned in calculating the majority in value, but shall not be reckoned in calculating the majority in number. It requires no strained reading of the language to insert the word "calculating," in each instance, between the word "in" and the words "the majority." Such is the sense, if the entire clause be read as a whole, without the insertion of the word "calculating" in those places, and the insertion of that word only makes more evident what is really the meaning of the clause as a whole.

As, in this case, the number of all the creditors to be reckoned was 13, because there were only 13 whose debts exceeded $50 each, and as 11 of those 13 signed in confirmation, the resolution was duly confirmed by the

signatures of two-thirds of the 13, and the proper order will be entered calling the second meeting of the creditors.

Case No. 5,423.

In re GILE.

[5 Law Rep. 224; 1 N. Y. Leg. Obs. 87.]

District Court, D. Vermont. July 25, 1842.

BANKRUPTCY — WITHDRAWAL OF PETITION AFTER DECREE– ASSENT OF ASSIGNEE.

1. A voluntary petition for a decree of bankruptcy cannot be withdrawn and further proceedings stayed, after a decree of bankruptcy has been made, without the concurrence of all whose interests may be affected.

2. It seems, that the assent of the assignee to such a course, is not absolutely necessary in all cases.

The petitioner [John Gile] having been declared a bankrupt on the twenty-fourth of May last, on his own application, now filed a petition praying, for the reasons therein set forth, that the decree of bankruptcy might be set aside and all further proceedings stayed.

PRENTISS, District Judge. At the last May term of the court, applications were made for leave to withdraw petitions which had been filed for the benefit of the bankrupt act [of 1841 (5 Stat. 440)], and upon which orders of notice had been issued and published for a hearing at that time. The applications were granted, and the petitions ordered to be dismissed. Other applications of a like nature, since presented, have been disposed of in the same way. In neither of the cases was there any appearance on the part of any of the creditors; and as to the power or right of the court, under such circumstances, to dismiss a petition, for good reasons, on motion of the petitioner, before a decree of bankruptcy, I entertained no doubt whatever. But the application in the present case, being after a decree of bankruptcy has passed and intervened, presents an entirely new and different question. By the decree, all the property and rights of property of the bankrupt have passed from him and become vested in the assignee, for the benefit of his creditors. The effect of setting aside the decree would be to divest the assignee of the property and restore it to the bankrupt; and I do not see how this can be done without the concurrence of all whose interests may be affected by it. If the consent of the assignee and the creditors is obtained, there would seem to be, on principle, no good objection to the proceeding; for no one else can have any possible interest in the matter. I believe there is no instance in the English practice, where a commission of bankruptcy has been superseded, on application of the bankrupt, in any case at all analogous to the present, without the actual consent of the creditors; and it appears to me that their consent, at any rate, cannot be dispensed with. Perhaps the actual consent of the assignee may not be indispensable. If he has not taken possession of the property, or done any act under the decree, he can be put to no possible harm, nor have any real interest adverse to the application. If, however, he should refuse his consent, having no good reason to withhold it, the court, with the concurrence of the creditors, might order the decree vacated, and all further proceedings stayed in the case, on notice to him to show cause against the motion.

Case No. 5,424.

GILES et al. v. The CYNTHIA.

[1 Pet. Adm. 203.] [1]

District Court, D. Pennsylvania. 1801.

SEAMEN'S WAGES — WRECK OF VESSEL — PORT OF DELIVERY.

The seamen shipped for a trading voyage, and the vessel was wrecked on her passage to Jamaica from Honduras. Their claim for wages was opposed on the ground that Honduras was not a port of delivery, and that the freight to be earned depended on the arrival of the vessel at Jamaica. Wages decreed to Honduras, as a port of delivery. Claim suspended as to residue.

[Cited in The Saratoga, Case No. 12,355; Thompson v. Faussat, Id. 13,954; The Two Catherines, Id. 14,288; Bronde v. Haven, Id. 1,924; Reed v. Hussey, Id. 11,646; Pitman v. Hooper, Id. 11,186; The Massasoit, Id. 9,260; Stone v. The Relampago, Id. 13,486; Farrell v. Mayers, Id. 4,685; Hart v. Shaw, Id. 6,155; The Main v. Williams, 152 U. S. 129, 14 Sup. Ct. 487.]

[Cited in Gookin v. New England Mut. Marine Ins. Co., 78 Mass. 516 (12 Gray, 516); Benson v. Atwood, 13 Md. 53; Cole v. Union Mut. Ins. Co., 12 Gray, 516.]

[See Adams v. The Sophia, Case No. 65.]

An American vessel had shipped her hands in Philadelphia, for what is called a trading voyage, having as usual cleared out for the "West Indies" or elsewhere, and to return to Philadelphia. She went to several ports, and finally was wrecked on her way to Jamaica from the Spanish continental possessions, after having been at a port which was at first alleged not to be a port of entry, or place of delivery of a cargo. But it turned out that a regular custom-house was there established, and the ship there paid port charges, and passed through the usual forms. The object of the last voyage was to load with woods, and other productions of that coast. The only question before me was how far the demand of the seamen should extend. The wages were claimed to the time of the loss of the vessel, as it was said, enough had been saved to pay them. The owners and captain alleged, that all the wages were lost with the wreck. They denied that the port on the Spanish Main was a port of

[1] [Reported by Richard Peters, Jr., Esq.]

delivery, though it appeared that some goods, part of the cargo, or captain's adventure, he being a part owner, which were not salable at Jamaica, had been carried to the Main, and at this port disposed of. The case of Hernaman v. Bawden, 3 Burrows, 1844, was relied on to shew that it was an entire voyage, though some small matters had been delivered at the Spanish port. It was insisted on in argument, that this was no more a delivering port than Newfoundland, which is settled by the British case not to be so. And a voyage for woods, &c. on the Spanish coast, is in its consequences as to wages, the same as one for fish to Newfoundland. Where no cargo is delivered, no freight is earned; and no wages can be payable, where no freight is earned, as the latter is the fund to discharge the former. Vessels go with salt and casks to Newfoundland, which gradatim, as the fish are caught, are sent on shore, and of course delivered, to cure and enclose them. No more was done in the present case, than to put on shore some provisions, though these were disposed of, to furnish means for the progress of the ship.

BY THE COURT. There can be no doubt of the principle that wages are due to seamen in cases of capture or wreck, to the last port of delivery, and for half the time the vessel stayed there. This is settled law in this court. The wages for the interval, after the vessel leaves her last port of delivery to the time of the wreck depend on circumstances. The sailors must assist in saving the ship and goods, or so much thereof as possible, so as to entitle them by way of encouragement, to their wages out of the property saved. Laws Oleron, art. 3; "Les Us et Coutumes de la Mer," 8. But there is no question here to induce me to go into this part of the case minutely. The only point seems to be whether the Spanish port was one of delivery, in legal contemplation, under the circumstances of this case. I do not see the bearing of the case in 3 Burrows on the present cause. The voyage, in that case, was, in fact, from England to Spain, with a load of fish, to be taken off the banks of Newfoundland; where the ocean, and not a port of delivery, afforded the prey, which was to be caught by the ingenuity and labour of the crew, and which was then to compose the cargo. The salt and casks were the means of preserving and enclosing, after the fishing-lines and tackle had been employed to take and secure the object of the voyage. These (the salt and casks) were used in and about the cargo, and re-shipped in the vessel, with the cargo, of which they were part, on the further prosecution of the voyage. Of course, there had been no delivery, or any contemplated sale or purchase; the voyage being, in its nature and object, entire. Whaling and sealing voyages, and those on coasts where the cargo is to be obtained in a similar way, and not at a port of usual entry, as an article of traffic or purchase,[2] are to be considered in a similar predicament. Possibly a voyage to cut wood, and reclaim it from a state of nature, though on land which was not here the case, might be compared in its principles, to the case in Burrows.

I think the force and true meaning of "freight" has been much misconceived. It is a technical expression. It does not always imply that it is the naulum, merces, or fare, for the transportation of goods. It is applied to all rewards, hire or compensation, paid for the use of ships; either for an entire voyage, one divided into sections, or engaged by the month, or any period. It is also called "freight" (and it is to be determined on the like legal principles) in the case of passengers, transported in vessels, for compensation. Howland v. The Lavinia [Case No. 6,797]. In Saxon, from which much of the English language is derived, it is called "fracht," whether it be a compensation for transportation in ships by sea, or carriage by land, either of goods or persons, in gross, or detail. Many of the commercial terms, as well as the laws and customs of the sea, are derived from the Saxons, who were, for a great length of time, the most extensively commercial and nautical people of Europe. There can be no distinction in reason and law, whether this freight, or hire, be actually paid by one, for the use or chartering of the vessel of another; or whether he sends his own vessel for, or with a cargo, to a designated port: which cargo is to be obtained by funds or credit there, or goods, money, or bills, sent in and with the ship. The services of the seamen entitle them to their wages, for that portion of the voyage they have so far completed. A port of destination, it will be seen, is, in this respect, the same as a port of actual delivery. And it matters not that the vessel did not carry thither any goods; but went in ballast. She earns her freight, and the wages are due out of it, as much in legal contemplation, as if she had been fully laden. So is it if she be partially laden, as in this case. Was it ever known that wages were apportioned, according to the quantum of cargo the merchant chooses to ship? Why then should it depend on there being no cargo—but money, bills, or credit, to obtain a cargo, for the further prosecution of her voyage. If a merchant sends the vessel of another for cargo, to a

[2] A ship went from the United States to the N. W. coast, for furs, ultimately destined for Canton. The seamen shipped by the freight; i. e. they were entitled to a certain portion of the freight earned. I held this to be an entire voyage, from the United States to Canton. The vessel was not successful in obtaining a full cargo on the coast; having arrived out of season. She called at a port, on her way to Canton, where skins had been left by a vessel not fit to proceed. These skins were carried on freight, to Canton, and the cargo thereby completed. I considered the seamen entitled by the contract to a proportion of the whole freight; as well on the furs obtained on the coast, as on those taken at the intermediate port.

designated port, and obtains none (vide Lex Mercatoria; Beawes, 110, 111; 2 Vern. 212), he who hired the ship must pay "empty for full."[3] Why then should the case of the sailor not depend on the same principle, and have the same measure meted to him? both in the case of the vessel sent by the owner, and that of one chartered? And there can be no difference in principle, whether the vessel go empty to a destined port for a cargo, or return under disappointment, without one. Most of the cases, in which the law is settled, for payment of wages to ports of delivery, and for half the time of stay at them, are those of vessels on India voyages. Now it is well known, that the inward cargoes, according to the course of trade, both in Europe and in this country especially, are generally obtained with specie, sent for their purchase or credit obtained there. In China this is particularly the case—a small portion of cargo is sent to comply with regulations insisted on at Canton, but very inadequate to the purchase of that in return. It appears then clear to me that any port of destination where cargoes are obtained in a course of traffic, either with money, credit, barter, or any means (not such as I have first stated), is a port, technically, and to legal intent, of delivery. So are they, though as beforementioned, disappointments in obtaining cargoes occur, so far as they relate to wages earned by, and payable to mariners. Agreements made with them contrary to this position, whereby they bind themselves not to demand wages, until the return of the vessel to the port of outfit, have been held, even in chancery, void; as may be seen in the case of Edwards v. Child, 2 Vern. 727.[4] Thus far does the law extend its protection to this principle.

I therefore direct the wages to be paid[5] to the bay of Honduras, as the last port of delivery, and let the fate of the subsequent wages be determined, by the circumstances attending the wreck; into which I will enquire, if requested so to do.

GILHAM (WELFORD v.). See Case No. 17,376.

Case No. 5,424a.

GILKERSON et al. v. HAMILTON.

[1 Am. Law. Mag. 35.]

Circuit Court, E. D. Arkansas. 1882.

ASSIGNMENT FOR BENEFIT OF CREDITORS—BADGES OF FRAUD.

[1. Payment by an insolvent of a just debt to his assignee at the time of making the assignment is a quasi bribe and a badge of fraud.]

[2. The omission of schedules and inventory by an insolvent merchant making an assignment is a badge of fraud.]

[3. Delivery of assets to the assignee before he has qualified himself to take possession by filing the inventory and bond is a fraudulent conveyance.]

[4. Concealment of a large sum in cash at the time of making an assignment renders the instrument of assignment fraudulent and void.]

[This was a suit in bankruptcy by Gilkerson and Sloss against P. C. Hamilton.]

P. C. Hamilton, a merchant of Prescott, Arkansas, becoming insolvent, made a general assignment for the benefit of his creditors to J. H. Arnold, as assignee, the assignment conveying all the assignor's property, real and personal, wherever found. On the day the assignment was executed, or the previous day, Hamilton paid to Arnold a debt he owed him of $2,000 in cash. A few weeks after the execution of the assignment, Hamilton, becoming very ill, admitted to a friend that he had money buried in a glass jar under his corn crib in his yard, and directing that it be delivered to his assignee, stating at the same time that he intended to make this an addition to his assignment. The friend found in the place designated $3,030, in gold, silver and currency, and surrendered the same to the assignee to be administered under the assignment. There were no schedules attached to the assignment, and the assignee took possession of the assigned assets before filing the inventory or bond with the probate clerk, as required by the statute, before the assignee should be entitled to take

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[3] Near 40 years ago, in my outset at the bar, I brought indeb. assump. for money had and received, &c. against the master of a ship, for 90 guineas paid, in advance, by a gentleman, for himself and others, who took the cabin, and agreed for their passages, from an out port of England to Philadelphia. The day for going on board had been fixed by the parties. The passengers loitered on their route from London; and did not arrive at the port appointed until the ship had departed. The case turned out to be as before stated, though conceived by my client to be otherwise, as to the day fixed. Such of the cabin stores as were in preservation, and laid in by the passengers, were returned. I failed in the cause. The passage-money was held to be legally retained, among other reasons, on the principle mentioned in the above case, i. e. that freight it earned "empty for full," when the disappointment is owing to the misfortune or neglect of the freighter, and no laches are imputable to the master or owner of the ship. In this case it appeared that the wind, which had been adverse, veered to a point favourable to the ship's departure from the Downs; and afforded an opportunity which could not, at that season of the year, be justifiably neglected. She had waited three or four days after that agreed on.

[4] See the notes of decisions in the Maryland district, by the late Judge Winchester,—Relf v. The Maria [Case No. 11,692, note].

[5] Several cases, similar in the leading circumstances, have been determined on the same principles. One, a case of capture and condemnation for unneutral conduct. The cause of the loss of the ship, whether by capture or wreck, has no operation upon the principle. In some of the causes, cargoes were obtained in whole or in part; in others, disappointments occurred. It was probable that in all the cases, an illicit trade had been carried on or attempted, but no objections were made on this account.

possession and there was no inventory taken at the time.

Held (CALDWELL, District Judge): 1. The payment by the insolvent assignor to his assignee of a just debt, when made at the time of the assignment is a quasi bribe, and a badge of fraud.

2. The omission of schedules to the assignment, as well as of an inventory, is a badge of fraud.

3. The delivery of the assets to the assignee before he had qualified himself to take possession, by filing the inventory and bond, was a fraudulent conveyance.

4. The concealment of the $3,030 was part and parcel of the same transaction as the assignment, and rendered the instrument of assignment fraudulent and void.

GILL (ATTERBURY v.). See Case No. 638.
GILL (BUCK v.). See Case No. 2,080.

Case No. 5,425.

GILL et al. v. The CONTINENTAL.

[8 West. Jur. (1874) 232.]

District Court, E. D. Missouri.

ADMIRALTY AND MARITIME JURISDICTION — HOME PORT.

The jurisdiction of the courts of the United States conferred by the constitution, is exclusive and does not depend upon state legislation. Supplies and materials furnished in the home port give a maritime lien, and the lien may be enforced in the district court. There is no distinction in the maritime law between supplies furnished in the home or foreign ports.

[This was a libel by Reuben Gill and others against the steamboat Continental for supplies furnished in the home port.]

Since the last change of rule 12 in admiralty, the United States district court for the Eastern district of Wisconsin (Wolf v. The Selt [Case No. 17,927]), and the United States district court for the Southern district of New York (The Circassian [Id. 2,720a]), have expressed their views upon the legal effect of said change, and as to the practice in admiralty thereunder. The proposition now to be considered was not directly involved in those cases, viz.: whether by force of said changed rule and the recent decisions of the United States supreme court concerning the exclusive jurisdiction of admiralty courts, the earlier doctrines of the supreme court as to home supplies and state liens therefor are to be considered as still in operation or to be recognized. It might be of interest to trace the history of judicial action on this class of questions, but this court is so pressed with business that only a brief reference thereto can be made. The early decisions in the case of The Thomas Jefferson [10 Wheat. (23 U. S.) 428], and later decisions of Thomas v. Osborne [19 How. (63 U. S.) 22], and Pratt v. Reid [Id. 359] followed what may be termed the narrow and restricted English rule, instead of the general rules known to maritime powers in admiralty and maritime causes. Without analyzing the several decisions in this country and in continental European courts, and the effect of the 12th rule, it may be stated that the English rule as to the home-port supplies should no longer be held to obtain in United States courts.

As early as 1857, the United States circuit court for this district, in the case of Hill v. The Golden Gate [Case No. 6,491], reviewed the law as then acknowledged and enforced in the United States admiralty courts, and pointed out the supposed jurisdictional and other difficulties springing from a recognition of liens on vessels created by state statutes, and from a refusal to recognize the broader rules known and upheld generally by the maritime world. Since then many changes have occurred, whereby the exclusive jurisdiction of United States courts in admiralty has been asserted and enforced; also the doctrine exploded that the admiralty jurisdiction of those courts rested on, or was restricted by the constitutional grant to congress of the power to regulate commerce among the several states. Now, the true constitutional construction is maintained in full vigor, viz.: that the admiralty and maritime jurisdiction of United States courts rests, not on said grant of power to congress, but on the grant in article 3, concerning the judiciary, viz.: that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction." That grant it has been held, raised ex industria the word "maritime" so as to exclude the narrow and restrictive English doctrines. It is well known that among the most potent causes leading to the formation and adoption of the United States constitution were the restrictions and counter-restrictions on freight and inter-state commerce, which by way of local interests, or for purposes of retaliation, the various states had enacted and were enforcing. Nothing was more essential than that the new government, common to all, should have vested in it full and exclusive authority over all the foreign and inter-state relations of commerce. The reasons for the English rule springing from "Magna Charta," writs of prohibition from the king's bench, etc., had no force under our form of government. Nay, the United States constitution expressly conferred the power for the general good, which the English Magna Charta denied under the reasonable jealousies out of which it sprung. Taking, therefore, the recent decisions of the United States supreme court as a guide, whereby exclusive jurisdiction of admiralty and maritime causes is vested in the United States judiciary, how is it to be maintained that cases not of the description named fall within that clause of the constitution? The jurisdiction of the United States judiciary cannot be enlarged or restricted by state statutes, nor can such a jurisdictional result follow from a mere change of a

rule of practice. The comments of the various courts on the changes of the twelfth rule, wherein these changes are said to be mere changes of practice, do not reach the main point under consideration. If the jurisdiction exists under the constitution, rules of practice for its enforcement may be formed, but if no such jurisdiction is granted, then no rule of practice can give it.

If the United States courts in admiralty can maintain jurisdiction in rem, or in personam over supplies furnished in the home port, its authority so to do cannot rest upon a mere rule of practice, but must be based on the constitutional grant—a grant which cannot be enlarged or diminished by state legislation or modes of practice. When, therefore, the United States supreme court, by the last change made in rule 12, recognized that "in all suits by material men for supplies, or repairs, or other necessaries, the libellant may proceed against the ship and freight in rem or against the master or owner alone in personam," that court must have recognized that the distinction between supplies furnished in the home and in a foreign port was no longer to be observed. Certainly that court did not intend to state, or admit even by implication, that the admiralty grant in the constitution existed or ceased to exist in its entirety, dependent on state legislation. No state and no rule of mere practice in courts could alter or work an amendment of the United States constitution. A recognition that all suits by material men were to be enforced in the same way in United States courts of admiralty, when taken in connection with previous decisions and changes of the twelfth rule, indicates that of necessity the rights of material men should no longer be supposed to rest on state liens or state legislation, but on the true admiralty doctrine, wherein no distinction as to supplies in home or foreign ports is known. If it is necessary to prevent the vessel from laying by the wharf instead of plowing the seas, that supplies should be furnished, the same rules obtain whether they are furnished at home or abroad; that is the supplies must be necessary for the purpose and be furnished upon the credit of the vessel, instead of the personal credit of masters or owners. The Grapeshot, 9 Wall. [76 U. S.] 129. This case in 9th Wallace brought back the rulings which obtained before the cases of Thomas v. Osborne and Pratt v. Reid [supra]. Supplies furnished for voyages on western rivers should stand on the same footing. If a boat is registered or enrolled in the port of St. Louis, and supplies are furnished there or in the state of Missouri, no adequate reason exists for displacing a demand therefor in favor of a claim for supplies on the other side of the river and consequently in the state of Illinois, it may be only a few miles distant from St. Louis. The seeming injustice heretofore existing in such cases is remedied by the enforcement of the true maritime rule. In marshalling the claims proved, therefore, all demands of material-men will be placed in the same class, and the funds applicable thereto be distributed pro rata.

Case No. 5,426.

GILL et al. v. JACOBS.

[Brunner, Col. Cas. 268;[1] 6 Hall, Law J. 117.]

Circuit Court, D. South Carolina. June 27, 1816.

STATE INSOLVENT LAW — EFFECT OF DISCHARGE UNDER.

A discharge under a state insolvent law does not entitle a defendant, in the custody of the United States courts on mesne process, to be released on common bail.

[At law. Action of debt by Gill, Canonge & Co. against Levi Jacobs.]

DRAYTON, District Judge. This was a case of habeas corpus, in which a motion was made to discharge defendant on common bail, he being in the marshal's custody on mesne process issuing from this court, with an order for bail. The plaintiffs are citizens of Philadelphia; and the debt to a considerable amount (upwards of six thousand dollars) was contracted with them there. The defendant having been arrested by process, issuing from the state court of common pleas, has been discharged by the same authority, under the insolvent debtor's act of this state, passed in the year 1759. He therefore contends he should be enlarged on giving common bail, as he has been arrested since he was so discharged. On the part of the plaintiffs it is urged they were not parties to this discharge, not having due notice; nor were they parties to the record. That they have not agreed to receive any portion of the dividends, and, therefore, they ought not to be delayed, or prevented having due relief, under the laws of the United States and the practice of this court.

The case before me being strictly a mercantile contract will be considered as referring to those laws which relate to commerce and merchandise. As respects their principles, it is contended there is a difference between a bankrupt and an insolvent debtor; as the first becomes so by omissions and commissions, as well as by compulsory process; whereas, the latter is so situated, by the effects of a suit at law, and by taking the benefit of an insolvent debtor's act thereupon, for regaining his liberty. This distinction, and the discharge obtained in the state court, appear to be the general grounds on which the argument seems to rest. For bankrupts being exclusively concerned in trade and merchandise, in buying and selling in gross, or by retail; dealing in ex-

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

change and in other acts of necessary commercial intercourse; it seems but reasonable they should be protected and controlled by laws more especially for themselves, and which the practice of civilized nations is in the habit of ordaining. Hence a bankrupt law may be very different from an insolvent debtor's act, as a bankrupt law relates to the interest of merchants and traders; whereas, an insolvent act relates to the general interest of society. If, then, this distinction of interest prevail, can it be said the distinction of rights does not also prevail?

By the eighth section, first article, of the United States constitution, congress have a right "to regulate commerce with foreign nations, and among the several states," also to establish "uniform laws on the subject of bankruptcies throughout the United States." The power, then, of making bankrupt laws no longer remains with the several states; it is vested in the United States government. And how far a transient merchant, indebted in Philadelphia, can plead in this circuit court for the district of South Carolina a discharge under the insolvent debtor's act of South Carolina, obtained in the state court, against a suit instituted in this court, is the question which is now before me. On this point, involving the rights of the United States and individual states, I feel myself delicately situated in deciding the contending claims. More especially, as one of the particular reasons for calling into existence the present constitution of the United States was to equalize the commerce and trade, and the rights and privileges of the American and other merchants and traders throughout the Union, and with foreign nations. Unless, then, the question be considered as having this grand object in view, the merits of this case will be carried back to where they would have been before the passing of the constitution. The lex loci and lex fori of the several states would be brought under special consideration, as having more controlling powers than I think ought to be admitted at this day. Each state would then by such reasoning be deemed to authorize discharges of insolvency according to its own laws, and in mercantile concerns; not by uniform laws resting on the same principles, and promoting the same ends, but sometimes conflicting in points of justice and expediency not only with themselves but with the United States, and the principles of their superintending government.

On the 4th of April, 1800 [2 Stat. 19], a bankrupt law was passed. It was limited to the term of five years; and from thence to the end of the next session of congress thereafter, and no longer. It then expired, and there has never been since any bankrupt law in the United States. What were the reasons which influenced congress not to revive that act, or not to pass a new one, is not for me to say. Although it would appear that the different decisions which take place in the courts of the United States, and in those of the individual states, afford some grounds for the reconsideration of a bankrupt law; as well as the great inconvenience resulting from the want of one to which parties are occasionally subjected, by vexatious suits in different states of the Union against insolvent debtors, after they have obtained insolvent discharges in one of the states. In passing the bankrupt law it is evident congress looked towards bankrupt merchants and traders especially, as respecting the insolvent act of state authorities. For in the sixty-first section of the bankrupt law—5 Smith's Laws U. S. p. 81 [2 Stat. 36]—it is expressly enacted that this act shall not "repeal or annul, or be construed to repeal or annul, the laws of any state now in force, or which may be hereafter enacted, for the relief of insolvent debtors, except so far as the same may respect persons who are or may be clearly within the purview of this act." It is said, however, this act has expired; it does not thence follow that the reasons which gave rise to the exception do not still exist. And so far it does not come within the rule of "cessante ratione, cessat et ipsa lex." If, then, they do exist, I see not why for national and commercial purposes this court should not give them a consideration, although they be not engrafted into a bankrupt law. Under this impression it would seem the distinction taken by the defendant's counsel between a bankrupt law and an insolvent debtor's act has not been improperly introduced.

Among the great features of government, population and credit are to be ranked. As to the population, congress has equalized that by acts of naturalization throughout the United States; but having no bankrupt law, the credit as to provisions for bankrupts, and for securing the rights of their creditors, has not been so equalized, resting at present upon the insolvent acts of individual states, and the discretion and decisions of courts having cognizance. It hence results that foreigners and citizens of different states will look to the government of the United States for some general system, as either emanating from their laws or from their courts; and more particularly when they commence suits in the courts of the United States. The obligation is, therefore, the more imposing upon these courts, having this high responsibility to carry all such suits into effect in as uniform a manner as possible, so far as their authorities will permit, agreeably to the rights and just expectations of individuals, and the confidence so reposed in the United States government.

It is urged, this court is bound in this case by the thirty-fourth section of the judiciary act [1 Stat. 74]; but I do not see for what reason, as I think it can be made to appear the meaning of that section as contended for does not at present apply. By that instrument it is enacted "that the laws of the several

states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decisions in trials at common law in the courts of the United States where they apply." As it is not necessary on the present occasion to give an opinion respecting the discharge of an insolvent debtor against the debt itself, I shall not do so, but will confine myself to that part of the state act which enacts that the discharged debtor shall not be liable to be sued, impleaded, or arrested for a twelve month after his discharge. Grimke's Laws S. C. 249, § 2. Can it be said this part of that act applies? Does it not impair the security of the contract between Jacobs, the defendant, and Gill, Cononge & Co., the plaintiffs? and if it do, is it not in direct opposition to the constitution of the United States? These are important questions, which should be well considered before a decision take place. As to any inconvenience which may arise to the defendant under arrest, it remains with himself to give bail and be liberated from his confinement; if he cannot or will not this court is obliged to perform its duties in the premises, however desirous it may be to relieve his personal necessities. And in doing so, I cannot but say that were the present motion to be sustained, and the defendant admitted to common bail, the security of the plaintiffs would be much weakened and perhaps might be forever lost. For the state court is in possession of his schedule and property, given up upon his discharge, said by no means to be equal to the payment of his debts allowed in that court. Of course the defendant has nothing to rest his suit upon in this court but the defendant's person or security for the same, without which the defendant might abscond to whatever quarter of the world he pleased, thereby weakening, if not forever nullifying, his creditor's just demands. The reasoning of Judge Washington, in the case of Golden v. Prince [Case No. 5,509], and of Judge Story, in Van Reimsdyk v. Kane [Case No. 16,871], strengthen my opinion on this head. As to the cases cited from 1 Dall. [1 U. S.] 231, and 2 Dall. [2 U. S.] 100, [Millar v. Hall, and Donaldson v. Chambers], they are between state authorities, and in my opinion do not apply any more than the insolvent act of this state may be said to apply to the present case. Whenever the final discharge is brought before this court in bar of this suit, and at a proper stage of the pleadings, it will be time enough to consider its bearing character as to discharging the debt.

By the eleventh section of the judiciary act, —1 Folwell's Laws U. S. p. 55 [1 Stat. 74],— the circuit court has cognizance where an alien is a party, or a suit is between a citizen of the state where the action is commenced and a citizen of another. This gives authority to the circuit court to maintain the action, and is an implied contract between the United States and the parties concerned that it shall be so maintained. But if a state law be allowed to come in with a sweeping effect as a bar to the action, confidence is at an end, and the court is at the mercy of a state authority. Van Reimsdyk v. Kane [supra]. Upon this principle the impropriety of the motion in this incipient stage of the suit, and before the return of the writ, is, in my opinion, apparent, insomuch as to induce a court to be on its guard how it allows the claims of an individual under arrest, when a little time and a regular practice would better conduce to justice and the end proposed. Besides, by the laws and practice of this court, a defendant cannot take the benefit of the insolvent acts until after judgment obtained,— 4 Folwell's Laws U. S. p. 123 [1 Stat. 561]; 5 Smith's Laws U. S. p. 6 [2 Stat. 4],—whereas in the state court he has the benefit of them on mesne process before judgment obtained. This marks a difference between the practice of the United States courts and the state courts as to cases of solvency, which is of importance in this inquiry. It consequently results that the security of the creditor in the court of the United States is greater than in the courts of this state, as he has a longer time to search out cases of fraud against his debtor, and is thereby the better enabled to provide for his own security before the debtor can be liberated or discharged under insolvent debtor acts.

Upon the whole, without touching any other contested points of the argument (deeming it unnecessary in the opinion I am about to give), the case appears to me to resolve itself into this: That by the constitution of the United States the individual states have given up their rights of legislating as to commerce and bankruptcy; that this right is now solely in possession of the United States government, which, through its laws and judiciary, is bound to watch over and superintend the same; that no bankrupt law existing at this time does not affect the main question, because the right in government still remains to enact one, or to repose its confidence in the judiciary as to their decision respecting the same, in relation to the state laws; that the courts of the United States by admitting defendants to the benefit of the state insolvent acts, under the superintending and contracting power of the laws of the United States now existing, can and do promote the due ends of justice as relating to bankrupts. But it must be remembered all this is done under the authority of the United States and not under that of state authorities, although in doing so the insolvent acts of the states are referred to as rules of decisions in cases when they apply, as declared by the thirty-fourth section of the judiciary act. Under these impressions I do not think that by insolvent discharges from the courts of this state the insolvent debtor's acts of this state should be allowed to suspend or weaken the lien of process in this court, in the manner contended for in this case. It would be an interference

between creditors and debtors, and certainly would tend to impair the obligation of contracts.

[See Ogden v. Saunders, 12 Wheat. (25 U. S.) 286.]

Case No. 5,427.

GILL v. PATTEN.

[1 Cranch, C. C. 114.] [1]

Circuit Court, District of Columbia. March Term, 1803.

PLEADING—WITHDRAWAL OF PLEA OF COVENANTS PERFORMED—SPECIAL PLEA.

The court will give the defendant leave to withdraw the plea of covenants performed, and to file a special plea, if it appear to be a plea to the merits, and not decidedly bad, leaving the plaintiff to his demurrer.

Covenant for rent. Plea, covenants performed.

Mr. Youngs, for defendant, moved for leave to withdraw the plea, and file a special plea, stating a covenant on the part of Gill that he would pay the ground-rent due to W. T. Alexander, but had not done it, whereby Patten was prevented from occupying fully, for fear of having his goods seized for that rent due to Alexander.

The first plea was put in at the rules in time. THE COURT not being certain that the plea offered is bad, and not being willing to decide upon the validity of the plea, permitted to be filed.

[See Cases Nos. 5,428-5,430.]

Case No. 5,428.

GILL v. PATTEN.

[1 Cranch, C. C. 465.] [1]

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

EJECTMENT—MESNE PROFITS AND IMPROVEMENTS.

Permanent and useful improvements made upon the land, may be given in evidence in mitigation of damages, in an action of trespass for mesne profits, brought after recovery in ejectment.

[Cited in Stark v. Starr, Case No. 13,307.]

The question submitted to the court, in this case was, "Whether valuable and permanently useful improvements made upon the land, may be given in evidence in mitigation of damages by the defendant in an action of trespass for mesne profits, brought after a recovery in ejectment."

F. L. Lee, for defendant, submitted the following written argument:

May improvements be recouped in an action of trespass for mesne profits? 1st. Permanently useful improvements were recouped in the action of assize of novel disseisin at common law. 2d. They were recouped in the action of trespass with continuando when brought after an entry. 3d. They may, and for particular reasons ought, to be recouped in the same action when brought after a recovery in ejectment.

1. When a man has been disseized of his estate and kept out of possession, he is or may be injured in three respects; by the loss of his land, by the loss of the profits, and by injury done to the estate itself. For all these injuries he ought to be indemnified; but they do not all happen in every case. For this reason the remedies are various, so as to suit each case. Illustration: When the ancestor was disseized, and nothing has descended to the heir but the mere right to the land, he may recover the land in the writ of entry, but he is entitled to no damages, because the waste and the disseisin done in the lifetime of the ancestor have died with him, and the waste done since is no trespass to the heir who has not entered; and as to the profits, the wrongful person was permitted to keep them to pay the feudal services, &c. 3 Bl. Comm. c. 10, pp. 187, 188. The heir having sustained but one of the before-mentioned injuries, the loss of the land, has a specific remedy to recover that, and nothing else. If the ancestor died seized, and a stranger abated, the heir might recover the land in the writ of mort d'ancestor, but no damages, for the reasons before mentioned. 3 Bl. Comm. c. 10, p. 185; 2 Inst. 286. But if the heir had entered, and a stranger put him out of possession, all the before-mentioned injuries were sustained; and therefore for this new disseisin he might recover the land and damages in the writ of assize of novel disseisin. 3 Bl. Comm. c. 10; 2 Inst.; and Booth's Law of Real Actions. In the assize of novel disseisin, the demandant counted on an actual possession in himself; and for the trespass done to that possession by the disseisin, the damages were given. Hence this action was called a mixed action (Sayer's Law of Damages), because it partook of the nature of a writ of entry so far as it regained the land, and of the nature of a writ of trespass so far as it gave damages. But although the demandant was entitled to damages, it was not necessary to pay him in money. It is enough that he receive something valuable, which will put him in as good a situation as if he had not been disseized; for that is the object of the writ. He may therefore be paid for the profit by improvements. "He who recovers the land shall have the emblements, but the assize recouped the damages because the land was sown." 9 Vin. Abr. tit. "Emblements," 369, cites Brooke, Abr. "Emblements," 11, 24, E 3, 50. "Damages to 40s. found by the assize, and no more, because the land is well sown and the house mended, and so recouped the damages." 8 Vin. Abr. tit. "Discount." In assize the plaintiff recovered the land and no damages,

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

because the place was well amended by building. 8 Vin. Abr. tit. "Discount." "Disseisin done ad damnum £9, disseizor sows the land which is worth £10; and the assize gave £9 damages; per Cur. they shall be attainted for not recouping the sowing." 8 Vin. Abr. tit. "Discount." "In divers cases one who is in of his own wrong shall recoupe and retain. The disseizor shall recoupe in damages all that he hath expended in amending the houses." Coulter's Case, 5 Coke, 30. In Penrice v. Penrice, a writ of inquiry in dower was quashed because the jury omitted to deduct the chief rents and repairs. Barnes' Notes, Cas. 234.

2. It seems then that in assize of novel disseisin, which was the only action in which damages were given for mesne profits, improvements were recouped, and there can be no difference in this respect between the actions of assize and trespass with continuando. When a man is out of possession he may recover his land at common law by entry or by action. If my ancestor was disseized, I may recover the possession by entry, if that right has not been tolled; but I could have no action for damages, for the same reason that I could get none in the writ of entry. Trespass with continuando does not lie, because there was no former possession in me to which my entry could relate, so as to give me that possession during the interim, upon which the action of trespass with continuando is founded. Liford's Case, 11 Coke, 51. If my ancestor died seized and a stranger abated, I could recover the land by entry; but had no action for damages. Trespass with continuando does not lie against an abater after entry by the heir. 20 Vin. Abr. 463, 464; Bl. Comm., causa qua supra. But if I was myself disseized, I may recover the land by entry, and then sue for damages in trespass with continuando. 11 Coke, 51. The action of trespass is here brought and allowed for the same reason that damages are given in assize of novel disseisin, the trespass done to the actual possession of the disseized. Entry followed by trespass with continuando was just equivalent to the action of assize; and they were alternative remedies for the same injury. Their very near resemblance in many particulars is singular. In assize, "a man shall recover damages for all injury done to the estate itself;" so in trespass with continuando, he may "recover for all and any injury done during the disseisin." 20 Vin. Abr. 464. In assize "he shall recover to the value of the issues of the land." 7 Vin. Abr. 267. And in trespass with continuando "he shall recover the natural and artificial profits." 11 Coke, 51. If it appear in assize that "the trees which the disseizor cut were used in mending the houses, they shall be recouped." 8 Vin. Abr. 557. So in trespass with continuando "if the disseizee hath himself taken any of the corn, grass, or trees, they shall be recouped; for in both cases, the disseizee has back his property." 11 Coke, 52. At common law the demandant in assize could only recover damages from the disseizor himself and not from his alienee; but the statute of Glocester gives damages against the latter. So at common law the action of trespass with continuando could only be sustained against the disseizor, (1 Hob. 98); but it is certain that since the statute this action has been sustained against the alienee of the disseizor (Cro. Eliz. 540). To conclude the resemblance, Coke says in Liford's Case, "that I shall recover in this action of trespass in the same manner that a disseizee shall recover against his disseizor in assize at common law." Entry, followed by trespass, was the usual remedy when the disseisin was fresh, and assize when it was ancient. 1 Reeve. Eng. Law, 324. Hobart says, "If the disseizee has reëntered and thereby lost his assize, he may have trespass with continuando for the mesne profits." Hob. 98. He may recover the profits in trespass, because he can no longer have assize for them; and clearly therefore he must recover them in the same manner in both actions. If then a recouper of improvements was allowed in one action, it must have been in the other, for they were alternative remedies for the same injury. So far as the assize gave damages, it was in nature of trespass; and the form of the action of trespass is favorable to recoupers, for Coke says, as before mentioned, that if the disseizee "himself take any of the corn or trees, they shall be recouped," and it is a common thing, in an action of trespass, for the ouster of a personal chattel to show that the article has been restored, in order to mitigate damages. It is said in 12 Vin. Abr. tit. "Evidence," 158, "The law is that in trespass for goods taken the plaintiff shall recover the value of them; yet if the plaintiff re-has the goods this may be shown in evidence to mitigate the damages." If I may show that I have carried back the plaintiff's trees, I may certainly show that I not only carried them back but also built him a fence with them. If he may show, to increase damages, that when I broke his close, I trampled down his corn, I may show in mitigation of the damage, that I mended his gate. It may be said, therefore, with certainty, that recoupers were and might be made in the action of trespass with continuando, when brought after entry.

3. And they may and should be made in that action when brought after a recovery in ejectment. When a man has recovered possession of land by a modern action of ejectment, he is precisely situated like a disseizor after entry at common law; that is, he has got his land and no damages. He could get no damages on the ejectment, because the parties were fictitious; and he was obliged to get the possession in that way, because he is prohibited by the statute from making a forcible entry. After having recovered the

possession he proceeds with the old action of trespass, which was formerly brought after an entry. All the recoupers which were formerly admissible in this action ought to be admitted now. There are many strong reasons for it. The recoverer in a modern ejectment must be either a freeholder or a termor. If a freeholder, he ought not to be placed in a better situation, as to the defendant's right of retainer, by the fictions of the court, than he was by the old law; and by the old law the improvements would be recouped in either of the alternative remedies which the plaintiff might elect to pursue. If he be a termor, he should not be placed in a better situation as to this particular by the awarding of the writ of possession than he was before the courts undertook to award that writ. By the old law the plaintiff recovered in ejectment the value of the whole term, but the term itself remained in the hands of the defendant. 3 Bl. Comm. 300. The defendant was safe as to his improvements, because they remained on the land which he retained during the term. But the courts undertook to give back the term specifically to the plaintiff and invented the writ of possession in the time of Henry VII. for that purpose. 3 Bl. Comm. 201; Runnington, Eject. "The writ of ejectment was now licked into the form of a real action" (Goodtitle v. Tombs, 3 Wils. 120), and the damages must have been of course, lowered from the full value of the whole term to the value of the profits generally (3 Wils. 121); and because this action now assumed the form and the effect of a real action, it must also have taken the character of a real action as to the defendant's right of retainer for improvements. Why did the courts of law award the writ of possession? Blackstone and Runnington say, to prevent the plaintiff from going into chancery for a restitution of the land. Now if the courts had not allowed the defendant recouper, he would have been driven into chancery for relief; but they would certainly never have invented a writ to relieve the plaintiff from going into chancery, and drive the defendant there unnecessarily.

CRANCH, Chief Judge (DUCKETT, Circuit Judge, absent). Before the fictitious action of ejectment was devised by the courts, and took the place of real actions, the true action of ejectment was brought only by the termor himself against the actual ejector, and the term itself was not recovered, but only damages to the value of the residue of the term yet to come; but the actual ejector still retained possession of the land; and by this means secured the benefit of all his improvements. When the fictitious action of ejectment was devised, it can scarcely be supposed that the court intended to deprive the defendant of any reasonable benefit which he had before in the old form of action; for "in fictione juris semper aequitas existit." Again, the fictitious action of ejectment was a substitute for the assize of novel disseisin, the assize of mort d'ancestor, or for an actual entry, so far only as the assize or the entry, restored the disseizee to the actual possession of the land. It did not, like the assize, afford a remedy for the damages sustained by the disseizee by being kept out of possession, or by actual injury done to the land and premises. This defect arose from the circumstance that the parties were fictitious. It required the subsequent action of trespass for the mesne profits, in addition to the fictitious action of ejectment, to make the remedy equivalent to an assize. Where the disseizee regained his possession by reëntry, he was entitled to the action of trespass with a continuando for the mesne profits; and in the assize and in the action of trespass after reëntry, the defendant was permitted to show, in mitigation of damages, that he had sowed the land, or otherwise increased its value by improvements.

THE COURT thinks that the action of trespass for the mesne profits, after a recovery in the fictitious action of ejectment, is strictly analogous to the action of trespass with a continuando after an entry, and to that part of the remedy by assize which gave the defendant his damages, and is accompanied by the same equitable defence.

The opinion of THE COURT, therefore, is, that the improvements mentioned in the case agreed, may be given in evidence in mitigation of damages in the present action.

[See Cases Nos. 5,427, 5,429, and 5,430.]

Case No. 5,429.

GILL v. PATTON.

[1 Cranch, C. C. 143.] [1]

Circuit Court, District of Columbia. Nov. Term, 1803.

DEFENCES TO AN ACTION OF COVENANT FOR RENT.

To an action of covenant for rent, the defendant cannot plead that his lessor had not paid the ground-rent, according to his covenant.

Covenant for rent. The plea was that the plaintiff had not paid the ground-rent to Alexander, the original landlord, whereby the defendant was prevented from occupying the premises for fear of being distrained for that rent. General demurrer.

Mr. Taylor, for plaintiff, cited Dawson v. Myer, 1 Strange, 712; Monk v. Cooper, 2 Strange, 763; 2 Ld. Raym. 1477; Belfour v. Weston, 1 Term R. 310; Howlet v. Strickland, Cowp. 56.

Mr. Swann, on the same side. This covenant is of no effect, because it could not support an action. Patton could not recover till he was damnified. There has been no eviction. 1 Esp. N. P. 323. The covenant pleaded in bar is to keep the premises exonerated

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

from the payment of the rent due to Alexander.

Mr. Youngs, for defendant. Whatever happens by the act of God or of the lessor, to prevent the occupation of the lessee, is a good bar to an action for the rent. Enjoyment of the premises is the consideration of the rent. Eviction is not necessary. 4 Bac. Abr. 366. Patton was not obliged to stay until his property was seized for the rent due to Alexander. Patton's rent to Gill was £18, per annum; Gill's rent to Alexander was £135, per annum. Shep. Touch. 376. Fear of distress is as available as an actual distress. So that Gill has broken his covenant. The reason why one covenant cannot be set off against another, is because the damages may not be equal. But here the breaches are equal from the nature of the thing. Johnson v. Carre, 1 Lev. 152. The covenants are dependent. The intention of the whole deed is to be taken into view. This plea prevents circuity of action. As to 1 Term R. 310, the defendant enjoyed the land, although the house was burned. But here the defendant is wholly deprived of enjoyment.

C. Lee, same side. The plea is just and equitable. The two covenants made but one contract. The defendant's covenant is a condition or limitation of the covenant of the defendant. The defendant was to pay so long as he was permitted to enjoy. Shep. Touch. 114, tit. "Condition."

Mr. Swann, in reply. It might be either a plea of entry and eviction, or of dependent covenants. Gill's covenant is not a condition precedent. Patton's rent became due 1st September; Gill's on 4th September. Where the covenant goes to the destruction of the whole contract, it may be pleaded in bar. This plea goes to set up unliquidated damages against a covenant to pay a sum certain.

Judgment for the plaintiff on the demurrer, at June term, 1804.

[See Cases Nos. 5,427, 5,428, and 5,430.]

Case No. 5,430.

GILL v. PATTON.

[1 Cranch, C. C. 188.] [1]

Circuit Court, District of Columbia. Nov. Term, 1804.

COVENANT FOR RENT—INTEREST.

In an action of covenant for rent, the landlord cannot recover interest.

Writ of inquiry, upon a judgment on demurrer in an action of covenant on a lease; breach, not paying rent.

C. Lee, for defendant, contended that as the landlord has a summary process to compel payment, he is not entitled to interest.

Mr. Youngs. The action is covenant and sounds in damages, and the jury alone can assess them.

THE COURT instructed the jury that they were as much bound to give interest on the arrears of rent as on any other debt by specialty; that it is in the power of the jury to refuse interest; and if they refuse, it is in the power of the court to grant a new trial.

Verdict for plaintiff, including interest.

A new trial was afterwards granted on the ground of misdirection of the jury by the court.

[See Cases Nos. 5,427–5,429.]

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

GILL (SAWYER v.). See Case No. 12,399.

Case No. 5,431.

GILL et al. v. STEBBINS et al.

[2 Paine, 417.] [1]

Circuit Court, S. D. New York. June Term, 1828.

JURISDICTION DEPENDING ON SITUATION OF PARTIES TO THE RECORD — CONTRACTS—NECESSARY AVERMENTS IN DECLARATION — DEMURRER TO WHOLE DECLARATION WHICH IS ONLY PARTLY BAD.

1. Jurisdiction of the court is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record; and in all cases where jurisdiction depends on the party, it is the party named in the record.

2. Where a declaration on a special agreement, which was, that one G., who had been arrested in the city of New York, upon certain promissory notes made by a firm in the state of Alabama, in which he was a partner, to L. & B. of Boston, in consideration that plaintiffs would discharge him from that arrest, undertook and promised that he would forthwith proceed to Boston and call on L. & B., and offer such payment and satisfaction to them as he could accomplish, and in case his offer was not satisfactory to them, that he would surrender his person to any suit which L. & B. might institute against him within three weeks from the date of the agreement, and acknowledge service in the same, and the defendants, for the same consideration, bound themselves to the plaintiffs that the said G. should well and truly accomplish the conditions of said agreement, and in case of neglect on the part of the said G., within thirty days to perform, to enter bail for the said G.'s personal appearance at the suit of L. & B.; it was *held* on demurrer, that before G. could be charged with having violated his agreement by not surrendering himself, it must be averred that L. & B. had instituted a suit against him, and that if the declaration had contained an averment to that effect, plaintiffs would not be entitled to recover the amount of the notes without a further allegation as to their damnification.

3. In covenant, when several breaches are assigned, some of which are sufficient and others not, the defendant should only demur to such as are bad; and if he demur to the whole declaration, judgment must be given against him.

Demurrer to declaration. The declaration alleged that the plaintiffs [Theophilus A. Gill

[1] [Reported by Elijah Paine, Jr., Esq.]

and others] were holders of two promissory notes, which had been made by a certain firm under the name Sturtevant, Trent and Gurney, at Blakesley, &c., amount $1,375.49, and which were payable to certain persons doing business under the name and firm of Ladd & Barnes, at Boston, in the commonwealth of Massachusetts (no averment of their citizenship), and that the said notes were received from Ladd & Barnes for collection from the makers thereof, for and on account of John Osgood, a citizen of Massachusetts, who was then and there the owner of the said notes, &c. The declaration then alleged that Gurney, one of the firm of the makers of the notes, was arrested in New York, and in consideration that they would not prosecute, the said Gurney promised he would go to Boston and make payment or satisfaction of notes to Ladd & Barnes to their satisfaction, or surrender his person to any suit they might choose to institute against him in three weeks from date of agreement, and thereby acknowledge service of process in the same; and the defendants [Russel Stebbins, Joseph Sheffield, and Thomas Strong, survivors of James W. Peters], for the same consideration, bound themselves to the plaintiff, and guaranteed that the said Gurney should well and truly accomplish the said agreement so as aforesaid made; and in case of neglect so to do, the defendants bound themselves to enter bail for the said Gurney's personal appearance at the suit of the said Ladd & Barnes, in Boston aforesaid; and the plaintiffs averred that, confiding in such promise, they ceased to prosecute the suit against Gurney. Yet the said Gurney did not forthwith, nor within thirty days from the date of the agreement, proceed to Boston and call on Ladd & Barnes, or either of them, and offer such payment or satisfaction of the notes as he could accomplish; nor did he, within the thirty days, call on the said Ladd & Barnes, or either of them, nor surrender or offer to surrender his person to any suit to be commenced by them; nor have the said defendants, although the said thirty days have long since elapsed, entered bail for the said Gurney's personal appearance at the suit of the said Ladd & Barnes, in Boston aforesaid, or offered so to do; but have wholly neglected and refused.

THOMPSON, Circuit Justice. One of the questions raised upon the argument of the demurrer in this case related to the jurisdiction of this court. The plaintiffs, in the declaration, aver themselves to be citizens of New York; but, in setting out the cause of action, show that they are mere nominal parties. The real party in interest is John Osgood, a citizen of Massachusetts, and the defendants are alleged to be citizens of Alabama. If the jurisdiction of the court depended upon the real parties in interest, the objection would be fatal, as neither party is a citizen of the state where the suit is brought, and the objection appearing from the plaintiffs' own showing, advantage may be taken of it upon demurrer; and this objection, in principle, appears to be sustained by the case of Brown v. Strode, 5 Cranch [9 U. S.] 303, where it is decided that the circuit court of Virginia had jurisdiction in a case between citizens of that state, the plaintiffs being only nominal parties for the use of an alien. The doctrine of this case is, however, overruled in that of Osborn v. U S. Bank, 9 Wheat. [22 U. S.] 856. The court say that jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record; and add, that it may be laid down as a rule that admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record. This rule is again recognized and adopted in the case of Governor of Georgia v. Madraro, 1 Pet. [26 U. S.] 122. It is a little remarkable that no notice appears to have been taken, either by the court or the counsel, of the case of Brown v. Strode [supra], where a contrary rule is certainly adopted. The objection therefore, on the ground of want of jurisdiction, cannot be sustained, and the decision must turn upon the sufficiency of the averments in the declaration. The action is founded on a special agreement, which, as stated in the declaration, is substantially that one Gurney, having been arrested in the city of New York upon certain promissory notes, made by a firm in the state of Alabama in which he was a partner, to Ladd & Barnes, of Boston; and in consideration that the plaintiffs would discharge him from that arrest, he, Gurney, undertook and promised that he would forthwith proceed to Boston, and call on Ladd & Barnes, and offer such payment and satisfaction to them as he could accomplish; and in case his offers were not satisfactory to them, he promised to surrender his person to any suit which Ladd & Barnes might choose to institute against him within three weeks from the date of the agreement, and he thereby agreed to acknowledge service on the same; and that the defendants, for the same consideration, bound themselves to the plaintiffs that the said Gurney should well and truly accomplish the conditions of the said agreement and promises, and in case of neglect on the part of the said Gurney, within thirty days after the date of the agreement, to accomplish the same, the defendants bound themselves to enter bail for the said Gurney's personal appearance at the suit of the said Ladd & Barnes, in Boston aforesaid; and the plaintiffs aver that they discharged Gurney from the arrest, but that he did not, within thirty days, proceed to Boston and offer such satisfaction as he could accomplish; nor did the said Gurney, within thirty days, call on the said Ladd & Barnes, nor surrender or

offer to surrender his person to any suit to be commenced by them; nor have the defendants entered bail for the personal appearance of the said Gurney at the suit of Ladd & Barnes, in Boston aforesaid, or offered so to do.

The principal exception taken to the declaration is the want of an averment that a suit was commenced against Gurney by Ladd & Barnes. It is often, in cases of this kind, attended with some difficulty in deciding whether the promises are dependent or independent, and how far it is necessary for a plaintiff to aver performance on his part, to entitle him to sustain an action for non-performance against the other party—as between the plaintiffs and Gurney, the first act was clearly to be performed by Gurney; he promised to proceed to Boston and offer to Ladd & Barnes such payment and satisfaction as he could accomplish—and the averment is direct that he did not do this. He, in the next place, undertook, that in case his offer was not satisfactory, to surrender himself to any suit which Ladd & Barnes might choose to institute against him. But there is no averment that any suit was instituted against him. It is said this averment was unnecessary, as the demurrer admits he did not go to Boston, and that, of course, no suit could be commenced against him. The answer, however, does not appear satisfactory for several reasons: In the first place, it is not alleged as a separate and independent engagement by Gurney that he would go to Boston, but was connected with the further stipulation that he would offer such payment and satisfaction as he could accomplish. The demurrer does not, therefore, admit that Gurney was not at Boston, or that he was not within the reach of process in Massachusetts; nor is there any allegation that he was not within the reach of process. There is, therefore, no averment of any act by Gurney, nor is there any admission by the demurrer of any fact which can be considered as dispensing with the institution of a suit. But, in the second place, a suit might have been instituted without Gurney's being in Boston, or within the state of Massachusetts. The process could not have been served upon him; but he might have authorized his appearance to be entered to such suit, if instituted. His engagement was to surrender himself to any suit which Ladd & Barnes might choose to commence. Whether they would choose to commence any suit or not, was a matter depending entirely upon themselves; and Gurney could be under no obligation to surrender himself; nor could he do it until a suit was commenced. He could not be bound to urge Ladd & Barnes to institute a suit; nor could he enter an appearance to any suit without their consent. The declaration alleges no court in which the suit was to be instituted. As to this part of the agreement, therefore, the first act was to be done by Ladd & Barnes, viz., to institute a suit, and this should be averred to have been done before Gurney can be charged with having violated his agreement, by not surrendering himself. Gurney is not a party to this suit; and the promise on the part of the defendants is alleged to have been, that in case of neglect on the part of Gurney to accomplish the agreement on his part, within thirty days from the date thereof, then the defendants bound themselves to enter bail for Gurney's personal appearance at the suit of Ladd & Barnes in Boston. The undertaking of the defendants, therefore, more emphatically presupposes a suit to be instituted; and the same difficulties and embarrassments present themselves in the way of their performing the agreement on their part, before a suit should be commenced against Gurney. As to the defendants, therefore, it was clearly necessary for the plaintiffs to aver that a suit was instituted against Gurney before they can be charged with not having entered bail for him. The declaration does, however, contain a general allegation that the defendants bound themselves that Gurney should well and truly accomplish the conditions of the said agreement on his part; one of which was, that he should proceed to Boston and offer such payment and satisfaction to Ladd & Barnes as he could accomplish, which the plaintiff avers was not done, and this is admitted by the demurrer. In this respect, therefore, the defendants have not fulfilled their promise, and the declaration as to that alleges a sufficient breach; and the demurrer being to the whole count, if there is one good breach alleged, the plaintiff is entitled to judgment. This is the rule in covenant when several breaches are assigned, some of which are sufficient and others not. The defendant should only demur to such as are bad. If he demurs to the whole declaration, judgment must be given against him; and we see no good reason why the same rule should not apply in the present case.[2] 1 Chit. Pl. 643; 11 East,

[2] If no trick has been resorted to for the purpose of delay, the demurrer cannot be disregarded. Anon., 4 Hill, 56. A plaintiff is not at liberty to treat a demurrer to a declaration as a nullity, and enter the defendant's default for not pleading; and the court, on a motion to set aside such default, will not pass upon the question of the validity of the demurrer. Coster v. Waring, 19 Wend. 97; Anon., 4 Hill, 56. Where the defects in a declaration are of such a character as that a verdict will not cure them, the defendant, on demurrer to a special plea, may attack the declaration notwithstanding that the general issue was pleaded with the special plea. Miller v. Maxwell, 16 Wend. 9. A plaintiff is not bound to take judgment by nil dicit where a defective plea is interposed, but may demur. Underwood v. Campbell, 13 Wend. 78. It seems where, to a declaration on a bond for the performance of covenants, a plea of non est factum only is put in, without a notice of special matter attached, that the defendant may both demur and plead; but that he cannot do both where such notice is attached to the plea, as the plea and notice conjoined will be considered as equivalent to a special plea to the whole declaration.

567; Vermont v. Society, etc. [Case No. 16,919]; 6 Dane, Abr. 203, and cases cited. The plaintiffs must, accordingly, have judgment; but we do not at present see how they can recover more than nominal damages. And, indeed, if the declaration contained an averment that a suit was commenced by Ladd & Barnes against Gurney, it is not perceived how that would entitle the plaintiffs to recover the amount of the notes set out in the declaration, without some further allegations as to their damnification. If the plaintiffs, however, choose to amend their declaration, they have leave so to do.

[See Case No. 5,432.]

People v. Ten Eyck, Id. 448. Formerly, in assumpsit, a defendant might traverse not only the contract itself, but the consideration and the plaintiff's performance of a condition precedent; but now the practice is obsolete; and where the defence consists of matter of fact amounting to a denial of the allegation which the plaintiff must prove in support of his declaration, the general issue must be pleaded, or it will be good cause of special demurrer that the plea amounts to the general issue. Wheeler v. Curtis, 11 Wend. 653. Where a defendant pleads the general issue, and also a special plea, to which the plaintiff replies, and a demurrer is interposed to the replication, although the plaintiff may object to the plea, if bad in substance, the defendant cannot overleap the general issue and object to the declaration; he cannot plead and demur to the same count. Id. Where a defendant has pleaded the general issue, he cannot, upon a demurrer to the replication, or subsequent pleadings, attack the declaration. Russell v. Rogers, 15 Wend. 352; Dearborn v. Kent, 14 Wend. 183. Though a demurrer be interposed to the defendant's plea, and it may be defective, he will still prevail, if the count to which the plea relates is bad in substance. U. S. v. White, 2 Hill, 59. Otherwise, where the plea is to several counts, one of which is good in substance, though all the rest be bad. Id. In England, if a plea begins as an answer only to part of the declaration, and is in truth only an answer to part, the plaintiff cannot demur, but must take judgment for the part unanswered as by nil dicit. Here, however, it is otherwise; and to such plea a general demurrer will be sutained. Etheridge v. Osborn, 12 Wend. 399. In indebitatus assumpsit it is not a cause of demurrer that the declaration states the indebtedness of the defendant, and his promise to pay in a sum greater than what, from the cause of action set forth in the declaration, he is entitled to recover. Waite v. Barry, Id. 377. Where a demurrer to a declaration is overruled by a justice, and the defendant subsequently pleads the general issue, and after verdict against him appeals to the common pleas, that court is authorized to pass upon the validity of the demurrer, and, if well taken, to give judgment for the defendant. Wickware v. Bryan, 11 Wend. 545. In debt against several on a judgment of the supreme court of Ohio, two of them, viz., P. and T., pleaded that it was void for want of jurisdiction, having been rendered in a suit of which neither they nor their co-defendants had notice, and that none of them appeared therein, &c.; replication, that P. and T. employed an attorney to appear in the suit, and did, by said attorney, so appear as well for themselves as for the other defendants, &c. On demurrer to the replication, it was sustained, and the matter contained in it held sufficient to estop P. and T. from alleging either their own non-appearance, or that of the other defendants. Reed v. Pratt, 2 Hill, 64. Where a demurrer is interposed to a surrejoinder the plaintiff may go back and avail himself of a defect in the plea. Mercein v. Smith, Id. 210. Where there are two counts in a declaration on the same instrument, and there is no plea to the second count, but the plea to the first count contains an averment that the instrument set forth in that count is the same identical instrument set forth in the second count, it cannot be objected upon general demurrer that there is a defence to only one of the causes of action set forth in the declaration. Case v. Boughton, 11 Wend. 108. Though after a demurrer to a declaration is adjudged frivolous, the court reluctantly gives leave to a defendant to plead anew; yet wherein such a case, an affidavit was made that the demurrer was put in in good faith, that the defendant had a defence on the merits, and that unless he was permitted to plead to the count demurred to, the whole cause of action would stand confessed upon the record, leave will be given to plead anew. Patten v. Harris, 10 Wend. 623. It seems that a demurrer put in, not with a view of disposing of the case on the merits, but solely in the hope of its proving successful, cannot properly be said to have been put in bona fide. Id. A demurrer is not an issuable plea within the meaning of the 21st general rule of this court. Marsh v. Barney, Id. 539. Nonjoinder of a private corporation as defendant cannot be taken advantage of by demurrer, unless the declaration show the corporation to be still in existence. Indiana v. Woram, 6 Hill, 33. If a plaintiff assigns a good breach of a condition of a bond, and then proceeds and specifies the items of damage sustained by him, the defendant cannot demur to such specifications; the question whether the plaintiff is entitled to recover the items specified will be determined on the trial. Williams v. Maden, 9 Wend. 240. In an action of covenant, a plaintiff is bound to aver enough to show, with all reasonable certainty, that he has been damaged. Thus, where G. agreed to sell a farm to A., containing 161 acres, and A. agreed to pay G. twenty-six dollars per acre for all the land except the road running through the same, and covenanted to purchase in the premises if they were sold under certain mortgages which were liens upon the land, and to advance sufficient to pay such mortgages; on the land being sold under the mortgages, and an action brought on the agreement, for the recovery of damages, it was holden on demurrer, that the declaration was defective for the want of an averment as to the quantity of land contained in the road, so as to enable the court to say that the plaintiff had sustained damage by the neglect or refusal of the defendant to purchase in the farm at the mortgage sale. Gould v. Allen, 1 Wend. 182.

[1] [Reported by Elijah Paine, Jr., Esq.]

Case No. 5,432.

GILL et al. v. STEBBINS.

[2 Paine, 454.] [1]

Circuit Court, S. D. New York. March, 1832.

BAIL—LACHES.

Delay by the plaintiff for a period of five years, to call on the officer for bail, will be such laches on the part of the plaintiff as to exonerate the officer.

Rule on the United States marshal to bring in the body of Sheffield, or show cause, &c. The facts as disclosed by affidavit on the part of the officer, were as follows: In July, 1823, a capias ad respondendum was issued

against all the defendants [Russel Stebbins, Joseph Sheffield, and others], and returned cepi corpus as to Sheffield, and non est as to the others. Bail below had been taken for his appearance, but the bond was mislaid or lost. Nothing had been done by the plaintiffs [Theophilus A. Gill and Henry Bennett] until April, 1828, when the above rule was served upon the marshal. For the marshal it was contended, that he had become exonerated by laches on the part of the plaintiffs, in not having proceeded within a reasonable time to fix his liability, and that courts have adopted this as a rule for the protection of the officer. In support of the position the following cases were cited: Rex v. Sheriff of Surrey, 7 Term R. 452; Rex v. Sheriff of London, 1 Taunt. 111; Rex v. Perring, 3 Bos. & P. 151; People v. Stevens, 9 Johns. 72; Jourden v. Hawkins, 17 Johns. 35.

R. Sedgwick, for plaintiffs.

W. Q. Morton, for marshal.

THOMPSON, Circuit Justice. We think that the lapse of time is sufficient to exonerate the officer. If parties can wait five years, they may twenty. If the bond can be found we may direct its assignment to the plaintiffs. Rule dismissed.

NOTE. A bail-bond is void, unless it is conditioned that the defendant will appear by putting in special bail within twenty days after the return day specified in the writ, and by perfecting such bail, if required, according to the rules and practice of the court. Barnard v. Viele, 21 Wend. 88. It must be strictly conformable to the statute. 2 Rev. St. (2d Ed.) p. 271, § 13. A bail-bond taken on an arrest under a capias, tested out of term, is valid; and the defect cannot be taken advantage of by plea. The remedy is by motion to set aside the process. Parke v. Heath, 15 Wend. 301. Bail to the sheriff are entitled to relief on the usual terms, although the sheriff, after a rule for attachment for not bringing in the body, pays the plaintiff's demand. Seymour v. Curtiss, 1 Wend. 105. On a motion to set aside the proceedings on a bail-bond, affidavits may be read, made in support of the motion, and entitled in the original cause, attached to an order to stay proceedings entitled in the bail-bond suit, with a notice of motion showing the real object of the application. Ex parte Metzler, 5 Cow. 287. Where the bail below became bail above, and the plaintiff excepted, and then took an assignment of the bond, and commenced an action upon it; this proceeding was irregular, and should be set aside with costs. Id. Where a sheriff on being served with an attachment for not bringing in the body of the defendant, pursuant to a rule of the court, procured a person, (on promise of indemnity,) to put in special bail in the original suit, the sheriff could not maintain an action on the bail-bond. Matthison v. Forbus, 19 Johns. 292. In such case, the sheriff on being served with an attachment should pay the debt and costs in the original suit, and then bring his action on the bail-bond or against the defendant for so much money paid. Id. In order to hold to bail in an action for assault and battery, or defamation, some special reason must be shown. Zimmerman v. Chrisman, 7 Hill, 153. Affidavits to hold to bail, and by way of showing cause of action on motion to mitigate or discharge bail, must be positive, and make out a prima facie case. In trover, affidavits showing a contract, and alleging fraud as a cause of avoidance, the circumstances of the contract must be set out, and in what the fraud consisted. Satterlee v. Lynch, 6 Hill, 232. Where trover for wrongful conversion will lie, the defendant may be held to bail; the rule applies to a warehouseman, but plaintiff may waive the tort, and proceed on the bailment. Brown v. Treat, 1 Hill, 225, limited; Suydam v. Smith, 7 Hill, 182. Actions on recognizances of bail or bail-bonds, taken in suits in the court of common pleas, must be brought in the court of the county in which the suit was originally commenced, if the parties to the recognizance or bond reside within the jurisdiction of such court, and not be brought in this court. Burtus v. M'Carty, 13 Johns. 424. Where a bail-bond is taken in a court of common pleas, and the bail reside out of the county, an action may be maintained by the assignee of such bond in the supreme court, who will grant relief to the bail on the same terms as if the bond had been taken in the supreme court. Haswell v. Bates, 9 Johns. 80. So where the bail resided in the county where the suit was brought; and the action on the bond was against both. Gardiner v. Burham, 12 Johns. 459. See Davis v. Gillet, 7 Johns. 318. But the bail are bound to pay the common plea costs only. Id. Bail to the sheriff will be relieved in all cases upon the return of the writ against them. Haswell v. Bates, 9 Johns. 80; Bulkley v. Colton, 1 Johns. 515; Ellis v. Berry, Colem. Cas. 57. After bail has been put in to the action the plaintiff cannot take an assignment of the bail-bond, unless it has been regularly excepted to. Caines v. Hunt, 8 Johns. 277; Colem. Cas. 91. If the sheriff on arresting the defendant, take from him the promissory note of A., endorsed by the defendant, in blank, as security, the assignment or transfer is illegal and void. Strong v. Tompkins, 8 Johns. 98. And in action by the sheriff as endorsee against the maker, the latter may avail himself of the fact to defeat the action. Id. If, after the arrest, and before the defendant has given bail, he is delivered over by the sheriff, by whom he was arrested, to his successor, the assignment will not affect his right to be discharged on giving bail. Richards v. Porter, 7 Johns. 137. The sheriff is not bound to give the plaintiff any other notice of his having taken a bail-bond, than the endorsement on the writ. Id. If the former sheriff do not deliver the writ to the sheriff, but returns it himself cepi corpus in custodia, and the new sheriff lets the defendant to bail, he will not be liable to the plaintiff for not giving him notice. Id. The plaintiff, after proceeding on the bail-bond to give judgment, and charging the principal and bail in execution, cannot waive these proceedings by filing common bail in the original suit, and proceedings to judgment therein; but is concluded by his election to proceed on the bail-bond. Beecker v. Simmons, 7 Johns. 119. In moving to set aside the proceedings in a bail-bond suit, the papers must be entitled in that suit. Executors of Phelps v. Hall, 5 Johns. 367; Pell v. Jadwin, 3 Johns. 448. If the principal die, and the bail afterward be sued, proceedings will be staid on payment of costs, on the return of the writ against them. Bulkley v. Colten, 1 Johns. 515. In an action on a bond conditioned for the payment of money, the bail below will be discharged on payment of the condition of the bond in the original action with interest and costs, together with the costs on bail-bond suit. Treadwell v. McKeel, 2 Johns. Cas. 340. The original suit was settled, and the costs were agreed to be paid by the defendant, which he neglected to do; the plaintiff instituted a suit on the bail-bond in order to obtain his costs; the court refused to set aside the proceedings. Campbell v. Grove, 2 Johns. Cas. 105; Colem. Cas. 113. Where irregular notice of bail was given, but they had not put the bail-bond in suit at the subsequent term, the bail were relieved on payment of costs, and justification if required. Gelston v. Swartwout, 1 Johns. Cas. 136; Colem. Cas. 76. If the plaintiff pro-

ceed in the original suit before the costs in the bail-bond suit are paid, he cannot afterward proceed on the bail-bond to obtain them. Id. And the court will set aside the proceeding in the bail-bond suit, on the payment of the plaintiff's costs up to the time when special bail was entered and notice given. Id. If the court and place of the defendant's appearance be substantially set forth in the bail-bond, it is sufficient. Steevens v. Clancey, 1 Johns. 521. If, from a change of attorneys, a bail-bond taken by a plaintiff deputed to arrest be lost, the court will, after verdict, grant the plaintiff leave to file common bail nunc pro tunc. Napier v. Whipple, 3 Caines, 88. Proceeding in the original suit, is a waiver of the proceedings on the bail-bond. Huguet v. Hullet, 1 Caines, 55. If the plaintiff proceed in the original suit before the costs in the bail-bond suit are paid, he cannot afterward proceed on the bail-bond to obtain them. Id. And the court will set aside the proceedings in the bail-bond suit on the payment of the plaintiff's costs up to the time when special bail was entered and notice given. Id.

[See Case No. 5,431.]

GILL (STEVENS v.). See Case No. 13,398.

GILL (WELLS v.). See Cases Nos. 17,393–17,395.

Case No. 5,433.

GILLELAND v. MARTIN.

[3 McLean, 490.] [1]

Circuit Court, D. Ohio. Dec. Term, 1844.

EJECTMENT—INSANITY OF LESSOR OF PLAINTIFF—WITNESS—COMPETENCY OF WIFE TO PROVE THAT HER HUSBAND IS LIVING—BURDEN OF PROOF.

1. The court will not dismiss an action of ejectment when the lessor of the plaintiff is living, though he may be insane.

2. The wife is not a competent witness to prove that her husband is living, on such a motion.

3. Where an individual is proved to have been living within seven years, the burden of proving his death lies upon the party who asserts it.

4. The death of the lessor at the time of the demise laid in the declaration, when proved, will defeat the action.

5. If the lessor be a lunatic the action is well brought in his name.

At law.

Mr. Corry, for plaintiff.

H. B. Curtis, for defendant.

LEAVITT, District Judge. At the last term, a motion was made by the defendant, to strike out the demise laid in the declaration, and to dismiss the suit, on the ground that the lessor of the plaintiff was dead at the time of its institution. This motion was based on the professional statement of counsel, setting forth, in substance, that in a conversation which he had with Mrs. Gilleland prior to the commencement of the suit, she asserted that her husband was not then living. This motion having been continued to the present term, the plaintiff by his counsel now appears, and shows cause against it. And for this purpose he exhibits the affidavit of Mrs. Gilleland, the wife of the lessor of the plaintiff, in which she states that her husband has been for many years past a lunatic, separated from his family, and at the time of the commencement of this suit resided in the city of Philadelphia. The affidavit of a Miss Wallace, the niece of Mrs. Gilleland, and residing with her, at Cincinnati, is also produced; in which she states that she has not seen Gilleland for several years, but has frequently heard of him, by letters from relatives of the family and other means of information, and that he was living in the city of Philadelphia, though laboring under insanity, and incapable of transacting business. The affidavit of Mrs. Gilleland is objected to as incompetent to prove the fact for which it is offered. And it is clear that, as the wife of the plaintiff, she is inadmissible as a witness, and her statement is therefore rejected. But no such objection lies to the affidavit of Miss Wallace. And her statement, though not conclusive to prove the plaintiff to be in full life, is sufficient to raise the presumption of that fact, and to throw upon the defendant the onus of proving his death. The doctrine is: That where an individual is proved to have been living within seven years, the burden of proving his death lies upon the party who asserts it. 1 Greenl. Ev. 47. For the purpose of this motion, the court is therefore justified, in the absence of proof to the contrary, in sustaining the presumption that the lessor of the plaintiff is in full life, and being a resident of the state of Pennsylvania, this court has jurisdiction of this suit. That the death of the lessor of the plaintiff at the time of the demise laid in the declaration, when proved, will defeat a recovery in the action of ejectment, has been settled by the adjudications of this court, and is sustained by numerous authorities. 3 Wend. 149.

It is suggested by counsel that the fact of the lunacy of the plaintiff, which appears from the affidavits, creates a disability on his part to maintain this action. But there can be no doubt that the action is rightly brought in his name. It would not be sustained in the name of his committee, or of a guardian. Adams, Eject. 89; Shelf. Lun. 395 (Law Library). The motion is therefore overruled.

The counsel for the plaintiff having previously obtained leave to amend his declaration, and having filed an amended declaration, inserting a lot of ground in the town of Delaware by a number differing from that contained in the original, the defendant's counsel moved to set aside the amendment. And it was held, that this amendment was not allowable. A plaintiff has no right to amend his declaration by adding a count containing a demise from another person, and for a tract of land not before claimed. 1 A. K. Marsh. 450.

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

GILLELAND (PENNOCK v.). See Case No. 10,942.

GILLES (BROWN v.). See Case No. 2,007.

GILLESPIE (BEECHER v.). See Case No. 1,224.

Case No. 5,434.

GILLESPIE v. CUMMINGS.

[3 Sawy. 259; 1 Ban. & A. 587.] [1]

Circuit Court, D. California. Dec. 21, 1874.

PATENTS—MULTIFARIOUSNESS.

1. Where two separate patents for improvements in the manufacture of brooms owned by the complainant are alleged to have been infringed by the defendant, and the broom manufactured by the defendant appears to be an infringement of both patents, the bill is not bad for multifariousness.

[Cited in Hayes v. Dayton, 8 Fed. 705; Deering v. Winona Harvester Works, 24 Fed. 90.]

2. Where the right to both patents alleged to be infringed for the state of California, has been assigned to complainant, the bill is not bad for multifariousness, because the assignment of one of the patents also embraces other territory than the state of California.

[In equity. Bill by James Gillespie against James H. Cummings. Heard on demurrer to the bill.]

J. V. O'Brien, for complainant.

Tully R. Wise, for defendant.

SAWYER, Circuit Judge. This is a suit in equity to restrain the infringement of two certain patents for improvements in the manufacture of brooms, one [No. 102,936] dated May 10, 1870, issued to William S. Hancock, and the other [No. 106,021] dated August 2, 1870, issued to James H. Anderson, the right to one of which for the Pacific coast, and to the other for the state of Calinia, have been assigned to complainants. Defendant demurs for multifariousness: Firstly, on the ground that the infringement of each patent is a separate and distinct cause of action and that the two cannot be joined in the same bill. Secondly, that the assignment of the patent right to the two patents is not for the same territory. Although it might be more directly and specifically alleged, I think it sufficiently appears that the same broom made by the defendant, if an infringement at all, must be an infringement of both patents. There is, therefore, a common point to be litigated, and much of the testimony must, from the nature of things, be applicable to both patents. So, also, the assignment of both patents embraces the state of California. Whatever the rule might be, if the several assignments covered no part of the same territory, these assignments do cover the state of California. I think the bill not bad for multifariousness on either ground. The principles laid down in Nourse v. Allen [Case No. 10,367], and Central Pac. R. Co. v. Dyer [Id. 2,552], appear to me applicable.

Demurrer overruled, with leave to answer upon the usual terms.

[1] [Reported by L. S. B. Sawyer, Esq.; reprinted in 1 Ban. & A. 587; and here republished by permission.]

GILLESPIE v. The LEONARD. See Case No. 8,256.

Case No. 5,435.

GILLESPIE v. McKNIGHT et al.

[3 N. B. R. 468 (Quarto, 117).] [1]

District Court, S. D. Mississippi. 1870.

BANKRUPTCY—FRAUDULENT CONVEYANCES—DEED OF TRUST FOR BENEFIT OF BANKRUPT'S WIFE.

1. In Mississippi, husband gave promissory note to the trustee of wife, for alleged balance on account stated between them, growing out of the use of the separate personal and real property of the wife, and executed a deed of trust on certain land of the husband to secure payment of the note, and subsequently went into voluntary bankruptcy. On petition of assignee and a secured creditor, *held*, the said conveyance must be held to be fraudulent and void as to existing creditors at the time it was made.

2. Semble, even if the wife's claim was valid under the laws of Mississippi, the effect of the conveyance would be to delay and hinder creditors, and enable the debtors to obtain an inequitable advantage over them, and so void.

In equity.

HILL, District Judge. This cause is considered as on bill, supplemental bills, answers, and proofs, from which it appears that on the 5th day of January, 1856, said Theodore McKnight, with Hamilton McKnight and W. F. Cain, as his sureties, executed their note to Sarah Gillespie, for the sum of one thousand dollars, with ten per cent. interest, payable twelve months thereafter, the same being for borrowed money. Upon this note the interest was paid annually, up to the 1st day of January, 1860, together with two hundred dollars of the principal debt. On the 23d day of May, 1866, said Theodore and Hamilton McKnight entered in the office of the clerk of the circuit court for the county of Amite, an office confession of judgment for the sum of eight hundred and thirty-two dollars and twenty-five cents upon said note, which was by the said court confirmed on the 2d day of June thereafter. Upon this judgment an execution was issued, and on the 17th day of January, 1868, levied upon the lands mentioned in the bill. The said judgment was, soon after its rendition, enrolled in Amite county, in the proper office. On the 29th day of February, 1868, said Theodore McKnight filed his petition in bankruptcy, and was soon thereafter adjudged a bankrupt thereon. On the 17th day of March, 1866, said Theodore McKnight executed his note to John F. Hamilton, as trustee for his wife, Hannah McKnight, for the

[1] [Reprinted by permission.]

sum of three thousand six hundred and sixty-seven dollars and seventy cents, payable two years thereafter; and at the same time executed to said John F. Hamilton a deed of trust upon the lands mentioned in the bill, to secure the payment of said note, being in all nine hundred and twenty acres, and so far as the proof shows, was all the estate then owned by said Theodore, liable to execution. The deed of trust recites that the consideration of the note was the amounts which said Theodore had received from the proceeds of sales of crops jointly raised by himself and his wife upon her lands, and by the labor of their slaves, from the time of their marriage, and the proceeds of sales of the separate property of said Hannah, received by him, and used in his own business, stating the amounts so received for each year, from 1856 to 1862, inclusive, being in all seven years, and making the amount above stated three thousand six hundred and sixty-seven dollars and seventy cents.

Mrs. Gillespie proved her claim as a secured debt with lien upon said lands, and filed this bill, praying that said deed of trust be set aside as fraudulent and void, and that said lands be sold, and the proceeds, so far as necessary, applied to the payment of said judgment. After the filing of this bill, Hamilton McKnight, who was solvent, and bound for the payment of said judgment, paid it in full to Mrs. Gillespie, and filed his petition, praying to be subrogated to the rights of Mrs. Gillespie in said judgment, and in the proceedings in this cause. The assignee in bankruptcy of said Theodore, also filed a petition, praying to be admitted as a party complainant upon the part of the general creditors of the said Theodore. The answer of Theodore and wife admits the judgment and the execution of the trust deed, but denies the fraud charged; also denies that Hamilton McKnight was the surety of Theodore; but states that they were joint makers, and that Hamilton McKnight was bound to pay one-half thereof. The proof, however, shows him only to be surety. The answer further charges that Hamilton McKnight is indebted to the estate of Theodore in a larger amount than the amount due on the judgment. Hamilton McKnight denies that he is indebted to Theodore in any sum, but admits that they had been copartners in a mercantile establishment, and the accounts thereof remain unsettled between them. The suretyship of Hamilton McKnight being established, and he having paid the amount due to Mrs. Gillespie upon the judgment, his right to be subrogated to her rights in the judgment, and in this cause as a means of enforcing it, cannot be successfully questioned; but he can claim no greater rights than he would be entitled to were he the original complainant, and consequently must, before receiving the amount due upon the judgment, account for any balance that may be found due to the estate of Theodore McKnight, and to ascertain which, this question must be referred for an account.

The next and more important question is, was this accounting between Theodore and his wife, and the conveyance of the land to the trustee, fraudulent and void, as against the creditors of Theodore, existing at the time the same was made? By the common law, the husband, upon the marriage, became vested with the title to the personal estate of the wife, as well as to that acquired during coverture, also the rents and profits of her real estate, consequently the support of the wife and family devolved entirely upon him. Such was the law in this state until the passage of the married woman's law in 1839 [Laws Miss. p. 72, c. 46], which secured to her, free from the debts and liabilities of the husband, her personal property, owned at the marriage, or which might come to her during coverture, provided it was not received from her husband, but left the rents and profits of her estate, real and personal, to the husband, as before, except the increase of her slaves, which went to the wife. By the act of 1846 [Laws Miss. p. 152, c. 13], the wife's rights and liabilities were enlarged, so as to secure to her the rents of her lands and the products of the labor of her slaves; but rendering such income liable for supplies purchased for the use of her slaves or plantation. Thus the law stood until the adoption of the Code of 1857, upon that subject, and upon a proper construction of which the decision of the question now presented depends. Article 1, § 5, c. 40, p. 336, secures to the wife the rents, issues, profits, and increase of her real and personal estate, and provides further, that if the husband shall purchase property with the money of the wife, and take the title in his own name, he shall hold it only as trustee for the wife; but with the limitation, that if the husband obtain credit in consequence of the possession of such property, such trust, as against such creditors, shall be void. The next article renders her separate estate liable for contracts made by either herself or husband for the benefit of her separate estate, and also for supplies furnished for herself and her children, including household furniture, carriage, horses, etc., also for the education of the children; thus throwing upon her a portion of the burden of her support and that of her children, the husband being thus deprived of the means for that purpose, given him by the common law. The 28th article, after making provision for the descent and distribution of the estates of married women, makes this proviso: "Provided, that neither the husband nor his representatives shall be liable to account to the wife or her representatives for the rents, profits, or income arising from the separate property of the wife, after the expiration of one year from the time of receiving the same." Taking the different articles of this section together, it is evident that the income

of the wife's estate, so far as necessary, should be used jointly with that of the husband in the support of the family; and further, that the wife should not, by permitting the husband to use and control the income of her estate as his own, obtain credit, and yet deprive the creditor of the means of payment upon which he had a right to rely.

The presumption, therefore, is, that if the wife permitted the husband to receive the income of her estate without accounting for the same for a longer period than one year from its reception, that it was used for the support of the family, or that she was willing for him to enjoy the benefit of it in his business, without requiring him otherwise to account for it, and that the same should remain liable for his debt. The rights of all parties must be governed by the laws in force when they accrue. Mrs. McKnight, by not calling her husband to account for so long a period, lost her right to call him or his representatives, were he dead, to account for the income stated. The creditors, who either gave credit or indulgence, had a right to look to such income, or to the property of the husband acquired by its use, for the payment of their demands. The accounting for such income after the title had thus become vested in the husband, was a gift by the husband to the wife, and this, under the law as then in force, he could not do to the prejudice of his creditors, if indeed, it could be legally done at all, under the proviso: "Provided it is not received from the husband." To hold this conveyance valid as against the creditors of the husband, would be to give to the wife all the benefits of her estate, and relieve her from all the liabilities and burdens which the law imposed upon it; it would be to charge the entire expense of the support of the wife and her children to the husband, to be discharged at the expense of his creditors.

Admitting that the claim of the wife was valid, the amount of property conveyed, which was all that was subject to execution, so far as the proof shows, the length of time given for payment, the relationship between the parties, and all the circumstances, it would be difficult to come to any other conclusion than that it was a conveyance to hinder and delay other creditors, and to obtain an inequitable advantage over them. The act of 1867 [Laws Miss. p. 725, c. 496], entitled "An act to amend the law heretofore in force respecting the rights of married women," has no application to this case, having been passed subsequent to the conveyance from Theodore McKnight to the trustee, and only applying to rights accruing after its passage. The limitation of one year made in Code 1857 was not intended as a limitation of a suit brought by the wife against the husband, but as a limitation to the accounting itself. This court is as much bound to respect and enforce the rights of married women under the laws of the state, as are the state courts, but neither can go beyond the legislative intention; especially when to do so would open the door to gross frauds by failing husbands upon the rights of their creditors.

After the able argument of counsel on both sides, and the most mature consideration of the important questions presented, I am compelled to hold this conveyance fraudulent and void as to the creditors of said Theodore McKnight, who were such at the date of its execution.

Case No. 5,436.

GILLESPIE v. REED et al.

[3 McLean, 377.] [1]

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

EJECTMENT IN ILLINOIS—EVIDENCE—COPY OF RECORDED DEED—SEAL—NOTICE TO SUBSEQUENT PURCHASERS.

1. In Illinois, all fiction in the action of ejectment is abolished.

2. The copy of a recorded deed may be received in evidence, to show that when recorded, it had a seal on it, which had been removed from the original.

3. Deeds recorded under a statute in Illinois, are made notice to creditors and subsequent purchasers, though not properly acknowledged. But such deed, when used in evidence, must be proved as similar instruments of writing.

At law.

Mr. Peter, for plaintiff.

Mr. Reed, for defendants.

OPINION OF THE COURT. This is an action of ejectment. All fiction in this action, in Illinois, is abolished by statute. In support of the plaintiff's title, a deed was offered which was executed in New Hampshire, and the acknowledgment of which was taken in that state before a justice of the peace. The certificate of the secretary of state, and the state seal, were offered as proving that the person taking the acknowledgment was a justice of the peace. This was objected to. The statute of Illinois regulating the execution of deeds out of the state, for lands lying within it, at the time this deed was executed, requires the certificate of the clerk, and seal of the court; if the person taking the acknowledgment be a justice of the peace, that he is a justice. The district judge held this authentication sufficient. The circuit judge said, if the clerk, who is to certify, be the clerk of the county, which is supposed to be the meaning of the act, he thought the authentication not sufficient. That where the statute pointed out a form of a deed executed out of the state for land within it, the statute must be pursued. But the deed was read in evidence. The defendants offered a deed purporting to be under seal, but the seal not appearing on the face of the deed, a copy of the record was

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

admitted to prove that originally it had been sealed. An objection was made to the acknowledgment, because it did not state that the grantor making the acknowledgment, was known to the person taking it. The act of July 21, 1817 [Laws Ill. p. 18, § 1], provides, "that the recording of any deed, grant, &c., shall be deemed and taken to be notice to subsequent purchasers and creditors, from the date of such recording, whether the said writing shall have been acknowledged or proven in conformity to the laws of the state or not; provided, that no such writing, acknowledged or proven in conformity to the laws of the state, to entitle the same to be recorded, shall be admitted as evidence in any court, unless execution thereof be proven in the manner required by the rule of evidence applicable to such writings." And it was declared, that "that act shall apply to writings heretofore executed." Previous laws authorised deeds to be recorded which had been acknowledged, &c., without a certificate that the officer knew the person making it. The deed was admitted on parol proof of its execution.

Case No. 5,437.

GILLET et al. v. PIERCE et al.

[Brown, Adm. 553.] [1]

District Court, E. D. Michigan. Feb., 1875.

PRACTICE—RIGHT TO JURY TRIAL UNDER THE ACT OF 1845 AND THE REVISED STATUTES.

1. Unless given by statute, there is no right in admiralty to a trial by jury.

2. The act of 1845 was passed upon the assumption that, by the constitution and judiciary act of 1789, admiralty jurisdiction was limited to tide waters; that cases arising upon the lakes were cognizable only in the common law courts, and were consequently triable by jury under the constitution; and that congress could not transfer the jurisdiction in such cases to courts of admiralty, without "saving to the parties the right of trial by jury." Congress did not intend by this clause to grant a new right, but to save one already supposed to exist.

[Cited in The Marine City, 6 Fed. 414; The Erie Belle, 20 Fed. 63; The Empire, 19 Fed. 558; Bigley v. The Venture, 21 Fed. 880.]

3. The assumption upon which the act was passed having been declared to have had no existence, the entire act, including the saving clause of a right to a trial by jury, became inoperative.

4. By the Revised Statutes, however, the law is changed, and the right to a trial by jury is expressly given in the class of cases specified in the act of 1845 [5 Stat. 726].

5. The party demanding a jury must bring himself by his pleadings within the provisions of the act.

Motion of libellants [John R. Gillet and others] to strike from respondents' answer a demand for a jury trial. The action was in personam on a contract for towing certain rafts of timber for the respondents [Jerome Pierce and others] from various places on Lake Huron to Buffalo. The answer admitted the contract, but alleged, by way of defense, negligence and damages in the performance of it, and contained a request that the issue thus joined be tried by a jury.

H. B. Brown, for libellants.
W. A. Moore, for respondents.

LONGYEAR, District Judge. It was conceded that the right of trial by jury, in civil causes of admiralty and maritime jurisdiction, does not exist unless it is expressly given by some statutory enactment; but it was claimed that it is so given by the act of congress of February 26th, 1845, entitled "An act extending the jurisdiction of the district court in certain cases upon the lakes and navigable waters connecting the same" (5 Stat. 726), as retained and embodied in the late revision of the statutes of the United States (section 566).

The history of this legislation is very peculiar. The act of 1845 was passed, as is well understood, on the assumption, and as had been up to that time held by the supreme court, that by the constitution and the judiciary act of 1789, admiralty jurisdiction was limited to tide water, and consequently did not extend to cases arising upon the lakes and navigable waters connecting the same. From this assumption it followed, as a matter of course, that at the time of the passage of that act all such cases were cognizable in the common law courts alone. From this followed, equally of course, the further assumption that the constitution (article 7 of amendments) guaranteed the right of trial by jury in all such cases. And from this followed, equally of course, the further assumption that congress could not transfer the jurisdiction in such cases from the common law to the admiralty courts, without saving that right to suitors, and so the language of the provision in question as originally enacted clearly indicates, "saving, however, to the parties the right of trial by jury of all facts put in issue in such suits, where either party shall require it" (5 Stat. 727). It is therefore clear to my mind that it was the intention of congress by the clause not to grant or confer a right which had no existence without it, but simply to save a right which it was assured was already in existence, and which they had not the power to abrogate. It was a mere saving clause, necessary to make the act constitutional upon the aforesaid theory on which it was based; and it was undoubtedly for that purpose, and that alone, that it was inserted, and not as a positive enactment. Looking at the clause in this light—and I do not see how it can be looked at in any other—it cannot be assumed for a moment that congress had the remotest idea or intention of making a positive grant of a right not already in existence.

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

But the theory upon which the act of 1845 was based, and consequently the theory upon which the clause in question was made necessary, and the purpose for which it was inserted, have been decided by the supreme court to have had no existence (The Genesee Chief, 12 How. [53 U. S.] 443), and hence that the act itself, as an act extending admiralty jurisdiction as indicated by its title, was inoperative and of no effect (The Eagle, 8 Wall. [75 U. S.] 25). In these cases the supreme court decided that admiralty jurisdiction in this country was not limited to tide water; but on the contrary, that by force of the constitution and act of 1789 [1 Stat. 73], it extended to the lakes and navigable waters connecting the same. From this it followed that at the time of the passage of the act of 1845, the very cases provided for by it, and as to which it assumed to confer jurisdiction upon the admiralty courts as a new jurisdiction, were already cognizable in those courts, and hence that the constitutional provision guaranteeing the right of trial by jury in suits at common law had no application to those cases. In the case of The Genesee Chief, it is true, the court upheld the act, notwithstanding the opinion then promulgated, that the jurisdiction existed independent of it; but in the later case of The Eagle, the court yielded to the only logical result of their former decision, and held that the act itself was useless for the purpose expressed in its title, and for which it was passed; and that inasmuch as the only effect it would have if enforced at all would be to limit instead of extend jurisdiction, contrary to its plain intent and purpose, it was held to be inoperative and of no effect so far as it related to the question of jurisdiction.

This left the clause in question in this shape: In its inception it was the mere saving of a supposed constitutional right; and the necessity of it was because of the supposed pre-existence of such right. Inasmuch, therefore, as no such right did in fact exist, as we have already seen, the clause had nothing to act upon, could save nothing, and, in fact, was inoperative and of no effect, equally with the other provisions of the act. This conclusion seems to me an inevitable and incontestible logical necessity.

I am not unmindful that in the case of The Eagle, the supreme court expressly excepted the clause in question from the effect of their decision holding the act inoperative and of no effect, and that the language made use of by the learned judge who delivered the opinion (the late Judge Nelson), may admit of the construction that the court considered the clause as giving the right of a jury trial in the cases specified in the act. But it is to be observed that the question of the effect of that clause was not directly before them; and it must be presumed that it did not receive that consideration it would have received if it had been before them and fully presented. I think the greatest effect that can be given to that exception is, that the question as to the effect of that clause, or whether it could be given any effect standing alone as it was left by the decision, was left open and undecided.

If this were all, I should have no difficulty in holding that the clause in question was inoperative and of no effect, and that the libellants' motion to strike out and deny respondents' request for a jury trial ought therefore to be granted. But in the late revision of the United States statutes the revisors and congress, probably looking alone to the language used by the judge in excepting the clause in question from the effect of the decision of the supreme court in the case of The Eagle, supra, have sought to retain it as an existing, effectual enactment, and as an express grant of the right in the cases specified in the act of 1845. In the revision it is embodied in the same section with the general provision of the act of 1789, in relation to trials of issues of fact in the district courts, and the whole section is made to read as follows:

"Section 566. The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury. In causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes and navigable waters connecting the lakes, the trial of issues of facts shall be by jury when either party requires it."

It will be observed that the language, and, it is respectfully suggested, the entire tenor and effect of the clause is wholly and completely changed from what it was in the act of 1845. In that act it was the mere saving of an erroneously supposed pre-existing right. In the revision it is an express grant of a right not previously existing. It is conceded that if retained at all, such change was essential to give the clause any force or effect whatever. The necessity for such change, however, furnishes to my mind an unanswerable argument why it ought not to have been retained, and why it ought to have been omitted from the revision as obsolete and of no effect. The embodiment of the provision in the revision in its changed form furnishes a remarkable instance of the manner in which laws may and sometimes do get upon the statute books without ever having been deliberately enacted. Being there, however, under the forms of legislation, it has become a law of the land, and as such, it must be obeyed. It is respectfully suggested, however, that, without further legislation, it is a mere excrescence upon the jurisdiction of

the admiralty courts, partial in its provisions, impracticable of application in many of the cases sought to be provided for by it, and in some respects impossible of execution so as to do complete justice, for want of the necessary machinery to carry it out to its proper and legitimate results. It is partial, because it includes only a portion of the causes cognizable in the admiralty, and as to those it is limited to such only as arise in a restricted locality. It is impracticable in many cases, because in cases arising upon contracts or torts upon or concerning two or more vessels where one is within the class of vessels specified in the provision and the other is not, as frequently occurs here upon these border waters, two trials may be made necessary, one with a jury and one by the court without a jury, and that upon the same state of facts, and often resulting perhaps in different and opposite judgments, and thus involving inextricable confusion. In some respects it is impossible of execution so as to do complete justice, because no provision is made for a review of cases thus tried, and it thus defeats a valuable right which a party feeling aggrieved would otherwise have. By the constitution (article 7 of amendments), "no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." By these rules the only mode known by which facts tried by a jury may be re-examined, other than by granting a new trial by the court where the issue was tried, is by the award of a venire facias de novo by an appellate court, for some error of law which intervened in the proceedings,—2 Story, Const. (3d Ed.) 548; Knickerbocker Ins. Co. v. Comstock, 16 Wall. [83 U. S.] 258, 269; which mode, however, is not known to proceedings in admiralty, and can have no application to such proceedings without express legislative enactment. The only provision in existence for the review of judgments and decrees in the district courts in civil causes of admiralty and maritime jurisdiction is by appeal. Section 21, Act 1789 (1 Stat. 83). An appeal entitles the parties to a full rehearing upon the facts as well as the law, which, however, cannot be had by the rules of the common law in a case tried by a jury in the district court, and by which rules alone, as we have seen, a case so tried, can be reviewed.

The imperfections and incongruities of the provision have doubtless arisen in a large degree from the mistaken theory upon which the act of 1845 was based, and the peculiar circumstances under which the enactment has found its way into the revision. It is to be hoped that the attention of congress will be speedily called to the matter, when they will undoubtedly repeal the provision or make it general and uniform, applicable alike to all cases and all localities; and at the same time make ample provision for a review of cases thus tried.

If trial by jury in admiralty causes is to be allowed at all, either under the present limited or more extended provisions, I would, if permitted, suggest that it be left to the discretion of the court in each individual case; and that it be accomplished by making up an issue under the direction of the court and sending the same to be tried by a jury on the common law side of the court, as is done in equity causes, and also, I believe, in the English admiralty. This course would do away with some of the difficulties above suggested.

The pleadings do not bring the present case within the provisions of the enactment, it nowhere appearing by the libel or the answer that the vessel concerning which the contract in question arose was "enrolled and licensed for the coasting trade." The motion must, therefore, be granted and a trial by jury denied.

Motion granted.

GILLETT (BEECHER v.). See Case No. 1,225.

GILLETT (LAMB v.). Case No. 8,016.

GILLETTE (GAFFNEY v.). See Case No. 5,168.

Case No. 5,438.

In re GILLEY.

[2 Lowell, 250.] [1]

District Court, D. Massachusetts. May, 1873.

BANKRUPTCY—MEETING.

1. The first meeting of creditors in a proceeding in bankruptcy should be kept open for at least one hour.

[Cited in Re Ewing, Case No. 4,587.]

2. Where such a meeting was warned for ten o'clock, and certain creditors appeared and voted for assignees, and the register declared the polls closed at half-past ten, and other creditors appeared and voted before eleven o'clock,—*held*, the register should have counted these last votes.

[In bankruptcy. In the matter of J. H. Gilley.] The register certified that the first meeting of creditors was duly notified to be held at his office, at ten o'clock in the forenoon of a certain day. Several creditors appeared and proved their debts, and voted for assignee. At half-past ten o'clock, all creditors present having voted, and no intimation from any one having been made that other creditors were expected, the register declared one of the two candidates who had been voted for to be elected. Thereupon the creditors left the office, and, in about ten minutes, other creditors arrived and proved claims, and filed votes sufficient to change the result and elect the other candidate. The register declined to count these votes, and decided, subject to the opinion of the court, that the former candidate was elected.

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

LOWELL, District Judge. It has been the practice, under the insolvent law of Massachusetts, and under the bankrupt act [of 1867 (14 Stat. 517)], so far as I am informed, to consider that a meeting of creditors, warned for ten o'clock, is to be open for at least one hour, and as much longer as the business before the meeting may require. The register has full power of adjournment for cause; but I do not think he should close the polls under one hour in any event. This is a matter of practice which the supreme court have not found it necessary to regulate, and which need not be uniform in all the districts, but which ought to be clearly established uniformly throughout each district.

It has always been the habit in New England, and probably in most of the states, to require a justice of the peace, or other magistrate or commissioner, sitting in civil causes, to give an hour for the parties to appear. U. S. v. Rundlett [Case No. 16,208]; Niles v. Hancock, 3 Metc. [Mass.] 568; Hobbs v. Fogg, 6 Gray, 251. See Hunt v. Wickwire, 10 Wend. 102; Shufelt v. Cramer, 20 Johns. 309. It is a common saying, and a true one, that "it is ten o'clock until it is eleven." The rule is by no means confined to magistrates. It is said in Shufelt v. Cramer to apply to orders to show cause before a judge in chambers; and such has always been my practice in the many orders I have occasion to issue in motions and interlocutory matters in bankruptcy. The meeting for the surrender of a bankrupt, under the old practice in England, was always enlarged on the application of the bankrupt; and Mr. Christian says: "If the time is not enlarged, and the bankrupt does not surrender, it is the present practice of the commissioners in London to wait one hour at the least, and until they have finished all other business before them." 1 Christ. Bank. (2d Ed.) 300. There is a general order under the new English statute of 1869, which authorizes the registrar to adjourn the first meeting for one week at the end of half an hour from the time notified, if a quorum (that is three) of the creditors have not appeared within that time. This, however, is very different from closing, within the hour, a meeting once fully entered on.

The reason for allowing a single plaintiff or defendant an hour to meet his adversary, applies still more strongly to a general meeting of creditors coming from various places, and liable to more numerous chances of delay, and having a right to suppose that the business of such a meeting must occupy a considerable time. I am of opinion, therefore, that the practice is, and should be, that the first meeting of creditors lasts for at least one hour, and that the votes which were rejected in this case were seasonably offered, and should have been counted. There is no objection to the register's announcing the state of the polls at any time, or even closing them provisionally, with the understanding that they will be opened again if creditors appear within the hour.

It may be said that, the election having been irregular, neither candidate ought to be held to be duly chosen, but that a new election should be ordered. There would be much force in this argument in many cases; but I understand there is nothing in the circumstances of this to require the trouble and expense of another meeting to be incurred,

I appoint A. W. Pope assignee in this cause, he being the person chosen, if the votes of all the creditors are counted.

GILLIES v. CONE. See Case No. 3,095.

GILLIES (UNITED STATES v.). See Case No. 15,206.

Case No. 5,439.

GILLIGAN et al. v. The WINGED RACER.

[43 Hunt, Mer. Mag. 69.]

District Court, S. D. New York. 1860.

SEAMEN'S WAGES — UNAUTHORIZED EMPLOYMENT.

[Seamen shipped by direction of one claiming to be the master, but whose character as such was denied by the owner, *held* to have no lien for wages, it appearing that the voyage was never performed, and there being no evidence of the alleged master's authority.]

This was a libel on behalf of the seamen to recover wages against the vessel, by reason of the failure of a voyage to China and back, for which they had shipped. They were shipped in this port by a broker, at the request of one Hanna, who was alleged to be the master of the ship, and four of them rendered themselves on board to do duty. Hanna testified that he had possession of the ship at the time as master, but did not prove any authority from her owner, and testified also that she was shortly afterwards taken possession of by the United States marshal under process, and the voyage was broken up, and he had not had possession since. The claimants offered depositions to show that Hanna's possession was an unauthorized usurpation of her, but that evidence was excluded by reason of informality in the certificate of the commission.

Before BETTS, District Judge.

HELD. That the libelants do not furnish sufficient proof that Hanna's possession was such as to authorize him to encumber the ship with the charge of wages of a crew. There is no evidence that he brought the vessel to this port, or even exercised any control over her, except in directing the broker to ship the crew. He may have wronged the libelants, but there is no proof which can authorize the court to redress that wrong at the expense of the lawful owner, who, on the proofs, must be deemed wholly innocent of any misconduct on his part. Libel dismissed, but, as the libelants are seamen, without costs.

GILLINGHAM (OGDEN v.). See Case No. 10,456.

GILLIS (UNITED STATES v.). See Case No. 15,207.

Case No. 5,440.

GILLIS v. VAN NESS.

[1 Cranch, C. C. 369.] [3]

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

BILLS AND NOTES.

If the defendant receive the proceeds of the plaintiff's note, discounted with the defendant's indorsement, the plaintiff cannot recover the amount unless he has paid and produces the note, or accounts for its non-production.

Assumpsit for money lent and for money had and received, and insimul computasset. The evidence relied upon by the plaintiff [the executor of Stanly Byus] was a receipt in these words, viz.: "Received of Mr. S. Byus one hundred dollars which I am to repay him, and which, together with two hundred dollars received of, and receipted to him before, makes the amount of a note indorsed by me and discounted in Bank of Columbia yesterday. John P. Van Ness. Jan. 27th, 1804."

THE COURT (nem. con.) said, the plaintiff cannot recover upon that receipt unless he shows that he has taken up the note, and produces it, or accounts for its non-production.

GILLUM, The WILLIAM. See Case No. 17,693.

Case No. 5,441.

GILMAN v. BROWN et al.

[1 Mason, 191.] [1]

Circuit Court, D. Massachusetts. May Term, 1817.[2]

UNPAID PURCHASE MONEY — LIEN OF, ON LAND — SHARES IN ASSOCIATIONS FOR PURCHASE AND SALE OF LAND—EFFECT OF.

1. The scrip or certificate holders, in the New England Mississippi Land Company, hold their shares under the company itself, as a part of the common capital stock, and are not considered as holding derivatively, and solely as individual sub-purchasers, under the separate original titles of the original purchasers from the Georgia Mississippi Company, so as to be affected by any circumstances of defect in these separate original titles; those titles being in fact now vested in the trustees of the New England Mississippi Company itself, as part of its common stock, and not in the individual holders.

[See note at end of case.]

2. The award of commissioners under the acts of congress of the 31st of March, 1814, c. 98 [2 Story, Laws, 1405; 3 Stat. 116, c. 39], and of the 23d of January, 1815, c. 706 [4 Bior. & D. Laws, 776; 3 stat. 192, c. 24], and of the 3d of March, 1815, c. 778 [4 Bior. & D. Laws, 843; 3 Stat. 235, c. 97], appointed to settle the claims of the New England Mississippi Land Company and others to the "Yazoo Lands" (so called), is not conclusive as between the scrip-holders and the said company, as to their rights, derived under the grants of certificates of shares in the stock of the company itself. The commissioners had no jurisdiction of any such question.

3. The origin and nature of liens on land for unpaid purchase-money. Generally speaking, such a lien exists, as between vendor and vendee, and also as against subsequent purchasers from the vendee with notice, that the money remains unpaid; but not as against a purchaser bona fide without notice. But the rule itself is not inflexible, as between vendor and vendee. And therefore if the parties do any unequivocal act, by which they clearly show that they do not contemplate such a lien to exist, the lien is not permitted to attach. If the vendor take a distinct security for the money, either of property, or of the responsibility of a third person, the lien is waived. But merely taking the note or bond of the vendee himself, without a surety, is no waiver of the lien. If the vendor take a negotiable note of the vendee, endorsed by a third person, payable at future times by instalments, this is such a distinct security as extinguishes the lien.

[Cited in Harris v. The Kensington, Case No. 6,122; Re Brooks, Id. 1,943; Re Perdue, Id. 10,975; Re Bryan, Id. 2,062.]

[Cited in Williams v. Roberts, 5 Ohio, 41. Disapproved in Graves v. Coutant, 31 N. J. Eq. 770. Cited in Re Palmer, 1 Doug. (Mich.) 428; Boos v. Ewing, 17 Ohio, 520; Tobey v. McAllister, 9 Wis. 469; Boynton v. Champlin, 42 Ill. 65; Adams v. Buchanan, 49 Mo. 64; Anderson v. Donnell, 66 Ind. 156; Messmore v. Stephens, 83 Ind. 527; Clower v. Rawlings, 9 Smedes & M. 122; Walton v. Hargroves, 42 Miss. 18; Baum v. Grigsby, 21 Cal. 178; Dunton v. Outhouse, 64 Mich. 425, 31 N. W. 413; Marshall v. Christmas, 3 Humph. 618; Kauffelt v. Bower, 7 Serg. & R. 78; Schnebly v. Ragan, 7 Gill. & J. 122; Chapman v. Chapman (Ark.) 18 S. W. 1037.]

[See note at end of case.]

4. Quaere, whether on a purchase of lands, lying in another state, made under a contract executed in Massachusetts by citizens of that state, a lien for the purchase-money vests in favor of the vendors, who are citizens of the state where the lands lie, the contract being silent on that head, and no such lien existing by law in any case of the purchase of lands in Massachusetts. A lien is always supposed to exist by the tacit consent of all the parties. Can such consent be presumed where the law of the state is not known to the purchasers in another state?

[Cited in Burrows v. Hannegan, Case No. 2,206.]

[See note at end of case.]

[Cited in Dow v. Rowell, 12 N. H. 59; Ahrend v. Odiorne, 118 Mass. 265; Snyder v. Martin, 17 W. Va. 301.]

5. A lien is neither a jus ad rem, nor a jus in re; and the lien of a vendor on the land sold is so mere a creature of the court of equity, that its existence cannot be safely predicated in any case, until established by the decree of the court. Quaere, whether commissioners under the acts of congress aforesaid, had any jurisdiction to inquire into or settle any claim for a mere lien.

[Cited in Dunlap v. Stetson, Case No. 4,164; Fletcher v. Morey, Id. 4,864.]

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

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

[2] [Affirmed in 4 Wheat. (17 U. S.) 255.]

[In equity. Bill by Mary Gilman against Samuel Brown and others.]

This cause was by consent heard upon the bill, answer, and exhibits in the case. There were no facts in dispute between the parties; and the whole controversy turned upon questions of law. The material facts were these: In the month of January, 1796, sundry persons, and among them William Wetmore, purchased of the agents of certain persons in Georgia, called the "Georgia Mississippi Company," then in Boston, a tract of land, then in the state of Georgia, and now in the Mississippi territory, estimated to contain 11,380,000 acres, at ten cents per acre; which tract the Georgia Mississippi Company had purchased of the state of Georgia, and had received a grant thereof in due form of law. The conditions of the purchase were, that the purchase-money should be paid as follows, viz. two cents thereof on or before the first day of May, 1796; one cent more on or before the first day of October, 1796; two and a half cents more on or before the first day of May, 1797; two and a half cents more, on or before the first day of May, 1798; and the remaining two cents on or before the first day of May, 1799. The whole of the purchase-money was to be secured by negotiable notes of the several purchasers with approved endorsers, to be made payable to Thomas Cumming, president of the Georgia Mississippi Company or order, payable at the Bank of the United States at Philadelphia, or at the Branch Bank of Boston, and to be delivered to the agents upon the execution of the deed of conveyance by them. It was further agreed, that the deed, when executed, should be placed in the hands of George R. Minot, Esq., as an escrow, to be delivered over by him to the grantees upon the first payment of two cents payable in May, 1796, for which first payment, and for that only, the purchasers agreed to hold themselves jointly responsible. Accordingly, a deed of conveyance was executed by the agents dated the 13th day of February, 1796, to certain grantees named by the purchasers, to wit, William Wetmore, Leonard Jarvis, and Henry Newman, in trust for the purchasers; and the same was duly placed in the hands of Mr. Minot, as an escrow, and negotiable notes with approved endorsers were duly delivered to the agents by all the purchasers for their respective shares of the purchase-money. And afterwards, the first payment of two cents having been satisfactorily made to the agents, the said deed was, with their consent, delivered over to the grantees as an absolute deed; and a deed of confirmation thereof was afterwards, in February, 1797, duly executed and delivered to the grantees by the Georgia Mississippi Company. After the purchase, and before the delivery of the deed, the purchasers formed themselves into an association by the name of the New England Mississippi Land Company, and executed sundry articles of agreement, and, among other things, therein agreed, that the deed of the purchase should be made to Jarvis, Newman, and Wetmore, as grantees as above stated (article 2); that they should execute deeds to the several original purchasers for their proportions in the lands, but should retain these deeds, until the purchasers should sign and execute the articles of association; and should also execute a deed of trust, to certain trustees, as provided for in the articles, of such their respective shares in the purchase (article 3); that the several purchasers should execute a deed of trust to Jarvis, Newman, and William Hull, of their respective shares in the purchase, to hold to them and the survivor of them in trust, to be disposed of according to the articles (article 4); that the business of the association should be managed by a board of directors, who were to have full power and authority to sell and dispose of the whole or any part of the property of the company, and to pay over to their respective proprietors their proportions of the money received from any and every sale, &c., (articles 8, 16, 20); that upon receiving a deed from any purchaser according to the tenor of the articles, the trustees were to give to each proprietor a certificate, in a prescribed form, stating his interest in the trust, and that he should hold it according to the articles of the association; which certificate was to be recorded in the company's books, and was to be "complete evidence to such person of his right in said purchase," and was to be transferable by endorsement; and, upon a record of the transfer in the company's books, the transferee was to be entitled to vote as a member of the company. The share of Mr. Wetmore in the purchase was 900,000 acres. He paid the two cents per acre in cash; and of the notes given by him for the purchase-money, $40,000 were paid by Mrs. Sarah Waldo, his endorser, and the residue $45,000 still remains unpaid. Mr. Wetmore received his certificates from the trustees for his whole purchase, and having sold or conveyed 500,000 acres, he afterwards conveyed the remaining 400,000 acres to Robert Williams, to whom certificates for that amount were duly issued by the trustees, three of which certificates each for 20,000 acres, duly endorsed by said Williams, came into the plaintiff's hands for a valuable consideration; and, the assignment thereof having been duly recorded in the company's books, she was admitted, and has always acted as a member of the company. From causes which are perfectly well known to the public, the New England Mississippi Land Company never obtained possession of the tract of land so conveyed to them.[3]

On the 31st of March, 1814, congress passed an act entitled, "An act providing for the

[3] See the history of this case in Fletcher v. Peck, 6 Cranch [10 U. S.] 89, and in the public documents of congress, 1809.

indemnification of certain claimants of public lands in the Mississippi territory." [3 Stat. 116.] By this act and other subsequent acts amending the same,—Act Jan. 23, 1815, c. 706 [3 Stat. 192, c. 24]; Act March 3, 1815, c. 778 [3 Stat. 235, c. 97],—it was provided, that the claimants of the lands might file in the office of the secretary of state, a release of all their claims to the United States, and an assignment and transfer to the United States of their claim to any money deposited, or paid into the treasury of Georgia, such release and assignment to take effect on the indemnification of the claimants according to the provisions of the act. Commissioners were to be, and were accordingly, appointed under the act, who were authorized to adjudge and determine upon the sufficiency of such releases and assignments, and also to "adjudge and determine, upon all controversies arising from such claims so released as aforesaid, which may be found to conflict with, and to be adverse to, each other." And the sum of $1,550,000, to be issued in public stock, was appropriated by the act, to indemnify the claimants, claiming in the name of, or under, the Georgia Mississippi Company. The New England Mississippi Land Company duly executed the release and assignment, required by the act of congress; and presented the claims of the whole company before the commissioners. The commissioners awarded the company the sum of $1,083,812 in stock, certificates for which were duly issued under the act of congress, and received by the treasurer of the company. A farther claim was made for the whole amount of the original share of Mr. Wetmore, but the board of commissioners decided, that the Georgia Mississippi Company had a lien in equity on the land sold and conveyed to said Wetmore, for the purchase-money due and unpaid by said Wetmore, and that the indemnity under the act of congress should follow that lien, and be awarded to said Georgia Mississippi Company to the amount thereof. And inasmuch as the said Sarah Waldo was the holder of certain certificates issued by said trustees, on account of said Wetmore's original purchase, the commissioners further awarded, that the sum of $40,000 of the purchase-money (which had been paid or satisfied by her for said Wetmore, or her endorsement) should be applied first to make good the scrip or certificate so issued to her; and that if there was any surplus after making her scrip or certificates good, such surplus could not be applied to the scrip or certificates held under Robert Williams, who did not become the assignee of the said Wetmore until after the said sum was paid. And the commissioners further decided, that the certificates, issued by the trustees on account of any of the original purchasers, who failed to make payment of the purchase-money to the Georgia Mississippi Company, were bad, and that the parties claiming under them must lose their indemnity under the act of congress. By this award of the commissioners, the claim of the New England Mississippi Land Company for the amount of the share of the plaintiff was completely excluded. But the plaintiff claimed her share of the stock actually received, as a proprietor in the New England Mississippi Land Company, notwithstanding the award of the commissioners, and to establish this claim, the present suit was brought; and in her bill she averred, that she was a bona fide purchaser for a valuable consideration, without notice of the nonpayment of the purchase-money by Mr. Wetmore, which averment was not denied by the answer.

Mr. Webster, for defendants.

The plaintiff comes into court as the holder of an equitable interest only. The legal estate was vested by the conveyances in trustees, and William Wetmore, from whom the plaintiff's title is derived, was entitled to nothing but the benefit of the trust. The title, therefore, is no better in the plaintiff's hands, than it was in the hands of William Wetmore. The purchaser of an equity must abide by the case of the person from whom he buys. He must take the estate subject to all incumbrances. Want of notice, or payment of a valuable consideration, will not enable him to raise himself higher than his vendor. Lord Thurlow says (Davies v. Austen, 1 Ves. Jr. 247) he takes that to be a universal rule. See, also, Mackreth v. Symmons, 15 Ves. 329, and Sugd. (2d Lond. Ed.) 482. Holding the title of Wetmore subject to all the equity which belonged to it in his hands, the question is, whether the plaintiff can claim any portion of this fund? A sufficient answer to this claim is, that she has contributed nothing to the fund. She wishes to partake in the benefit, without having partaken in the burden. She may indeed have paid a valuable consideration to Wetmore, or his assignee of whom she purchased; but that payment has not gone into this fund, and gives her no equity against these defendants. She is the representative of Wetmore's right, and as far as any thing was paid on that right, so far an allowance has already been made by the commissioners under the act of congress, to those whom they thought entitled to receive it. For what remains, she can be entitled to nothing, because, as to this, the right which she represents has paid nothing. It has been urged, that the New England purchasers intended to incorporate their several titles and estates into one common estate, and out of this to carve new portions for the several purchasers, according to the amount of their original interest, but entirely disregarding the quality of their original titles. If this had been so, it would not help the plaintiff's case. Wetmore, as well as the others, had covenanted for title, and could not be permitted, in a court of equity, to claim

against those covenants the benefit of a conveyance, which turns out to be inoperative and unproductive, as far as he was concerned in it, on account of his violation of the covenants of his deed. But there was no intention to consolidate their several titles by the purchasers. They had purchased in unequal portions a large tract of land. It had been conveyed to them by several and distinct conveyances. They did not expect to make partition, and occupy the land immediately. Their object was to sell, and this object could be best attained, as they supposed, by acting together. They agreed, therefore, on common trustees to hold the legal estate, and on a committee, who should be the common agents, stewards, or attorneys of the parties. But in their deeds to the trustees they covenant severally, each one for himself, and expressly renounce all mutual responsibility. They agreed to appoint the same trustees, and the same agents, but there is nothing from which it can be in the slightest degree inferred, that they intended to take the risks of each other's titles. It was not necessary to say, whether the commissioners were well supported in the decision which they had made. No fraud or negligence is at any rate imputed to the defendants. They have used due diligence, and sought to increase the fund, by obtaining from the commissioners the stock which would have belonged to the original purchase of Wetmore, if his title had been deemed valid. In this they have failed without any fault of their own. The commissioners have decreed, that that portion of Wetmore's purchase which was conveyed to Williams, through whom the plaintiff derives her title, is not entitled to any indemnification. They proceed on the ground, that the original Georgia vendors had a lien for the purchase-money, and that they, if any body, the purchase-money not being paid, are entitled to the indemnity provided by the act of congress. That the vendor has in equity a lien for the purchase-money against the vendee, and all purchasers under him with notice, if it be a legal estate; and against all persons purchasing with or without notice, if it be an equitable estate; could not be denied as a general doctrine. The English cases, on this point, are all considered by Lord Eldon in Mackreth v. Symmons [supra]. There may be a relinquishment of this lien; and the evidence of such relinquishment may result from the nature of the transaction and the circumstances attending it. How far such evidence existed here, it was the duty of the commissioners to consider. If they have erred in judgment, the consequences of that error ought not to be thrown on the defendants. The stock, which the commissioners were to issue, may be considered as the proceeds or product of the estate vested in the trustees. The bill does not complain, that the defendants have injured the plaintiff by surrendering the estate to the United States. In this they are admitted to have done precisely what they ought to have done. The complaint is, that a just distribution has not been made of the proceeds. But the plaintiff's estate has produced no proceeds. The commissioners were empowered by the act to judge between adverse claims. They have decided against the claim of the plaintiff; and it would be manifestly unjust and unreasonable, that, having a bad claim herself, she should partake with others in the benefit of their claims, which are good, unless she clearly proves an agreement to form this sort of partnership. And indeed if it were proved, that Wetmore and others agreed to form this partnership, each at the same time covenanting for the title of what he himself brought to the common stock, he could not claim in equity a proportionate share of the proceeds of the whole, having broken his own covenant, and the general proceeds being thereby diminished in an amount equal to what he undertook to convey to the trustees. If the plaintiff could recover in this case against the defendants, one of whom is the surviving trustee, that trustee must have his action against Wetmore on the covenants of his deed of trust. But such a proceeding would be novel. It is not the course in equity to treat covenants as distinct and independent, but to require of plaintiffs to allege and prove performance, or readiness to perform on their part. 2 Fonbl. Eq. 383. If the land, or its proceeds, have been taken from the trustee by some one, whose title has been adjudged better than that of the cestui que trust, is it possible, that the cestui que trust can have any claim on the trustee? The plaintiff relies on the articles of association, which say that the certificate shall be complete evidence of the title. So it may be; but it does not say what title the holder of the certificate shall be taken to have. The articles mean no more than that the certificate should be evidence of the transfer. Whatever the vendor could sell, he might assign by endorsing the certificate. But in this there is no agreement to assure the title. The certificate itself refers to the articles of association and the deeds of trust, to show the nature and condition of the property. These articles and deeds prove clearly, that the original purchasers stand on their several distinct purchases, and decline all mutual responsibility. She must therefore be taken to have known, what she purchased, as the reference in the certificate to the deeds and articles was sufficient to put her on inquiry. Where one has sufficient information to lead him to the knowledge of the fact, he shall be deemed conusant of it. Sugd. Vend. 498, and cases there cited. Even if her estate had been a legal and not an equitable interest, still this constructive notice would have prevented her from standing in any better condition, than those under whom she held. It may be added, that this whole subject was within the jurisdiction of the commissioners. They were not bound to award an aggregate sum to the de-

fendants, to be by them divided for the benefit of the associates. In point of fact they did award in some instances to individuals, who made application for themselves, not through the agency of the defendants. In regard to the sums, which the defendants have received, the commissioners have decreed, that the plaintiff is entitled to no portion. Whatever their original rights were, all parties have agreed to surrender them to the United States, and to receive indemnification to the amount and in the manner, provided by the act of congress. Under that act nothing has been allowed the plaintiff. The defendants, as her agents, have received nothing, and therefore can be chargeable with nothing.

Mr. Amory, for plaintiff.

The fee simple in the lands in question, which vested in Wetmore, was transferred to Hull and others, trustees, and ever after remained in them. Mrs. Gilman, the plaintiff, was not the assignee of Wetmore, and did not hold his title; she could not be an assignee without a privity, either in fact or in law, which did not exist in this case. The intention of the associates was, from the commencement, to avoid the difficulties of title, and to render the certificates of the trustees the only evidence thereof, for which purpose the legal title was placed in the trustees, and a new title, in all the property, was derived from them. The certificate possessed by Mrs. Gilman does not contain the name of Wetmore, nor was the certificate originally issued in his name; it could not have expressed a trust upon the portion, or title, acquired by him and conveyed to the trustees; but such a certificate must have expressed a general interest or title, pervading the whole land. Inasmuch as the trustees derived their title, not from Wetmore only, but from different sources, it must be presumed and intended, that their certificates were to operate generally on all the right and title, which they possessed, without reference to the mode of acquirement. If Mrs. Gilman, or any holder of certificates, was obliged to search into the title, this estate would be attended with all the consequences and incidents of other titles; but the difficulty was expressly intended to be avoided by the 12th act of association, which declares, that such certificate shall be complete evidence; thereby announcing to any purchaser, that the common rules of real property were dispensed with. Shall the trustees and associates now be permitted, contrary to their express stipulation, to depart from this rule of property, which they themselves created, and thus entrap a bona fide purchaser without notice? This association was not incorporated, but the parties intended, as far as they could by law, to give it those facilities, and, in some degree, to convert this real estate into personal estate. The title at law was to vest in the trustees, until bona fide sales of the land were actually made. It is the proceeds of such sales only, or money acquired therefrom, that is assured to the holders of the certificates. It is analogous to the original stockholders in a bank; if one stockholder had originally deposited counterfeit money for his share in the funds, and he had afterwards sold his certificates, and new ones were granted, the new stockholder would not be affected by the false consideration. The trustees and original purchasers undertook to examine each other's title, and precluded all further inquiries in relation to it. Wetmore gave a quit-claim deed only; the quality of his title the associates or trustees could judge of, of which they had as much knowledge as he had; and such deed of quit-claim, whether it conveyed a good or a bad title, constituted a good consideration for the compact with the associates and trustees. It might have been, that Mr. Wetmore's title would have been good, and the other titles bad, by the non-payment of the notes of the other parties, or other cause. This hazard the parties severally sustained, in regard to each other's rights, and made a common stock of all their titles. Was Mr. Wetmore's title, at any period, a good one? If so, what has made it bad? The idea of lien for the unpaid notes of the purchaser without mortgage, is unknown in Massachusetts; and any person learned in the law would have pronounced it to have been good before the decree of the commissioners. If the doctrine of lien for the purchase-money, without mortgage, obtains in Georgia, the contract being made in Massachusetts, where the intention of both parties must be considered as constituting the contract, the laws of Massachusetts ought to construe such contract in preference to those of Georgia. We contend, that this doctrine of lien is only a creature of equity, and refers only to such estates or rights of real property, as are especially recognised by that tribunal, and which do not derive their support from the ordinary rules of law. The title, in order to be what is commonly denominated equitable, must be such a one, as is not recognised by law; such as the assignment of a chose in action, which cannot be assigned by law; or the title must be equitable from the inefficient mode adopted for its transfer, such as the conveyance of real estate by an instrument without seal, or by an executory contract. The conveyance of land, in this case, did not pass an equitable title merely; but the case of Fletcher v. Peck [6 Cranch (10 U. S.) 87], and a subsequent case, in the same court, show, that notwithstanding the Indian title be not extinguished, the freehold and seisin may be transferred; and, in this case, the most solemn deeds and instruments, duly acknowledged, were adopted for the conveyance of the title; and it is sustained by every

legal form. Even in courts of equity, this lien is only raised by implication; and where other circumstances resist this implication, showing that the parties did not mean to rely on the estate sold, for security, such lien was waived. This transaction is filled with circumstances repugnant to such implication. The design of the parties to sell the land, instead of cultivating the same, whereby to pay the notes, expressly excludes the idea of such a lien; as no man would have purchased, who knew that such a note was given for the first purchase, without seeing that his money was appropriated to extinguish the notes; and the strongest circumstance, to repel such a lien for the consideration, consists in this, that the sum of five dollars only is expressed as the pecuniary consideration. Any purchaser, therefore, making inquiry concerning the purchase-money's being paid or not, is at once checked in the pursuit; and we call on the defendants to show any case of lien for the purchase-money, where the sum is not expressed in the deed of sale. Such nominal consideration and concealment of the true one, seems to be properly inserted in order to waive such lien. It is also a doctrine in equity, that the vendee has a lien on the land, in case the title be defective and proper conveyance not made to him, thus making the right reciprocal. But in this deed express provision is made, that the consideration-money shall not be refunded by the vendor for any cause whatsoever; thus essentially distinguishing the present case from those, in which such lien is maintained. It is said, that the commissioners, having a right to decide upon adverse titles, here conclusively decided on our claims; but this we deny, as the adverse titles or claims, on which they were to decide, were adverse claims to the stock from the treasury of the United States, and between such persons, as released their claims to the United States. Mrs. Gilman did not release any claim to the United States, or demand any money from the treasury; of course her rights or claims could not be adjudged by the commissioners. Her claim is not on the government, but on her associates and trustees. The commissioners were bound to decide, to whom the money or stock from the treasury should be paid; not the use the receiver should afterwards make of that money, or the obligations he might be under in relation to it. Suppose Steward and Michael had never applied to the commissioners, or released their claims on the scrip, but had called on the directors as the plaintiff does, what opinion or decree of the commissioners would have been known on this subject? And shall such a casual circumstance affect her rights? Decrees of law affect only those who are parties to the suit, and an opinion incidentally given by the commissioners, ought not to control the plaintiff's rights. This money, except a very small sum, was delivered to the directors as such, for the use of the members, as much as one year previous to the declaration of the sentiments of the commissioners on this subject. The rights of Mrs. Gilman, with respect to the money, vested in her, when it was first received by the directors, and a subsequent opinion of the directors, in relation to the claims of Michael and Steward, cannot alter her rights. The commissioners had power to judge, whether Michael and Steward should receive any money from the treasury of the United States; but they could not decide what rights they had on other persons. Suppose the company had been dissolved some years past, and by a vote of the company, the trustees were directed to convey to each associate his portion of the land; could they, in such case, have conveyed to Mrs. Gilman a portion of Mr. Wetmore's interest in said land, or a portion of their own? And if of their own, which must have been the case, the same would have embraced their title, acquired from other persons; and if, on receiving such release from the trustees, or even from Mr. Wetmore, Mrs. Gilman, under this act of congress, had released to the United States, and the commissioners had not allowed her an indemnity, the legal title would now have vested in her; as the act provides, that the releases shall not operate, until an indemnity is granted; whereas she has now lost her right, by consenting, that the trustees and directors should release her title. This consent was given in contemplation, and on assurance of receiving her rateable part of the funds received by the directors. They, however, hold the funds, and do not reinstate her in her former title. In short, every consideration, both in law and equity, demonstrates her right to a portion of this stock.

STORY, Circuit Justice. The material questions in this case are: 1st. What is the nature and validity of the plaintiff's title to the shares, which she claims in the lands of the New England Mississippi Land Company? 2dly. Supposing it to be originally valid, is it extinguished? Or is the plaintiff estopped from asserting it, by the award of the commissioners? 3dly. If not, is she in equity entitled to claim her proportion of the certificates of the public stock, which have been received by the company under the award of the commissioners? The estate acquired by the first grantees, Messrs. Jarvis, Newman, and Wetmore, under the conveyance to them by the Georgia Mississippi Company, was beyond all question a legal, and not merely an equitable estate in fee simple. By the subsequent conveyances, first to the respective purchasers, and next by them to the trustees, Messrs. Jarvis, Newman, and Hull, a legal estate in fee was also conveyed; so that the latter became seised of the whole

tract of land in fee, subject to the terms, conditions, and trusts, stated in the trust-deed and the articles of association of the New England Mississippi Land Company. The titles of all the original purchasers were acquired at the same time, under the same contract; and, at the instant they were complete, were conveyed to the trustees in the same state, that they were acquired, uno flatu. There is no pretence of any intermediate incumbrance, unless there was a lien for the purchase-money; a point, which will hereafter be considered; and to the extent of that lien, if any, it must be admitted, that the holders of the scrip or shares under the articles of association cannot place themselves in a better situation, than the trustees, who must be taken to be conusant of the facts of the original purchase. For, whether the scrip or shares are to be deemed a shifting use or trust, or personal property, notice to the trustees, who hold the legal estate, affects and binds all, for whom they originally held, or have, upon the transfer of the shares, continued to hold.

But the material consideration is, whether, in virtue of the articles of association, and the conveyances made in pursuance thereof, the original purchasers, and those claiming by assignments under them, are to be considered as holding strictly and exclusively under the original titles of the original purchasers; or whether the whole lands are to be considered as thrown into a common stock, and the scrip-holders are entitled to an undivided portion of the whole stock under the company itself. And, upon the best consideration, which I can give the subject, it does seem to me, that the latter is the true interpretation of the acts of association. The original purchasers were conusant of each other's titles; and mutually agreed to the articles of association, and to the manner, in which the conveyances should be made, before their titles were complete. They agreed to release to the trustees their respective rights and titles in the whole lands included in the purchase; and that the trustees should hold the aggregate amount, to be disposed of, not as a several trust of the respective purchasers, but as the joint stock of the company itself. To be sure, the purchasers were to take certificates of shares according to their original proportions in the purchase; but, in this respect, the case is not distinguishable from that of subscribers to a bank, or insurance company, who contribute a certain amount of the capital stock, and become entitled to a similar amount of shares. Yet no person ever imagined, that they were holders of the specific money paid in; and, if their title to that money should be impugned, that the holder under them lost his right to the shares transferred to him. The only remedy, that would remain, would be personal against the original subscribers for a failure of their titles. In the present case, upon the conveyance to the trustees, each purchaser (excepting Messrs. Wetmore, Jarvis, and Newman) covenanted personally with the trustees, for his own share of the land, against incumbrances. And in case of such incumbrance, (which, except from an implied lien for the purchase-money, could scarcely, from the circumstances of the case, by possibility arise), a personal remedy was provided under the covenant. After a very careful examination, I am unable to perceive throughout the whole articles the slightest allusion to any stipulation, by which the proprietors of scrip or shares were to hold, not under the company, but under the original purchasers; and were to be affected by all the circumstances, that might affect the original grant of the land to them. On the contrary, the very certificates of shares, which on their face carry an assignable quality, and the provision, "that they shall be complete evidence to the legal holder of his right in the purchase," or stock, as well as the manifest objects of the association, in my judgment require, that the whole stock should be deemed to belong to the company in its aggregate capacity; and that every scrip-holder should be held to take a specific proportion, not of the specific stock of an original purchaser, but of the common stock of the company itself. And if the association had been incorporated, instead of being voluntary, under similar articles and conveyances, I am at a loss to conceive, how it would be possible to sustain a different proposition. The fact of the association being voluntary, and not incorporated, cannot in a legal view change the construction, which the articles would otherwise require. On examining the articles, it will at once be seen, that the principal objects of the association were, to unite the several distinct interests of the purchasers into one common interest; to produce uniform and simultaneous efforts to enhance the value of the property; to prevent the injurious competitions and collisions arising from individual and separate negotiations; to provide a common fund for all expenses, and a uniform mode of selling the property for the general and common benefit of all the proprietors; and to give a negotiable quality to the stock or property, which, without impairing the great objects of the association, might facilitate the transfer of shares in the property, and give it a marketable value. For these purposes, the entire management and control of the whole funds or property were given to a board of directors, with full authority to dispose of the same at their sole pleasure and discretion. Taxes were to be levied pro rata on all the proprietors; and their shares in the stock were held responsible for the payment. The moneys received upon every sale of any portion of the property were to be distributed among all the proprietors according to their shares; and the evidence of their title to any shares was to

be vouched, and solely vouched by certificates, to be issued from time to time by the trustees, in a form prescribed in the articles. The negotiability of the stock itself would have been materially impaired by the supposition, that each successive holder was bound to trace up his title, through his own vendor, to the first and original purchaser; and to ascertain, what were the rights and liabilities of such purchaser, and of all the intermediate holders from the origin of the title. Such an inquiry would at all times have been difficult; and, from its involving matters en pais, must have been in most cases very unsatisfactory in its result. If with these considerations we combine the form of the certificate itself which states the shares of the proprietor, and the manner in which he is to hold them, without any notice of, or reference to, the title of any original purchaser from whom they are derived; and the declaration of the articles, that it is to be complete evidence of title; it is difficult to resist the impression, that the company must have meant, that the certificate should be conclusive evidence of title in the holder of his shares, not in the stock of any individual original purchaser, but in the common stock of the company itself. In short, that the whole property was an aggregate fund belonging to the company in its collective capacity, and that each proprietor held his shares under the company's grant, and in no other manner. My judgment accordingly on this point is, (though with the greatest deference for a different judgment pronounced by another tribunal) that the plaintiff held 60,000 acres of the common capital stock of the company, and not of the specific acres originally purchased by Mr. Wetmore. The title to the whole tract of land belonging to the company has, under the act of congress, been lawfully released by the company or its agents to the United States, and the plaintiff's portion included in that release. Of that act she does not, and, indeed, has no right to complain, because it is in strict conformity with the articles of association. What she claims is, to receive her proportion, according to her interest, of the certificates of public stock received by the company under the award of the commissioners, as an indemnification for that release.

The objections urged by the defendants against this claim are: 1st. That the award of the commissioners is conclusive upon the subject matter of the claim, and that the plaintiff is thereby estopped to assert it. 2dly. Supposing the award of the commissioners is no estoppel; still it is right upon principles of equity, and that therefore, under all the circumstances of the case, the plaintiff has no right to sustain the present suit. In respect to the accuracy of the grounds, upon which the commissioners have made their award, it certainly behoves this court to speak with the utmost diffidence. Although the written opinion, containing those grounds, is before this court; yet some facts are stated, which have no existence in this cause, and references are made to others in so indistinct and general a manner, that it is not easy to ascertain the precise nature or bearing of them. What I shall therefore say in respect to that award will refer rather to principles of law, than conclusions of fact, and always with this reserve, that I shall only discuss these principles with reference to the facts of this cause, and upon the supposition, that they are not inconsistent with what appeared before the commissioners. I own, that there are some things in the written opinion of the commissioners, which I do not perfectly comprehend. When it is stated, that "the board has expressed an opinion, that the vendors in this case conveyed only an equitable title," (and by the vendors I understand them to mean the Georgia Mississippi Company) I am somewhat at a loss to know, what meaning is to be attached to the language. If there is any point in the case, which is free of doubt, this seems to be that point. That the state of Georgia was seised in fee simple, and had a capacity to convey, notwithstanding the non-extinguishment of the Indian title, is completely established by the case of Fletcher v. Peck, 6 Cranch [10 U. S.] 87. And that a grant by a state of its own lands conveys a seisin to the grantees without further act or ceremony, is as distinctly established by the case of Green v. Liter, 8 Cranch [12 U. S.] 229. By the grant, therefore, from the state of Georgia, the Georgia Mississippi Company became seised in fee simple of the whole tract of land; and that company legally conveyed that fee simple to Messrs. Jarvis, Newman, and Wetmore, and they again conveyed the same to the trustees. It seems to me, therefore, extremely difficult to sustain this opinion of the commissioners upon any principles of law, which have occurred to me in the course of this investigation.

The doctrine, that a lien exists on the land for the purchase-money, which lies at the foundation of the decision of the commissioners, as well as of the present defence, deserves a very deliberate consideration. It can hardly be doubted, that this doctrine was borrowed from the text of the civil law;[4] and though it may now be considered as settled, as between the vendor and the vendee, and all claiming under the latter with notice of the non-payment of the purchase-money; yet its complete establishment may be referred to a comparatively recent period. Lord Eldon has given us an historical review of all the cases (Mackreth v. Symmons, 15 Ves. 329), from which he deduces the following inferences: First, that, generally speaking, there is such a lien. Secondly,

[4] "Quod vendidi, non aliter accipientis, quam si aut pretium nobis solutum sit, aut satis eo nomine factum, vel etiam fidem habuerimus emptori sine ullâ satisfactione." Dig. lib. 18, tit. 1, l. 19; Domat, lib. 1, tit. 2, § 3, l. 1.

that in those general cases, in which there would be a lien, as between vendor and vendee, the vendor will have the lien against a third person, who had notice, that the money was not paid. These two points, he adds, seem to be clearly settled; and the same conclusion has been adopted by a very learned chancellor of our own country. Garson v. Green, 1 Johns. Ch. 308. The rule, however, is manifestly founded on a supposed conformity with the intentions of the parties, upon which the law raises an implied contract; and therefore, it is not inflexible, but ceases to act, where the circumstances of the case do not justify such a conclusion. What circumstances shall have such an effect, seems indeed to be a matter of a good deal of delicacy and difficulty; and the difficulty is by no means lessened by the subtle doubts and distinctions of recent authorities. It seems, indeed, to be established, that prima facie the purchase-money is a lien on the land; and it lies on the purchaser to show, that the vendor agreed to waive it (Hughes v. Kearney, 1 Schoales & L. 132; Mackreth v. Symmons, 15 Ves. 329; Garson v. Green, 1 Johns. Ch. 308); and a receipt for the purchase-money, endorsed upon the conveyance, is not sufficient to repel this presumption of law. But how far the taking a distinct security for the purchase-money shall be held to be a waiver of the implied lien, has been a vexed question.

There is a pretty strong, if not decisive, current of authority, to lead us to the conclusion, that merely taking the bond, note, or covenant of the vendee himself for the purchase-money, will not repel the lien; for it may be taken to countervail the receipt of the payment usually endorsed on the conveyance. Hughes v. Kearney, 1 Schoales & L. 132; Nairn v. Prowse, 6 Ves. 752; Mackreth v. Symmons, 15 Ves. 329; Blackburn v. Gregson, 1 Brown, Ch. 420; Garson v. Green, 1 Johns. Ch. 308; Gibbons v. Baddall, 2 Eq. Cas. Abr. 682; Coppin v. Coppin, 2 P. Wms. 291; cases cited in Sugd. Vend. c. 12, p. 352, etc. But where a distinct and independent security is taken, either of property or of the responsibility of third persons, it certainly admits of a very different consideration. There, the rule may properly apply, that "expressum facit cessare tacitum"; and where the party has carved out his own security, the law will not create another in aid. This was manifestly the opinion of Sir William Grant in a recent case; where he asks, "If the security be totally distinct and independent, will it not then become a case of substitution for the lien, instead of a credit given because of the lien?" And he then puts the case of a mortgage on another estate for the purchase-money, which he holds a discharge of the lien, and asserts, that the same rule must hold with regard to any other pledge for the purchase-money. Nairn v. Prowse, 6 Ves. 752. And the same doctrine was asserted in a very early case, where a mortgage was taken for a part only of the purchase-money, and a note for the residue. Bond v. Kent, 2 Vern. 281. Lord Eldon, with his characteristic inclination to doubt, has hesitated upon the extent of this doctrine. He seems to consider, that whether the taking of a distinct security will have the effect of waiving the implied lien, depends altogether upon the circumstances of each case, and that no rule can be laid down universally; and that, therefore, it is impossible for any purchaser to know, without the judgment of a court, in what cases a lien would, and in what cases it would not, exist. His language is, "If, on the other hand, a rule has prevailed (as it seems to me), that it is to depend, not upon the circumstance of taking a security, but upon the nature of the security, as amounting to evidence (as it is sometimes called), or to declaration plain, or manifest intention (the expression used on other occasions), of a purpose to rely not any longer upon the estate, but upon the personal credit of the individual; it is obvious, that a purchaser taking a security, unless by evidence, manifest intention, or declaration plain, he shows his purpose, cannot know the situation, in which he stands, without the judgment of a court, how far that security does contain the evidence, manifest intention, or declaration plain upon that point." Mackreth v. Symmons, 15 Ves. 329, 342; Austen v. Halsey, 6 Ves. 475. If, indeed, this be the state of the law upon this subject, it is reduced to a most distressing uncertainty. But, on a careful examination of all the authorities, I do not find a single case, in which it has been held, if the vendor takes a personal collateral security, binding others as well as the vendee, as, for instance, a bond or note with a surety or an indorser, or a collateral security by way of pledge or mortgage, that under such circumstances a lien exists on the land itself. The only case, that looks that way, is Elliot v. Edwards, 3 Bos. & P. 181, where, as Lord Eldon says, the point was not decided; and it was certainly a case depending upon its own peculiar circumstances, where the surety himself might seem to have stipulated for the lien, by requiring a covenant against an assignment of the premises, without the joint consent of himself and the vendor. Lord Redesdale, too, has thrown out an intimation (Hughes v. Kearney, 1 Schoales & L. 132) that it must appear, that the vendor relied on it as security; and he puts the case, "Suppose bills, given as part of the purchase-money, and suppose them drawn on an insolvent house, shall the acceptance of such bills discharge the vendor's lien? They are taken not as a security, but as a mode of payment." In my humble judgment, this is begging the whole question. If, upon the contract of purchase, the money is to be paid in cash, and bills of exchange are afterwards taken in payment, which turn out unproductive, there the receipt of the bills may be considered as a

mere mode of payment. But if the original contract is, that the purchase-money shall be paid at a future day, and acceptances of third persons are to be taken for it, payable at such future day, or a bond with surety payable at such future day, I do not perceive, how it is possible to assert, that the acceptances or bond are not relied on as security. It is sufficient, however, that the case was not then before his lordship; and that he admits, that taking a distinct security would be a waiver of the lien. On the other hand, there are several cases, in which it is laid down, that if other security be taken, the implied lien on the land is gone. To this effect certainly the case of Fawell v. Heelis, 2 Amb. 724, 2 Dick. 485, is an authority, however it may, on its own circumstances, have been shaken. And the doctrine was explicitly asserted and acted upon in Nairn v. Prowse, 6 Ves. 752. See, also, Bond v. Kent, 2 Vern. 281. In our own country, a very venerable judge of equity has recognised the same doctrine. He says, "The doctrine that the vendor of land, not taking a security nor making a conveyance, retains a lien upon the property, is so well settled as to be received as a maxim. Even if he hath made a conveyance, yet he may pursue the land in the possession of the vendee, or of a purchaser with notice. But if he hath taken a security, or the vendee hath sold to a third person without notice, the lien is lost." Cole v. Scot, 2 Wash. [Va.] 141. Looking to the principle, upon which the original doctrine of lien is established, I have no hesitation to declare, that taking the security of a third person for the purchase-money ought to be held a complete waiver of any lien upon the land; and that in a case standing upon such a fact, it would be very difficult to bring my mind to a different conclusion. At all events, it is prima facie evidence of a waiver; and the onus is on the vendor to prove, by the most cogent and irresistible circumstances, that it ought not have that effect.

Such was the result of my judgment upon an examination of the authorities, when a very recent case before the master of the rolls first came to my knowledge. I have perused it with great attention, and it has not, in any degree, shaken my opinion. The case there was of acceptances of the vendee and of his partner in trade, taken for the payment of the purchase-money. It was admitted, that there was no case of a security given by a third person, in which the lien had been held to exist. But the master of the rolls, without deciding what would be the effect of a security, properly so denominated, of a third person, held, in conformity to the opinion of Lord Redesdale, that bills of exchange were merely a mode of payment, and not a security. This conclusion he drew from the nature of such bills, considering them as mere orders on the acceptor to pay the money of the drawer to the payee; and that the acceptor was to be considered, not as a surety for the debt of another, but as paying the debt out of the debtor's funds in his hands. Grant v. Mills, 2 Ves. & B. 306. With this conclusion of the master of the rolls, I confess myself not satisfied, and desire to reserve myself for the case, when it shall arise in judgment. It is founded on very artificial reasoning, and not always supported in point of fact by the practice of the commercial world. The distinction, however, on which it proceeds, admits, by a very strong implication, that the security of a third person would repel the lien. If indeed the point were new, there would be much reason to contend, that a distinct security of the party himself would extinguish the lien on the land, as it certainly does the lien upon personal chattels. Cowell v. Simpson, 16 Ves. 275. In applying the doctrine to the facts of the present case, I confess, that I have no difficulty in pronouncing against the existence of a lien for the unpaid part of the purchase-money. The property was a large mass of unsettled and uncultivated lands, to which the Indian title was not as yet extinguished. It was, in the necessary contemplation of all parties, bought on speculation, to be sold out to sub-purchasers, and ultimately to settlers. The great objects of the speculation would be materially impaired and embarrassed by any latent incumbrance, the nature and extent of which it might not always be easy to ascertain, and which might, by a subdivision of the property, be apportioned upon an almost infinite number of purchasers. It is not supposable, that so obvious a consideration should not have been within the view of the parties; and viewing it, it is very difficult to suppose they could mean to create such an incumbrance. A distinct and independent security was taken by negotiable notes, payable at a future day. There is no pretence, that the notes were a mere mode of payment, for the endorsers were, by the theory of the law, and in fact, conditional sureties for the payment; and in this respect the case is distinguishable from that of receiving bills of exchange, where, by the theory of the law, the acceptor is not a surety, but merely pays the money of the drawer in pursuance of his order. Hughes v. Kearney, 1 Schoales & L. 132; Grant v. Mills, 2 Ves. & B. 306. The securities themselves were, from their negotiable nature, capable of being turned immediately into cash; and in their transfer from hand to hand, they could never have been supposed to draw after them, in favor of the holder, a lien on the land for their payment. But I pass over these and some other peculiar circumstances of this case, and put it upon the broad and general doctrine, that here was the security of a third person, taken as such, and that extinguished any implied lien for the purchase-money.

There is another view of this case, which enforces the opinion, which has been already

expressed. The contract for the purchase was originally made and executed in Massachusetts with citizens of that state, and having no tacit reference to the laws of any other state, further than that the title to the land should be conveyed, so as to be binding by the laws of that state. The first deed of the land was, in fact, executed by the vendors in Massachusetts, and the deed of confirmation in Georgia. Nothing can be clearer, than that, by the law of Massachusetts, no lien in any case whatsoever exists upon land for the purchase-money. We have no court of chancery to recognise and enforce such a lien; and the peculiar principles and doctrines of courts of equity have never been adopted into our jurisprudence. The general rule of law certainly is, that contracts are to be construed according to the law of the place, where they are made and to be executed. Even contracts respecting lands, lying in another state, form no necessary exception to the rule; for these, in many instances, both as to rights and remedies, are governed by the lex loci contractus. Stapleton v. Conway, 1 Ves. Sr. 428, 3 Atk. 727; Van Schaick v. Edwards, 2 Johns. Cas. 355. What is the law of Georgia on this subject, I have no present means of knowing. But it does seem to me, that it will be very difficult to maintain the proposition, that a lien is to be implied upon a contract made and executed in Massachusetts, when the laws of that state repel any such right. I do not know, that it has ever been established, that a party, executing in one state a contract and conveyance of land lying in another, is to be held to reserve all the rights and remedies, which the law of the state, where the land lies, might give, and the law of the place of the contract would deny. It seems more reasonable, that the general rule of law should in such case prevail, that the contract should be construed according to the law of the place, where it is executed. But certainly when a lien is to be created upon a supposed intention of the parties, there ought to be, in such a case, the clearest evidence of such intention. It is not sufficient, that the vendor supposed, that he was contracting according to the law of one state, and so had a lien, if the vendee supposed the reverse, and never dreamed of a lien. Now, there is not the slightest reason to imagine, that the vendees ever contemplated a lien in the present case. The very objects of their association in the purchase would have been defeated, or embarrassed by it. No notice is pretended to have been given of such a claim by the vendors; but a distinct and independent security was taken. Under such circumstances, it seems to me irreconcilable with sound principles and justice, to establish a latent lien, which must so materially impair the rights of innocent and ignorant parties. For it is to be considered, that until the decision of the commissioners, no such lien was ever contemplated by the scrip-holders in Massachusetts.

Another subject necessarily connected with this cause, and of a good deal of delicacy, remains to be considered; and that is, whether the commissioners had authority to entertain any question in respect to a lien for the purchase-money; or, in other words, whether they had jurisdiction to make any award respecting the supposed equitable right of lien of the vendors of the land. The act of congress—Act March 31, 1814, c. 98, § 2 [3 Stat. 116, c. 39]—authorizes the commissioners "to adjudge and finally determine upon all controversies, arising from such claims so released as aforesaid"; that is, from all claims released under the first section of the act, or of the acts supplementary thereto. Act January 23, 1815, c. 706 [3 Stat. 192, c. 24], and Act March 3, 1815, c. 778 [3 Stat. 235, c. 97]. The word "claim" is certainly of very large signification in the law, and it undoubtedly extends to all equitable, as well as legal estates in the land released. But a person, having a lien on land, has not any estate in, or right to the land; and it has been very correctly observed of the lien of a judgment creditor, that "he has neither a jus in re, nor a jus ad rem, and therefore though he releases all his right to the land, he may extend it afterwards." Brace v. Duchess of Marlborough, 2 P. Wms. 491. The lien of a vendor for the purchase-money is not of so high and stringent a nature, as that of a judgment creditor, for the latter binds the land according to the course of the common law, whereas the former is the mere creature of a court of equity, which it moulds and fashions according to its own purposes. It is, in short, a right, which has no existence, until it is established by the decree of a court in the particular case; and is then made subservient to all the other equities between the parties, and enforced in its own peculiar manner, and upon its own peculiar principles. It is not, therefore, an equitable estate in the land itself, although sometimes that appellation is loosely applied to it; and it is never enforced against a subsequent bona fide purchaser of the legal estate without notice. It is to me, in this view, a matter of extreme doubt, whether it was within the jurisdiction of the commissioners; it not being technically a claim in the land, nor, of course, the proper subject of release within the act of congress. It is, too, so peculiarly and exclusively the creature of a court of equity, that its existence cannot be safely averred independent of the decree of such a court. And to suffer the commissioners (who are, in no correct sense, a court of equity) to award respecting such a lien, without the means or authority to settle all other equities between the parties, or enforce an equitable decree, could scarcely have been within the reasonable contemplation of congress. If such a lien were asserted, it was proper matter for a suit in equity, after the rights of the parties to the land itself had been ad-

justed under the commission. Thus much it has become my duty to state, in respect to the merits of the proceedings before the commissioners, so far as they involve important principles of law, applicable to the present suit. If these proceedings were conclusive upon the plaintiff, I might have been spared this discussion. But I am distinctly of opinion, that they are not so conclusive. The commissioners had no right or authority to adjust or settle any claims of the plaintiff, relative to the New England Mississippi Land Company. They had a right to examine into the title of the company to the land claimed by them, and to decide upon the sufficiency of that title. But as to the shares held under the company by the plaintiff, or the rights appertaining thereto, as against the company itself, the plaintiff never submitted her claims to them; and their award would be res inter alios acta. The commissioners were not justified in severing the plaintiff's interest from that of the company. The trustees held the legal estate, and the directors had the sole right to dispose of it. It was the property of the company in its collective capacity, liable to its debts, and to be accounted for and settled according to the articles of association; and the individual share-holders, as such, had no authority to act in relation to it.

Upon the whole my judgment is, that the plaintiff as a holder of certain shares of the common stock of the company, and not of Mr. Wetmore, is entitled to the relief, which she claims. Whatever has been lost by the company is a general loss, occasioned, not by her default, but, as I think, by the mistake of the commissioners; and is to be borne by the whole company in proportion to their interest. She has, by the general release of the company, lost all title to the land; and is equitably and legally entitled to her share of all the stock received as an indemnification for release. Decree accordingly.

[NOTE. The respondents appealed the case to the supreme court, and the decree of the circuit court was affirmed in an opinion by Chief Justice Marshall. 4 Wheat. (17 U. S.) 255. In examining the case, the nature of the contract of sale of the land, the motives of the New England Mississippi Company, and their acts were all exhaustively considered. The holder of every certificate was not bound to trace his title through the particular original purchaser under whom he claimed, and in whose place he stood. It is not more apparent that the general object of the association was to promote the sale of their lands than it is that the particular object of this certificate and of the articles which relate to it was to enable every proprietor to avail himself of his individual interest and to bring it into circulation. On no other principle can we account for subdividing the stock of the company into such small shares; for issuing the certificate itself; for making it assignable. If any latent defect existed in the title of one of the original purchasers, such defect could not have been set up against an assignee. "We think," remarked the learned justice, "this, on principles of English law, a clear case of exemption from lien." Nor would it alter the liability of the New England Company to the complainant whether they were purchasers with or without notice.]

Case No. 5,442.

GILMAN v. HERBERT.

[2 Cranch, C. C. 58.] [3]

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

SALE—FRAUDULENT AS TO CREDITORS—POSSESSION.

A sale of goods in the possession of the vendor's bailee, is fraudulent as to creditors, unless the possession accompany and follow the sale, or an order be given by the vendor, and served on the bailee, to deliver possession to the vendee.

Trover, for fifty barrels of salt, &c. Douglass, in May or June, 1810, being indebted to Gilman, agreed that he should have this property, which was then in the possession of Shuck, and gave Gilman a written order to Shuck to deliver the goods to Gilman, who neglected to give notice to Shuck of this order, until after Douglass had taken the oath of an insolvent debtor, and Herbert was appointed his trustee, and demanded the goods of Shuck as the property of Douglass.

Mr. Taylor, for defendant, prayed the court to instruct the jury, that the sale under those circumstances, was fraudulent as to the creditors of Douglass, unless the jury should be satisfied by the evidence that the possession accompanied and followed the deed; and that the order to Shuck did not transfer the possession from Douglass to Gilman, if notice of such order was not given to Shuck until after the discharge of Douglass under the insolvent law, and after the defendant had claimed them, as trustee.

Which opinion THE COURT gave (THRUSTON, Circuit Judge, absent).

E. J. Lee took a bill of exceptions, but did not prosecute a writ of error.

Case No. 5,443.

GILMAN et al. v. ILLINOIS, ETC., TEL. CO.

[1 McCrary, 170.] [1]

Circuit Court, D. Iowa. Oct., 1874.[2]

RAILWAY—MORTGAGE OF ROAD AND INCOME—GARNISHMENT OF RAILROAD COMPANY BY GENERAL CREDITORS.

A general judgment creditor of a railroad company, in a case where the trustees under a prior mortgage of the road and income never obtained possession of the road, or demanded the income, was *held* entitled by virtue of a garnishment of the officers of the railroad company to the net income of the road between the date of a decree of foreclosure and the appointment of a special receiver, the de-

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

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

[2] [Affirmed in 91 U. S. 603.]

cree of foreclosure being silent as to such income, and the road meanwhile being operated by the company.

[See note at end of case.]

[This was a bill by Gilman, Cowdrey and others, trustees, against the Illinois & Mississippi Telegraph Company.]

In 1857 the Des Moines Valley Railroad Company made to trustees a mortgage, and in 1858, to other trustees, another mortgage to secure a large number of bonds. They were ordinary railway mortgages conveying the road, franchises, rolling stock, etc., together with "all rents, issues, incomes, tolls and profits." In case of default to pay interest or principal, the trustees were authorized to take possession "and collect and receive the tolls, incomes, issues and profits," and apply them on the debt secured by the mortgages, and upon the request of one-third of the bondholders to sell railroad and property mortgaged. The trustees never took possession; but default having been made in the payment of interest on both mortgages, the trustees in the second mortgage, in July, 1872, commenced suit to foreclose in one of the state courts, making the railway company, the trustees in the first mortgage, and various judgment and lien creditors of the company parties defendant, and among others the Illinois and Mississippi Telegraph Company. No receiver was applied for or appointed pending the foreclosure proceedings except as hereinafter stated. On May 31, 1873, a decree of foreclosure was entered by the state court, fixing the priorities of the several parties, and holding that the telegraph company's judgment for $25,185.76, rendered in this court, May 21, 1872, was a lien subject to the mortgages in suit and certain other specified liens. The decree ordered a sale of the mortgaged property by the sheriff on special execution, but as originally entered made no provision as to the possession or earnings of the road (which was still in the possession of the railroad company and operated by it) between the date of the decree and the sale which the decree ordered. This decree was rendered May 31, 1873, and on the thirteenth day of June, 1873, the telegraph company issued execution on its judgment out of this court, and garnished, under the statute of the state, moneys in the hands of the agents of the railroad company at its various stations received by them from the income and earnings of the road. On June 20, 1873, the trustees in the first and second mortgages filed in this court the present bill in equity against the telegraph company to enjoin the said proceedings upon the execution under its judgment, which bill was, on the twenty-seventh day of June, 1873, amended so as to make the Des Moines Valley Railroad Company also a defendant, and a temporary injunction was allowed as prayed. On September 9, 1873, after a sale had been advertised by the sheriff, application was informally made without any petition for rehearing or bill of review to the state court by the trustees under the first mortgage for a modification of the decree of May 31, 1873, and the same was modified in several important particulars; and among other additions to the decree, was one appointing a "special receiver of all the incomes and earnings of the road" between the date of the decree or sheriff's first publication of notice of sale and the sale to be made by him. This was done saving the rights of the telegraph company. The special receiver took possession September 15, 1873. The sale by the sheriff under the decree (which was absolute, and under which the purchasers were let into possession) took place October 17, 1873, and left a large amount of the mortgage bonds unpaid. Between the date of the decree of May 31, 1873, and September 15, 1873, when the special receiver took possession, the road was operated by the railroad company, and during this period the net earnings, after paying operating expenses, were $27,147.96.

John Fyffe and Gatch, Wright & Runnels, for plaintiff.

Cook, Richman & Bruning, for defendant

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

DILLON, Circuit Judge. Among other security taken by the bondholders was a pledge of the income and earnings of the road, with a provision that the railroad company should remain in possession until default in the payment of interest or principal, and upon default by the company in this respect, that the trustees might take possession and collect and receive the earnings of the road. They never took possession or asked for it, nor did they apply for a receiver at any time prior to the ninth day of September, 1873. He took possession September 15. The decree rendered May 31, 1873, made no provision as to the income of the road, or disposition of it. The present controversy respects only the right to the net income between the date of the decree and the appointment of a special receiver. The telegraph company claims it by virtue of its seizure on execution by garnishment of the agents of the railroad company. The plaintiffs claim it by virtue of the mortgages to them as trustees. To this claim on the part of the plaintiff the defendant relies upon two main grounds of objection: 1st. That the decree of foreclosure merges their rights under their mortgages, and now constitutes the measure of their rights; and as this decree did not give them the earnings in the interim between it and the sale, they cannot now fall back upon their mortgage and claim such earnings under it. But if the plaintiffs may still rest upon the mortgages, the defendant contends that until they take possession under them, or apply

for and obtain a receiver, the income or earnings may be used by the company or seized by its creditors, especially as the mortgage contains no covenant by the company to apply its net earnings to the payment of the mortgage debt.

If it be conceded that the first position of the telegraph company is not well taken, we would be brought at once to the inquiry, what is the effect of the pledge of the rents and profits, and what must be done to make such pledge effectual?

The cases on the subject in this country are not very numerous, and those in England are controlled by very special statutory provisions.

The supreme court of the United States has decided that under a mortgage by a railway company of its tolls and income the bondholders or trustees cannot make the railroad company or its assignees accountable therefor, until at least a regular demand has been made upon the company therefor. Galveston R. Co. v. Cowdrey, 11 Wall. [78 U. S.] 459, 482. So in Noyes v. Rich, 52 Me. 115, it was held that a receiver appointed in a suit to foreclose a railway mortgage could not recover the earnings of the road accruing before his appointment. And see City of Bath v. Miller, 51 Me. 341.

In the Case of the Galveston Railroad, above cited, there was, as here, a mortgage of the tolls and income, with power in the trustees on default to take possession and sell. Mr. Justice Bradley, referring to these provisions in the deed of trust, says: "It seems to us that the latter clause defines and points out the manner in which the pledge of the tolls and income is to be practically carried into effect. At all events, until a regular demand was made for the payment of the tolls and income, we do not think, under the language of the deed, that the defendants were bound to account therefor."

There is in the case now before us no proof of any demand of the trustees for the income or earnings upon the railroad company before the foreclosure suit against it, or pending the foreclosure suit, until the ninth day of September, when, upon the application of some of the trustees, a special receiver was appointed, unless this suit can be considered such a demand. I do not think it should be so regarded. This suit was not brought to settle rights between the plaintiffs and the railroad company—those had been settled or were to be settled in the state court which had jurisdiction of that controversy.

Since the railroad company, before and pending the foreclosure, was left in possession of the road, and since no attempt to disturb it was made, no receiver applied for or provision made in the decree as to the earnings between the decree and the sale, I am impressed with the belief that the plaintiffs in the foreclosure suit did not intend to disturb the possession of the company, and that no question would have been made as to these earnings or their application if the telegraph company had not levied its execution.

On the whole, I think the bill ought to be dismissed. Judge LOVE agrees in the conclusion that the net income was subject to garnishment, but is of opinion that the gross income cannot thus be seized.

Decree accordingly.

[NOTE. This decree was affirmed in the supreme court (91 U. S. 603) in an opinion by Mr. Justice Swayne, in which it was held that it is competent for the mortgagee to pursue three remedies at the same time. He may sue on the note or obligation, he may bring an action of ejectment, and he may file a bill for foreclosure and sale. In this case the last-mentioned remedy was adopted, and a final decree made for the sale of the property only. The decree was silent as to possession and earnings in the meantime, and, until the mortgagee took possession, the earnings were the property of the railroad company, and subject to attachment by its judgment creditors.]

Case No. 5,444.

GILMAN v. KING et al.

[2 Cranch, C. C. 48.] [1]

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

BILLS AND NOTES—LAW OF PLACE WHERE NEGOTIABLE—INDORSER AS WITNESS FOR MAKER.

1. A promissory note made in Georgetown, D. C., in the year 1810, payable to C. L. Nevitt or order, at 60 days, "negotiable in the Bank of Alexandria," is governed by the laws in force in Alexandria; and the holder in an action against the maker, must allow all just discounts against the payee before notice of the assignment given to the maker.

2. An indorser is a competent witness for the maker of a note, to prove that the indorsement was without consideration, and to give credit to the note, but the payee is not a competent witness for the plaintiff.

Assumpsit upon the promissory note of A. King and Company, dated September 7, 1810, at sixty days, payable to C. L. Nevitt or order, "negotiable at the Bank of Alexandria," indorsed by Nevitt to Preston, and by Preston to the plaintiff. The defendant claimed to discount C. L. Nevitt's note to him, under the Virginia law of the 4th of December, 1786, § 4, pp. 36, 37, by which the assignee is bound to allow the defendant all just discounts before notice of the assignment.

E. J. Lee, for plaintiff, contended that by the 19th section of the act of congress "concerning the bank of Alexandria" (2 Stat. 625), such a note, when indorsed, was to be considered as a bill of exchange, and as governed by the laws applicable to that species of mercantile instruments. But it was discovered that the printer had misrepresented the date of that act, February 15, 1810, instead of 1811, which was subsequent to the

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

date of the note, and therefore could not affect its character for negotiability.

Mr. Lee and Mr. Taylor then contended that the note was to be governed and construed by the law of the place where it was made, and cited Robinson v. Bland, 2 Burrows, 1077; Stapleton v. Conway, 3 Atk. 727; 1 Eq. Cas. Abr. 288, 289; Melan v. Duke De Fitzjames, 1 Bos. & P. 142; Talleyrand v. Boulanger, 3 Ves. 449; Holman v. Johnson, Cowp. 343; and Alves v. Hodgson, 7 Term R. 241.

Mr. Swann and Mr. Jones, for defendant, cited Robinson v. Bland, 2 Burrows, 1077; Norton v. Rose, 2 Wash. [Va.] 233; Lord Ranelaugh v. Champant, 1 Eq. Cas. Abr. 289.

THE COURT (nem. con.) considered the note of A. King & Co. as an Alexandria contract, and suffered the note of C. L. Nevitt to be given in evidence by the defendant as a discount.

THE COURT permitted Preston, the indorser, to be examined as a witness for the defendant to prove that he (Preston) indorsed without consideration to give credit to the note; and refused to admit C. L. Nevitt, the payee, as a witness for the plaintiff, because, if the plaintiff succeeded, the witness would be discharged from his liability.

The verdict was for the defendant, and THE COURT (nem. con.) refused a new trial, after argument.

Case No. 5,445.

GILMAN v. LIBBEY.

[4 Cliff. 447.] [1]

Circuit Court, D. Maine. April Term, 1878.

COURTS—AMENDMENT OF RECORD—CORRECTION OF MISTAKES—OMISSION OF CLERK—EQUITY—ANSWER RESPONSIVE TO BILL—PROOF—COSTS.

1. Courts of record have power at any time, as well after as during the term at which any entry is made, of their own motion, or at the suggestion of any party interested, and without notice to any one, to correct the mistakes and supply the omissions of their clerks or recording officers, so as to make the record conform to the truth of the case.

2. They are the exclusive judges of the necessity and propriety of so amending and correcting their records, and of the sufficiency of the proofs offered to show the necessity of such action.

3. It is a universal rule that the mere omission or misprision of a clerk cannot be permitted to deprive a party of his rights, if the means of supplying the defect or correcting the mistake are within the reach of the tribunal whose proceedings are incorrectly recorded.

4. Where the answer is responsive to the bill of complaint, and positively denies the matter charged, and the denial is made in respect to a transaction within the knowledge of the respondent, the answer is evidence in his favor, and unless it is overcome by the satisfactory testimony of two opposing witnesses, or of one witness, corroborated by other facts and circumstances, which give to it greater weight than the answer of the respondent, it is conclusive. So that the court will neither make a decree nor send the case to trial, but will simply dismiss the bill of complaint.

5. When the complainant calls upon the respondent to answer an allegation, he admits the answer, if duly filed, to be evidence, and if it is testimony, it is equal to the testimony of any other witness. As the complainant cannot prevail if the balance of proof is not in his favor, he must have circumstances in addition to his single witness in order to turn the balance.

6. The bill of complaint contained an allegation to the effect that the defendant in the present suit, while judge of the supreme judicial court of the state of Maine, ordered judgment for himself in a suit in that court where he was plaintiff, and the present complainant defendant. This allegation was not true, but the record of the state court, by the omission of the clerk thereof, seemed to afford ground therefor. After the beginning of this suit, the record of the state court was amended by the court, so as to conform to the fact, which was, that the judgment had been ordered by another justice of the state court, and not by this respondent. *Held*, that the respondent in this case was still entitled to his costs.

7. If the state court record did not suggest the error, if inquiry had been made, it could have been ascertained that this respondent was not presiding in the state court when the judgment in his favor was entered.

Bill in equity. The material allegations in the complainant's bill were as follows: In 1867 she [Anna K. Gilman] was executrix, with others as executors, of the last will and testament of Nathaniel Gilman, both in the state of Maine and in the state of New York. In the month of March of that year, being involved in litigation in the county of Kennebec as such executrix, and also in proceedings for the partition of real estate devised to her in common and undivided, with others in said county, and having need of counsel, she applied to the respondent [Artemas Libbey] for his services in his capacity as attorney and counsellor at law, and at the time of such application it was specially agreed that the respondent should look to the estate of said Nathaniel Gilman alone for reimbursement for any services rendered or disbursements made in the matters aforesaid, and should not hold her responsible therefor until he should have rendered a bill to said estate for the same, and such bill should have been presented to the surrogate's court, and there allowed, and the amount thereof should have been received by her; and that she should be in no case liable to the respondent for any sum over and above what she should receive from said estate for such payment; and the respondent then and there agreed to act in the matters aforesaid, upon the terms aforesaid, and did appear in the actions then pending in the supreme judicial court for said state, and said probate court, in which she was a party, and did thereafter act for her in his said capacity until his appointment as judge of the supreme judicial court of Maine. That in 1871 the respondent rendered an account for his services and disbursements to that time in said matters, which she believed in-

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

cluded all charges and was the end of litigation, amounting to $563.71, which she presented to the surrogate's court, and asked for an allowance thereof, but she had not been able to procure an allowance thereof at the time of filing her bill. That on Feb. 26, 1875, the respondent commenced a suit against her in the supreme judicial court, county of Kennebec, and caused her real estate in that county to be attached. That the suit was entered at the March term of that court in that county, and continued to the August term thereof, when an order for personal service of the writ by copy thereof, and of the order of the court thereon, was issued by the court, and was duly served on her on Aug. 7, 1875, at Augusta, in said county. That said service gave her the first actual information of the pendency of said suit, of which she had been, up to that time, wholly ignorant. That in that suit the respondent claimed the sum of $898.71, which included the bill before rendered, and also for his services from the time that bill was rendered to the time of the commencement of the suit, amounting to $335. That, upon the service of the order of court upon her, she applied to the respondent for an explanation thereof, whereupon he represented to her "that said service was a matter of form only and for her benefit, that he would not take any further proceedings in the matter, but would let it remain as it then was, and wait until" she "should get the sum aforesaid allowed by said surrogate's court," "and would not in any way prejudice" her "in her rights and interests in said property." "And at the time of said representations she supposed him to be continuing as such counsel, she relied on his said representations, and made no defence to said action." "That contrary to his said representations and promises, he proceeded to have the notice to" her "aforesaid proved, and an entry thereof made on the docket" at the October term, 1875, and caused a default to be entered against her, and the case to be continued to the next March term: That said respondent was appointed a justice of said court on April 23, 1875, and as such justice held said court at the March term, 1876, and ordered and decreed judgment in said suit in his own favor on April 28, 1876. That on April 29, 1876, execution was issued on said judgment and put into the hands of the sheriff of said county, who, on May 25, 1876, seized her equity to redeem certain lands in said county, the same being under a mortgage to the Augusta Savings Bank, and, after giving due notice of the time and place of sale, sold said equity to the respondent on July 1, 1876, for the amount of said judgment and the officer's fees on the execution, being $1,020.78. That she had well hoped that the respondent, as having assured her that said proceedings were a mere form, and for her benefit, and that he would not prejudice her rights thereby, would, upon request thereto, release to her all claim of right or title in and to said real estate, but that he claimed to hold the same by virtue of the sale, unless redeemed by her. The prayer of the bill was that the deed might be decreed to be unauthorized and of no legal force or effect, and that the respondent might be decreed to release to complainant all her right, title, and interest, conveyed to him by said deed, and for general relief. The answer denied all the allegations of the bill relative to the special agreement as to how respondent was to be paid for his services, and alleged that a large part of the services were rendered for the complainant in her private capacity; also the allegations in regard to the promises made to complainant after the service of the writ; also that he held the court in which judgment was rendered for his services. In short, all the substantial allegations of the bill were denied in the answer. The principal evidence for the complainant was given by herself. The respondent testified, upholding the allegations of the answer.

M. W. Gage, for complainant.

The respondent was guilty of duplicity as counsel toward his client. Hill v. Bush, 19 Ark. 522. He led her to believe that in his suit he was seeking security only, and would proceed no further. Peter v. Wright, 6 Ind. 183; Gill v. Carter, 6 J. J. Marsh. 484; Cooke v. Nathan, 16 Barb. 342; McCormick v. Malin, 5 Blackf. 509; Jenkins v. Eldredge [Case No. 7,266]. The judgment in the state court was a nullity at the time it was entered. No amendment could render it valid. The amendment of the record of the state court was insufficient, in that the amended record would still show that respondent acted jointly with another justice in the rendition of judgment in his own behalf. Cox v. Bennett, 13 N. J. Law, 165. A court of equity has the power to vacate and set aside a judgment, and all the proceedings had thereunder. Warner v. Blakeman, *43 N. Y. 487. In this case, Woodruff, J., delivering the opinion, the court said: "It is the just and proper pride of our matured system of equity jurisprudence that fraud vitiates every transaction; and, however men may surround it with forms, solemn instruments, proceedings conforming to all the details required in the laws, or even by the formal judgments of courts, a court of equity will disregard them all if necessary, that justice and equity may prevail." In the case of Dobson v. Pearce, 12 N. Y. 157, Allen, J., said: "A party must bring a distinct original suit as plaintiff, to get rid of and set aside the judgment. . . . So fraud and imposition invalidate a judgment, as they do all acts; and it is not without semblance of authority that it has been suggested that at law the fraud may be alleged whenever the party seeks to avail himself of the results of his own fraudulent conduct by setting up the judgment, the fruits of his fraud.

. . But whether this be so or not, it is unquestionable that a court of chancery has power to grant relief against judgments when obtained by fraud. Any fact which proves it to be against conscience to execute a judgment, and of which the injured party could not avail himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an interference by a court of equity." See, also, Wright v. Miller, 8 N. Y. 9. In the case of Byers v. Surget, 19 How. [60 U. S.] 308, the court used the following language: "But with any fraudulent conduct of parties in obtaining a judgment, or in attempting to avail themselves thereof, this court can regularly, as could the circuit court, take cognizance. Such a proceeding is in the legitimate province of a court of equity, and constitutes an extensive ground of their jurisdiction. The true and intrinsic character of proceedings, as well in the courts of law as in pais, is alike subject to the scrutiny of a court of equity, which will probe and either sustain or annul them according to their real character, and as the ends of justice may require." Cox v. Bennett, 13 N. J. Law, 165.

T. T. Snow, for respondent.

As to the allegations in the bill that the respondent, as a justice of the supreme judicial court of Maine, rendered the judgment against the complainant in his own favor, they are fully met and disposed of by the answer, and the duly authenticated copy of the record of the judgment, put in evidence by the respondent. But, if that allegation is true, we maintain that it gives this court no jurisdiction in equity, to decree a release of the interest in the land sold to respondent on execution issued on that judgment. The respondent had no jurisdiction of the suit, and the judgment is absolutely void. Penobscot R. R. Co. v. Weeks, 52 Me. 456; Eastman v. Wadleigh, 65 Me. 251; Pennoyer v. Neff, 95 U. S. 714,—in which the doctrine is fully examined. This court has no jurisdiction in equity to set aside and annul the judgment of a state court on the ground that it is void for want of jurisdiction. The judgment being void, the remedy is clear and adequate at law. Pennoyer v. Neff, supra. That case was ejectment to try the title to land taken to satisfy a judgment held to be void for want of jurisdiction. This suit is brought to try the title to the land sold, and not to annul the judgment. The prayer of the bill is that the deed may be decreed unauthorized and of no effect, and that respondent may be decreed to release the title acquired by the purchase to the complainant. The judgment cannot be thus attacked collaterally. It is binding on the parties to it until reversed or annulled in a process brought directly therefor. Christmas v. Russell, 5 Wall. [72 U. S.] 290; Homer v. Fish, 1 Pick. 435; McRae v. Mattoon, 13 Pick. 57; McClees v. Burt, 5 Metc. [Mass.] 198; Boston & W. R. Corp. v. Sparhawk, 1 Allen, 448; Dunlap v. Glidden, 31 Me. 435; Davis v. Davis, 61 Me. 395; Smith v. Abbott, 40 Me. 442. This is the rule in equity as well as at law. Boston & W. R. Corp. v. Sparhawk, supra. The circuit court, as a court of equity, possesses no revisory power over the state courts in the exercise of their jurisdiction. Tobey v. Bristol [Case No. 14,065]. By the law of this state, the state court has no jurisdiction in equity to annul a judgment for fraud. The remedy is by review. That remedy is clear and adequate, and protects both parties. Chalmers v. Hack, 19 Me. 124; Cowan v. Wheeler, 25 Me. 267; Warren v. Baker, 43 Me. 570. The record of the judgment in this case is entitled to the same faith and credit in every other court in the United States as it has by law or usage in the courts of this state. Christmas v. Russell, supra. But if this court has jurisdiction in equity to annul a judgment of the court of this state, which we do not admit, though we are aware there are decided cases looking strongly that way, it is only by bill brought directly therefor, and in which the fraud is distinctly alleged and proved. Clark v. Hackett [Case No. 2,823]. This bill does not allege fraud on the part of the respondent, in procuring the judgment. It alleges an attachment of complainant's real estate, and a due service of the writ upon her, and a promise by the respondent that he would let it remain as it was, and a breach of that promise by respondent, by taking judgment about nine months thereafterwards. It does not allege that the promise was made for a fraudulent purpose, nor that it was fraudulently broken. For aught that appears in the bill, the promise may have been made and broken, as alleged, with no actual fraud. And it is for actual fraud only, that courts of equity will annul a judgment. But, assuming that the bill properly alleges fraud in procuring the judgment, the case, as presented by the bill and the complainant's evidence, is one of fraud against Mr. Baker, by attaching and holding the complainant's real estate to prevent his taking it for her benefit. This, as she represents her case, was the motive of the respondent, fully participated in by her; for she alleges, in her bill, that she fully supposed the respondent would release to her the title he acquired by his purchase, on request. In such case equity will not give relief. Wells v. Smith, 13 Gray, 207. The respondent takes issue with the complainant upon all the allegations in her bill, upon which she relies in proof of fraud. They are as to the terms of the contract of employment, and the promise of respondent to take no further proceedings in his suit, and the breach of that promise. The answer is responsive to the bill. It not only positively denies the allegations as to the contract and promises, but it avers what the real transactions were. "It must prevail unless it is overcome by the testimony of two witnesses to the substantial

facts, or at least by one witness and such attendant circumstances as will supply the want of another witness." Clark v. Hackett, supra. The evidence of the original contract is material only as tending to show fraud. The court will not grant relief because the judgment is for too large a sum, nor because nothing is in fact due; but if the evidence shows that nothing was due the respondent, it may tend to show fraud. The complainant alleges in her bill, and testifies that, by the contract, she was in no event to be personally liable. This is positively denied by the respondent in his answer, and in his testimony. Which is the more strongly corroborated by the circumstances and the written evidence? We have failed to discover any corroboration of complainant. She testifies that she never became personally liable to counsel for services rendered to her as executrix, and that all services rendered by the respondent were rendered to her in that capacity. It is in evidence that Mr. Baker was her counsel for several years. That she did not pay him. That he brought suit against her and her brother and got judgment. That he brought suit on their official bond, after having a demand made on the execution against them. That the complainant defended the suit on the bond successfully, on the ground that his bill for services was not a claim against her father's estate, but against her personally. Baker v. Moor, 63 Me. 443.

Before CLIFFORD, Circuit Justice, and FOX, District Judge.

CLIFFORD, Circuit Justice. Courts of record have power at any time, as well after as during the term at which any entry is made, of their own motion, or on the suggestion of any party interested, and without notice to any one, to correct the mistakes and supply the omissions of their clerks or recording officers, so as to make the record conform to the truth of the case, and they are the exclusive judges of the necessity and propriety of so amending and correcting their records, and of the sufficiency of the proofs offered to show the existence of such necessity and propriety. Balch v. Shaw, 7 Cush. 282. Authorities to show that such courts have full power to amend their records, and that they are the sole judges of the correctness of the entries made therein, and of the necessity and propriety of any such correction, are numerous, unanimous, and conclusive. Sheppard v. Wilson, 6 How. [47 U. S.] 277; Hudgins v. Kemp, 18 How. [59 U. S.] 534; Close v. Gillespey, 3 Johns. 526; Lee v. Curtiss, 17 Johns. 86. It must be so, else the rule which rigidly excludes all evidence to contradict or control a record, when offered in support of judicial proceedings, would work very gross and irremediable wrong and injustice. Hence the universal rule that the mere omission or misprision of a clerk cannot be permitted to deprive a party of his rights, if the means of supplying the defect or correcting the mistake are within the reach of the tribunal whose proceedings are erroneously or defectively recorded. Batty v. Fitch, 11 Gray, 185.

Services as an attorney and counsellor at law were rendered by the respondent for the complainant, in certain matters of litigation and proceedings for the partition of certain real estate devised to her by her deceased father, in common and undivided with certain other parties. It is not denied that the respondent rendered certain services; but the complainant alleges that he rendered them for her as the executrix of her father's estate, and that he agreed that he would look to the estate alone for reimbursement for any services he might render, and that he would not hold her responsible for the same until he should render the bill to the estate for such services, and that she should in no case be held liable for any sum over and above what she should receive from said estate for such payment; that during the year 1871 he rendered an account for such services, amounting to $563.71, which was presented to the proper probate court for allowance, where it is still pending.

All of these matters are merely preliminary to the more material grounds of complaint, which are as follows:—

That the respondent brought an action against her, returnable to the supreme judicial court of the state, held at Augusta, within and for the county of Kennebec, on the first Tuesday of March, 1875, and that he caused her real estate situated in that county to be attached, to respond for any judgment he might obtain. Certain proceedings as to notice followed, which are not material in this investigation.

That the account annexed to the writ amounted to $898.71, including charges to the amount of $335, in addition to the amount pending in the probate court, which subsequent charges, the complainant avers, are unjust, exorbitant, and greatly disproportionate to the services rendered, and that, if rendered at all, were rendered without her knowledge, consent, or authority.

That she applied to the respondent for an explanation, whereupon he represented to her that the service of the writ was a matter of form only, and for her benefit; that he would not take any further proceedings in the matter, but would let it remain as it then was, and wait until she should get the amount allowed out of the estate, and would not in any way prejudice her in her rights and interests in her property.

That, contrary to his said representations and promises, the respondent proceeded to have the notice proved, and, at the October term of the court, 1875, caused her to be defaulted, and the cause to be continued to the next term.

That at the next term of the court, holden at Augusta the first Tuesday of March, 1876,

the respondent was the presiding justice, and that, as such justice, he did unlawfully and improperly, without any consent of the complainant, and without having jurisdiction of the cause, render, order, and decree a judgment in said cause, in favor of himself, as plaintiff, and against the complainant, as defendant, for the sum of $966.10 debt or damage, and $18.11 costs of suit.

That execution issued on the said judgment, and that the sheriff seized and sold all the right the complainant had to redeem the certain parcels of real estate described in the bill of complaint to the respondent, he being the highest bidder, for the sum of $1,020.78.

That the sheriff conveyed the premises sold to the respondent, who caused his deed for the same to be duly recorded.

That the respondent, instead of admitting that said proceedings were a mere form, and for the benefit of the complainant, now pretends and claims to hold said real estate as under a legal and valid levy and sale, and that said judgment, execution, levy, and sale are valid and legal, and that he is entitled to keep the title under such levy, purchase, and sale.

Service was made, and the respondent appeared and filed an answer. Such parts of the answer as are deemed material in this investigation will be reproduced, and no others.

He admits that he was, at the time alleged, an attorney and counsellor at law, and that he was in the practice of his profession; that he was retained by the complainant specially and generally, as fully set forth in the answer, and that he did appear and act for her in suits where she was a party in her own right and as executrix.

Matters of that sort are fully admitted; but he alleges that the allegations in the bill of complaint, in respect to the alleged contract between him and the complainant, "are not true in whole or in any particular." Before denying the same, the answer copies the allegations of the bill of complaint, and appends thereto the denial that those allegations "are not true in whole nor in any particular," which must be understood as equivalent to a separate denial of each of the preceding allegations.

That the suggestion was never made to the respondent, that he must rely upon the said estate for payment, until August, 1875, but that the employment was made and the services rendered in the ordinary mode of retainer and employment of counsel, with nothing agreed as to the manner of payment.

He admits that he rendered the said bill, and requested payment, but alleges that a large portion of it was for services rendered her in her private capacity, and in no way relating to her capacity as executrix.

He also admits that he commenced the suit for the full amount of his account; that the real estate was attached, and the proceedings had in respect to notice; but avers that the allegation that the service of the notice was the first information the complainant had of the suit is not true; that, before the said service, he had an interview with her, in which he fully informed her of the pendency of the suit and of the reasons why he commenced it, and urged her to employ counsel to appear to save the cost of service and to protect her rights, but that she declined to do so, and that thereupon he procured the order of notice and had the writ served.

That the charges in his account for services rendered subsequent to the first bill presented, were rendered with the knowledge of the complainant in the suits specified in the answer and that the charges are fair, reasonable, and just.

He avers that the allegations of the bill of complaint, as to the representations and promises which it is alleged that the respondent made when the complainant called upon him for an explanation, are not true. On the contrary, he alleges that he had an interview with her on the day before the writ was served, in which he informed her of the pendency of the suit, and stated to her the reasons why he commenced it, which were in substance that he had been rendering services and making disbursements in her behalf for several years without payment, and that he thought it was for his interest, as well as hers, in view of the circumstances stated, that he should secure his debt.

That it was then, for the first time, that the complainant requested him to rely on her father's estate for payment, which he declined to do, explaining to her that he had no claim against said estate, that his employment was by her, and that he must proceed with the suit.

That it is not true that, at the time the judgment was rendered in the case, the court was held by the respondent; nor is it true that he rendered, ordered, or decreed judgment in the same in favor of himself against the complainant. His denial in that regard is explicit and unqualified; and he avers that the court, at the time the judgment was rendered, was held by Charles Danforth, a justice of said court, and that said judgment was rendered, ordered, and decreed by said Charles Danforth, so holding said court as a justice thereof, and that the respondent, at the time of the rendition of said judgment, was holding a term of said court as a justice thereof in Calais, in and for the county of Washington, in said state.

The respondent also admits that he assured the complainant and her counsel, before she brought the bill of complaint, that he would not claim a forfeiture of the estate if she should not be able to redeem within the time limited by law, and he avers that he met her counsel on the fourth of July, 1877, who then paid him the full amount due to redeem said estate from said sale, and that he, the respondent, then and there de-

livered to her said counsel his deed of release and quitclaim in due form, dated one day earlier, releasing and conveying to her all of said estate sold and conveyed to him by the sheriff in virtue of the execution issued upon the said judgment.

Where the answer is responsive to the bill of complaint, and positively denies the matter charged, and the denial was in respect to a transaction within the knowledge of the respondent, the answer is evidence in his favor, and, unless it is overcome by the satisfactory testimony of two opposing witnesses, or of one witness, corroborated by other facts and circumstances, which give to it greater weight than the answer of the respondent, it is conclusive, so that the court will neither make a decree nor send the case to trial, but will simply dismiss the bill of complaint. 2 Story, Eq. Jur. (8th Ed.) § 1528; Banks v. Geary, 5 Pet. [30 U. S.] 111. Two witnesses, or one witness with probable circumstances, says Marshall, C. J., will be required to outweigh an answer asserting a fact responsively to a bill in equity. He also states very clearly the reason for the rule, which is that, when the complainant calls upon the respondent to answer an allegation, he admits the answer, if duly filed, to be evidence, and if it is testimony, it is equal to the testimony of any other witness, and as the complainant cannot prevail if the balance of proof is not in his favor, he must have circumstances in addition to his single witness in order to turn the balance. Clark's Ex'rs v. Van Reimsdyke, 9 Cranch [13 U. S.] 160; Hughes v. Blake, 6 Wheat. [19 U. S.] 453; Delano v. Winsor [Case No. 3,754].

The application of that rule to the pleadings in the case before the court disposes of most of the issues between the parties without entering into any discussion of the proofs. Two of the charges, however, are of such a character that they ought not to be passed over without careful examination. They are as follows:—

1. That the respondent presided in the court and rendered the judgment against the complainant in his own favor.

2. That he induced the complainant not to defend his suit against her, by promising that he would not claim a forfeiture of the estate in case the judgment was in his favor, and she did not pay the same within the time limited by law, and that he refused to fulfil that promise.

Flagrant as the first charge is, it is proper to say in the outset that there is not a word of truth in it when the facts are properly understood. Sufficient appears to show that the term of the court referred to, commenced at Augusta on the 7th of March, 1876, the respondent presiding as a justice of the court, and it is conceded that he continued to preside all, or nearly all, the time until near the close of the term, when he was called away to hold a term of the court in a distant county of the state. Cases of the kind often arise where a justice who has been holding a term in one county, is obliged to leave to discharge the duty assigned to him in another; nor is it at all unusual that another justice in such a case comes in to finish the term left without a justice, in consequence of the departure of the one who, up to that time, had held the term. Pursuant to that custom, Justice Danforth came in and held the court at Augusta on the last day of the term. Judgments not previously rendered are usually rendered on the last day of the term by special order, or under the general order. Beyond all doubt, the judgment in this case was rendered by Justice Danforth at a time when the respondent was holding court in Washington county, at a point quite distant from the capital of the state. Justice Libbey had held the court at Augusta for nearly the whole term; and the clerk, in making up the record, omitted to state that it was Justice Danforth who presided on the last day, when the judgment in this case was rendered. Before the record was corrected, the bill of complaint was filed in this case; but, at the August term, 1877, of that court, holden at the same place, the following proceedings were had, to wit: "And now, on inspection of the records of this court, in this county, for the March term thereof, 1876, it appearing that an error exists in said records, in that it appears that Artemas Libbey, a justice of said court, presided on the last day of said March term, 1876, the day of the rendition of judgments at said term, when in fact Charles Danforth, justice, presided; wherefore it is ordered that the clerk amend said records by inserting the following words in the caption thereof, to wit: 'and by the Hon. Charles Danforth, a justice of said court, on the forty-second and last day of the term.'" Power to make that correction was clearly vested in the court, as appears by the authorities referred to, and by many others which might be cited. People v. McDonald, 1 Cow. 189; Buckingham v. Dickinson, 54 N. Y. 682; Palmer v. Lawrence, 5 N. Y. 455; Bank v. Wistard, 3 Pet. [28 U. S.] 431; Fay v. Wenzell, 8 Cush. 317. Nothing can be plainer in legal decision than the proposition that it was entirely competent for the court to make the said correction, and if so, all will agree that justice and truth required that it should be done.

Nor is there the slightest foundation for the second charge, or for any imputation of unfairness, breach of agreement, deception, or attempt to mislead the complainant, on the part of the respondent. Her counsel called upon the respondent for the purpose of adjusting the matter, and they mutually fixed a day when they would meet to transact the business; and when the day came, they met, and the respondent received the money due, and delivered his deed in due form and duly executed, to her attorney, conveying all the right he acquired under

the sheriff's deed to the complainant. Whether she has ever accepted it or not does not appear, nor is it of any importance to inquire, as it is clear that she can have it whenever she pleases.

Suggestion is made that the respondent is not entitled to costs, because the record had not been corrected when the bill of complaint was filed; but the court, both judges concurring, is unhesitatingly of a different opinion. Even if the record itself did not suggest the error, it is plain that, if counsel had seen fit to make any inquiry upon the subject, they would readily have ascertained that the respondent was not presiding when the judgment was rendered.

Decree for the respondent that the bill of complaint be dismissed, with costs.

GILMAN (POTOMAC COMPANY v.). See Case No. 11,317.

Case No. 5,446.

GILMAN v. The TYLER.

[3 Woods, 111.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1877.

COLLISION BETWEEN VESSEL IN DISTRESS AND RESCUING VESSEL—ERROR IN JUDGMENT.

1. A steamboat was, upon a dark and stormy night, drifting in a helpless and perilous condition on the Mississippi river, blowing signals of distress, and the lives of all on board were in jeopardy, and the peril was imminent. A steam-tug, on approaching her for the purpose of affording succor to the passengers and crew, collided with and sunk her. *Held*, that the steam-tug was not liable in damages if her attempt at succor was made in good faith, and with reasonable judgment and skill.

2. In such case the degree of judgment and skill should not be weighed with scrupulous nicety.

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

On the morning of February 4, 1876, about four o'clock, the steamboat Garry Owen, which was the property of the libelant [William T. Gilman], collided with the steam-tug Tyler, on the Mississippi river, in front of the city of New Orleans. The effect of the collision was the breaking of a hole in the starboard side of the Garry Owen, near her stern, from which she sank and became a total loss. The libel was filed to recover of the Tyler the damages sustained by the owner of the Garry Owen from the collision.

Charles B. Singleton and R. H. Browne, for libelant.

M. M. Cohen, for claimant.

WOODS, Circuit Judge. The Garry Owen came into the harbor of New Orleans about 4 o'clock in the morning of February 4, 1876. It was very dark, and the wind was blowing a gale from the north, and off the New Orleans shore. The wind and darkness made the landing of a steamboat a very difficult and dangerous task. The Garry Owen made several unsuccessful attempts to land—one below Canal street and others above. In making the last attempt, the Garry Owen came in collision with the steamboat Mary Bell, which was lying moored to the wharf, and the fantail of the Garry Owen was caught under the guard of the Mary Bell, and the wheel of the Garry Owen was thereby disabled, and she became unmanageable, and drifted from shore up stream and towards the middle of the river, in a helpless condition. She blew her whistle repeatedly as a signal of distress. The steam-tug Little Jerry went to her assistance, but was too small to control her movements so as to bring her to the wharf. The Garry Owen drifted toward the iron-clad monitor Canonicus, which was lying at anchor about the middle of the river, struck her and then passed between her and the Algiers side of the river, and then drifted below. She continued to blow signals of distress, and the Tyler started to her assistance, and reached her about the time that the Little Jerry cut loose from her. When the Tyler approached her, the Garry Owen was in the edge of the eddy, and had again commenced to drift up the river, carried by the force of the eddy-current.

The complaint of the libelant is, that in approaching the Garry Owen the Tyler collided with her, and that the collision was occasioned by the gross negligence, inattention and want of proper care and skill on the part of the officers and crew of the Tyler. The claimants assert that there was no gross negligence, or want of ordinary care, and that the collision was the result of inevitable accident. There can be no question that the Garry Owen was helpless and in a perilous condition at the time the Tyler approached her, nor that she was then and for some time previous had been blowing signals of distress and calls for help, nor that the purpose of the Tyler was to save her and her officers, crew and passengers, who were in imminent danger of their lives. Under such circumstances, all that was required of the Tyler was that, in making an effort to save the Garry Owen, she should act in good faith and with reasonable judgment and skill: The Laura, 14 Wall. [81 U. S.] 333. The burden of proof is on the libelant to prove negligence and want of skill. The mere fact that the Tyler, under the circumstances, collided with and damaged the Garry Owen, does not of itself prove negligence or want of skill: The Gray v. The Fraser, 21 How. [62 U. S.] 184; The Heroine [Case No. 6,417]; The Marpesia, 1 Asp. Marit. Law Cas. 261. Have negligence and want of ordinary skill been shown on the part of the Tyler? In my judgment they have not.

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

The almost unbroken current of the testimony is, that the night was exceedingly dark and a violent gale, almost a hurricane, was blowing. The attempts of the Garry Owen to land, and the result of her attempts, are stated by A. P. Trousdale, a witness for libelant. He says, "After we made two or three unsuccessful attempts to land, I went to the hurricane roof with Captain Gillam, the master of the Garry Owen. While I was on the roof, she attempted to land just below Canal street. At that time the other pilot had just come on watch, and not making a successful landing, and coming in so rapidly, the captain had her backed out again. She went out, and the next attempt she made was to land alongside the Mary Bell, and the wind and the eddy took her up so rapidly that they found she would sink the Mary Bell, or smash herself to pieces, and she was again backed out, her stern backed to the wind, and she came round against the Mary Bell's guard. Her stern landed against the Mary Bell's bow, and she landed against her. They then put a line out, and that line either broke or was not made fast at all, and the boat passed up with the eddy and the wind above the Mary Bell. The Garry Owen's wheel became unmanageable. She could not turn it. She then floated away by the stern. She went up and struck a barge or hay-boat that we were landed against there, and as she struck that, she drifted out into the stream in front of the Canonicus." She then, according to the same witness, drifted out to the middle of the stream, and by the aid of the Little Jerry was barely able to avoid a direct collision with the Canonicus, which she passed on the Algiers side. She then drifted below the Canonicus, and had got into the edge of the eddy on the New Orleans side, and was drifting up stream, when the Tyler came to her assistance. All the time after she became disabled she was blowing signals of distress. When the Tyler started for her she was in the neighborhood of the Canonicus, and the officers of the Tyler supposed, and had reason to suppose, that she was in imminent peril and demanded prompt succor. To save life, and for that purpose only, the captain of the Tyler swears that he went to the assistance of the Garry Owen. When he neared her, the evidence is positive that he gave orders to back his engine and that the order was promptly obeyed. Nevertheless, the Tyler still had head-way, and the Garry Owen was carried up by the eddy, and the two collided with each other. I have been able to find no fault in the captain and officers of the Tyler. It must be remembered that the Garry Owen had just made four ineffectual attempts to land, and that in making the last she had disabled her wheel and become helpless. If the Garry Owen had found it impossible to land at the wharf without serious damage to herself, how much more difficult was it for the Tyler to approach her in mid-stream, where she was drifting helpless at the mercy of the wind and currents. The occasion was one which appeared to demand promptitude and haste in order to save human life. It so appeared to the officers and crew of the Tyler. During a night intensely dark, with a gale blowing, the Tyler was called by the signal of distress from the Garry Owen, to render her immediate and speedy help. No more difficult or dangerous feat of seamanship could be demanded of the Tyler than to approach promptly and speedily and lay alongside the Garry Owen, herself helpless and drifting at the mercy of wind and waves. Under such circumstances, when human life was or might reasonably be supposed to be in peril, the court, in case of disaster resulting from the effort to save life, ought not to measure the degree of skill and judgment displayed with scrupulous nicety: The Columbus [Case No. 3,043]; The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443.

I believe that the Tyler made the effort in good faith and with reasonable judgment and skill, and although the attempt resulted in the sinking of the Garry Owen, yet the Tyler ought not to be held responsible for the loss. Libel dismissed at libelant's cost.

GILMAN (WEBSTER v.). See Case No. 17,335.

GILMAN (WONSON v.). See Case No. 17,933.

GILMARTIN (GODFREY v.). See Case No. 5,498.

GILMORE (FULTON v.). See Case No. 5,154.

Case No. 5,447.

GILMORE v. GOODRICH.

[Cited in Harding v. Whitney, Case No. 6,052. Nowhere reported; opinion not now accessible.]

Case No. 5,448.

GILMORE v. NORTH AMERICAN LAND CO. et al.

[Pet. C. C. 460.] [1]

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

FRAUDULENT CONVEYANCES — INTENT — PRESUMPTION—PURCHASER UNDER EXECUTION AGAINST PARTNER.

1. A conveyance is fraudulent, under St. 13 Eliz. c. 5, when the same is voluntarily made by the owner of the land, if land be conveyed, the grantor being indebted at the time it was executed; the conveyance must be made with intent to delay, hinder, and defraud creditors or others.

[Cited in McKee v. Jones, 6 Pa. St. 427.]

[Cited in Willis v. Whitsitt (Tex. Sup.) 4 S. W. 256.]

2. A fraudulent intent will in general be presumed, from the fact that the party conveying

[1] [Reported by Richard Peters, Jr., Esq.]

was indebted at the time the conveyance was executed.

[Cited in Heath v. Page, 63 Pa. St. 119.]

[Quoted in Briscoe v. Bronaugh, 1 Tex. 326.]

3. A purchaser under an execution against one partner, becomes a tenant in common with the other partners, in an undivided share of the land purchased, subject to all the rights of the other partners. Until the partnership debts are paid, he can have no claim, but on the separate interest of the individual partner in the residue.

[Cited in Re Corbett, Case No. 3,220.]

[Cited in Newhall v. Buckingham, 14 Ill. 408.]

In equity.

WASHINGTON, Circuit Justice. This is a bill in equity, filed by a purchaser of the lands in question under an execution against Robert Morris, in 1797, in order to set aside certain articles of agreement, bearing date the 20th of February 1795, entered into between the said Robert Morris, John Nicholson, and James Greenleaf; and to obtain a conveyance of the property, so purchased, from the defendants, the trustees of the North American Land Company, in whom the legal estate became vested by grants from the state of Pennsylvania subsequent to the plaintiff's purchase.

The material parts of the case appear from the bill, answer, and exhibits, to be as follows: On the 10th of December, 1793, the before named gentlemen, R. Morris, J. Nicholson, and J. Greenleaf, entered into articles of copartnership for the purchase and sale of large tracts of land in Pennsylvania, and elsewhere in the United States, for the joint account and risk, and for the equal benefit of the partners; to continue for five years certain, or for a longer time if the parties should consent. The purchases were to be made by Morris and Nicholson for the account of the company; and not only the lands so to be purchased, but other tracts to a great amount then owned by Morris and Nicholson, were to become the joint stock of the copartnership; Greenleaf paying cash to the other partners for one-third of the said lands. The legal titles in the said lands thus purchased, and to be purchased, were to be vested in such persons as the partners or a majority of them should appoint, and to be conveyed by them to persons who should be willing to buy the same, or to advance money on them. Neither party was permitted to purchase lands on his own separate account, so as to interfere with the objects of the company. The clear profits which should be made upon these purchases and sales, were to be equally divided, from time to time, between the partners. On the 13th of January, 1794, Morris and Nicholson entered into an agreement with Thomas Stokely and John Hoge, by which the former bound themselves to purchase from the state of Pennsylvania, warrants for 120,000 acres of land, between the Ohio and Alleghany rivers, and the northern limits of the said Stokely's district, which warrants were to be surveyed by the said Stokely and Hoge, in their districts or elsewhere, and the purchase money for the said warrants, as well as the office fees and expenses of making the surveys, were to be paid by Morris and Nicholson. Stokely and Hoge to receive as a compensation for their trouble in locating and surveying the lands, one equal third part of the whole quantity. These are the lands which form the subject of this suit. On the 20th of February, 1795, the agreement which this bill seeks to set aside, was entered into between Morris, Nicholson and Greenleaf, for forming a company to be called the North American Land Company. By this agreement, 647,046 acres of the lands belonging to the copartnership of Morris, Nicholson and Co. lying in the state of Pennsylvania, of which the lands in dispute are a part, as well as other large quantities of lands belonging to those partners, amounting in the whole to about 6,000,000 of acres, were to constitute the capital of the said land company. These lands, valued by the parties at fifty cents an acre, were to be divided into 30,000 shares, at 100 dollars a share; at which price the partners, by the said agreement were to sell the said lands in the first instance, the legal titles to the same to be vested in certain trustees, and by them to be conveyed to those who should become purchasers, and the fruits of the sales to be for the use of the share holders in proportion to their respective interests. Each owner of a share, so long as he held it, was to become a member of the company and entitled to vote for the members of the board of managers, by whom all the affairs of the company were to be conducted. The company to continue to exist for fifteen years, and the dividends to be made amongst the stockholders annually. This agreement professes to be made by Morris, Nicholson and Greenleaf, with those who should thereafter become purchasers, owners, or holders of shares in the company; and it is agreed, both by the bill and answer, that no conveyance of the land in dispute, other than these articles, was at any time made by Morris, Nicholson and Greenleaf to the trustees named in that agreement. On the 28th of May, 1796, an agreement was entered into between James Greenleaf of the one part, and Robert Morris and John Nicholson of the other, by which the former agreed to sell to the latter, as tenants in common, his interest in the above land company, for a large sum of money, to be secured upon the shares of the said Greenleaf in the said property, which were not to be transferred till the purchase money should be paid. The answer states that no part has been paid. It appears that many shares in this company were disposed of; but it is quite uncertain, from the bill, answer and exhibits, what is the real condition of the company's affairs at this time, and whether there will be any and what profits to divide amongst the members

of it, after all the partnership debts are discharged. On the 23d of November, 1797, Parish and Co. obtained a judgment at law in this court against Robert Morris, for upwards of nineteen thousand dollars, and under a fieri facias and venditioni exponas, issued on that judgment, the tracts of land mentioned in the bill were levied upon, sold as the property of Robert Morris, and purchased by the complainant. For these tracts, or a part of them, patents have been obtained by the defendant James Greenleaf, who has conveyed the same to the trustees under the articles of the 20th of February, 1795. The bill charges, that the lands in question were the property of Robert Morris, or of Morris and Nicholson, and were paid for by him or them; and that at the time when the articles of the 20th of February, 1795, were entered into, Robert Morris, John Nicholson, and James Greenleaf, were insolvent or greatly indebted, and that they entered into those articles with intent to delay, hinder, and defraud their creditors. The answer of the defendants, James Greenleaf and the managers of the North American Land Company, denies that Morris, Nicholson and Greenleaf, or either of them, were insolvent at the time stated in the bill, but it admits that they were largely indebted. They deny that the purchase money for the warrants for the land in question was paid by Robert Morris, but assert positively, that it was paid by John Nicholson. The answers deny generally that Robert Morris had any right or title to these lands, except such equitable interest as the articles of the 10th of December, 1793, and the 20th of February, 1795, conferred upon him.

The first question to be decided in this stage of the cause is, whether the complainant is entitled to the relief specifically asked for? And if not, then, secondly, is he entitled to any other, and what relief, under the general prayer of the bill? The only ground upon which the claim of a conveyance of the legal estate in the property in question is or can be placed, is, that the ownership in it was vested in Robert Morris on the 20th of February, 1795, and that the articles entered into on that day were fraudulent, as to the creditors, and therefore void under St. 13 Eliz. c. 5. To bring a case within this statute, the conveyance must be voluntary; it must be made by the owner of the land, (if land be the subject in dispute,) he being at the time indebted; and the conveyance must be made with intent to delay, hinder, and defraud creditors or others of their just and lawful actions, &c. In general, the intent will be presumed from the circumstance of the party conveying being indebted. Where these circumstances concur, there is no doubt but that the conveyance is void as well in respect to subsequent as to prior creditors. It is admitted by the answers, that Robert Morris was largely indebted on the 20th of February, 1795, when the agreement which is the object of this bill to set aside was made; and if this agreement deserves to be called a conveyance to delay and defraud creditors, within the meaning of the statute (a point not necessary to be decided in this cause), it still remains to be shown, that Robert Morris was at that period the owner of the land in dispute. The agreement of the 10th of December, 1793, constituted Robert Morris and John Nicholson trustees of all the lands which they should thereafter purchase within the scope of that agreement, for the company of Morris, Nicholson and Greenleaf. As to Robert Morris, in his individual capacity, the purchase did not vest in him even an equitable estate; since the answer (responsive to a direct allegation and interrogatory in the bill) states that the purchase money for the warrants was paid by John Nicholson. Robert Morris had no title whatever to these lands, except such as he derived under the agreements of 1793 and 1795, as a partner in the firm of Morris, Nicholson and Greenleaf. Here it is that the foundation of the complainant's bill as to his special prayer, fails him. The articles of the 20th February, 1795, did not operate upon the separate estate of Robert Morris, but on the partnership property of Morris, Nicholson and Greenleaf. Robert Morris by virtue of these articles acquired an equitable interest in one undivided third part of the land in question, but he parted with nothing. To set aside that agreement therefore, might injure the complainant, but it could not possibly do him a benefit.

Second. The next question is, whether the complainant is entitled to any, and what remedy under the general prayer of his bill? Upon this point there is no difficulty. By the purchase of the complainant under the execution against Robert Morris in his separate capacity, the former became at law a tenant in common with the other partners in one undivided third part of the land which he purchased. The marshal had no power to sell a greater interest than that in the land levied upon, and if a timely application had been made to this court on its law side, he would have been so directed. But the purchaser holds the property so purchased subject to all the rights of the other partners. In equity more especially, he stands in the place of the partner under whom he claims, subject to the partnership accounts. Until the partnership debts are paid, he can have no claim but upon the separate interest of the individual partner of the residue which may then remain. Upon these principles, the complainant is entitled to an account, if he desires it, and the court will so decree.

GILMOUR (MINGE v.). See Case No. 9,631.

GILMOUR (UNITED STATES v.). See Case No. 15,208.

Case No. 5,448a.

GILOOLEY v. PENNSYLVANIA R. CO.[1]

District Court, S. D. New York. Dec. 21, 1878.

TOWAGE—NEGLIGENCE OF TUG.

[It is negligence for a tug which has brought a tow of canal boats to port to immediately cast off and go away, without inquiring as to the condition of one of the boats, with which she had come in violent contact during the day.]

[This was a libel by William Gilooley against the Pennsylvania Railroad Company to recover damages for injuries to his canal boat.]

E. D. McCarthy, for libellant.

Beebe, Wilcox & Hobbs, for respondents.

CHOATE, District Judge. This is a libel in personam to recover damages for the loss of libellant's canal boat, the Exchange, alleged to have been lost through the negligence of the respondent, in the performance of a towage service. On the 16th of December, 1876, the Exchange was one of thirty-six boats forming a tow, which was made up by the respondent at New Brunswick, on the Raritan river, for New York. The tow started with the tug Bordentown, a large and powerful side-wheel steamer, in advance, followed by two smaller tugs, the Harry and the Willie, which were connected with the tow by four hawser lines. The Exchange was the starboard boat on the hawser tier. The evidence is that at that time she was seaworthy, and in good condition. The hawser tier was formed of four large canal boats. The tow started at seven in the morning. The day was then fine, but cold. During the forenoon the wind increased, and at ten o'clock it blew a violent gale. About that time the Blue Bonnet, a powerful tug propeller belonging to the respondent, which had arrived at New Brunswick from New York after the tow started, and had been sent down the river to assist it, overtook the tow, and took the place of the Bordentown, being better able to keep the tow in the channel, because she presented less surface to the wind. The tow proceeded without accident till about eleven o'clock, when in turning at a bend in the river at a place called the "Middle Grounds" one of the port hawsers broke, the tow sheered to port, and four of the boats and the tug Harry got aground on the north bank of the river. The tow was completely broken up. The tug Willie got separated from the Harry, and lay helpless in the river for want of a rudder, which she had lost a few days before. The wind and the tide carried the boats, which were still afloat, down stream, and the Exchange broke away from the other boats in the hawser tier, and drifted down against the Willie, and received an injury by the collision on her starboard side at and below the water line, the planks being broken and forced in. She was laden with coal. By the assistance of men from the tugs she was listed to port by shovelling the coal to that side, and the injury was temporarily repaired with oakum and tallow, and covered over. A board was afterwards nailed over the place, and in this condition, so far as that injury was concerned, she remained till her arrival at South Amboy. Meanwhile the Bordentown had gone down the river to a place called "Crow's Mills." The Blue Bonnet took hold of the boats afloat as they drifted down, and reformed the tow, the Exchange being still the starboard boat in the hawser tier; and the tow came down tail first to Crow's Mills without further accident. There they tied up at a pier, and waited for the flood tide, not thinking it prudent to attempt to go through the bridge below Crow's Mills till the change in the tide. Except near New Brunswick, where the new ice had formed, about an inch or two in thickness, the tow had met with no obstruction from the ice up to this point; but from a short distance below Crow's Mills to the bridge drift ice had become packed in so as to make the navigation with the tow difficult and dangerous. It was after dark when the tow left Crow's Mills. The Exchange was still the starboard boat of the hawser tier. They started out with the Blue Bonnet and the Willie lashed together ahead, followed by the Bordentown and the tow, now consisting of thirty-two boats. Most of the boats were what are called "chunkers," smaller than ordinary canal boats, and less strongly built. They had only got a few hundred yards from Crow's Mills when they got into the ice, and the Blue Bonnet found it impossible to push through incumbered with the Willie by her side and the tow behind. The Bordentown therefore was cast off. The Willie was put astern of the Blue Bonnet, and these two tugs made their way through the ice to South Amboy, where the Willie was left. The object of this movement was to get the Willie out of the way. The Bordentown then undertook to draw the tow through the ice alone, but had not proceeded far when the ice and the tide turned her round to starboard, and drove her against the starboard side of the tow. She struck violently against the starboard side of the Exchange, and inflicted a serious injury to her near the stern and three or four feet from the bottom, partly forcing in the planks, and causing her to leak. The testimony of those who examined the Exchange after she was raised shows clearly that this injury, which was the principal cause of the leaking of the Exchange, was not caused by the ice, but by some blunt point or projection violently pressed and moved along her side, and it cannot be accounted for except as having been caused by this collision; and the evidence I think shows that it was caused by this collision with the Bordentown. The tow was rescued from this immediate peril by the Bordentown's coming to anchor, and waiting for the return of the Blue Bonnet. After a

[1] [Not previously reported.]

while the Blue Bonnet returned, and she and the Bordentown succeeded in drawing the tow through the ice, and they arrived at South Amboy between eleven and twelve o'clock that night, without other accident, except that one or more of the hawsers broke while going through the ice. During this passage the Exchange leaked, and the libellant was frequently pumping. At South Amboy the tow was brought around to be moored at a pier, and to be held there by the Bordentown, the Blue Bonnet having cast off; and the tow swung round, heading towards New Brunswick, with the tide. The Bordentown had just got her lines on the pier and made fast, when the captain of the Blue Bonnet called to the captain of the Bordentown to know if he was all right. The captain of the Bordentown replied that he was. The Blue Bonnet then started to go up the river again to bring off the boats left aground, the intention being to leave the tow at South Amboy for the night, and proceed to New York in the morning. The Blue Bonnet left without any inquiry being made by anybody connected with the tugs as to the condition of the Exchange or the other boats. About the time the Blue Bonnet left, the libellant, finding that his boat was making water, hailed the Bordentown, and called for help. He continued to pump, but the water gained on him. He shouted again to the Bordentown that his boat was sinking. They answered that they could not help him, and ordered him to cast off the lines, which was done, and they were fastened to the other boats in the tow. In twenty minutes to half an hour afterwards the Exchange sunk.

Various acts of negligence are alleged and relied on by the libellant,—that the tow was too large; that the hawser lines were insufficient; that the Willie had no rudder; that the Exchange was not fit to leave Crow's Mills that night, with so much ice in the river; that she was especially unfit, in her injured condition, to be put on the starboard side of the hawser tier, the most exposed place in the tow; that the Bordentown improperly attempted alone to draw the tow through the ice; that the injuries to the Exchange, from the effect of which she was lost, were caused by these and other acts of negligence in the management of the tow, and not by the ice; and that the Blue Bonnet was allowed to leave, and no inquiry made as to the condition of the tow, nor any attempt made to save the Exchange by beaching her.

It is unnecessary to examine in detail all these points, because I am satisfied that it was gross negligence to send away the Blue Bonnet on the arrival of the tow at South Amboy, without any inquiry as to the condition of the Exchange; and that, if she had remained, she could easily have put the Exchange on the beach, within no great distance from where the tow lay, and thus have saved her. The captain of the Bordentown knew, or had every reason and opportunity to know, that she had been in collision with the Bordentown, and was injured. It was no more than a prudent owner dealing with his own property would be expected to do, to see that the boats, and especially the Exchange, thus injured, had sustained no serious injury by being dragged through the ice, before he allowed the Blue Bonnet to go away. Instead of this, he contented himself with finding that his boat was all right, and paid no attention to the tow. As soon as he made fast, he banked his fires, so that it was impossible probably for him to rescue the Exchange after he became aware of her danger. It is no defense that the Bordentown alone could not save her if proper foresight would have furnished the means of saving her by the Blue Bonnet.

It is not necessary to consider the effect of the agreement signed by the libellant purporting to exempt the company from damage caused by ice, since the loss of the boat was not caused by ice. Decree for libellant, with costs, and reference to compute damages.

[For a hearing on exceptions to the commissioner's report, see Case No. 5,448b.]

Case No. 5,448b.

GILOOLEY v. PENNSYLVANIA R. CO.[1]

District Court, S. D. New York. March 26, 1879.

DAMAGES—EVIDENCE OF VALUE — AVERAGING ESTIMATES.

[Where, in estimating the value of a canal boat lost by collision, the witnesses for the opposite parties are so far apart that both cannot be approximately correct, it is not proper to average the same, but, if the court is satisfied that the witnesses of one party are entitled to the greater credit, it should adopt their valuation.]

[This was a libel by William Gilooley against the Pennsylvania Railroad Company to recover damages for injuries to a canal boat. There was a decree for libellant, and a reference to ascertain damages. Case No. 5,448a. The cause is now heard on exceptions to the commissioner's report.]

E. D. McCarthy, for libellant.

Beecher, Wilcox & Hobbs, for defendant.

CHOATE, District Judge. The libellant having a decree for his damages sustained by reason of injuries to his canal boat, caused by defendant's negligence, and the commissioner to whom it was referred having made his report, both parties have excepted to that report. The principal objection made by the defendant is to the allowance of $1,000 for the value of the canal boat. The libellant testified that the boat was worth $1,500 at the time of its loss. Of two other witnesses called by him one makes her worth $1,800, and the other $1,400. On the other hand, the defendant called six witnesses as to value, one of them the builder of the boat. They put her value at from $300 to $600. They had not

[1] [Not previously reported.]

all seen her, and some of them testify from the description given to them upon their examination. It appeared that she was about ten years old at the time of her loss; that she was of a class costing when built $2,500 to $3,000; that she had suffered injury from a collision, by which she was thrown slightly out of line. The libellant bought her in 1873, three years before her loss, for $450. He testified that between the time he bought her and the time of her loss he expended about $1,750 in repairs. He attempted to give an account of these repairs, but had no account except a memorandum, very recently made, and was not very successful in establishing the fact that he had expended so much. Nor did his evidence show that she had been in whole or in any considerable part rebuilt, or that the repairs were more than such as were necessary for keeping the boat in good condition. I do not think the report of the commissioner is sustained by the weight of the testimony on this point of the value of the boat. He has adopted a sum or value about midway between the valuation put upon her by the libellant and his witness and that put upon her by defendant's witnesses. I think it was not a case where such averaging of values given was proper. The discrepancy is so great that both cannot be approximately right, and I am satisfied that defendant's witnesses are entitled to the greater credit. As to the libellant himself, the opinion of an interested party on a mere matter of judgment, especially as to the value of the property injured, should be received with great caution. In matters of opinion, as distinguished from matters testified to from personal knowledge, the interest of the party to the cause is much more liable to create bias and self delusion. The two witnesses for libellant as to value are not particularly strong in their experience or means of forming a judgment, and I think their testimony and that of the libellant is clearly overborne by that of the respondent's witnesses, who testify from an intimate knowledge of the whole subject of the cost and market value of such property, and of the effect of the age of the boat and other circumstances shown in her history upon her value. They are disinterested, and, though some of them had not seen this boat, their opinions as to value were based on the libellant's own statements as to the amount and nature of the repairs he had put upon her. I have given no weight to the offer testified to by one of the witnesses as having been made by libellant to sell her to him for $300, because it appears there was no serious proposition to buy, nor is it certain that it was a serious proposition to sell. The valuation of the libellant and his witnesses is also apparently extravagant and unreasonably high. It is highly improbable that a boat of this description should, after ten years' use, without reconstruction to any considerable extent, be still worth more than half her original cost. This item must be reduced to $600.

As to the cabin furniture and personal property, reported at $361.22, there is no evidence conflicting with the values given by Mrs. Gilooley, on which this finding is based; nor can the property, in the absence of evidence, be regarded as of any value after being submerged in mud and water for two months. The boat was raised, and part of her cargo saved. The cargo consisted of 223 tons of coal. Only 169 tons are accounted for as saved and sold by the wreckers. The defendants claim that this loss in quantity is not accounted for. I do not think, however, that the libellant should be charged with this loss. The coal was mixed with mud; one solid mass. It had to be dug out, screened, and washed. By this process doubtless a considerable part of the loss may be accounted for. And part may have been lost in the sinking of the boat or in raising her, and part was never got out of her. The coal saved and cleaned was mostly sold at retail at Harlem by a man employed by the wreckers for that purpose, to whom the wreckers appear to have paid $210 for this service. The commissioner has reported this item of expense not satisfactorily proved, and has allowed $42.70, at the rate of 35 cents a ton. I agree with the commissioner in thinking the charge of $210 so exorbitant that it ought not, upon the testimony, to be allowed to any greater amount than the sum of $42.70 allowed by the commissioner. This was shown to be the full and fair value of the service rendered, and, if anything was paid beyond this, the burden is thrown on libellant of showing that such further payment was proper and necessary. A loss which has happened through the extravagance or gross carelessness of the libellant, or those employed by him, after the property was restored to him, cannot be attributed to the negligence of the defendant.

The other objections are all overruled. Libellant's exceptions overruled. Defendant's exception as to allowance for value of boat sustained, and that item reduced to $600. Defendant's exceptions otherwise overruled. Decree to be entered in conformity hereto.

GILPIN (BLOOMER v.). See Case No. 1,558.

Case No. 5,449.

GILPIN v. CRANDELL.

[2 Cranch, C. C. 57.] [1]

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

ACTION ON ADMINISTRATION BOND.

An action cannot be maintained, under the laws of Virginia, upon an administration bond, until a devastavit shall have been established in a suit against the administrator.

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

Debt [by Gilpin, judge of the orphans' court, for the use of Faxon] on the administration bond of Crandell, who was a surety in Dyson's administration bond, for the non-payment of a debt due from Dyson, the intestate, and for which a judgment had been recovered by Faxon against Dyson's administratrix. The defendant pleaded that Dyson's administratrix had performed the conditions of the administration bond. The plaintiff replied that she had not, in this: that Faxon had recovered judgment against her de bonis intestatoris, for $59, upon which a fieri facias was returned nulla bona, and that she had assets, but wasted them; to which there was a general replication and issue.

E. J. Lee, for defendant, contended that he had a right to prove a devastavit in this case, in the same manner as if the plea had been pleaded by Dyson's administratrix herself in a suit against her.

But THE COURT (nem. con.) was of opinion, under the decisions in Virginia, that this suit was not maintainable; as no devastavit had been established in a suit against Dyson's administratrix.

[See Case No. 4,705.]

GILPIN (EDGERTON v.). See Case No. 4,280.

GILPIN v. O'NEILL. See Case No. 3,924.

Case No. 5,450.

GILPIN v. OXLEY.

[1 Cranch, C. C. 568.] [1]

Circuit Court, District of Columbia. July Term, 1809.

PRINCIPAL AND SURETY—ADMINISTRATION BOND—PROOF OF DEBT.

An action will not lie against the sureties in an administration bond, until the plaintiff shall have proved his debt and a devastavit, in an action against the administrator.

Debt [by Gilpin, judge of the orphans' court] on an administration bond against the administrator of Henley and his sureties. The breach alleged is the non-payment of two promissory notes made by Henley.

Mr. Taylor, for Murgatroyd, one of the sureties, prayed the court to instruct the jury that no suit can be supported against the sureties, until the debt has been established by a suit against the administrator, and nulla bona returned upon an execution de bonis testatoris. Braxton v. Winslow, 1 Wash. [Va.] 31.

E. J. Lee, contrà. The object of the bond is to secure creditors. If the administrator runs away, the plaintiff can get no judgment against him. And if his sureties are not liable, he will have no remedy. The sureties may require counter security. In Braxton v. Winslow, the suit was against the sureties only. The executor was not a party to the suit. In Turner v. Chinn's Ex'rs, 1 Hen. & M. 53, the court of appeals say the question is not decided; and they leave the question open, whether the return, that the executor had removed to Kentucky, was sufficient to charge the sureties. As to guardians' bonds, there is no such decision. Call v. Ruffin, 1 Call, 333.

THE COURT stopped Mr. Taylor in reply, considering the point as settled by the court of appeals in Virginia. Nonsuit.

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

Case No. 5,451.

GILPIN v. PLUMMER.

[2 Cranch, C. C. 54.] [1]

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

LIMITATIONS—ACTION ON BOND—DEVISEE OF OBLIGOR—RESIDENCE OF PARTIES—PAYMENT BY EXECUTOR.

1. The Maryland statute of limitations of twelve years, is a bar to an action against the devisee of the obligor, brought in Alexandria upon a bond executed and assigned in Maryland; all the parties having continued to reside in Maryland until the expiration of the twelve years.

2. A payment of part of the debt, by the executor, within the twelve years, does not take the case out of the statute, as to the heirs and devisees.

Debt, in Alexandria [by Gilpin, as assignee, etc.], against the devisee of the obligor of a bond, made in Maryland, and due in the year 1788; more than twelve years before the commencement of the suit. All the parties resided in Maryland until the expiration of the twelve years. The bond was assigned to the plaintiff, in Maryland, but not in such form as the Maryland law required to enable the assignee to bring a suit upon it in his own name. This objection was taken in argument, but not decided by the court. The defendant pleaded the Maryland statute of limitations, 1715, c. 23, § 6, by which it is enacted "that no bill, bond, judgment, recognizance, statute merchant, or of the staple, or other specialty whatsoever," (except such as shall be taken in the name of the king, &c.) "shall be good and pleadable, or admitted in evidence against any person or persons of this province, after the principal debtor and creditor shall have been both dead twelve years, or the debt or thing in action above twelve years standing;" "saving," &c. To this plea the plaintiff replied a payment made by the executor in 1798; to which replication the defendant demurred.

Mr. Swann, for defendant, made two points. (1) That the Maryland statute was a bar; all the parties having resided there until the

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

action was barred. (2) That the plaintiff, as assignee, could not recover upon the bond in his own name, the assignment not having been made in the form prescribed by the Maryland statute, 1763, c. 23, §§ 9, 10. The law of Maryland is the law of this contract. Warder v. Arell, 2 Wash. [Va.] 282; 2 Fonb. Eq. 442. The defendant is only one of the devisees, and cannot recover contribution from the others, if the law of Maryland is not a bar here as well as there. A payment, or acknowledgment, or even a new promise by the executor, cannot keep the bond alive against the heir or devisee. There is no privity between them. Quarles v. Littlepage, 2 Hen. & M. 401; Henderson v. Foote, 3 Call, 248; Fisher v. Duncan, 1 Hen. & M. 563.

Mr. Taylor, contrà. The statute of limitation of Maryland applies only to the remedy, and can be enforced only in the courts of that state. It does not destroy the debt. In Olive v. Mandeville, [Case No. 10,488,] this court refused the defendant leave to amend by pleading the English statute of limitations. There is no case in which the statute of limitations of another state has been pleaded. Although the assignment is not under seal, as required by the statute of Maryland, yet it is sufficient under the law of Virginia, which is in force here.

THE COURT (nem. con.) was of opinion that the bar was good; and overruled the demurrer.

GILPIN, The JOHN. See Cases Nos. 7,343–7,345.

Case No. 5,452.

GILPINS v. CONSEQUA.

[Pet. C. C. 85;[1] 3 Wash. C. C. 184.]

Circuit Court, D. Pennsylvania. April Term, 1813.

CONTRACTS—PAROL EVIDENCE—FRAUD—ACCOUNT OF SALES—CUMULATIVE EVIDENCE AFTER CLOSING OF TESTIMONY — EXCUSE FOR NONPERFORMANCE—SEASON OF YEAR.

1. Action for damages, for not delivering teas, according to a written contract, entered into at Canton, between the supercargo of an American ship, owned by the plaintiffs, and the defendant, a Hong merchant of Canton.

[See Fisher v. Consequa, Case No. 4,816.]

2. When a contract is in writing, conversations previous to and leading to it, cannot be given in evidence.

[Cited in Phillips v. Preston, 5 How. (46 U. S.) 291.]

[Cited in Rearick v. Rearick, 15 Pa. St. 72.]

3. Evidence to prove fraud, by showing it was in the power of the defendant to have changed the teas, after they had been examined by the plaintiffs' agent, is inadmissible; the contract of the defendant having stipulated, that the teas of the best quality should be delivered, on board the plaintiffs' ship.

4. An account sales of the entire cargo, cannot be given in evidence by the defendant, when the interest of the party against whom it is offered was separate and not joint, and when the defendant does not intend to impeach the separate account of sales of the plaintiffs' interest in the property sold.

[Cited in Gordon v. Bowers, 16 Pa. St. 228.]

5. After the defendant has closed his testimony, the plaintiffs will not be permitted to give additional evidence on a point, upon which they had already examined witnesses, and on which nothing new had been proved by the defendant.

6. Evidence to explain a transaction which had come out from the defendant's testimony, was allowed; and the plaintiffs were suffered, after their testimony in chief was closed, to examine witnesses to repel an argument, which might be drawn from the statements of the defendant's witnesses.

7. The examinations of the supercargoes of the muster chests, and their letters to the plaintiffs, expressing their satisfaction with the qualities of the teas, are not conclusive evidence of their quality, if in fact the teas were not of the quality represented.

[Cited in Port Carbon Iron Co. v. Groves, 68 Pa. St. 150.]

8. It is no excuse for the non-performance of a contract to deliver "prime" "first chop" teas, that the season of the year, when the teas were to have been delivered, was unfavourable to the best teas being at market.

[Cited in Peoria Marine & Fire Ins. Co. v. Walser, 22 Ind. 85.]

9. What is the proper test of the quality of teas, part of which were sold in Philadelphia, and part at the sales of the Dutch East India Company at Amsterdam.

10. Quere. Whether the quality of the teas should be ascertained, by comparing them with the highest prices for which other teas were sold at Amsterdam at the same time, or with an average of the prices; or what rule should be adopted?

11. The sales, at Amsterdam, of teas of prime quality, compared with the sales of the plaintiffs' teas, furnish the rate of loss, which is to be applied to the first cost in Canton; but these sales do not furnish the amount of loss.

[Cited in Youqua v. Nixon, Case No. 18,189; Cheongwo v. Jones, Id. 2,638.]

12. No damages are to be allowed, for any profit or gain the plaintiff might have obtained, by exchange or otherwise.

[Cited in Chicago & Rock Island R. Co. v. Ward, 16 Ill. 527; Ward v. Burr, 5 Blackf. 117; Adams Express Co. v. Egbert, 36 Pa. St. 363; Morey v. King, 49 Vt. 308; McAlpin v. Lee, 12 Conn. 133; Harbold v. Kuster, 44 Pa. St. 394.]

13. Interest on unliquidated damages is not allowed.

[Cited in Barrow v. Reab, 9 How. (48 U. S.) 371; Lincoln v. Claflin, 7 Wall. (74 U. S.) 135; Eddy v. Lafayette, 49 Fed. 813.]

[Cited in Moulton v. Scruton, 39 Me. 291; Gear v. Shaw, 1 Pin. 616.]

14. If the cross interrogatories are not put to a witness, examined under a commission, the deposition of the witness cannot be read.

15. It is no objection to a deposition, that it is in English, and commissioners before whom it was taken were Dutchmen, and do not state that they had the assistance of a sworn interpreter. Nor is it an objection, that the cross interrogatories were not put to each witness, immediately after he had answered the chief interrogatories, but were put to him after all the chief interrogatories were answered by all the witnesses; nor is the commission defective, because the commissioners and their clerk were not sworn.

[1] [Reported by Richard Peters, Jr., Esq.]

16. Those who execute a commission are appointed by the court, and although they may be nominated by the parties, they are not their agents.

[Cited in Jones v. Oregon Cent. Ry. Co., Case No. 7,486.]

This was action on the case, on a contract made between the supercargo of the plaintiffs, merchants of Philadelphia, with the defendant, who was a Hong merchant in Canton; in writing, but not under seal; whereby the defendant agreed to deliver to the supercargo, Redwood Fisher, a cargo of tea, for the Pennsylvania Packet, at certain prices, fixed in the contracts; the same to be fresh, prime, and of the first chop. The breach laid in the declaration was, that the teas were not of the quality stated in the contract, but were very inferior, &c. Plea non assumpsit.

The plaintiffs proved; that the Pennsylvania Packet was loaded for Canton in 1805, with about eighty thousand dollars specie, whereof one half was shipped by the plaintiffs, on their own account, one fourth by Dunant, and one fourth by Joshua Fisher; and also that she had on board, about fourteen thousand dollars worth of ginsang. Redwood Fisher and James Reed, were constituted the supercargoes; and a letter of instructions given to them by the shippers, stating their separate interest, and that the teas to be purchased were to be marked with the names of the respective shippers, according to their interests as above mentioned. Mr. Redwood Fisher gave evidence, that upon his arrival at Canton he secured the ship with the defendant, and entered into the contract stated in the declaration.

The defendant's counsel objected to evidence being given of any conversations with the defendant, leading to the contract, and tending to explain and in any wise to vary it. 5 Bin. 517; 1 Johns. 414, 453; 5 Johns. 138; 2 Caines, 155; 5 Bos. & P. 270; 12 East, 6.

BY THE COURT. Evidence to explain or vary the contract is improper; all conversations leading to the contract are merged in it; and if the evidence offered to be given, be only to confirm the contract as stated by plaintiffs' counsel, then it is improper, because unnecessary; the defendant not meaning, as his counsel declares, to impeach it.

The delivery of the teas and the payment for them were fully proved. The cargo was brought to Philadelphia, in August, 1806, in good order; and (except about two hundred and sixteen boxes which were sold) remained in store till March, 1807; when it was sent to Amsterdam, consigned to Hope and Co., who placed it in the warehouse of the East India Company, who have the exclusive privilege of selling teas there. These teas, amongst others in the possession of this company, were sold at public sales, according to the usage, part in August, 1807, and the residue in July, 1808; of which sales, printed copies were made out of the whole sales, as is usual, and forwarded to the plaintiffs. From a comparison of these sales it appeared, that the plaintiffs' teas sold for less than some other teas of the same kind, which one of the witnesses attributed to their being of inferior quality.

The plaintiffs offered in evidence, certain depositions taken under a commission to Amsterdam, which were objected to, for the following reasons: 1st. One of the depositions was taken upon the direct interrogatories of the plaintiffs, but the cross interrogatories were not put to the witness. 2d. The depositions are written in English, though the commissioners are Dutchmen, and it does not appear that there was a sworn interpreter. 3d. The cross interrogatories are not put to each witness, after he has answered the direct interrogatories, but after they have been answered by all the witnesses. 4th. The commissioners and the clerk were not sworn. In answer to the first objection it was said, that the omission to put the cross interrogatories was the fault of the defendant's commissioner, or agent; and therefore ought not to affect the deposition.

BY THE COURT. It is a great mistake to call the commissioner appointed by the defendant his agent; he is appointed by the court, though nominated by the party, and is no more the agent of the party nominating him, than an arbitrator is the agent of the party who chose him. The particular deposition objected to, because the cross interrogatories were not put, cannot be read; that objection does not apply to the other depositions taken under the commission. There is not the slightest weight in any other of the objections to this commission.

The plaintiffs having offered evidence, calculated to show, that after the examination made in Canton, by the purchasers of teas, they may be changed, and teas of a different quality imposed upon them, THE COURT stated, that this action being upon the contract, no evidence ought to be given calculated to impute fraud to the defendant. It is not sufficient for the defendant to show, that the teas which were examined by the supercargo, answered the description in the contract, if those which were delivered on board did not. He was bound to deliver them of that quality on board, unless the supercargo received them on shore at his risk.

On the part of the defendant it was proved; that the usage in Canton was, for the American merchants to secure with one of the Hong merchants. That one chest, called the muster chest, out of each chop (consisting of a great number of chests of each quality), was sent to the factory, or residence of the purchaser, for his examination. If, after trying it himself and taking the advice of others, on whose judgment he relies, he approves, the whole quantity purchased is sent to the weigh-house, where the chests are

weighed and marked anew; generally the next day, they are sent down, in one of the Hong boats, to Wampoo, about twelve miles from Canton, where the ship is moored. That the purchaser may, if he pleases, examine every chest of tea, though this is unusual; and he may, if he pleases, remain with the tea, after it is weighed, and accompany it to the ship. That the superior teas, are to be purchased from September to middle of December, and those afterwards purchased are inferior; the best having been selected before January.

The defendant offered in evidence, a paper sent to Joshua Fisher, one of the shippers, and delivered to the defendant by Fisher's executor, containing an account of the sales of the whole cargo of teas sent to Amsterdam, signed by Hope and Co.

BY THE COURT. Fisher, Dunant, and the plaintiffs, were separate, and not joint owners of this cargo; and it is therefore improper to give in evidence in this cause, an account of the sales of the entire cargo sent to Mr. Fisher; the defendant acknowledging, at the time he offers it, that he does not mean to impeach the account of sales from Hope and Co. which has been given in evidence by the plaintiffs.

After the defendant had closed his opening, the plaintiffs offered to examine witnesses, as to the custom spoken of by the defendant's witnesses, in relation to purchasing of tea at Canton.

BY THE COURT. In your opening you examined witnesses on this subject; and as nothing new in relation to it, has been given in evidence, it would be improper for the plaintiffs again to examine witnesses respecting it.

The counsel moved, that they might examine the supercargo, to explain a transaction, which had come out on the defendant's testimony, respecting ginsang, which had been smuggled on shore from the Pennsylvania Packet; and also to repel an argument which the defendant's testimony would authorize, that it was the duty of the plaintiffs' supercargo, to have examined for himself, all the teas; and that it was to be presumed, either that he had done so, and was satisfied; or, that having neglected to do so, the defendant was not liable. It was intended to be proved, that the defendant told the supercargo he need not examine the teas, as he the defendant was bound by his contract to deliver him good teas.

BY THE COURT. As to the affair of the ginsang, the plaintiffs have certainly a right to examine witnesses to explain it. They may also repel any argument, to be drawn from the evidence given by the defendant, that the plaintiffs' supercargoes, either examined the teas and were satisfied with them, or that they might have done so, and were therefore guilty of a faulty negligence in not doing so. The evidence offered to be given is, in this point of view, proper.

The plaintiffs contended, in their summing up, that the inferiority of the prices, which these teas commanded at the Amsterdam market, to other teas of the same denomination, was conclusive proof, that they were not prime, and of the first chop, as stipulated by the contract: and, that in ascertaining the quality of these teas, by comparing the prices at which they sold, with most of other teas of the same denomination, the comparison ought to be made, with those boxes which sold for the highest prices, and not with the average of the whole quantity, say five thousand chests, out of which those few chests were selected; and, that in estimating the damages, the plaintiffs were entitled to the difference, between the sale of their teas, and such highest priced teas; together with the gain by exchange, which they would have made upon such difference, had they received it; and also interest upon the whole.

The defendant insisted, that the supercargoes were satisfied with the teas, and so expressed themselves, to their owners; which, under the fair construction of the contract, had excluded any claim by the plaintiffs upon the subject of quality. That this vessel having arrived at Canton, out of the season for the best teas, the contract ought to be construed in reference to that circumstance; so as to mean such prime, first chop teas, as were to be obtained at that time. They insisted, that the sales of a part of the cargo at Philadelphia, with which the plaintiffs were satisfied, because no claim is made on account of that quality, is conclusive as to the quality of the whole cargo; which the sales at Amsterdam cannot effect. But at all events, the sales of the plaintiffs' teas at Amsterdam, should be compared with the average price of the whole of each denomination; in which case, it would appear, that the plaintiffs had not a pretence of claim; and also that their claim was unfounded, since it appears that they had made a considerable profit upon the whole voyage.

WASHINGTON, Circuit Justice (charging jury). The contract upon which this action is founded, obliges the defendant to deliver to the plaintiffs' supercargo, a certain quantity of teas, of different kinds, at stipulated prices; the same to be fresh, prime, and of the first chop, to their entire satisfaction. The true meaning of the words "prime," "first chop" (the latter of which seems to have been imported from the East into the mercantile language of this country), of course is familiar to a jury of merchants, and can be better understood by them, than by the court. This being done, it is then admitted by the defendant's counsel, that Consequa was bound to deliver teas of the described quality; but they contend, first, that if the supercargoes were satisfied (which they expressed themselves in their letters to the plaintiffs to be, by stating that the cargo

was composed of teas of the first quality) that the plaintiffs cannot afterwards object to the quality, in an action upon the contract; secondly, that these words as descriptive of the quality, should be construed in reference to the season of the year, and the state of the market. The court cannot sanction either of these arguments. As to the first, it is most obvious, from the usage of this trade at Canton, as given in evidence, the purchaser never examines all the teas, with which he is to be furnished, and seldom more than the muster chest, which is sent to him for that purpose; relying upon one of the Hong merchants, that the quality of the entire parcel of each denomination, will correspond with the sample sent. Besides, if the satisfaction of the purchaser, either expressed or implied, can dispense with the necessity of the tea answering the quality stipulated in the contract; his dissatisfaction, however capricious and unreasonable, might prevent the seller from fulfilling his contract. The real meaning of the contract is, that the teas shall be of the agreed quality, such as the purchaser ought upon examination to be satisfied with. The declarations of the supercargoes, that the cargo was of the first quality, made as they were in this case, without examination; could only have been upon the faith of the contract, and the honour and judgment of the defendant. Second, the quality of the teas, engaged to be delivered, should certainly be considered in reference to the general market of Canton, so as to preclude a construction which would compel the defendant to deliver teas, not usually brought there for exportation. But, if the advanced season of the market, should be admitted to control the general and strong expressions of the contract, it would be difficult to know where to stop; such a construction might sanction the delivery of inferior teas, in the face of a contract, which stipulates for those of prime quality. The defendant ought to have known, whether from this or any other circumstance, he could or could not comply strictly, with his engagements; and, consequently, he ought, in the latter case, to have qualified the expressions used. The true meaning of the contract being ascertained, the next question is, whether it has been broken?

There were two modes by which the quality of these teas could be tested: Examination by competent judges, and comparison of the prices given for these teas, by persons after examination with other teas, of the same denomination, sold at the same time, and under the same circumstances. The plaintiffs rely upon the latter, and generally speaking it may furnish a tolerably just criterion of value, though not always to be relied upon. That sales at auction, are not always a decided test of quality, common experience has proved. It sometimes happens, that a difference takes place where the quality is precisely the same, arising from the various motives which actuate those who bid. If the age of the tea contributes to its deterioration, that would be another reason, why the comparison might not be infallible. In this case, as the first sale at Amsterdam was one and a half, and the second two and a half years after they were purchased; whether the teas in question were affected in quality by this cause, by sea injury or otherwise, you must decide.

The defendant however contends, that the sales at Philadelphia, ought to be considered as conclusive of the quality of these teas; and certainly this argument is entitled to the serious consideration of the jury. The unexceptionable quality of one sixth of the cargo, taken out indiscriminately from the whole, and sold; and of course examined and approved of by the different purchasers; affords strong evidence of the good quality of the whole cargo, before it left Philadelphia; and if you should be of this opinion, the case is clearly in favour of the defendant.

But if you should prefer the test contended for by the plaintiffs, then another question arises:—Ought the sales of these teas, to be compared with those of the highest sales of other teas, of correspondent denominations, or with the average of those sales? The plaintiffs contend for the former, and the defendant for the latter. The court is of opinion that both are wrong. The plaintiffs are so, unless they first prove that the comparison of one thing to another, by auction prices, is an unvarying test of quality, which it certainly is not. The defendant's rule is also wrong; because it would result, in comparing teas which ought to be of the first quality, with those of inferior teas, so far as inferior teas compose the quantity from which the average is taken; and such teas must necessarily form a part of the average, if price be the test of quality. Some rule between these extremes may be more likely to meet the justice of the case, which the jury may probably devise.

Supposing that the jury shall have settled all these points to their satisfaction, that is, that this contract has been fulfilled as proved by the sales at Philadephia, or not fulfilled, as proved by the Amsterdam sales; and in this latter case, that the teas in question ought to be compared with the highest sales or with the average price, or with some price between these extremes; the important question remains, What ought to be the rule by which damages should be assessed? The plaintiffs claim the difference between the prices of their teas, and the highest sales of other teas, at the same time. Besides the objection to this mode before noticed, there is another, which is, that this would be to subject the defendant to the casualties of a foreign market, with which he has nothing to do. The decisions upon this point in cases of insurance, have a

strong bearing on the question. In those cases the insured, if the foreign market be high, may with at least a semblance of reason say to the underwriter, "You promised to indemnify me against all loss arising from certain risks in this voyage, and my loss is precisely the amount for which the cargo would have sold, had it arrived safe;" and the underwriter might use the same language, in case the market was low. Yet the decisions are, that the underwriter is not to be governed by the foreign market. But in this case, the contract of the defendant was merely to deliver, at Canton, teas of a certain quality. It was nothing to him what the plaintiffs did with them, at what market, or at what time they might choose to sell them. It would be most unreasonable, to hold the defendant bound to make up losses, which might arise out of the speculations or miscalculations of the plaintiffs, to which he was not privy and in no respect consented. If a man contract to deliver a quantity of flour, for instance, by a particular day, and fails; or deliver it of a quality inferior to that stipulated for; all that can be claimed from him in the first case, is the price of such flour, at the time and place when and where it was to have been delivered; or in the second, to make up the difference in the quality. He would never be permitted to resort to a foreign market, to which he might have carried it, to fix the standard of his loss. Upon this principle therefore, the jury will consider the sales at Amsterdam, and the comparison of them with those of other teas, not as furnishing the amount but the rate of loss;—and having ascertained that, whether it be five, or be ten, or any other rate per cent.; then to apply that rate to the prices of the same articles of first quality at Canton, when these teas were delivered; of which, in the absence of other evidence, the prices agreed upon in this contract may be taken. The result of this operation will furnish the proper rule of damages, should you give any.

The claim of the plaintiffs, for the supposed loss of what they might have gained by the difference of exchange, upon the amount to which you may think them entitled, is too extravagant to be treated seriously. They might as well claim all the profit, which might have been made by investing that money in a cargo of goods in England, and then selling them in the United States, and so on. As to interest, this is a question generally in the discretion of a jury. But it is not agreeable to legal principles, to allow interest on unliquidated and contested claims, sounding so much in damages.

The jury found a verdict for five thousand five hundred and fifty-six dollars: the claim of the plaintiffs was upwards of twenty-two thousand dollars.

GILSON (FRESH v.). See Case No. 5,112.

Case No. 5,453.

GILTNER v. GORHAM et al.

[4 McLean, 402;[1] 6 West. Law J. 49.]

Circuit Court, D. Michigan. June Term, 1848.

SLAVERY—RECAPTURE IN FREE STATE—PAROL AUTHORITY TO AGENT TO SEIZE FUGITIVE SLAVE—LIABILITY FOR RESCUE—RESCUE BY CROWD—DISCREDITING WITNESS.

1. It is under the constitution and act of congress only, that the owner of a slave has a right to reclaim him in a state where slavery does not exist. There is no principle in the common law, in the law of nations, or of nature, which authorizes such a recaption.

[Cited in Rodney v. Illinois Cent. R. Co., 19 Ill. 44.]

2. A parol authority by the master to his agent, is sufficient to authorize a seizure of a fugitive from labor.

[Cited in U. S. v. Weld, Case No. 16,660.]

3. To make a person liable for a rescue, in such a case, he must act "knowingly and willingly." But this knowledge that the colored person is a fugitive from labor, is inferable from circumstances.

[Cited in Weimer v. Sloane, Case No. 17,363; U. S. v. Buck, Id. 14,680.]

4. To every one who mingles with the crowd, it is not necessary that the agent should state on what authority he proceeds. It is enough that he states it generally. And one of a crowd, who interposes by manual force, or by encouraging others, by words to rescue a fugitive, is responsible. But he does not make himself responsible where he endeavors to allay the excitement, and prevent a breach of the peace.

5. The agent, in seizing a fugitive from labor, acts under the sanction of law, no warrant being necessary.

6. Distinct trespassers can not be joined in the same action.

7. Where a rescue is made by the continuous action of a crowd, any one who took a part in the course of action is responsible, and may be sued with others who participated at a different time in the same action.

8. A female fugitive from labor, having had a child during her residence in a free state; on an action for her value, and the value of her husband, etc., on a charge of rescue against the defendants, the court *held*, as the child was not claimed in the declaration, the question whether the claimant had a right to it and a control over it, was not necessarily involved in the case.

9. A witness con not be discredited by proving that he made a certain remark, which in his examination he does not deny, but can not recollect.

10. An expression by the agent of the plaintiff, that he should not pursue the slaves, is no abandonment of his right of action.

11. A witness who stated a falsehood, which probably does not arise from mistake or misapprehension, will not be believed by the jury in other parts of his evidence unless corroborated.

At law.

Platt & Norvell, for plaintiff.

Mr. Emmons, for defendants.

McLEAN, Circuit Justice (charging jury). This action is brought to recover the value

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

of six slaves claimed by the plaintiff, a citizen of Carroll county, Kentucky, who, having absconded from the service of the plaintiff, were arrested by his agents in the town of Marshall, in the state of Michigan, and who were by the defendants and others rescued, by reason of which their services have become lost to the plaintiff.

The second section of the fourth article of the constitution declares, that "no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due." By the third section of the act of 1793 [1 Stat. 302], respecting fugitives from labor, it is provided, that when a person held to labor in any of the United States, and under the laws thereof, shall escape into any other of the said states, the person to whom such labor is due, his agent or attorney, may seize or arrest any such fugitive, and take him before a judicial officer, who shall require proof that the claimant is entitled to the services of the fugitive. Upon proof being made, such officer shall give a certificate, etc. And the fourth section provides, that "when any person shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, when so arrested," etc.. "or shall harbor or conceal such persons, after notice that he or she was a fugitive from labor as aforesaid, shall for either of said offenses forfeit and pay the sum of five hundred dollars, etc., saving, moreover, to the person claiming such labor or service, his right of action for or on account of said injuries or either of them." Were it not for these provisions in the constitution and the act of congress, every slave who escaped, by whatever means, from the state where he is held in bondage to a state or territory where slavery is not allowed by law, he would be free. There is no principle of the common law, or of the law of nations, which would authorize his recaption. To avoid this consequence, and preserve the harmony of the states, the above provisions were adopted. Where the slave absconds, the master may reclaim him. But where the slave is taken to a free state by the master, or goes there with his assent, the slave can not, within the meaning of the constitution, be said to be a fugitive from labor, and consequently the master can not reclaim him. This shows that slavery exists only by the municipal law, and that beyond the operation of such law, there is no right of reclamation in the master, except that which is expressly given to him by law: and he must pursue the mode authorized to make the remedy effectual.

There are four counts in the declaration. Two, with some variation, charge the defendants with hindering the arrest, and two charge them with having rescued the slaves after they had been arrested. Francis Troutman, a witness, states that he is the grandson of the plaintiff; that he knew the six slaves named in the declaration, and that they absconded from the service of the plaintiff, in Carroll county, Kentucky, in August, 1843. In the fall of 1846, the plaintiff having been informed that the fugitives were in Marshall, in the state of Michigan, authorized the witness to search for and arrest them, and bring them to Kentucky, calling to his aid such persons as should be necessary. December 23d following, he arrived at Marshall, and finding the slaves there, he wrote to the plaintiff to send persons who could aid him, and who could identify the slaves. After this, witness left Marshall, and did not return until the 26th of January, 1847. David Giltner, son of the plaintiff, William F. Ford, and James S. Lee, persons sent from Kentucky to his assistance, met him at Marshall, and having procured the services of Dickson, the deputy sheriff of the county, early on the morning of the 27th they proceeded to the residence of the slaves. Dickson accompanied them to keep the peace. As they approached the house, Adam Crosswhite and his son Johnson, two of the fugitives, came out of the door and proceeded in different directions, apparently with the intention to escape. They were followed, and on being requested, returned to the house. The witness entered the house, and told the family he had come as the agent of Giltner to arrest them as his slaves, and to take them before 'Squire Sherman to prove that they belonged to the plaintiff. On this, Adam attempted to leave the house, but witness prevented him. The witness requested the family to get ready to go before the magistrate. Some preparation was made, when Adam inquired if they were to be taken off without a trial. Witness informed him they should have a fair trial, and the best counsel he could procure. Adam said the weather was cold, and that the family could not walk to the house of the justice. Witness replied, that a wagon should be procured to convey them. The witness permitted Adam to consult counsel, and he went to another part of the village, accompanied by Dickson, for that purpose. Witness remained in the house with the family. Before Adam's return, several colored persons and some white ones came to the house. Planter Morse, a colored person, and one of the defendants, entering the house, declared the family should not be taken. He was much excited, and pulling off his coat, declared he would go into the fight. He advised Adam, on his return, not to be taken, declaring that he and others would stand by him, and drive off the kidnappers. Adam then went to a drawer, took out of it something which witness supposed to be a knife and powder-horn. Morse drew a knife, and using it in a menacing manner,

declared what he would do with it, if witness attempted to take the family away.

About this time five other persons came to the house, one white man and a boy, the others colored. Hacket, one of the colored men, came near to the witness, who was standing in the door, and inquired what he was doing. Witness replied that he was doing what the law authorized him to do. Hacket said he would see about that, and attempted to pass into the house. Witness told him to stand back. Hacket's hand was in his pocket. Witness again told him to stand back, drawing a pistol which he retained in his hand, but did not present it in a firing attitude. Hacket retired, saying he would attend to witness. James Smith, a colored man, and one of the defendants, approached, and in an excited manner inquired where the Kentuckians were, who were attempting to kidnap the Crosswhite family. The witness was pointed out to him, and Smith, with a club raised, approached within five or six feet of witness, when he was seized by Dickson, who, with the aid of one or two other persons, led him away. Smith, as he approached witness, threatened to smash out his brains. Charles Berger, a colored man, and a defendant, approached, and in an excited manner inquired where the Kentuckians were, and, as witness thinks, drew a knife, the handle of which he saw, and which he used in a threatening manner. Dickson interfered and led him aside, though he still remained on the ground. William Parker, a colored man, and also a defendant, came up with a gun, and declared he would risk his life to prevent the Crosswhite family from being taken. By this time one hundred or more persons, white and black, had collected. Threats against the lives of the Kentuckians were made, if they persisted in taking the fugitives. They were denounced as kidnappers, and some proposed to tar and feather them—others to massacre them. About this time Charles T. Gorham, Herd and Combstock, defendants, came on the ground, with Easterly, at first made defendant, but as to whom the suit is now discontinued. This was about eight o'clock in the morning. A large crowd had assembled, who uttered a good deal of menace. The whites encouraged the blacks. Easterly said something, when Gorham said to the witness, "You have come here after some of our citizens." Witness replied that he had come as agent of Giltner, the owner of the slaves, to take them before a justice, with the view to establish the right of the plaintiff to their services. Gorham replied, "You can't have them, or take them: this is a free country, and these are free persons." Either at his suggestion or the suggestion of the witness, they walked aside, when Gorham advised witness not to take the negroes, and demanded his authority. Witness stated it, and Gorham then remarked, "There is a great deal of danger in making the attempt to take them;" and added, "We will not allow them to be taken." At this time the wagon to convey the family was driven near the house, when witness, after again stating his authority, declared he would take the fugitives before the justice. Combstock, one of the defendants, then said, "You can not have the negroes." Witness, looking him full in the face, inquired why they could not take them. Combstock, pointing to the crowd, said, "You see that in making the attempt your lives will be endangered;" and added, "You can't have them, or can't take them, by moral, physical, or legal force; and you might as well know it first as last, and the quicker you leave the ground the better for you."

Gorham took up the remark of Combstock, a short time after it was made, and offered the following resolution: "Resolved, that these Kentuckians shall not take the Crosswhite family by virtue of moral, physical, or legal force." This was passed by general acclamation, and with much noise. Witness then said, taking a book from his pocket, that he wanted the names of all responsible persons who intended to prevent him from taking the slaves. Gorham said he came there by public sentiment, to prevent his taking the slaves; that public sentiment was above the law; that similar attempts had proved abortive; and we will not permit our citizens to be kidnapped and taken back to slavery. This was before he offered the above resolution. When witness called for names, he addressed himself to Gorham and Easterly. They both gave their names, and Gorham requested that his name might be put down in capitals; and he requested witness to bear it back to the land of slavery as a moral lesson; and he added, that he wanted to make an example of witness. Combstock also gave his name in full, Oliver Cromwell Combstock, Jun., adding the Junior, he said, that his father might not be held responsible for his acts. These three were the only names taken by witness. Gorham said he was responsible, and Combstock requested witness to inquire of his neighbors as to his responsibility. Witness, standing in front of the house, requested Dickson to summon Gorham, Combstock, and others, to assist in keeping the peace, while he should seize the negroes to take them before the justice. Some of the slaves were in the house, others among the crowd. Dickson, and the friends of witness, seemed to think that nothing more could be done. After Gorham's resolution, as witness thinks, he asked the privilege to offer a resolution: "Resolved, that I, as agent of Francis Giltner, of Carroll county, Kentucky, be permitted peaceably to take the family of Crosswhite before Sherman, a justice, that I may make proof of property in the slaves, and take them to Kentucky." Witness heard no votes for the resolution, at least not more than one or two. Witness then proposed that if

they would permit him to take the slaves before the magistrate, and if he should prove the right of the plaintiff to their services, and obtain the certificate, he would give them time to raise money to pay for the slaves a reasonable price; and he proposed to contribute more than any other man. Gorham replied, "You can't have a sixpence for them, and you can't take them." Again witness requested Dickson to summon the above persons to assist in keeping the peace. Gorham then said, "Hold on, and we will see whether we will let you take them to the magistrate's office." Gorham, Herd, and Easterly seemed to be in consultation a short time. When it was ended, Herd, standing outside of the gate, in the presence of Gorham, a few rods in front of the house, offered the following resolution: "Resolved, that these Kentuckians leave town in two hours." Here some one of the crowd added, "Or they shall be tarred and feathered, and rode on a rail"—when Herd continued, "Or they shall be prosecuted for kidnapping or housebreaking." Prior to this, witness had been arrested on a warrant on complaint of Hacket, but was permitted by Dickson, who served the warrant, to remain on the ground. A warrant was made out by witness, and signed by Sherman, to arrest the slaves, which was placed in the hands of Dickson. This was done to prevent resistance. But Dickson refused to execute the warrant. He served the warrant on the witness, issued on the oath of Hacket, and being advised by Dickson and others that he could not, by reason of the crowd, take the negroes before the justice, and that it would not be safe to attempt to do so, he desisted. Before witness left the ground, Dickson several times declared that he must take him before the justice, as commanded by the warrant. A second process was issued against him for a trespass in breaking the fastening of Adant's door. After breakfast, witness was taken before 'Squire Hobart and went into trial on the trespass case, which continued until 9 or 10 o'clock in the evening, and was then adjourned until next morning. Gorham was present next morning, and observed to witness, "Your negroes are gone." Witness replied, that he had been told so, and observed he would give one hundred dollars if they were in the town. Gorham replied, "If you will say two hundred dollars we will have them brought back." He said that he would not place the negroes in the possession of the witness, but would return them to their house, and no white man should interfere. Witness refused to enter into the proposed agreement. A judgment of one hundred dollars damages and costs, was entered against the witness by the justice in the trespass case. On the morning of the 29th, as witness and his Kentucky friends were about leaving, at the National Hotel, in Marshall, Herd, Gorham, and others being present, witness said to Gorham, "You have all got the advantage of me now," but he could not tell how it would end. Gorham said, "Yes, the negroes are gone, and you can never get them." The witness estimates the value of the negroes at two thousand seven hundred and fifty-two dollars.

Harvey W. Dickson states, that he was deputy sheriff, and was requested by Troutman to accompany him in arresting the slaves to keep the peace. On entering the house of the negroes, Troutman explained to them that he had come as the agent of Giltner to take them before a magistrate, to prove property, and then take them to Kentucky. Crosswhite consented to go—told the family to get ready—put a cloak round his little girl—said that it was cold, and that he did not wish to go without a wagon. Troutman said a wagon should be procured. Afterward witness's attention was called by Troutman to the fact that Adam was arming himself. Morse was there at this time. Troutman prevented Adam from going into the cellar. Witness next observed Hacket, a white man and a boy—heard Hacket ask Troutman what was going on. Troutman replied that he had business there, etc. Hacked attempted to come into the house. Troutman, standing in the door, forbade him; but he continued to approach until Troutman drew something out of his pocket, which witness supposed to be a pistol; and Hacket turned about and went off. Smith came up with a club, and inquired where that kidnapper was who had drawn a pistol on Hacket—was shown Troutman—approached him with his club, but was stopped by witness and led away. Witness then saw Berger approach with a stone, that would weigh from four to six pounds, and said he would smash Troutman. About this time witness went to town with Adam, to consult about his case, and returned in half an hour. When he returned, there were from one hundred to one hundred and fifty persons collected—heard Troutman call for responsible names. Gorham requested him to "put down his name in capitals, and bear it back to the land of slavery, as an evidence of the example we intend to make of you." Witness refused to execute the warrant to arrest the negroes, handed to him by Troutman. He should have attempted to execute it with great reluctance, by reason of the excitement. On being requested, Troutman stated to Gorham, that he acted as the agent of Giltner, who owned the negroes, under the act of 1793. Gorham said they did not care about an act of congress: "The dear people are the law, and you can't have the negroes." Witness, at the request of Troutman, summoned Gorham, Herd, and others to assist in keeping the peace. Comstock asked witness for his warrant, before or after he gave his name in full to Troutman. Gorham offerred the following resolution: "Resolved, that we will not permit these Kentuckians to take the slaves, by moral, physical or le-

gal force." The ayes were called for, and the resolution passed with one or two dissenting voices. Troutman then offered the resolution as stated by him, which was unanimously rejected. Witness did not see Combstock on the ground at this time. Herd, one of the defendants, then offered a resolution: "Resolved, that these Kentucky gentlemen, if such they may be called, leave here in two hours, or we will take them with a warrant for trespass or housebreaking." Some one added, "Or we will tar and feather them, and ride them on a rail." Troutman then offered a resolution: "Resolved, that we adjourn to meet at two o'clock," observing, "and you will find me on the ground." Shortly after this the crowd dispersed. Before leaving the ground, a warrant was put into the hands of witness, by Hacket, against Troutman, charging him with an assault and battery with intent to kill. Witness must have had this warrant two or three hours before the adjournment, during which time Troutman considered himself in the custody of the witness; and as an excitement was getting up against witness for not executing the warrant, he stated the fact to Troutman, and told him that he must go before the justice. Troutman remained in the custody of the witness until the next day. Witness heard Troutman say the next day, that he would give one hundred dollars if the negroes were in the village. Gorham observed, "If you will give us two hundred dollars, we will bring them back—not to deliver them to you—but we will put them in the house they occupied, and every white man shall keep away; and then if you can take them, you shall have them." Before the first visit to the house of the fugitives, witness called there as a tax collector, to take an assessment of property, persons, etc., his object being to ascertain whether the family were there.

Charles W. Lusk was on the ground at about eight o'clock. There might have been fifty, sixty, or one hundred persons present, among whom were from fifteen to twenty colored persons. There was great excitement. Smith, one of the defendants, a colored man, had a club in his hand, and said he intended to welt some of the Kentuckians. Witness entered the house a few minutes—saw in it Adam, his wife, and several of the children. There were some white persons in the house. When he came out of the house, he observed the crowd had increased. Every one seemed to take an interest in the Crosswhite family, and it was said in the crowd that the Kentuckians would be sorry enough for their efforts. Witness saw Gorham, Combstock, and the other defendants in the crowd. Troutman stated his authority to the crowd, and that he wished to take the negroes before Justice Sherman, to prove them to be the property of Giltner. In other matters, the witness corroborated the statements of Troutman. Twelve other witnesses corroborated the statements of Troutman in several particulars.

David Giltner, the son of the plaintiff, identified the fugitives, and stated that they belonged to his father. At the request of his father, he came to assist Troutman, and was accompanied by Ford and Lee. These men, his father informed him, were employed to assist, and would meet him at a certain place. At that place the witness met them, and they accompanied him, as they had agreed with his father, the witness paying their expenses with money advanced by his father for that purpose. Being in the crowd at Marshall, and hearing the threats made against Troutman and the Kentuckians generally, the witness said if there was to be an attack on any person, he hoped it would be on him, as he was most interested in recapturing the slaves; and he also remarked, if by force they should be prevented from taking the negroes, that he would bring a regiment from Kentucky, and would take them.

The evidence of the plaintiff being closed, witnesses were called by the defendants.

Henry Halsey—For ten years has been a citizen of Marshall. At about a quarter before nine o'clock in the morning he rode up to the ground, passing Gorham on the way. When he arrived, Troutman was talking loudly with the crowd. As Gorham approached, Troutman stepped a little out of the crowd, and met him. Gorham inquired, "What are you doing here?" Troutman replied that he had come there to take the slaves, but had been interrupted—said they belonged to Francis Giltner, of Kentucky, etc. Gorham said, "You can't take them." Troutman inquired, "What is your name, sir?" Gorham replied, "Charles T. Gorham." Troutman commenced writing it, and inquired of Gorham if he were responsible for what he said. Gorham, or some one, answered in the affirmative, and he requested Troutman to write it in capitals. After writing it, Troutman asked, "Do you say that I shall not take the slaves away?" Gorham replied, "No; I said no such thing. You see the manifestation of the people, and it is impossible for you to take them." Gorham inquired, "By what authority do you act?" Troutman replied, "By the authority of the constitution and the act of 1793." Troutman asserted that he had rights there, and the people had prevented him from carrying them into effect. Gorham replied, "You see that the people have taken the law into their own hands. They consider the negroes as citizens. There was an excitement in the crowd, to impress any one with the apprehension of danger." Gorham did not seem to be excited—he treated Troutman politely. Gorham said this was not a mob: it is composed of men of character. Witness saw Combstock talking with Troutman near the house. Combstock asked Troutman for his authority. Troutman said he did not need any

authority." "Then," said Combstock, "you can't take the family away." Troutman inquired, "What is your name, sir?" Combstock replied, "Oliver Cromwell Combstock, Jun. Give it or write it in full." After writing it, Troutman observed, "You say that I shall not take this family away." Combstock answered, "I beg your pardon; I did not say so, or use that language. I said you must see that you can not take them away, from the excitement which exists, by moral, physical, or legal force." And he remarked, "This is not an abolition mob." The excitement was great. The witness says Troutman offered the first resolution. At this time, the excitement had measurably subsided, and the people were talking and laughing. Many had left the ground. The excitement abated when it was understood the negroes would not be taken away. Troutman's resolution was, "Resolved, as peaceable citizens, we will abide by the constitution and laws, and will permit the slaves to be taken before Justice Sherman," etc. Witness and a few others voted for the resolution, all the others against it. Gorham, witness says, offered an amendment to the resolution—"provided they do it legally." There was no vote, he thinks, on this amendment. Herd then offered the following resolution: "Resolved, that these Kentucky gentlemen be requested to leave town in two hours." Some one here proposed—"or be tarred and feathered." Herd expressed his disapprobation of this, and added, "or be prosecuted for breaking into the house of a peaceable citizen." Troutman then offered a resolution to adjourn until 2 o'clock, and added, "You will find me on the ground." Gorham disapproved of the amendment offered to Herd's resolution, and remarked it was unbecoming. The larger portion of the crowd at that time had dispersed. The witness thinks from one fourth to one third only remained on the ground. There seemed to be very little excitement at the time of the adjournment. The witness is brother-in-law of Dr. Combstock.

Asa B. Cook. Witness was on the ground at half after 8, at which time there were present six or seven white persons and eight or nine negroes. Troutman, Giltner, and the other Kentuckians were on the ground. He heard Giltner say, "If they shall refuse to let us take the slaves, we will bring a regiment from Kentucky and take them." Hearing a conversation between Troutman and Gorham, he approached them. Troutman said, "I understand you to say that I shall not take the slaves." Gorham replied, he had not said so, but he supposed Troutman would be satisfied from the crowd that he could not take them. Gorham said they were not abolitionists—advised Troutman not to make an attempt to take the fugitives, as it would cause great excitement. Gorham evinced earnestness, but he was good natured. In one or two instances, Gorham exerted himself to allay the excitement. Dickson called on witness, Gorham, and others to assist in taking the slaves. He had a warrant, but after this he made no attempt to take them. Combstock asked Troutman what he was going to do. He replied that he was going to take the slaves. Combstock replied, "It is evident from the excitement you can not take them." Troutman asked Combstock for his name. He gave it. Troutman said he did not want the slaves, if he could get names who were responsible. Troutman then said, "I understand you to say we shall not take the slaves." Combstock replied, that he had not said so, but remarked, "You ought to know from the appearance here that you can not take them by moral, physical, or legal force." Soon after this, witness left the ground with Combstock. He heard no resolution offered. There must have been about one hundred and fifty persons on the ground. In the course of his examination, this witness to impeach Dickson was asked, "whether Dickson did not admit to him that he might have called Gorham and others to assist in taking the negroes?" In his examination, Dickson said he had no recollection of having done so. But the court refused to permit the question to be asked, as it did not contradict the witness Dickson. His statement of a want of recollection, is not a ground to discredit the fact of recollection not being ascertainable.

Twenty-four witnesses were examined, who corroborated, more or less, the facts and circumstances stated by the two preceding witnesses.

From the facts proved, there seems to be no doubt of the right of the plaintiff to the services of the fugitives. Giltner identifies them as the slaves of his father, and Troutman does the same. And there is nothing in the evidence or in the circumstances of the case, which casts the least doubt on this right. The agency of Troutman and those associated with him, seems also to be established. It is proved by Troutman and by Giltner. The former was authorized to call to his assistance such persons as he should deem necessary, and those who acted with him were so called. And in addition to this, the plaintiff sent his son, and Messrs. Ford and Lee, to assist him. This is as clear a proof of agency as could be expected in any case. In the case of Driskill v. Parish [Case No. 4,089], doubts were suggested whether such an agency could be constituted by parol. But that was a case where a written power was given, and it was not produced on the trial. We suppose that a parol power must be held to be sufficient. This is a common law principle, and the statute, which authorizes the agency, does not require it to be in writing.

From the witnesses of the defendants, as well as those of the plaintiff, there would seem to be no doubt Troutman arrested the fugitives, and that they were rescued from

his possession and control. When he entered the house and communicated to Adam and his family that he came as the agent of Giltner to take them before a justice, to prove the service they owed, and to take them back to Kentucky, Adam yielded, and considered himself and family under his control. He left his family in the house with Troutman and others, and went into the village, under the care of Dickson, to take counsel. It was not until after the crowd assembled, became excited and showed a determination to resist the claim of the agent of Giltner, that Adam and his family saw a prospect of escape. Indeed the counsel for the defendants admit there was a rescue, and that it was not in the power of Troutman and his assistants, to take the fugitives before the justice. The rescue of the slaves enabled them to escape to Canada, beyond the reach of the claimant. As there was an arrest, the jury can disregard the two counts in the declaration for hindering an arrest. If they shall find for the plaintiff, it will be under the two counts for a rescue. The rescue is not only clearly proved, but admitted, consequently only two questions remain for the decision of the jury. Are the defendants guilty? and if guilty, what amount of damage is the plaintiff entitled to?

There is, as might be expected, a great difference among the witnesses as to the number of the crowd. It was hastily collected, under circumstances of great excitement. The estimate of the witnesses varies from one hundred and fifty to two hundred and fifty. Some of them suppose there might have been three hundred. Now to subject any one of that crowd to an action for the rescue of the slaves, it is not necessary to show that he used manual force, or conveyed the fugitives beyond the power of the claimants. Being present in the crowd, if by words or actions he encouraged others to make the rescue, he is responsible. It may be that the respectable persons which formed that assemblage acted under a mistaken view of the law, but this constitutes no justification or excuse. The injury of the plaintiff is the same, whether the acts complained of were done by a good motive or a bad one. The actors proceeded on their own responsibility, and they cannot now escape from it. Such assemblages are dangerous to the public peace and to private rights. Impelled to action by the most reckless, the crowd lose sight of individual responsibility, and are led to commit atrocities from which, as individuals, they would shrink with horror. Hence the danger of commingling with such a crowd, except as peace-makers and to prevent mischief. From the evidence it seems that many of the most orderly and respectable citizens of Marshall were found at the house of Crosswhite. And so far as they may have been induced to go, to protect the rights of the colored persons in question from an illegal seizure, their motive is not to be condemned. But when they were informed, by the principal agent, Troutman, that the seizure of the negroes was only for the purpose of taking them before a justice, to prove that they owed service to Giltner, there was no excuse for opposition founded in law or in conscience. That man is a dangerous citizen, who follows his conscience in violation of the legal rights of others. Troutman, as the agent of the plaintiff, was in pursuit of a legal right —a right sanctioned by the fundamental law of the Union—and his conduct under the emergencies was characterized by forbearance and a respect for the law. He was armed, but, as it seems, only for self-defense.

There are seven defendants, and the jury will apply the evidence to each. It is insisted that the jury can not find a general verdict of guilty against all the defendants, unless they all participated in the same act at the same time. That those who may have done acts which made them responsible at the first assemblage of the crowd, can not be connected with others, who subsequently did other acts which make them responsible. Distinct trespasses, it is admitted, can not be joined in the same action. But such is not the case under consideration. The act was continuous. The declaration charges a rescue, and that was accomplished by the crowd, in a course of proceeding of more than three hours. Threats were used, weapons were brandished by certain colored individuals, resolutions were passed, evincing a final determination by the crowd not to suffer the fugitives to be taken before the justice. Now, it may not be possible to point out any particular act, standing alone, which effected the rescue; but when we look at the course of action, we see that it was done. In this respect the acts of the multitude are inseparable, and responsibility attaches to each individual who participated.

Planter Morse, one of the defendants, entered the house of Crosswhite not long after Troutman entered it, and in a most violent and excited manner, declared that he would oppose the taking of Adam and his family; and he advised them not to be taken, and gave an assurance that he and others would stand by them. This, if you believe the witnesses, identifies this defendant with the rescue. A question is made whether this and some of the other defendants had notice that Adam and his family were fugitives from labor. The words of the act are, when any person shall "knowingly and wilfully" hinder an arrest of the fugitives, or rescue them after they shall have been arrested. In the case of Driskill v. Parish [Case No. 4,089], it was held, "that no one incurs the penalty under the act of congress, for 'hindering or obstructing an arrest,' who does not act 'knowingly.'" And the same principle applies in the case of a rescue. To bring an individual within the statute, he

must have knowledge that the colored persons are fugitives from labor, or he must act under such circumstances as show that he might have had such knowledge, by exercising ordinary prudence. Morse is not proved to have been present when Troutman communicated to Adam and his family, that he came to claim them as the agent of Giltner. He came, it is believed, shortly after this announcement was made; and of which he might have been informed had he inquired of the inmates of the house, or of those who were at that time present. In a free state, every human being is presumed to be free, without regard to color, until the contrary is proved. The presumption is said to be against the freedom of a colored person in a slave state. These were circumstances sufficient to put Morse upon the inquiry whether Adam and his family were not fugitives from labor. And the same remark applies to the other defendants. It was not necessary for Troutman, on the approach of every individual, to proclaim his authority and object. It was enough that he stated them once, and more than once, to the crowd.

Charles Bergen, another of the defendants, approached Troutman, drew his knife, and used it in a menacing manner, until he was led aside by Dickson. And William Parker, also a defendant, came to the crowd with a gun, and declared he would risk his life to prevent the Crosswhite family from being taken. James Smith, also a defendant, coming into the crowd, inquired where the Kentuckians were who were attempting to kidnap the Crosswhite family. Troutman being pointed out to him, he approached within six feet of him, raising a club, when he was seized by Dickson, who, with the aid of one or two others, led him away. None of the witnesses, it is believed, state anything which contradicts these facts, and, if the jury believe them, they would seem to be conclusive as to the guilt of the above defendants.

In regard to the defendants Gorham and Combstock, there is some contrariety in the evidence. This difference exists in regard to certain facts, and as to the order of time at which they occurred. From the statement of Troutman, and several other witnesses who corroborate him, it would seem that Combstock first declared "the slaves could not be taken by moral, physical, or legal force;" and that shortly afterward, Gorham adopted the same sentiment, which he offered to the crowd in form of a resolution, that was passed by acclamation. Gorham is also represented as saying that public sentiment was above the law, and that the people had taken the law into their own hands, and that he came there in obedience to public sentiment, to prevent the slaves from being taken. These statements were made by some six or eight of the plaintiff's witnesses. A still greater number of the defendants' witnesses represent the facts somewhat differently. They say that Troutman opposed the first resolution, and that no resolution was offered by Gorham. Some of the witnesses say that to Troutman's resolution, "that he might be permitted to take the slaves," Gorham offered an amendment, "if he shall take them legally." The resolution said to have been offered by Gorham, identified him with the illegal movement; but if he offered no resolution, and merely proposed the amendment to Troutman's resolution, as above stated, that act, disconnected with others, did not implicate him. And in regard to the declaration of Comstock, that "you can't take the slaves by 'moral, physical, or legal force,'" many of the defendants' witnesses say, it was a remark made wholly in reference to the public feeling, and not as a wish or determination of the defendant to prevent such a taking. On the contrary, it is said, that he referred to the excitement of the crowd, and its expressed determination, not to permit the slaves to be taken; and that his motive was, manifestly, to preserve the peace, and prevent blood-shed. It appears Combstock arrived on the ground somewhat late, and remained only a short time. That the facts which transpired in an excited crowd, should be differently related by different witnesses, was to be expected. Differences, under such circumstances, do not necessarily authorize an imputation against the motives of the witnesses. The confusion and excitement of the crowd, must have prevented witnesses from hearing distinctly and comprehending the movements of persons most actively engaged. It is proper that I should say of Troutman, the leading witness for the plaintiff, that considering the circumstances under which he was placed, he bore himself with moderation and excellent temper. To the taunts and abuse which were thrown out against him and his associates, by inconsiderate individuals in the crowd, he made no reply, but sustained himself with a manly firmness.

The credibility of witnesses rests with the jury. You will decide where witnesses differ, which is entitled to belief. It will be your duty to reconcile statements which seem to be contradictory, if they can be reconciled. The manner and bearing of witnesses in their examination, are entitled to great consideration where there is a conflict. If from the whole evidence it shall appear that Gorham and Combstock, and Herd, the other defendant, went upon the ground with the view to preserve the peace, and they nor either of them while on the ground said nor did anything to excite the crowd to oppose the seizure of the fugitives for the purpose avowed; and especially if the tendency of their acts was to allay the excitement without encouraging the rescue of the fugitives, they are not guilty as charged in the declaration. But, on the contrary, if their conduct on the ground had a different

tendency, if they said or did anything by resolutions or otherwise to encourage the crowd in their illegal acts, the defendants are guilty. Of this, gentlemen, you are the exclusive judges. The respectability and high moral bearing of these defendants, will not in the least excuse an illegal act, which is injurious to any one.

It seems that since the residence of the fugitives at Marshall, a child was born by the wife of Adam, and the court are requested to instruct the jury that the plaintiff had no right to the child, or through his agents to take it to Kentucky. Nothing is claimed for this child in the pleadings, and no question in regard to it is necessarily involved in the case. In this action, as in every other where damages are claimed for a wrong done, the wrong must be clearly proved—so proved as to satisfy the minds of the jury.

We are requested to say to the jury, if a witness swear falsely in one particular, he is not to be believed in any. This must depend on the nature of his relation. Should the jury believe that a witness swears falsely, deliberately and corruptly, they may and should place little or no confidence in any other part of his evidence, which is uncorroborated by other witnesses. But if the misstatement is the probable result of mistake or misapprehension, the jury will not regard it further than as showing an inaccuracy of memory or judgment. The jury, therefore, in weighing the evidence, will judge of it under all the circumstances connected with it. The belief of a witness, resting upon facts within his own knowledge, is evidence; but his belief is not evidence where it rests upon facts not within his knowledge. The direct pecuniary interest of a witness in a case, however small, renders him incompetent; and any other connection of agency or relationship to a party, may go to his credibility.

In this action, the plaintiff claims the value of the slaves in damages. For a rescue, as also for hinderance on arrest of fugitives from labor, and for harboring or concealing them, the act of congress gives a penalty of five hundred dollars; but, beyond this, the statute saves to the party injured an action for damages. Under this provision this action has been brought; and if the jury shall believe that the defendants, or any part of them, aided and assisted in the rescue, as before stated, the jury will find the whole of the defendants, or a part of them guilty, as the facts may authorize. There can be no doubt, that by reason of the rescue, the fugitives escaped to Canada. The value of their services, which has been proved by two or three witnesses, with little variations in their estimates, is the loss which the plaintiff has sustained. Any expressions of Troutman, that he should not pursue the fugitives, does not show a relinquishment of this right of action. It seems to have been an expression of abandonment of the claim, imposed upon him by a necessity which he could not control.

This, gentlemen, is an important case. It involves great principles, on which in a great degree depend the harmony of the states, and the prosperity of our common country. The case has acquired great notoriety by the action of the Kentucky legislature, and of the senate of the United States. It is the first one of the kind which has been prosecuted in this state.

The defendants' counsel, to some extent, have discussed the abstract principle of slavery. It is not the province of this court, or of this jury, to deal with abstractions of any kind. With the policy of the local laws of the states, we have nothing to do. However unjust and impolitic slavery may be, yet the people of Kentucky, in their sovereign capacity, have adopted it. And you are sworn to decide this case according to law—the law of Kentucky as to slavery, and the provisions of the constitution, and the act of congress in regard to the reclamation of fugitives from labor. This provision of the constitution is a guaranty to the slave states, that no act should be done by the free states to discharge from service in any other state, any one who might escape therefrom, but that such fugitive should be delivered up on claim being made. This clause was deemed so important, that, as a matter of history, we know the constitution could not have been adopted without it. As a part of that instrument, it is as binding upon courts and juries as any other part of it.

The chief excellence of our institutions consists, not so much in our written constitutions and laws, as in the moral power which they embody. Intelligent foreigners are more forcibly struck with this great fact than with any other. They see no military array—no display of martial music, or men-at-arms, to attract and intimidate; and they inquire, where is the government? It is neither to be seen nor felt, and yet the people are quiet and orderly. Foreigners seem to have no adequate conception of that moral power which unseen pervades every part of our country. Under its aegis our citizens repose in confidence, as to the safety of their persons and property. If injured in either, they look for redress to an energetic and enlightened execution of the laws. And from this does moral power emanate. Laws the most wise and wholesome, if not carried into effect, can be productive of no good. They will remain on our statute books as monuments of reproach. If we wish to give permanancy to our government, and preserve its great principles, we must stand by the constitution and laws; and in the administration of justice, especially, we must give effect to them. In the law is found the only safe rule by which controversies between man and man can be decided. In no supposable case, has a juror a right to substitute his own views, and disregard established principles

of law. A well instructed conscience is a proper guide for individual action; but when we are called upon to act upon the interests of others, we violate our oaths, and show ourselves unworthy of so important a trust, when we adopt, as a rule of action, our own convictions of what the law should be, rather than what it is.

The jury, after being out all night, returned at the opening of the court the next morning, and declared they could not agree, and they were discharged.

At the succeeding term a verdict was given for the plaintiff for the value of the slaves. Judgment.

GIMBEL (MAYER v.). See Case No. 9,343.

Case No. 5,454.

GIMMY v. CULVERSON.

[5 Sawy. 605.] [1]

Circuit Court, D. California. Aug. 25, 1866.

PUBLIC LANDS—QUALIFICATIONS OF PRE-EMPTORS—ACTUAL POSSESSION CANNOT BE INVADED BY PRE-EMPTORS.

1. The act of congress of May 30, 1862 [12 Stat. 409], authorizing settlements upon the public lands of the United States in the state of California, does not change the qualifications of pre-emption claimants prescribed by the act of September 4, 1841 [5 Stat. 453], or the limitations upon which the privilege of pre-emption is granted.

2. In allowing persons having particular qualifications to settle upon the unsurveyed lands of the United States, congress did not grant a license to invade by force the peaceable possessions of others, even though the latter are not within the class contemplated by its legislation. Its object was to extend the protection and encouragement of the government to those who, in advance of the public surveys, had entered upon and improved or might enter upon and improve the vacant and unoccupied lands of the United States by giving to them the first privilege of purchasing when the lands are offered for sale.

This was an action [at law by Maria B. Gimmy against William Culberson] for the possession of certain land in the county of Napa. It was tried by the court at the July term, 1865, without a jury, by the stipulation of parties.

N. Bennett, for plaintiff.

M. A. Wheaton, for defendant.

FIELD, Circuit Justice. The land in controversy is part of the public domain of the United States, and has not been surveyed or offered for sale by order of the government. The facts upon which the plaintiff seeks to recover, and the defendant rests his defense, as admitted by the parties, are these:

In 1860 one McCarthy inclosed the premises with a fence and erected a house thereon. In May, 1862, he conveyed them to John Gimmy, and in October following the latter transferred them to the plaintiff in trust to secure certain payments, and she immediately took possession.

In 1863 the defendant entered the inclosure of the plaintiff, claiming a right to do so under the pre-emption laws of the United States, and asserting this claim has since resided with his family upon the premises. The justification advanced by him is that he is a citizen of the United States, and as such has a right, under the laws of the United States, to settle upon unsurveyed public lands, and thus lay the foundation for the right of pre-emption when the survey is made; and that the plaintiff, who alleges in her complaint that she is an alien, can not acquire any such right, nor by her inclosure exclude him from such public lands. If the land in question had been surveyed by the government, and opened to entry in the land-office of the district, the defendant might perhaps, after such entry, justify the dispossession of the plaintiff, but we doubt whether, until such survey and entry, he can assert as against the prior occupation of the plaintiff any right to settle upon the land. Until then, his claim is a mere naked assertion of an intention to take some future steps to acquire a pre-emption right, and is unaccompanied with any act which will preclude him from seeking at any time other lands for settlement, or his immediate transfer to others of the possession obtained.

In allowing persons having particular qualifications to settle upon the unsurveyed lands, congress did not grant to them a license to invade by force the peaceable possessions of others, and seize their buildings and improvements, even though the latter are not within the class contemplated by its legislation. Its object was to extend the protection and encouragement of the government to those who, in advance of the public surveys, had entered upon and improved, or might enter upon and improve, the vacant and unoccupied lands of the United States, by giving to them the first privilege of purchasing when the lands are offered for sale. We doubt, therefore, whether the naked claim asserted by the defendant, under the circumstances, confers any right which can be considered in a court of justice. It is unnecessary, however, to determine this point at the present time, for the facts, as admitted, do not show that the defendant was entitled to make a settlement on the lands of the United States.

The act of May 30, 1862, which authorizes settlements upon unsurveyed lands in California, does not change in any respect the qualifications of pre-emption claimants prescribed by the act of September 4, 1841, or the limitations upon which the privilege of pre-emption is granted. No person is entitled to the benefits of that act, nor of the act of March 3, 1853 [10 Stat. 244], which extends the provisions of the first act to California, who is the proprietor of three hundred and twenty acres of land in any

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

state or territory of the United States; and the declaratory statement of the claimant, which is required to be filed in the land-office of the district, must contain an averment that he is not such proprietor. Without this averment the claimant cannot acquire any right of pre-emption to the land upon which he has settled. It would seem plain, therefore, that if he can assert in court any right by virtue of his settlement before survey and entry at the proper land-office, and of course before such declaratory statement is filed, he must bring himself by his proofs clearly and fully within the provisions of the act of congress. He must show himself entitled to demand the right of pre-emption when the survey shall be returned to the proper office. This he has not done in the present case, and so far as we are able to perceive from the facts admitted, he has not placed himself in any better position than the plaintiff; nor is he any more entitled than she is to assert a license to settle upon the premises in controversy. It follows that the present case must be determined by the rule which adjudges the better right in the first possessor, the government, which has the paramount title, not asserting it against either. Coryell v. Cain, 16 Cal. 567; Hubbard v. Barry, 21 Cal. 321.

Therefore, upon the admitted facts, judgment will pass for the plaintiff for the possession of the premises, and for six hundred and eight dollars, the value of their use and occupation from the entry of the defendant to the present time.

Case No. 5,455.

GINDRAT et al. v. DANE et al.

[4 Cliff. 260.] [1]

Circuit Court, D. Massachusetts. May Term, 1874.

JURISDICTION IN EQUITY — FRAUD — LEGAL DEMANDS — SUIT BY ASSIGNEE IN BANKRUPTCY AGAINST CITIZEN OF ANOTHER STATE — DEMURRER.

1. Courts of equity have jurisdiction of fraud, misrepresentation, and fraudulent suppression of material facts, in matters of contract.

2. But where the cause of action is a purely legal demand, and the defence at law may be set up as complete as in equity, a suit in equity will not be sustained. Such a case is controlled by section 16 of the judiciary act [1 Stat. 82].

3. The circuit court has jurisdiction of a suit in equity, brought by the assignee of a bankrupt in one state, against citizens of another state, to recover for a debt due the bankrupt estate.

4. It is true that no jurisdiction in such a case is conferred, in the late bankrupt act [of 1867 (14 Stat. 517)], on the circuit court, as it is on the district court. The jurisdiction of the circuit court is conferred by the judiciary act.

5. Matters of fact were alleged in the bill, in this case, that would entitle the complainants to relief, and in such a case a demurrer is not a good defence; but under all the circumstances the court allowed the respondents to file an answer on the merits.

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[This was a bill in equity by James A. Gindrat and others against Francis Dane and others.]

By the bill it appears that the complainants are the assignees in bankruptcy of the Alabama and Chattanooga Railroad Company, duly appointed as such by the district court for the middle district of Alabama, in which court the corporation was previously adjudged bankrupt. They, the assignees, brought this suit against the present respondents and others, all of whom, except Robert Treat Paine, Jr., were directors of the bankrupt corporation. Sufficient is alleged in the bill to show that the complainants are citizens of the state of Alabama, and all of the present respondents are citizens of the state of Massachusetts, and that all the estate, real and personal, of the bankrupt corporation was duly assigned and conveyed to the assignees, including all the property, of whatever kind, of which the corporation was possessed, or in which it was interested, and that the complainants as such assignees were empowered to claim all the assets, property, and effects of the bankrupts, and were invested with all the rights, privileges, and duties conferred in such case by the bankrupt act. Pursuant to those powers, they complain and charge that all of the present respondents, except Paine, were directors of the corporation, and that as such it was their duty to receive and manage its property and moneys, to disburse and pay the same, and duly to account therefor according to law, and when they ceased to hold such offices, to pay over and deliver to the corporation, or their successors in office, all the property, money, and other assets of the company, which they held or had control of, appropriating nothing to their own use. That the corporation was subsequently consolidated with two other corporations therein named, and by the law of the state and the contract of consolidation became entitled to all the assets, property, and effects of the other two companies, and the corporation as enlarged issued mortgage bonds to the amount of $4,700,000, and that the respondent directors were bound by law to use the same in the construction and equipment of the railroad; and they charge that the respondent directors did not use such bonds or the proceeds thereof in the ways and for the purposes provided by law; that they misused the same to a large amount, and expended the same in an illegal and improper manner and for illegal and improper purposes; and that instead of discharging their trust and duty as officers of the company with fidelity, and as they were bound to do, they violated and abused the same; that they, as such officers, conspired together, and with the said Robert Treat Paine, Jr., the solicitor and counsel of the company, employed by them, and confederated for the purpose of injuring the corporation and serving themselves individually instead of the corporation which they were bound to serve and protect; that among other illegal,

improper, and unauthorized expenditures and payments, they combined together and paid and divided among themselves, and for their joint and individual benefit alone, the sum of $160,000, each of them receiving and appropriating to his own use the sum of $20,000 in the said division; that $15,000 was paid to the said Paine over and above his pay for services as counsel, for all which he had been paid, amounting to the sum of $14,000. Other frauds and wrongs, and other misdoings and misappropriation of moneys and property by the respondents were also charged in the bill of complaint, to which it will be sufficient to refer without attempting to reproduce the several allegations. Demurrers were filed by Dane, Robinson, Burr, and Demeritt, and Paine filed a separate demurrer. Defences of several kinds are set up in argument to show that the demurrers should be sustained. That the proper forum for such a controversy is a court of law; that the allegations of the bill of complaint do not disclose any cause of action within the jurisdiction of a court of equity.

A. A. Ranney, for complainants.

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

CLIFFORD, Circuit Justice. Demurrers are either general or special, depending upon the nature and form of the pleading. They are called "general demurrers" when no particular cause is shown except the usual formula that there is no equity in the bill of complaint. When the particular defects or objections to the pleading are pointed out, the demurrer is called a "special demurrer." Where the objection is to the substance of the allegation, the former will be sufficient; but the latter is indispensable where the objection is to the defects of the bill in point of form. Whether general or special, a demurrer is not a good defence to a bill in equity, unless the objections are apparent on the face of the bill itself, either from matter inserted or omitted therein, or from defects in the frame or form of the pleading. Matters of fact which are relevant and well pleaded are necessarily admitted by a demurrer: but a demurrer, whether general or special, does not admit conclusions of law drawn from the facts set forth, even though such conclusions of law are also alleged in the bill of complaint.

Courts of equity unquestionably have jurisdiction of fraud, misrepresentation, and fraudulent suppression of material facts in matters of contract; but where the cause of action is a purely legal demand, and nothing appears to show that the defence at law may not be as perfect and complete as in equity, a suit in equity will not be sustained, as it is clear that the case, under such circumstances, is controlled by § 16 of the judiciary act. Insurance Co. v. Bailey, 13 Wall. [80 U. S.] 623; Hipp v. Babin, 19 How. [60 U. S.] 271. Flagrant breach of trust is charged in the bill, and that the respondents conspired and confederated together for the purpose of injuring the corporation, and that they, for illegal and improper purposes, divided among themselves $160,000 of the money of the corporation, which it was the duty of the directors to expend and pay out for the construction and equipment of the railroad; and the complainants pray for an account, and that the respondents may be decreed to pay over to them, as such assignees, what may be found to be due to them as such assignees. Much discussion of the first defence is unnecessary, as it is plain that a suit at law would not be as perfect and complete as a suit in equity, which is the true criterion to be applied in determining the force and effect of such a defence. Hill v. Lane, L. R. 11 Eq. Cas. 220. That the action is brought in the wrong court. That the plaintiffs should have commenced their action in the district court, as the proper auxiliary court to collect the assets of a bankrupt due from persons residing in another district. Doubtless the district court would have had jurisdiction of the case under the bankrupt act, but that admission does not show that the circuit courts are devested of jurisdiction in any such case where the suit is between a citizen of the state where the suit is brought and a citizen of another state. Sewing Machine Co. v. Sewing Machine Cos., 18 Wall. [85 U. S.] 573. Jurisdiction of the district court in such a case is derived from the bankrupt act, and it is true that the bankrupt act does not confer jurisdiction in such a case upon the circuit courts. Sherman v. Bingham [Case No. 12,762]. Hence it is safe to conclude that the circuit courts have no jurisdiction in such a case, unless the suit is between citizens of the state where the suit is brought and a citizen or citizens of another state. But the bankrupt act provides that the assignee shall have the like remedy, to recover all said estate debts and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. 14 Stat. 524. Viewed in the light of that provision, it is certain that the assignee is the proper party to institute such a suit, and, inasmuch as the suit is between citizens of different states, in exact conformity to section 11 of the judiciary act. We are of the opinion that the second objection must also be overruled. 1 Stat. 78; Stevens v. Savings Bank, 101 Mass. 109; Cook v. Whipple, 55 N. Y. 150; Fletcher v. Morey [Case No. 4,864]. That the respondents might do what it is alleged they did do, as there is no allegation of fraud, or that any persons have been misled or injured by their acts, and that the complainants do not show any ground for equitable relief. Enough has already been remarked to show that the first branch of the proposition is repugnant to the allegations of the bill of complaint, and that it must be overruled upon that ground. Equity will afford relief in such a

case, if the facts alleged are fully proved, as appears from the following authorities: 1 Daniel, Ch. (3d Am. Ed.) 576; Gould v. Gould [Case No. 5,637]. Matters of fact are certainly alleged in the bill, which, if fully proved, would entitle the complainants to relief, and in such a case a demurrer is not a good defence; but, in view of all the circumstances, the court will allow the respondents leave to file an answer to the merits. Decree for the complainants in conformity to the opinion.

Case No. 5,456.

The GIPSEY.

[Blatchf. Pr. Cas. 126.][1]

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

VESSEL AND CARGO CONDEMNED—BLOCKADE.

The vessel was pursued while attempting to violate the blockade. All on board of her escaped before she was taken. The court allowed other testimony to be given. Letters on board afforded a strong presumption that the vessel and cargo were enemy property. No claimant intervened. It not being probable that the papers of the vessel, or any of her crew, or any further proof could be produced, the court decreed condemnation of vessel and cargo, the vessel having been appraised and taken for the use of the government in the Gulf of Mexico, where she was captured, and not having been brought within this district.

BETTS, District Judge. The yacht schooner Gipsey, and her cargo, on the 29th of December, 1861, pursued, in attempting to violate the blockade of New Orleans, by the United States vessel of war New London, the Wissahicon being also in sight. The officers and crew of the yacht escaped from her in their boat before she was taken possession of by the captors, and after setting fire to the prize. The cargo on board was sent by the captors to this port, and the vessel, being insufficient to make the voyage north, was appraised and taken possession of and used by the government. After the cargo arrived here the district attorney, on an affidavit of the facts, moved the court for and obtained an order that Thomas W. Jackson be examined upon the standing interrogatories by the prize commissioners, with the like effect as if he were one of the witnesses prescribed by law, subject to any objections that might be made to his competency or credit. The case being regularly set down for hearing, and the proofs being clear that the yacht was seized in attempting to evade the blockade of the port of New Orleans, the strong presumption, from the written letters and memorada found on board the vessel, being that she and her lading were both enemy property, and no party intervening to claim the said prize, although due service of process of monition was made according to the course in admiralty, and the impracticability of obtaining the regular papers of the vessel, or any members of her crew, to give evidence in the case, being made clear, and it not being probable that any further proofs of the transaction can be produced before the court, because of the impediment of natural and physical causes, it is considered by the court that sufficient authority is shown for the condemnation of the said vessel and her cargo as prize of war. Jecker v. Montgomery, 13 How. [54 U. S.] 515, 516. Judgment of forfeiture is accordingly given in favor of the libellants.

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

Case No. 5,457.

Ex parte GIRARD.

[3 Wall. Jr. 263;[1] 19 Leg. Int. 412.]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1858.

JURISDICTION—CITIZENSHIP—SEVERAL PARTIES DEFENDANT—ALIENS—EJECTMENT.

1. To be able to remove a case from the state courts to the federal, under the 12th section of the judiciary act of 1789 [1 Stat. 79], each defendant—no matter how numerous the defendants may be—who have been properly served with process, or who voluntarily appear without having been so served—must be either an alien or a citizen of a state other than that of the state to which the plaintiff belongs. It is not enough that one defendant, or any—the largest number short of the whole—be so.

[Cited in Ex parte Turner, Case No. 14 245.]

[Cited in Bryant v. Rich, 106 Mass. 192.]

2. If one defendant be an alien and be properly served or be otherwise in court, and other persons, not aliens or citizens of a state or states other than that to which the plaintiff belongs, be named as defendants in the writ, but be not served, nor appear voluntarily, the alien defendant who is served, may himself remove the case. Per Grier, Circuit Judge.

[Cited in McHenry v. New York, P. & O. R. Co., 25 Fed. 67.]

3. Where a plaintiff brings ejectment against several persons who hold by several and distinct titles, no doubt the court in which such process is issued may compel such plaintiff to discontinue and divide his action; and will not permit him by joining defendants thus claiming, to affect injuriously the rights of any.

[Cited in Gibbons v. Martin, Case No. 5,381.]

The city of Philadelphia had brought ejectment in a state court of Pennsylvania against J. F. Girard and eleven other persons. The writ was served on J. F. Girard alone, he having been the only one of the twelve named in the writ who was in actual possession. The eleven persons not served appeared voluntarily to the action, and then the whole twelve petitioned the state court, as under the twelfth section of the judiciary act of 1789, that the case might be removed thence into this court. The petition for removal did not aver that each one of the twelve was either an alien or a citizen of some state other than Pennsylvania; though it did make one or the other of these averments

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

with regard to eight of them; J. F. Girard, however, the defendant in possession, not being one of them.

A motion was now made by Mr. Olmstead for the city to remand the case for want of the requisite averments in the petition to the state court; a copy of which, as the judiciary act directs, had been filed here.

The words of the section of the act on which the motion depended are thus: "If a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, . . . and the defendant shall . . . file a petition for the removal of the cause for trial into the next circuit court to be held in the district where the suit is pending . . . it shall then be the duty of the state court to accept the surety and proceed no further in the cause, . . . and being entered as aforesaid in such court of the United States, the cause shall there proceed, &c."

It was argued by the counsel of the twelve defendants, that if there was "an alien," that is to say, one alien in the case, or "a citizen" of another state—that is to say, a single citizen—this was enough.

GRIER, Circuit Justice. If J. F. Girard be an alien, he would have had the right to remove the case under the act of congress to this court, for the plaintiff cannot, by inserting the names of persons not in actual possession, affect the right of the tenant in possession, who may call in his landlord to defend his possession at his own option. His landlord may, also, at his own election, apply to the court, and be made a co-defendant. But the plaintiff has no right to assume that any other person except the one in possession, claims a right in the land. The defendants may all be owners, and J. F. Girard, the tenant in possession, may be their lessee or tenant. But persons resident elsewhere than in the state where the land lies, cannot be made parties to an action of ejectment in that state, except by their own consent and that of the defendant in possession. The parties not served with process here, appeared voluntarily to the action, and have thus made themselves parties defendant, and admit themselves in possession, and to be proper parties. They all join in the petition for removal, but they do not aver that J. F. Girard, on whom the writ was served, and three others of their number are—in addition to the eight remaining, of whom it is averred—either aliens or citizens of any other state. Beardsley v. Torrey [Case No. 1,190], decides that when the tenant in possession is a citizen of Pennsylvania, and his landlord, a citizen of another state, is admitted to defend, the case is not within the provisions of the 12th section of the judiciary act, and cannot be removed to this court. And in Ex parte Turner [Id. 14,245], just decided, the same decision has been made after full argument, and a careful consideration of the question. But although the plaintiff could not, by serving his writ on persons not in possession, affect the rights of the tenant in possession to remove the case if he had been an alien, yet, if the other defendants—some of whom are citizens and some aliens,—volunteer to appear to the suit, and become parties with the tenant in possession, they cannot, by their own consent, thus transfer to this court a case not within the provisions of the act of congress.

Where there is more than one person plaintiff or defendant, each must be competent to sue in the court of the United States. The right to remove must exist in each, and all the persons suing, and against whom the opposite party may demand a decree or judgment.

How far several defendants in ejectment, who hold several portions of the land by several and distinct titles, may have a right to have their cases severed, so that one who has a right to remove may not lose his right by being made co-defendant with one who has none, is a question not in this case. But I doubt not, that the court in which such process has issued, may compel the plaintiff to discontinue and divide his action, and will not permit him, by joining defendants claiming by distinct and several titles, to injuriously affect the rights of either.

In the present case the defendants have not brought themselves within the description of the act. They are neither aliens, nor citizens of another state.

I am aware that this contraction of the act may tend to defeat the provisions of the 12th section altogether, in actions of ejectment. "But the remedy," says Mr. Justice Washington, in the case above cited, "is with congress."

Case remanded.

GIRARD (ASTOR v.). See Case No. 595.

GIRARD (HOURQUEBIE v.). See Case No. 6,732.

GIRARD (McCULLOCH v.). See Case No. 8,737.

Case No. 5,458.

GIRARD v. PHILADELPHIA.

[See 7 Wall. (74 U. S.) 1.]

Case No. 5,459.

GIRARD v. PHILADELPHIA.

[2 Wall. Jr. 301; [1] 11 Leg. Int. 74.]

Circuit Court, E. D. Pennsylvania. April Term, 1853.

DEVISE OF AFTER-ACQUIRED LANDS—ATTRACTION OF TITLES.

It being admitted that a devise of real estate to which, at the date of the devise, the testator

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

had not a good title; but of which nevertheless he had an actual, notorious and continuing possession, and one that by time might have ripened into title, and under which possession and pretence of title he claimed entire ownership, does not carry the estate as real estate owned at the date of the will; the court here further decides that a good title acquired subsequently to the date of the devise, will not be attracted nor cohere to the old claim or imperfect interest, so as to be merged, or extinguished in it, and so to pass the estate as real estate acquired previously to the date of the will. Payment of taxes for even more than 21 years, without an adverse possession druing that length of time, gives no colour of title; though it defines extent of claim. And so an entry to run lines, &c.

[Cited in Quin's Estate, 144 Pa. St. 458, 22 Atl. 965.]

Nicholson being the owner of 11 tracts of wild land, mortgaged them in 1797 to the Bank of the United States. The bank afterwards bought them in under this mortgage, and in February, 1830, its trustees sold them to Girard, who took deeds describing the tracts in the ordinary way. By his will, made afterwards, Girard left all his real estate to the defendants, the city of Philadelphia, and by a codicil made in June, 1831, and before the date of another deed to him hereafter mentioned, devised in the same way all the estate he should thereafter purchase; a matter, however, which as the law of Pennsylvania was afterwards judicially declared to have always been, he had no power effectively to do.

Prior to the mortgage by Nicholson, the state of Pennsylvania, which was a creditor of his, passed a law which, as was determined in 1833, by the supreme court of the United States (Livingston v. Moore, 7 Pet. [32 U. S.] 469), after a great deal of litigation by the parties to the suit, gave that commonwealth a continuing lien, and under this lien the state of Pennsylvania sold this same property to this same Girard, in September, 1831, sometime after the execution of his will and codicil, leaving his real estate to the city. Girard had thus two deeds for the same property; the earliest one from the trustees of the Bank of the United States, the other from the state of Pennsylvania. This last one contained, along with its terms of "bargain and sell," the terms "grant, remise, release, quit claim," &c.

Until shortly before this last deed, Girard supposed his first deed gave him a good title. He paid a full price. He was the unquestioned owner of 57 other tracts adjoining these 11, and with them constituting one body of land. After the purchase from the bank of these last, he sent an agent to look after the whole body; had all the outer lines carefully run, and some of the interior ones, and built saw mills and small houses on different spots on the 68 tracts, which his tenants constantly occupied for nineteen years. His agent went over each and every tract, including these 11, and protected the whole, which were treated as one body, from trespassers. Girard notoriously paid the taxes for more than 21 years, and was at other expenses up to the time of this trial in October, 1852.

It having been decided by the supreme court of Pennsylvania (Girard v. City of Philadelphia, 4 Rawle, 335) that a devise of subsequently acquired lands passed nothing, Girard's heirs at law [Madeline Henriette Girard, Marguerite P. Lardy, Anne Stephanie De Lentilhac, Alfred De Lentilhac, Fabricius Devars Dumaine, and Marguerite Palmire], represented here by Messrs. J. M. Read, Cuyler, and Guillou, now brought this ejectment, claiming that as Girard's only real title, was acquired after the date of his will and codicil, the lands belonged to them; while Mr. Cadwalader and the city solicitor (Olmsted), for the city, admitting the correctness of the doctrine, that after-acquired lands cannot (independent of a statute) be made to pass by will, propounded the following propositions as sufficient to defeat the claim of the heirs.

That surveys of large bodies of land are good where the exterior lines only are run and marked on the ground. Stevens v. Hughes, 3 Watts & S. 465; Schnable v. Doughty, 3 Barr [3 Pa. St.] 392; Mock v. Astley, 13 Serg. & R. 382. That actual possession of part of a tract under colour of title to all the land within defined and marked boundaries, gives constructive possession to the whole, although the unenclosed part is within the bounds of an elder and better survey. Heiser v. Riehle, 7 Watts, 35; Waggoner v. Hastings, 5 Barr [5 Pa. St.] 300; Kite v. Brown, Id. 291; Seigle v. Louderbaugh, Id. 490. That an entry on two adjoining lots under a deed is presumed to be in accordance therewith, and makes the actual possession co-extensive with the boundaries mentioned in the deed. Hopkins v. Robinson, 3 Watts, 205. That all contingent possible estates are devisable, for there is an interest. 4 Kent, Comm. 511. That independently of the proof of actual possession taken and held by the defendant's testator, the plaintiffs, claiming under him, are estopped from denying that the bargain and sale from the trustees of the Bank of the United States, vested in him the possession from the date of its delivery. Harg. Co. Litt. 273; Co. Litt. pp. 275, 276, 566; Leblyn v. Slack, Bridg. 495, cited in margin; Iseham v. Morrice, 6 Res. Cro. Car. 110. That a party thus in possession with colour of title, is capable of receiving a release of the fee from any holder of an adverse title. Litt. § 469; Co. Litt. 275a; Lampet's Case, 10 Rep. [Coke] 47a; Bradstreet v. Huntington, 5 Pet. [30 U. S.] 434. That conveyances like these to the defendant's testator, made after the date of his will on which the plaintiffs rely to establish their present claim, enure by way of release, or otherwise as may best promote the grantee's interest. Co. Litt. 301b; Chester v. Willon, Sid. 452; Ventris, 78. And see Jackson v. Smith, 13 Johns. 406.

As to any question between parties claiming as heirs, devisees, or in any other manner as mere volunteers, they enure as an extinguishment of the adverse right of the parties conveying, so as to prevent the question, which was the better right from afterwards arising. Brook (Abr. tit. "Mortmain," pl. 38) says, "Abator or disseisor aliens the land in mortmain by license, and afterwards he who has a right releases to the abbot in fee, the lord cannot enter, per Norton; forasmuch as the tenant is in by the first fee or license, therefore the release to him who is in by title goes by extinguishment of the right." Coke's Littleton is to the same point. Page 275a. Release, per mittre le droit, "in some respects enures by way of extinguishment." The acceptance of such a release is not a revocation of a prior devise by the release. (1) It has never been held or judicially said, that a devise was revoked by the acceptance of a conveyance, capable of enuring as a mere release of the right of the grantor. (2) There is no case in which a devise has been held to be revoked by an alteration of the devisor's estate, where he has not himself done an act divesting himself of the estate. (3) There is no case in which the heir alleging that his ancestor's devise was inoperative, has been allowed to call any act of such ancestor in question, or dispute any title of which such ancestor may have claimed to be the holder. Goodtitle v. Otway, 2 H. Bl. 516. (4) If express authorities were required, that it is not a revocation, or that the heir cannot set it up in derogation of his ancestor's prior title, they are found in Jackson v. Ireland, 3 Wend. 99, in New York, and in the old books which show that revocations by alteration of a devisor's estate, where not a question of capacity, is a question of mere intention. And that in the case of a conveyance to such uses as had been declared by the grantor's prior devise, the devise is a good appointment of the use to prevent an escheat, and therefore to bar an heir. Skerrett v. Burd, 1 Whart. 250; Rolle, Abr. 616, Devise Q, pl. 3, 6 Edw. VI.; Dyer, 143 a and b; Winkfeild's Case, Godb. 132, pl. 152; Gibson v. Mutess, Owen, 76; Gybson v. Platless, Goldesb. 32; Hussey's Case, Moore, 789; Mytton v. Lutwich, W. Jones, 7. The rule on the subject is the same at law and equity, and is that a subsequent conveyance does not revoke a prior devise, unless the testator's estate (not right) has been materially modified. Parsons v. Freeman, 3 Atk. 748; Brydges v. Duchess of Chandos, 2 Ves. Jr. 425–431; Harmood v. Oglander, 6 Ves. 222; Jones v. Hartley, 2 Whart. 103.

GRIER, Circuit Justice. The reason why after-purchased lands do not pass by a will, even though the testator has expressed clearly his wish or intention that they should, is not because such a purchase is a revocation of the will, but because a will is in the nature of a conveyance or an appointment of a particular estate, and consequently the testator must have the power to dispose at the time the will is executed. Hence a devise of land, though it operates in future, can pass only such interest or estate as the testator had at the time, and continued to have till his decease. Like a grant of all a man's estate and interest without warranty or covenant of title, it is no estoppel against the grantor or his heirs.

Thus, if a man having an equitable estate in land, devise it, and afterwards purchase the legal title, the latter will descend to his heir; but equity will hold him as a trustee for the devisee of the equitable or usufructuary estate. On the contrary, if the testator have but the legal estate at the time he makes his will, and afterwards purchases the equitable estate, the devisee of the legal estate will be held as trustee for the heir to whom the after-purchased equitable estate descends. There is no extinguishment of the after-purchased title for the sake of enlarging the devise, and the heir is not stopped from averring that the devisee took just such estate or title as the testator had at the date of the execution of his will. Nor can the distinction taken by the counsel of the city between title and estate avail to establish a difference in the present case. A man who has neither possession nor right, has no estate in the land. He who has nothing can convey nothing. It is true that a void deed, which conveys no estate, may be used by one in possession as colour of title and evidence of the extent of his claim, while his whole estate in the land is no more than a naked or tortious possession. It is true also, that by the ancient feudal doctrine of disseisin, a person who has ousted the owner is treated as tenant of the freehold. A disseisin was considered not only as a dispossession of the freeholder, but also as a substitution of the disseisor as tenant to the lord, as one of the pares curiae. But, though some of the consequences of actual disseisin continue to be law in England, yet Lord Mansfield admits that in his day very little was known of seisin or disseisin but the name. In Pennsylvania, where property is allodial, it is still less known or applied, except in its analogies as connected with the statute of limitations and adverse possessions. In England, till lately, the disseisee could not dispose of the land by will or otherwise, and descent cast takes away his right of entry. But such has never been the law in Pennsylvania. Overfield v. Christie, 7 Serg. & R. 177; Humes v. McFarlane, 4 Serg. & R. 435; and McCall v. Neely, 3 Watts, 71. One in possession without right, or merely by disseisin, is considered as "having a something which may be transferred," a naked possession which may ripen into a title by the statute of limitations. But until it has done so, neither his heir nor alienee is in possession by title, tolling the entry of the disseisee or owner. By the feudal law of disseisin, the heir of the disseisor, or his

alienee by feoffment, with livery of seisin, is in actual possession with title, and the disseisee having lost the right of entry, has but a bare right. Whether a release by such a disseisee after devise, would be construed to operate by way of enlargement of the devisees's estate or extinguishment of that of the disseisee, we need not inquire. No case has been brought to our notice containing such a doctrine. But a release from disseisee to disseisor, is in fact the creation of a new estate, being equivalent to an entry and feoffment, and could not be construed to operate by way of extinguishment.

But it is unnecessary to trouble ourselves with these antiquated and obscure doctrines; for, admitting all the consequences claimed from them, they have no application to this case.

1st. Because neither the trustees, nor Girard, under their quit claim deed, had any actual seisin: they had neither possession nor right of possession. The title and estate of the bank was divested by the commissioner's sales, under the Nicholson lien; and the purchasers had the title and the actual possession, or if the land remains vacant, the law cast on them the possession. The trustees were not disseisors, nor was Girard enfeoffed by them with livery of seisin. And though a deed of bargain and sale may be equivalent to such a feoffment, yet where the bargainor had neither possession nor title, no seisin by right or by wrong, his deed could confer no seisin or estate whatsoever on the bargainor.

2nd. The acts of Girard, relied on as giving title, giving the testimony its utmost effect, did not amount to an ouster or disseisin of the owners whether in actual or legal possession. A mere entry upon another is no disseisin, unless it be accompanied with expulsion. An estate by disseisin is got by wrong and injury; and the rightful owner must be expelled either by violence or some act which the law regards as equivalent in its effects. Doe v. Thompson, 5 Cow. 371.

Girard had, therefore, no seisin, no estate, or freehold by right or by wrong, on which a release could operate by way of enlargement, confirmation or extinguishment. His vendor having neither possession nor right could convey nothing to him by his deed. At the time the codicil was executed Girard had no estate which he could convey by grant or devise. The conveyance, subsequent to the codicil, conferred a new and independent title—gave him seisin and right to, or estate in, the land. Then for the first time he became owner of the lands, and had power to convey them.

The proposition which the counsel for the devisees must substantiate, under the facts in this case, must be this: That a man who has purchased a pretended title to land where his vendor had neither possession nor right, and who afterwards purchases from the true owner, and thus becomes seised and possessed, is estopped to deny that he claims by the pretended and worthless title; that this estoppel descends to his heir, and that the good title becomes merged in the bad one, and that in order to assist the devisee as against the heir at law, equity will construe the good conveyance by which alone the grantee has any seisin, estate or title, to be a mere extinguishment of an outstanding claim or cloud on the title. This doctrine cannot be supported by analogy of authority in ancient or modern law.

The case cited from Brooke gives no countenance to such doctrine. For where an abator or disseisor aliens in mortmain by license of the king and lord paramount, and disseisee releases the right to the abbot, it must be observed that the abbot being alienee by livery of seisin of the disseisor, is in possession of the freehold by title. And the entry and feoffment being by license are sufficient to pass the freehold to the abbot as against the king and lord paramount, and all the world except him who hath the right. But his right of entry being tolled, his release, which is of the bare right, will be construed to operate only as extinguishment of his right, and not to the destruction of the estate so as to countervail entry and feoffment by license. Hence the distinction taken "where the abbot himself is disseisor and the king or lord releases, and confirms to him, and then the disseisee releases the abbot. In such case, it seems that the king or lord can enter, for this countervails entry and feoffment, and then there is a new mortmain." In this case the abbot being himself disseisor is not in by title or livery of seisin; the entry of the disseisee is not tolled; his release operates as a feoffment with livery of seisin and confers a new freehold or estate on the disseisee, which being without license is forfeited as mortmain.

It needs no argument to show that these cases, sought out from the lumber garrets of obsolete feudal laws, will afford no analogy or authority for the proposition which the defendants are compelled to establish, in order to success. The principles laid down by the supreme court of Pennsylvania in their construction of this devise, Girard v. City of Philadelphia, 4 Rawle, 335, overrule the positions advanced by defendants and leave their case without a foundation on which to rest. It is there decided, that "the question whether after-purchased lands pass by a previous devise, does not depend on the intention of the testator: that a will is a species of conveyance, and operates only as regards the disposing power and capacity of the testator at the time of its execution, insomuch as to require his power over the estate to be perfect at the time: that the act of disposition must be complete in every respect at the performance of it: that a testator, like any other grantor, cannot give what he has not; and finally, that a subsequent purchase giving the land to the testator, is repugnant to the import of the devise which would give it to the devisee, and therefore

not to be intended to have been in subservience to the will."

These principles rule this case. Girard, by the purchase and completion of this title, defeated and put an end to the uncertain possessor's estate, or right held by him at the time of his devise. No case can be found where the purchase of a fee simple estate after a devise, has been held in subservience to the object of the will, because at the time of making it, the testator had some worthless or pretended claim to it. The law favours the heir at law, and has devised no fictitious extinguishment or estoppel to bar his claim as against the pretended or doubtful claims of the devisee.

Judgment for plaintiff.

Case No. 5,460.

GIRARD v. WARE et al.

[Pet. C. C. 142.] [1]

Circuit Court, D. Pennsylvania. April Term, 1815.

MARINERS' WAGES.

1. Seamen, forcibly put on shore by the captors, from a vessel, which was afterwards ransomed, and arrived at her port of destination, navigated from the place of capture, by a new crew, the owners not having given the original crew an opportunity to rejoin the vessel; are entitled to wages, subject to a contribution for the ransom.

[Cited in Van Beuren v. Wilson, 9 Cow. 160.]

2. The nett proceeds of the ship and cargo, at the port of discharge, and not the invoice cost of the cargo; with the wages of all the persons belonging to the ship; must contribute to the ransom.

The ship Montesquieu, belonging to the appellant, sailed from Canton, on her return to Philadelphia, in November, 1812; and in March, 1813, was captured, within the capes of Delaware, by the British blockading squadron; her crew were put on shore, forcibly, by the captors, and they arrived at Philadelphia. Mr. Girard, after the capture, negociated with the enemy, for the ransom of his ship; and had a flag of truce granted to him, by the government, to carry down the ransom money, which amounted to one hundred and eighty thousand dollars, to Sir John Beresford, who commanded the squadron. The vessel, which carried the money, also took down hands to navigate the ship up to Philadelphia. As soon as the appellees heard of the ransom, which, however, was not until after the vessel with the ransom money had left Philadelphia, they called at the appellant's counting house, and offered their services to bring up the ship; but they were informed, that the appellant had left directions that they were not to be employed. The ship, with her cargo on board, arrived in safety at Philadelphia, her port of destination. This suit was brought to recover the wages of the crew, who had been put on shore, by the captors, from one half of the time that the vessel was at Canton, to the time of her arrival at Philadelphia; the wages for the outward voyage, and for the other half of the time the ship remained at Canton, having been paid.

Peters, for appellees, contended that they were entitled to recover their full wages, subject to a contribution, with the ship and cargo, according to the nett value of both, at the port of Philadelphia. He cited 1 Esp. 237; 3 Esp. 36; 3 Mass. 37; 2 Mass. 39; Chit. Law Nat. 98; Hart v. The Littlejohn [Case No. 6,153]; Howland v. The Lavinia [Id. No. 6,797]; Singstrom v. The Hazard [Id. 12,905]; Story, Abb. 508, 510, 512, 395, 396; 4 East, 560; 2 N. Y. Term R. 284, 291; 8 Term R. 276, and also the case of Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, and of Bond v. The Cora [Case No. 1,620].

On the other side, Messrs. Dallas and Ingersoll, contended that no wages were due, if a crew do not perform the whole voyage; and another crew are hired to complete it; but if they are entitled to wages, only the invoice price of the cargo, should contribute. Story, Abb. 509; Lord Raym. 1211.

The invoice price was, one hundred sixty-four thousand seven hundred and forty-four dollars. The sales of the cargo at Philadelphia, amounted to four hundred eighty-eight thousand six hundred and fifty-five dollars. The ship was worth from fifteen to twenty thousand dollars.

G. M. Dallas and Ingersoll, for appellant.
Peters and Delany, for appellees.

WASHINGTON, Circuit Justice. The court is of opinion, that the appellees, having been separated from the ship, by the captors, and forcibly put on shore, are entitled to their full wages, from half the time the ship remained at Canton, to their arrival at Philadelphia; subject to contribution, on account of the ransom; notwithstanding the appellant hired other persons, to bring the ship to Philadelphia. The appellees were not bound to offer themselves to perform this service, before they knew of the ransom; and that offer, then, to do it, being rejected by the appellant, they are in no default. This opinion is formed, upon an attentive examination of all the cases.

The nett proceeds of the whole cargo, on board, whether belonging to the appellant, the master, supercargo, or any other person, according to its amount, at the port of Philadelphia; and the value of the ship, together with the wages of the appellees, and of the officers of the ship; must contribute towards paying the ranson.

It was referred to the clerk, to ascertain the rate of contribution, to be deducted from their wages; and a decree was given for the balance.

[1] [Reported by Richard Peters, Jr., Esq.]

Case No. 5,461.

GIRARD FIRE & MARINE INS. CO. v. GUERARD et al.

[3 Woods, 427] [1]

Circuit Court, S. D. Georgia. Nov. Term, 1878.

JURISDICTION IN EQUITY — FRAUD OF PERSON NOT PARTY TO SUIT—DISCOVERY.

A court of equity has no jurisdiction of a suit on a bond which, it is alleged, was, through the fraud of a person not a party to the suit, delivered up to be canceled, but which it was claimed was still in force, where no discovery was sought, and where the bill furnished a substantial copy of the bond.

In equity. Heard on demurrer to the bill.

The bill alleged in substance as follows: On July 6, 1875, the complainant, a fire and marine insurance company of the city of Philadelphia, appointed one Benjamin E. Guerard, of Savannah, Georgia, its agent for that place. Guerard accepted the appointment, and on the same day executed and delivered his bond to the complainant, in the penal sum of three thousand dollars, with the defendants Richard D. Guerard and H. F. Train, sureties, conditioned, among other things, for the faithful performance of his duty as agent of the complainant, according to its rules and instructions, and for the payment to complainant of all cash premiums due on policies issued on applications for insurance taken by him or under his direction, and delivery, without fraud or delay, of all moneys, papers, notes, or other property which should come into his hands or under his control as such agent, and which belonged to complainant. Having given such bond, the said Benjamin E. Guerard entered on his duties as such agent. On or about October 1, 1875, it became known to complainant that Richard D. Guerard, one of the said sureties on said bond, and one of the defendants to the bill, had become a copartner of said Benjamin E. Guerard, in the insurance agency business, at Savannah, which included the agency of complainant. The interest of Richard D. Guerard in the business continued until about December 20, 1876, at which time both he and Benjamin E. Guerard represented to complainant that Richard D. Guerard had sold his interest in said business to said Benjamin E. Guerard, and was about embarking in other business enterprises in which it was required of him that he should be free from any possible embarrassment as a surety for others, that said Richard D., therefore, desired to be relieved from his suretyship on said bond, and that if the bond was delivered up, the said Benjamin E. would furnish to complainant a new bond of indemnity.

Benjamin E. Guerard had, since he became the agent of complainant, made from time to time reports showing the policies of insurance issued and the premiums received by him, and complainant having full confidence in the truth of his reports, it appeared, therefore, when said request to deliver up said bond was made, that the complainant had received from Benjamin E. Guerard all moneys due from him by reason of his agency, and that all the conditions of his bond, up to the 20th day of December, 1876, had been fully performed. Complainant, therefore, in compliance with the request of Benjamin E. and Richard D. Guerard, did, on the 8th of February, 1877, return by mail to Benjamin E. Guerard the said bond, the complainant having before that time received from him a new bond of indemnity, dated December 20, 1876. On investigation, instituted after the return to Benjamin E. Guerard, of said bond of indemnity, it turned out to be the fact, that prior to the dissolution of said partnership, on December 20, 1876, Benjamin E. Guerard had, at various times, made false and fraudulent reports of the policies issued and premiums received by him; that upon the policies issued he reported premiums received by him only to the amount of forty-nine dollars and fifty-five cents, when, in fact, the amount received by him up to December 20, 1876, was twelve hundred and sixty-one dollars, and the amount fraudulently withheld by him, and not accounted for, was the difference between said amounts, to wit: the sum of twelve hundred and eleven dollars and forty-five cents. This last-named sum, with interest, still remains due and unpaid.

According to the rules of the complainant, well known to Benjamin E. Guerard, it was his duty to report monthly, the amounts received by him for premiums. This duty he failed to perform, and complainant had no knowledge or information of the falsity of the reports of Benjamin E. Guerard, or of his fraudulent conduct towards complainant, until after the first-mentioned bond of indemnity had been returned to him. Had complainant known or suspected the true state of facts, it would not have returned the bond to Benjamin E. Guerard, but was induced so to do by his fraudulent reports and representations. The return of the bond was obtained from complainant by means of the fraud and concealment of material facts practiced by Benjamin E. Guerard. The condition of the bond of indemnity so returned had been broken, and all the obligors were liable thereon before its return to Benjamin E. Guerard. Complainant has requested the return of said bond, but it has not been returned.

Discovery is waived, and the bill prays that the defendants Richard D. Guerard and H. F. Train might be decreed to return and deliver up said bond, if it is in their possession or control; if it has been lost or destroyed, that the court would by decree establish it, and that defendants might be ordered and decreed, jointly and severally, to pay to complainant the said sum of $1,211.45

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

and interest, and all losses, damages and expenses which complainant may have sustained by reason of the promises and the breaches of the condition of said bond aforesaid. A substantial copy of the said bond of indemnity is, as the bill alleges, appended thereto as an exhibit. The principal in the bond, Benjamin E. Guerard, was not made a defendant to the bill, but it was alleged that he had absconded, and, at the time of filing the bill, the complainant did not know his place of residence or sojourn. The defendants demurred to the bill on the ground that this court, as a court of equity, had no jurisdiction of the case made by the bill, there being a plain, adequate and complete remedy at law.

William Garrard, for complainant.
John M. Guerard and J. R. Saussy, for defendants.

WOODS, Circuit Judge. The bill cannot be sustained on the ground of discovery, for discovery is expressly waived, nor on the ground of account, for the complainant states with precision the amount he claims, and if anything is to be added by way of interest or expenses, that can be ascertained as well in a court of law as of equity. Does the fact that the bond is not in the possession of complainant, but that its possession has been obtained by the fraud of one of the obligors, give a court of equity jurisdiction? It does not, if, notwithstanding these facts, there still remains to complainant a plain, adequate and complete remedy at law. These circumstances do not, either in stating the case by pleading, or in proving it by evidence, in a court at law, present any obstacle to a complete and adequate remedy. When a party pleads a deed, or claims or justifies under it, he must, as a general rule, make profert of it. But there are exceptions to this rule, among which is the case where the deed is lost or destroyed, or is in the possession of the opposite party. These circumstances dispense with the necessity of profert. Steph. Pl. 439–441.

In proving the averments of the declaration, when the instrument sued on was lost or in possession of opposite party, there would be no obstacle in a court of law. Even where a written instrument which is required in evidence is in the possession of a third person, yet if there is a privity between such person and the party, a notice to the party is sufficient to let in evidence of its contents. And in case the other party refuses to produce an original deed or agreement which is in his possession, and which he has had notice to produce, secondary evidence of the contents will be received without proof of the execution of the original. 1 Phil. Ev. 440, 452. This is substantially the rule enacted by the Code of Georgia, without regard to the means by which the paper got into the possession of the opposite party. See Code, §§ 3508–3510. So that if the complainant had brought an action at law on the bond, he would have found no difficulty incident to the limited powers of the court, either in stating his case upon the pleadings, or sustaining it upon the evidence.

But it is insisted by complainant's counsel that the bill avers fraudulent conduct and practices on the part of the principal of the bond in obtaining its return, and that these averments give a court of equity jurisdiction. In answer to this, it is to be observed, first, that it is not the fraud of a party defendant to the bill which is complained of. There is no averment that either Richard D. Guerard or H. F. Train was guilty of any fraudulent practices in obtaining possession of the bond or otherwise. It is fraud practiced by a party defendant and not by third persons, which gives a court of equity jurisdiction. 1 Story, Eq. Jur. § 203.

It is not mere fraud which confers jurisdiction on a court of equity. A party may be guilty of fraud in the warranty of personal property sold, but nevertheless the remedy is at law on the warranty. So, if the maker of a bond by fraudulent artifice, or even theft, gets possession of the bond from the obligee, still if the obligee has a duplicate of the bond he cannot proceed in equity to recover upon the bond. A court of equity has jurisdiction to relieve from the consequences of fraud, as where a bond or note is procured, or deed of conveyance obtained, on false and fraudulent pretenses. So where a bond or deed is delivered up on fraudulent representations and is canceled or destroyed. Crosse v. Bedingfield, 12 Sim. 35; East India Co. v. Donald, 9 Ves. 275. But in this case there is no averment that the bond is lost, destroyed or canceled. The averment is simply that one of the parties to the bond, not a party to the suit, had, by false pretenses, obtained the possession of the bond, and the complainant, by his bill, furnishes what he avers to be a substantial copy. The bond is still in force, for the fraudulent acts of the principal in getting possession of it do not cancel it. Even deeds canceled by fraud and imposition are still in force. U. S. v. Spaulding [Case No. 16,365]. The bond, from all that appears by the bill, is in existence, is still in full force and effect, and it can be pleaded and proven without difficulty or obstruction in a court of law. Under these circumstances it seems clear that the fraud of one not a party to the suit, in getting the possession of the bond from the obligee, does not authorize it to go into a court of equity for relief.

The rule to govern such cases is laid down with great precision and clearness by Mr. Justice Campbell in the case of Hipp v. Babin, 19 How. [60 U. S.] 271: "The result of the argument is, that whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment, which affords a plain, adequate and

complete remedy without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

The demurrer to the bill must be sustained.

GIRARD FIRE & MARINE INS. CO. (YEOMANS v.). See Case No. 18,136.

GIRARD LIFE INS. CO. (HIDELL v.). See Case No. 6,464.

Case No. 5,462.

GIRARDEY v. MOORE et al.

[3 Woods, 397;[1] 4 Am. Law T. Rep. (N. S.) 387; 23 Int. Rev. Rec. 294; 5 Cent. Law J. 78; 1 Month. Jur. 344.]

Circuit Court, S. D. Georgia. April Term, 1877.

JURISDICTION—CITIZENSHIP OF PARTIES — ACT OF MARCH 3, 1875—NOMINAL PARTIES—REMOVAL OF WHOLE SUIT—ACT OF JULY 27, 1866.

1. Whenever the controversy in a suit is between citizens of different states, it is within the judicial power of the United States, though there are other persons in the case citizens of the same state, with a person or persons on the opposite side to them.

2. Subject to a limitation as to the amount in controversy, the act of March 3, 1875 [18 Stat. 470], "to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes," invests the federal courts with jurisdiction arising from diverse citizenship of litigant parties, co-extensive with the judicial power conferred upon the general government by the constitution.

[Cited in Van Brunt v. Corbin, Case No. 16,832; Wormser v. Dahlman, Id. 18,048.]

3. Persons who are only nominally interested in the controversy cannot confer jurisdiction or take it away.

4. Under the act of March 3, 1875, mentioned in head-note 2, if some of the plaintiffs and some of the defendants to a suit are citizens of the same state, the removal of the cause must be sought by all the plaintiffs or all the defendants.

5. But if all the plaintiffs on the one hand, and all the defendants on the other, are citizens of different states, then any one or more of either may remove the cause.

6. Under the said act of March 3, 1875, the whole suit must be removed, or no removal can take place.

7. The said act of March 3, 1875, does not repeal that part of the act of July 27, 1866 (14 Stat. 306), which authorizes one defendant, if a citizen of another state, to separate his case from that of the other defendants, who are citizens of the state where the suit is brought, and to remove it to the federal court.

Bill in equity [brought by Martha M. Girardey, for herself and as guardian of her children, against Andrew M. Moore, John W. Bessman, and Isidor P. Girardey, and] removed to the United States circuit court from the Richmond superior court. Heard on motion to remand to the state court.

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

W. W. Montgomery, for the motion.

W. H. Hull, contra.

BRADLEY, Circuit Justice. This cause was commenced in December, 1875, in the superior court of Richmond county, Georgia, and was removed by Moore, one of the defendants, so far as it concerned him, to this court, in October, 1876, he being a citizen of Pennsylvania, and the other parties all being citizens of Georgia. Motion is now made to remand the cause, on the ground that it cannot be thus split into two causes under the existing state of the law. The nature of the case is as follows: The bill charges that certain property in Augusta, known as "Lafayette Hall and the Opera House," on which Moore holds a mortgage for twenty-seven thousand dollars, is subject to a trust for the benefit of the complainant, Mrs. Girardey, and her children, paramount to the mortgage; that it was property which was purchased by the defendant, Isidor P. Girardey (her husband), with the proceeds of other property which he had conveyed upon said trust to the remaining defendant, Bessman, but the deed had not been recorded, and was lost; that after the purchase of Lafayette Hall and the Opera House, Girardey borrowed $27,000 of Moore, and gave him the mortgage in question; and that Bessman, the trustee, acted as Moore's agent in making the loan, thus affecting him with notice of the trust. The bill charges Girardey with receiving the rents and profits, and Bessman with breach of trust, and prays an account there, and that Moore may be enjoined from selling the property under his mortgage (which he is seeking to do) until the trust has been established, and for general relief. Moore, in his petition to have the cause removed as to him, states that the controversy in the suit is wholly between him and the complainants, and can be determined, as between them, without the presence of the other defendants as parties in the cause. His counsel contends that the removal was authorized by the act of July 27, 1866, (14 Stat. 306), or if that is repealed, then by act of March 3, 1875. The counsel of complainants insists that the act of 1866 is repealed by that of 1875, and that the latter does not authorize the removal of a cause in the manner in which this has been removed; and that neither act authorizes this cause to be split in this way.

In order to get at the state of the law on this subject, it will be necessary briefly to review the history of the legislation which has been adopted in relation to the removal of causes from the state to the federal courts, on the ground of the parties being citizens of different states. Without noticing other conditions as to amount, etc., the judiciary act of 1789, § 12, authorized a removal where the suit is by a citizen of the state where the suit is brought, and against a citizen of

another state. If there were more than one plaintiff or defendant, the courts held that all of the plaintiffs must be citizens of the state where the suit is brought, and that all the defendants must be citizens of other states. The act of July 27, 1866 (14 Stat. 306), without making any change in the requirement as to the citizenship of the plaintiffs in the state where the suit is brought, authorized a removal of the suit so far as it relates to a defendant who is a citizen of another state, though there are other defendants citizens of the state in which the suit is brought, if, so far as it relates to the former, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties in the cause. Both of these acts give the right to remove the cause to the defendant alone. The act of March 2, 1867 (14 Stat. 558), gives the right of removal, when a suit is between a citizen of the state where the suit is brought, and a citizen of another state, to the latter, whether plaintiff or defendant, on his making affidavit that he has reason to believe that, from prejudice or local influence, he will not be able to obtain justice in the state court. This act, like the act of 1789, has been held to apply only to cases where all the parties on one side are citizens of the state where the suit is brought, and all the parties on the other side are citizens of another state, or other states. Lastly, the act of March 3, 1875 (18 Stat. 470), gives a right of removal to either party in every suit in which there is a controversy between citizens of different states; and where the controversy is wholly between citizens of different states, and can be fully determined as between them, it authorizes any one or more of the plaintiffs or defendants actually interested in such controversy to remove the suit. This act repeals all acts and parts of acts in conflict therewith.

The act of 1875 undoubtedly greatly enlarges the class of cases which may be removed from the state into the federal courts, and a more careful examination of it may be useful on this occasion. Before this, congress had never invested the federal courts with the jurisdiction arising from diverse citizenship of litigant parties co-extensive with the judicial power conferred upon the general government. Subject to a limitation as to the amount in controversy, this was attempted to be done by that act. It declares, in section first, that the circuit courts of the United States shall have original cognizance (concurrent with the courts of the several states) of all suits of a civil nature at common law or in equity, in which there shall be a controversy between citizens of different states; and in the second section it gives to either party, in such a suit as we have seen, the right to remove the same from a state court (if originally commenced there) to the circuit court. And where the controversy is wholly between citizens of different states, and can be fully determined as between them, it authorizes any one or more of several plaintiffs, or of several defendants, thus to remove the suit. The true interpretation of this statute involves the true interpretation of the constitutional power. The jurisdiction given to the circuit court is as broad as the judicial power.

Now, as to the extent of the judicial power I never had a doubt. My view may not be the correct one, but it is that which I have ever entertained; and, as yet, there has been no decision of the supreme court to the contrary, whatever dicta may have dropped from different judges; and it is this, that whenever the controversy in a suit is between citizens of different states, it is within the judicial power of the United States, though there are other persons in the case citizens of the same state with a person or persons on the opposite side to them. The grant of judicial power is in the affirmative, it extends to controversies (and of course to all controversies) between citizens of different states. There is no negative; no exception of any cases in which the same controversy has also citizens of the same state on the two sides thereof. If the controversy involved is a controversy between citizens of different states, it is within the term, and I think within the spirit of the power granted. The constitutional language cannot be satisfied without giving it this construction. To say that it only embraces those controversies in which all the parties on one side and all the parties on the other side are citizens of different states, is to interpolate a limitation in the constitution which is not found there. Of course, persons who are only nominally interested in the controversy cannot confer jurisdiction and cannot take it away. This has been frequently decided under the former laws.

It is objected to this view that it would be attended with great inconvenience, by having the effect of giving jurisdiction to the federal courts in cases where only a single one of many plaintiffs or defendants happened to be a citizen of another state. But the contrary view would be attended with equal inconvenience, for cases would arise (as they have often arisen under the old law as construed by the courts) in which one of many plaintiffs or defendants happening to be a citizen of the same state with one of the parties on the opposite side has defeated the jurisdiction. Extreme cases of the sort would undoubtedly arise whichever view may be taken, but no intermediate view can be taken which will avoid them. The argument ab inconvenienti is worth nothing, for it neutralizes itself by equal weight on both sides. I do not regard the construction given to the old judiciary act as at all conclusive on this question. I refer to those decisions in which it was held that all the plain-

tiffs must be citizens of the state where the suit was brought, and all the defendants must be citizens of other states. They were made upon the peculiar language of that act and took their origin at a period when a strict construction of federal jurisdiction in judicial matters was in vogue. The circumstances which induced this tendency are familiar to every student of American history.

If I am right in my construction of the act of March 3, 1875, the right of removing a cause from the state court to the circuit court of the United States exists in all cases where there are substantial parties, citizens of different states, on opposite sides of the cause, although there are parties on opposite sides who are citizens of the same state. But then arises the question: To whom is the right of removal given? The answer to this question, as derived from the second section, is that it is given to either party, that is, to the plaintiffs or the defendants, in either case acting collectively, and where the controversy is wholly between citizens of different states, and can be determined as between them, the right is given to any one or more of the plaintiffs or defendants actually interested in the controversy. In other words, if some of the plaintiffs and defendants are citizens of the same state, the removal must be sought by all the plaintiffs or by all the defendants. One of several plaintiffs or one of several defendants cannot in that case remove the cause. But if all the plaintiffs on the one hand, and all the defendants on the other, are citizens of different states, then it does not require all the plaintiffs nor all the defendants to remove the cause, but any one or more of either may do it. But in either case it is the suit that is removed, and not a part of the suit. If my construction of the act of 1875 is correct, it is clear that the removal of the cause could not be had under that act unless Bessman and Isidor P. Girardey are to be regarded as merely nominal parties, and the real controversy in the suit is wholly between the complainants and the defendant Moore, as stated by the latter in his petition for removal. It is not at all improbable that the principal object of the suit was to defeat Moore's mortgage; but the frame of the bill is conceived for the purpose of establishing the trust, and the postponement of the mortgage as a consequence thereof, and Bessman being the alleged trustee, and Isidor P. Girardey being the owner of the property to be affected, it cannot be said that the controversy in the suit is wholly between the complainants and Moore. His controversy with the complainants may, it is true, be disposed of separately. But under the act of 1875, the whole suit must be removed, or no removal at all can take place. It becomes important, therefore, to determine whether the act of 1875 has repealed the act of 1866. If it has, the case is ended here. If it has not, then the removal may, perhaps, be supported by the latter act.

The act of 1875 does not profess to repeal any acts, or parts of acts, which are in conflict with it. Is that part of the act of 1866 which authorizes one defendant, if a citizen of another state, to separate his case from that of the other defendants who are citizens of the state where the suit is brought, and to remove it into the federal court, in conflict with anything in the act of 1875? Cannot both stand together? In a case like the present, the act of 1875, as I understand it, would authorize all the plaintiffs or all the defendants collectively to remove the whole suit. The act of 1866 authorizes a defendant, not being a citizen of Georgia, to remove the case as to him, if there can be a final determination of the controversy, so far as he is concerned, without the presence of the other defendants as parties in the cause. It seems to me that there is no conflict here, no reason why both acts should not stand. I conclude, therefore, that the act of 1866, so far as it authorizes a defendant to remove a cause as to him, is not repealed by the act of 1875. And I see no reason why the controversy between the complainants and Moore cannot be finally determined without the presence of the other defendants. Had the complainants filed the bill against Moore alone, he could have demurred to it for want of parties. He had obtained an order to issue a fi. fa. for sale of the mortgaged premises, and had issued the writ, and the sheriff had advertised the property for sale. The bill, on the facts alleged, would well have lain against him alone to enjoin him from selling the property, and to establish the trust as against his mortgage. The other defendants would have been proper parties, but I think they would not have been necessary parties to the case.

If this view is correct, this controversy between him and the complainants may be determined without the presence of the other defendants as parties in the cause. The motion to remand the cause is refused.

GIRARD'S HEIRS. See Case No. 5,457.

GIRD (SIMMONS v.). See Case No. 12,867.

Case No. 5,463.

GIRO et al. v. The ALEXANDER WISE.

[N. Y. Times, May 8, 1862.]

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

SALVAGE—PRIORITY—BOTTOMRY AND RESPONDENTIA—DISCHARGE.

[1. Salvage claims are paramount to that of the holder of a bottomry and respondentia bond.]

[2. The borrower on a bottomry and respondentia bond of moneys advanced on the risk of the voyage, payable by its terms on the arrival of the vessel at her port of discharge, and conditioned to be void if the vessel is utterly lost, is discharged, and the bond rendered void, by the total loss of the vessel on her voyage, though part of her tackle and cargo is saved.]

[In admiralty. Libel in rem by Emanuel Giro and others against the cargo of the brig Alexander Wise on a bottomry and respondentia bond.]

This was an action upon a bottomry bond. The British brig Alexander Wise, while on a voyage from Marseilles to New York, ran upon a reef and was injured so as to make it necessary for her to go to Gibraltar, discharge her cargo and obtain repairs and supplies. Her master, James Pill, ordered the repairs and supplies, and to secure the moneys advanced to pay the bills, amounting to £1,198, he executed a bottomry and respondentia bond, by which that sum, with 21 per cent. maritime interest, was declared to be secured "upon the said vessel, her hull, tackle, apparel, furniture, freight and appurtenances, and upon the cargo now laden on board." It declared that the obligees had consented to advance the money on such security, "and on the risk of the said voyage to New York, and it provided that if the said vessel "do and shall proceed with all convenient dispatch from the port of Gibraltar to New York aforesaid, (the damages and accidents of the seas and of navigation excepted,) and if the said James Pill, his heirs, executors and administrators, within two days next after the arrival of the said vessel at New York aforesaid, do and shall, well and truly, pay, or cause to be paid," the said sum, &c., and interest; "or if, in the course of the voyage aforesaid, the utter loss of the aforesaid brig shall unavoidably happen," then the bond was to be void, otherwise of force.

The vessel sailed from Gibraltar on the voyage, but was lost by perils of the sea, having been wrecked near Wilmington, N. C. A part of the cargo was taken out of her by salvors, and was brought to this port, subject to salvage claims exceeding the amount due on the bond. After the cargo was taken out, the vessel took fire and finally went to pieces, and was wholly lost by perils of the sea, although some pieces of the hull, a few sails, a small portion of the rigging, a boat and three kedge anchors were saved and were sold near where she was wrecked. This libel was filed against the cargo alone, which was claimed by the original consigners and also by the salvors.

Mr. Owen, for libelants.
Mr. Hand, for claimants.

HELD BY THE COURT (HALL, District Judge): That the salvage claims are paramount to that of the bondholders, because the salvage service was rendered after the bondholders' lien attached. That there is nothing in the evidence to justify the court in reforming the contract between the parties. There was no fraud or mistake affecting its terms or its execution, and the court must determine the rights of the parties upon the bond as executed. That the provisions of the bond are clear and unequivocal. The money secured is declared to be advanced on the risk of the voyage to New York, and it is made payable only after the arrival of the vessel in that port, and it is further declared that if an utter loss of the vessel during the voyage shall unavoidably happen, the bond shall be void. That as long as the vessel or other subject of the hypothecation remains in specie and has not been wholly lost by capture or otherwise, the borrower on bottomry or respondentia is not discharged. But the fact that the vessel and cargo were both hypothecated by the master in this instrument does not authorize any strained construction of the language of the bond for the benefit of the lenders. That the bond is void by its own terms. The day of payment has not arrived and can never arrive. The vessel has been totally lost and the borrower is discharged. Decree dismissing libel with costs.

GIST (TABB v.). See Case No. 13,719.

In re GITCHELL. See Case No. 5,371.

GITMA (UNITED STATES v.). See Case No. 15,209.

GITTINGS (BIRCH v.). See Case No. 1,426.

Case No. 5,464.

GITTINGS v. BURCH.

[2 Cranch, C. C. 97.] [1]

Circuit Court, District of Columbia. Dec. Term, 1813.

APPEAL—NEW EVIDENCE.

New evidence cannot be heard upon an appeal from the orphans' court.

THE COURT (nem. con.) was of opinion that upon an appeal from the orphans' court, new evidence could not be heard.

Case No. 5,465.

GITTINGS v. CRAWFORD.

[Taney, 1.] [2]

Circuit Court, D. Maryland. April Term, 1838.

JURISDICTION OF DISTRICT COURT—SUITS AGAINST CONSULS AND VICE-CONSULS—IMMUNITIES—LAWS OF NATIONS.

1. In the second section of the 3d article of the constitution of the United States, it is declared that "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction:" *held*, that this does not conflict with and render unconstitutional the act of congress passed 24th September, 1789, § 9 [1 Stat. 76], giving jurisdiction to the district court of the United States, in civil cases, against consuls and vice-consuls.

[Cited in State of Texas v. Lewis, 14 Fed. 67. Quoted in Bors v. Preston, 4 Sup. Ct. 410, 111 U. S. 258.]

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

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

2. The grant of jurisdiction over a certain subject-matter to one court, does not, of itself, imply that that jurisdiction is to be exclusive.

[Cited in Bors v. Preston, 4 Sup. Ct. 410, 111 U. S. 258.]

3. A consul is not entitled, by the laws of nations, to the immunities and privileges of an ambassador or public minister. He is liable to civil suits, like any other individual, in the tribunals of the country in which he resides.

[Cited in Bors v. Preston, 4 Sup. Ct. 410, 111 U. S. 258.]

[In error to the district court of the United States for the district of Maryland.]

At law.

Mr. McMahon, for plaintiff in error.

Johnson & Glenn, for defendant in error.

TANEY, Circuit Justice. The suit in this case was brought by John S. Gittings against John Crawford, upon a promissory note made by Crawford to Gittings, for $980, dated December 27, 1834, and payable twenty days after date. The writ stated the plaintiff to be a citizen of the state of Maryland, and the defendant to be the consul of his Britannic majesty. The defendant appeared to the suit, and moved to quash the writ, on the ground that the district court had no jurisdiction over the case; the court below sustained the motion, quashed the writ, and gave judgment in favor of the defendant for costs. [Case unreported.] The case has been brought here by the plaintiff, by writ of error, and the question to be now decided by this court is, whether the act of congress of September 24, 1789, § 9, giving jurisdiction to the district court of the United States, in cases of this description, against consuls and vice-consuls, is constitutional or not.

The clause of the constitution of the United States which is supposed to be violated by this law, is that part of the 2d section of the 3d article, which declares that, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." It is insisted, that the grant of original jurisdiction in these cases to the supreme court, means exclusive original jurisdiction, and that it is not in the power of congress to confer original jurisdiction, in the cases there mentioned, upon any other court.

The question thus presented for the decision of the circuit court, is certainly a difficult and embarrassed one. Different opinions have been expressed upon it by eminent men in high judicial stations; and the difficulties which arise from the words of the constitution itself have been greatly multiplied by the different constructions, which, at different times, have been given to the clause in question.

The earliest case upon the subject is U. S. v. Ravara [Case No. 16,122], in the year 1793. That was an indictment in the circuit court against a consul, for a misdemeanor; and the counsel for the defendant moved to quash the indictment, upon the ground that the clause of the constitution above quoted vested exclusive jurisdiction in such cases in the supreme court, and that the act of 1789, which conferred original jurisdiction on the circuit court, was unconstitutional and void. A majority of the court, however, overruled the objection, and decided that the grant of original jurisdiction to the supreme court was not exclusive; that congress might vest original jurisdiction, in the cases there enumerated, in other courts, and that the act of 1789, conferring jurisdiction upon the circuit court, was constitutional and valid. At a subsequent term of the circuit court, in 1794, the case came up for trial, Chief Justice Jay presiding, and the court charged that the defendant was not privileged from prosecution in virtue of his consular appointment. and the jury, under that charge, found him guilty.

It appears, then, that in the circuit court, upon two different occasions, it was held, that the jurisdiction conferred by the constitution upon the supreme court, in cases affecting consuls, was not exclusive. And these decisions were made by eminent and distinguished judges, some of whom had been members of the convention which framed the constitution, and all of whom had taken prominent and leading parts in the discussions which preceded its adoption by the people. These discussions have all the force and authority which courts have uniformly given to the contemporaneous construction of a law.

But the authority of the decisions in the circuit court was shaken by the case of Marbury v. Madison, 1 Cranch [5 U. S.] 137, where the question as to the construction of this clause of the constitution came, for the first time, before the supreme court. In the opinion delivered in that case, it was said, in general terms, by the court, that the original jurisdiction conferred on the supreme court was exclusive.

In Cohens v. Virginia, 6 Wheat. [19 U. S.] 378, the construction of this part of the constitution again came under consideration. And although the court reviewed and recalled some of the dicta in the case of Marbury v. Madison [supra], yet what had been there said on the point now in question, was not disturbed, and the court again strongly intimated that the clause granting original jurisdiction to the supreme court was so far exclusive, that congress could not grant original jurisdiction, in the cases enumerated, to an inferior tribunal of the United States.

And in Osborn v. United States Bank, 9 Wheat. [22 U. S.] 820, the chief justice distinctly expressed the opinion that the original jurisdiction granted to the supreme court, is exclusive, and cannot be given by congress to any other tribunal.

It is worthy of remark, that in two of these three cases in the supreme court, the question was upon the jurisdictions of that court, and not upon the jurisdiction of an inferior

tribunal of the United States. And in the last of them, the question was upon the jurisdiction of the courts of the United States, as contradistinguished from the state courts; and the further question whether the case before them arose under a law of the United States. In neither of these three, was the point directly presented, whether congress could grant original jurisdiction to an inferior court, in the cases enumerated in the clause now in controversy. All therefore that was said by the court in these cases, on that question, was by way of argument and illustration, and not necessarily involved in the decision of the cases then before the court. And we are warned by the chief justice, in the opinion delivered by him in Cohens v. Virginia [supra], that principles thus stated are not to be regarded as binding adjudications; and some of the principles strongly put forth by him in the case of Marbury v. Madison, are repudiated and overruled in Cohens v. Virginia.

Yet, after these repeated declarations of the opinion of the supreme court, so explicitly reiterated in the case of Osborn v. United States Bank [supra], I should not have felt myself at liberty to adopt a different construction of the article in question, if the action of the supreme court on this subject had stopped with the last-mentioned case; for the controversy involves no right reserved to the states or secured to individual citizens. It is a question merely of the distribution of power among the courts of the United States, and when the supreme court had so repeatedly expressed its opinion, that that court, under the constitution, had exclusive original jurisdiction over the subject-matters enumerated in the clause now under consideration, it would hardly have been proper or decorous in the circuit court to disregard those opinions, although they were expressed when the point in controversy was not directly before it.

But the action of the supreme court did not stop with the cases above cited; the point in dispute was brought directly before the court in U. S. v. Ortega, 11 Wheat. [24 U. S.] 467. That case came before the supreme court upon a certificate of division of the judges of the circuit court, and the points presented by the certificate were—1. Whether it was a case affecting an ambassador or public minister; and—2. If it were such a case, was the act of 1789, giving original jurisdiction to the circuit court, constitutional or not? The court said it was not necessary to decide the second point, because they were of opinion that it was not a case affecting an ambassador or public minister. It can hardly be supposed, that the supreme court would have refused to express an opinion on the second point, if they had regarded the question as settled by the previous decisions of that court. The manner in which they treated it, when thus directly brought into discussion, shows that in their opinion, it was still an open one, and had not been concluded by anything said in the different opinions of the court to which I have before referred; and the reporter in a note to this case expressly states that the point in question had not been decided by the supreme court.

But in another and very late case the court have, in my judgment, distinctly affirmed the constitutionality of the act of 1789, on the very point in controversy. In the case of Davis v. Packard, 7 Pet. [32 U. S.] 281, the question was brought before the court by writ of error from the court of errors of New York, which court was supposed to have decided that a state court had jurisdiction in cases where a consul was concerned. It turned out afterwards, that the court had not so decided; but the supreme court, when the case came before them, interpreted the record otherwise, and, acting upon that interpretation, reviewed the judgment of the court of errors of New York. Judge Thompson, in delivering the judgment of the supreme court, says: "As an abstract question, it is difficult to understand, on what ground a state court can claim jurisdiction of civil suits against foreign consuls. By the constitution, the judicial power of the United States extends to all cases affecting ambassadors, other public ministers and consuls; and the judiciary act of 1789, § 9 (1 Stat. 76), gives to the district courts of the United States, exclusively of the courts of the several states, jurisdiction of all suits against consuls and vice-consuls, except for certain offences mentioned in the act." This language used by the court, with the point directly before them, can only be understood as an affirmance of the constitutionality of the act of 1789; for the exclusion of the state courts is not put upon the ground, that they were impliedly excluded by the grant of original jurisdiction in such cases to the supreme court; but the decision is placed on the grant of power to the courts of the United States generally, and on the act of 1789, which conferred the jurisdiction on the district courts, and excluded the state courts. No notice is taken, in that opinion, of the clause conferring original jurisdiction on the supreme court. The exclusion of the state courts is not derived from it, but from the act of 1789; so, of course, that act was deemed constitutional.

This decision is in conformity with the contemporaneous construction of the constitution, given by the circuit court in the case of U. S. v. Ravara, before referred to. And although the authority of that case was much doubted, after the opinions delivered in Marbury v. Madison, Cohens v. Virginia, and Osborn v. United States Bank [supra], and more especially on account of the high and just reputation of the eminent judge by whom those opinions were delivered, yet this vexed question ought, in my judgment, to be regarded as now settled by the case of Davis v. Packard [supra].

It is worthy of remark, also, that the elementary writers, generally, seem to have re-

garded the act of 1789 as constitutional, and to have relied on the case of U. S. v. Ravara; Vide [U. S. v. Ortega] 11 Wheat. [24 U. S.] 473, note; Rawle, Const. 221, 222; Conk. Exec. Powers, 160; Serg. Const. Law, cc. 17, 18.

Independently, however, of any judicial authority, the conclusions of my own mind must have been very clear and free from doubt, before I should have felt myself justified in pronouncing an act of congress passed in 1789 a violation of the constitution. It was the first congress that met under the constitution, and in it were many men who had taken a prominent and leading part in framing and supporting that instrument, and who certainly well understood the meaning of the words they used. The fact that the law in question was passed by such a body, is strong evidence that the words of the constitution were not intended to forbid its passage.

Nor am I by any means satisfied that the words used require a different construction from that given to them by the act of 1789. There are no express words of exclusion in the clause which confers original jurisdiction, in the cases mentioned, upon the supreme court. Why should they be implied? They are clearly not implied in relation to the state courts, in the clause immediately preceding, which gives judicial power in certain cases to the courts of the United States; for there are some subjects there enumerated from which it never could have been designed to exclude altogether the state authorities. For example, the constitution of the United States is the supreme law in the several states, and the courts of the states are bound to respect and interpret it, and to declare any state law null and void which violates its provisions. Again, the laws of congress, when passed in the exercise of its constitutional powers, are obligatory upon the state courts, and must be construed by the courts, and obeyed by them, whenever they come in conflict with the laws of the state. It is true, that the decisions of the state courts must be subordinate to, and subject to the revision of, the supreme court of the United States, to whom the ultimate decision of such questions belongs; yet, the state courts are not, and cannot, from the nature of our institutions, be excluded from all jurisdiction in such matters, and the grant of power to the courts of the United States has never been held to exclude them. If the grant of jurisdiction to the courts of the United States, generally, is not, by implication, the exclusion of all other courts, in the cases enumerated in that grant of power, why should the grant of original jurisdiction to the supreme court in certain cases, in the very same section, and by the next succeeding clause, be held to imply such exclusion? The original jurisdiction conferred on the supreme court is not inconsistent with the exercise of original jurisdiction on the same subjects by the inferior courts of the United States, and there is no necessity, therefore, for implying an intention to exclude them.

Indeed, if the grant of original jurisdiction, in the cases mentioned, implied exclusion of jurisdiction on those subjects, the exclusion would seem most naturally to apply to the appellate jurisdiction of the court itself, and to prohibit it from the exercise of the latter in the cases where the former was given. The subject-matter of this part of the section is the jurisdiction of the supreme court, and it is divided into appellate and original. The cases are enumerated in which it shall have original jurisdiction; and appellate is given to it in others. Now it might very well be supposed, that in thus classing the subjects upon which it should have original, and upon which it should have appellate jurisdiction, the framers of the constitution meant to limit its jurisdiction in the manner in which it is there divided, and to exclude it from original jurisdiction where appellate was given, and to exclude it from appellate where original was given; and this was supposed to be the construction given to it in the case of Marbury v. Madison [supra], by the learned judge who delivered the opinion. But when the subject was further discussed and considered in the case of Cohens v. Virginia [supra], it became manifest, that such a construction could not be sustained, without depriving the supreme court of some of its most important and necessary powers; powers which, from the whole frame of the instrument, it was evidently intended that the court should exercise; and which, although classed in its original jurisdiction, it could exercise only in an appellate form, when the question arose in a suit in a state court. The language used in Marbury v. Madison was therefore qualified and explained, and it was decided, that the grant of original jurisdiction, in the cases enumerated, to the supreme court, did not exclude from appellate jurisdiction over the same subjects. And this latter construction is now the established law of the country. If the arrangement and classification of the subjects of jurisdiction into appellate and original, as respects the supreme court, do not exclude that tribunal from appellate power in the cases where original jurisdiction is granted, can it be right, from the same clause, to imply words of exclusion as respects other courts whose jurisdiction is not there limited or prescribed, but left for the future regulation of congress? The true rule in this case is, I think, the rule which is constantly applied to ordinary acts of legislation, in which the grant of jurisdiction over a certain subject-matter to one court, does not, of itself, imply that that jurisdiction is to be exclusive. In the clause in question, there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject-matter.

Nor is there anything in the official char-

acter and functions of a consul which should lead us to suppose, that the framers of the constitution meant to confine cases affecting such officer exclusively to the supreme court. A consul is not entitled, by the laws of nations, to the immunities and privileges of an ambassador or public minister. He is liable to civil suits, like any other individual, in the tribunals of the country in which he resides; and may be punished in its courts for any offence he may commit against its laws. Wheat. Int. Law, 181; 1 Kent, Comm. 43, 45. He, usually, is a person engaged in commerce; and in this country, as well as others, it often happens, that the consular office is conferred by a foreign government on one of our own citizens. It could hardly have been the intention of the statesmen who framed our constitution, to require that one of our citizens who had a petty claim of even less than five dollars against another citizen, who had been clothed by some foreign government with the consular office, should be compelled to go into the supreme court to have a jury summoned in order to enable him to recover it; nor could it have been intended, that the time of that court, with all its high duties to perform, should be taken up with the trial of every petty offence that might be committed by a consul, in any part of the United States; that consul too, being often one of our own citizens. There is no reason, either of policy or convenience, for introducing such a provision in the constitution; and we cannot, with any probability, impute such a design to the great men who, with so much wisdom and foresight, framed the constitution of the United States; they have used no words expressly prohibiting congress from giving original jurisdiction in cases affecting consuls, to the inferior judicial tribunals of the United States; and in the absence of every express prohibition, I see no sufficient grounds to justify this court in implying it, and pronouncing, merely upon such implication, that the act of 1789 is unconstitutional and void.

The judgment of the district court in this case must, therefore, be reversed, and the motion to quash the writ which issued from that court overruled.

GITTINGS (THOMAS v.). See Case No. 13,897.

Case No. 5,466.

GIVEEN v. SMITH.

[1 Hask. 296.] [1]

Circuit Court, D. Maine. Sept., 1870.

BANKRUPTCY — SUIT IN EQUITY BY ASSIGNEE AGAINST MORTGAGEE OF CHATTELS— FRAUDULENT PREFERENCE.

In equity, an assignee in bankruptcy cannot maintain a bill against a mortgagee of the chattels of the bankrupt to avoid the mortgage as a fraudulent preference, after having sold the chattels without order of court for the sale of incumbered property under section 25 of the bankrupt act [of 1867 (14 Stat. 528)], when the mortgagee, by answer, repudiates all claim to the funds received from the sale, and acquits the assignee from all liability.

In equity. Bill by [Thomas M. Giveen] the assignee of a bankrupt against [Joseph Smith] a mortgagee of chattels, to set aside the mortgage as a fraudulent preference given by the bankrupt. The assignee had sold the chattels before he brought his bill, but without order of court for the sale of incumbered property under section 25 of the bankrupt act. The mortgagee, by answer, repudiates all claim to the funds received by the assignee from the sale of the property, and acquits the assignee of all liability in the premises. Proofs were taken.

William L. Putnam, for orator.

Edwin B. Smith, for respondent.

Before SHEPLEY, Circuit Judge, and FOX, District Judge.

FOX, District Judge. The bill, as originally drawn charged, that the mortgage given by the bankrupts to Smith, on the 17th day of February, 1869, was fraudulent and void, under the provisions of the bankrupt law, having been made within four months of the filing of the petition in bankruptcy, with intent to give a fraudulent preference, &c., and "that Smith sets up and claims to hold and maintain the mortgage as against the assignee and refused to surrender the same, though requested so to do, and that at a sale of the property by the assignee, on the 27th day of May, he notified said assignee and the other persons present that he claimed to hold the goods by said mortgage;" and the complainant prayed, "that Smith may be required to surrender up and cancel the mortgage, and that he and his agents, &c., may be enjoined from foreclosing, setting up or claiming said mortgage as against the complainant as assignee, and offers to pay whatever may be due upon said mortgage, if adjudged valid." A preliminary injunction was granted, as prayed for, upon the complainant's filing satisfactory security to abide the decree and to pay all sums for principal and interest, decreed by the court to be due on said mortgage.

Smith, in his answer, claims that the mortgage is in all respects valid, and was made and received "as security for a debt for present considerations," without fraud or any intent to violate the bankrupt act, and alleges, "that the assignee has sold the property at auction to C. J. Walker, with notice of Smith's claim, and that Walker bought it at a sum far below the actual value in consequence of this incumbrance; that Walker, prior to the filing of the bill, sold the property to Elwell; and so the defendant avers, that the complainant has now no interest or title to the property, and hath no right to

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

maintain this bill relating thereto, and that the present owner purchased the same with a full knowledge of all the facts and subject to said mortgage, and has a complete remedy at law; and that upon these facts, this court has not jurisdiction in equity over the parties or the subject matter thereof."

The case was heard in part, at the last April term, and the complainant then moved for and had leave to amend his bill by alleging, "that said stock was sold by the assignee, May 27, 1869, expressly free from all incumbrances, for $975 to C. J. Walker, which sum was recovered and is still held by said assignee; that at the time of the sale, said Smith notified said assignee that he claimed to hold said stock by virtue of said mortgage, and he has ever since claimed to hold, and has set up said mortgage, as a valid lien and claim upon the property; that by reason of said claim, he is embarrassed and prevented from settling said estate and dividing said proceeds among the creditors of said bankrupts who have proved their claims, and he fears, he may be sued by said Smith for his acts aforesaid by reason of said mortgage; he therefore prays, that the court will decree said mortgage void as against the complainant, his successors and assigns, and will also determine, whether said Smith had any claim on said property by virtue of said mortgage as against the complainant, his successors and assigns, and by reason thereof, any lien on the proceeds aforesaid; and if they shall find that he has any such lien or claim, that thereupon the court will determine the amount thereof, and that upon the payment of said sum, if any, by your complainant, from said proceeds, said Smith may be restrained and perpetually enjoined from foreclosing, setting up or claiming said mortgage as against your orator, his successors and assigns; and that a subpoena may issue to said Elwell and he may be made a party defendant thereto."

To the amended bill Smith makes further answer, denying that the property was sold, "expressly free from all incumbrances;" and he alleges, "that all that was sold was the equity of redeeming said stock from his mortgage; that he does not set up any claim to the sum received from the sale, except as he may be entitled by reason of the order of the court, which gave him security, at the time he was enjoined at the instance of the complainant, from prosecuting his claim to and remedy against the goods themselves, which have since been scattered and sold, while this defendant has been prohibited and restrained by said injunction from preventing it. He denies that the complainant is delayed or embarrassed in any way, by defendants, in selling said estate or distributing its assets, and disclaims any purpose of suing the assignee for any action by him taken with reference to said goods or sale thereof, claiming such sale to be subject to defendant's mortgage."

From the evidence, we are fully satisfied that the mortgage which was taken by Smith from the bankrupt, in February, 1869, it having been made within four months of the filing of the petition against him in bankruptcy, was designed and intended by the parties as a fraudulent preference, and was therefore fraudulent and void as against the assignee in bankruptcy, and under the provisions of the 35th section of the act, the assignee, if he had not disposed of the property, could without doubt have sustained a bill in equity against Smith to have said mortgage decreed void, and to recover of him the property or the value thereof.

By the 25th section of the bankrupt act, upon the petition of the assignee, "whenever it appears to the satisfaction of the court, that the title to any portion of the estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold under the direction of the assignee, who shall hold the funds received, in place of the estate disposed of."

In the present instance, the assignee did not avail himself of this very salutary provision of the law, but he obtained from the register the common order of sale of unencumbered property, without any suggestion that the property was mortgaged or in dispute, or that there was any other claimant thereto, and without any notice to Smith of the application. The proceeds of the sale are now held by the assignee. If this sale had been by an order of the district court, after due notice to Smith, the proceeds realized therefrom would have been substituted for the property; the rights of all parties would have attached to the proceeds, the same as they existed to the property itself, and no question is entertained that under such circumstances the assignee could have sustained a bill in equity to determine the validity of the mortgage and Smith's rights to the proceeds by virtue thereof. But unfortunately for the complainant, this course was not adopted by him, and he cannot derive any aid or support to his bill from the provisions of the 25th section of the bankrupt act, but his right to maintain it depends on the general principles of law as administered in courts of equity.

The complainant, having disposed of the mortgaged property, brings his bill against the mortgagee, alleging, that he is in possession of the proceeds of the sale, and that the mortgagee has ever since the sale claimed to hold and has set up said mortgage as a valid lien and claim on the property, whereby the complainant is embarrassed and prevented from settling the estate in bankruptcy; and he fears that he may be sued by said Smith for his acts aforesaid, by reason of said mortgage; and the prayer is,

that the court will decree the mortgage void as against the complainant and his assignee, and will determine whether said Smith has any claim on said property by virtue of said mortgage as against the complainant, his successors and assigns, and by reason thereof, any lien on the proceeds aforesaid, the amount of which when determined by the court, the complainant offers to pay and discharge from the proceeds; the substance of the bill therefore is, that the complainant apprehends that Smith may have a lien or claim on the proceeds of the sale in the hands of the assignee, and may hereafter institute a suit against him therefor. The validity and extent of this lien, the court is asked to determine in this suit; but the respondent, in his answer, makes no claim whatever against the proceeds from the sale of the mortgaged property, he the rather, as we understand the answer, admits he has no claim against the fund in the hands of the complainant, and as we apprehend, would, by his answer, be barred from ever setting up any claim thereto. He avers that only the equity of redemption was sold, to the proceeds of which, of course, he as mortgagee could not sustain any claim, and although his disavowal of any interest in the fund or of any right to satisfaction of his mortgage debt is presented in rather a double aspect, yet the effect of his answer would be to estop him hereafter from any legal claim against the assignee, either for disposing of the mortgaged property or for its proceeds. He avers in his answer, "that he does not set up any claim to the sum received from said sale, except as he may be entitled by reason of the order of the court, which gave him security at the time he was enjoined, etc., disavows any purpose of suing the complainant for any action by him taken with reference to said goods, or the sale thereof, claiming such sale to be subject to defendant's mortgage."

His disavowal therefore is full and precise, with the exception of a reservation of his rights to the security ordered to be given him by the complainant, when the injunction was obtained; this security was by bond, with surety, conditioned "that said Giveen shall abide by the decision of said court in said suit, and shall pay all sums for principal and interest decreed by said court to be due on said mortgage." As the court has no doubt that the mortgage was fraudulent and void under the provisions of the bankrupt act, it cannot be expected that the respondent will succeed in obtaining a decree for the payment of his debt secured thereby; if the bill cannot be sustained, the proper course would be to dismiss the bill, leaving all parties to their legal rights. But a court of equity would never be justified under such circumstances in aiding a party to a fraudulent transaction to obtain any benefit or advantage therefrom. The exception in the answer therefore would not be of any effect, and the disavowal of all claim against the assignee, or the proceeds of the property in his hands must be deemed as if absolute and unqualified, so that no claim could be hereafter made against the assignee by said Smith.

The answer therefore presents a complete defence to the bill as now framed, and we do not find any testimony contradictory to the answer, sufficient to satisfy us that the respondent has heretofore set up any such claim or pretence as is alleged in the bill of the complainant, and which would justify a decree for the complainant.

The counsel for the complainant, at the argument, endeavored to sustain the bill on an entirely different ground, viz.: that the mortgagee might hereafter institute his suit to recover the value of the mortgage property from Elwell, and in that case the assignee would be bound to indemnify him from any judgment which might be recovered against him. The difficulty in adopting this view is, that the bill is not drawn to meet any such case. It does not contain any averments, that Smith may hereafter make such a claim on Elwell or require Smith to avow or deny his purpose to institute such a suit, nor does it admit directly that the assignee would be bound to indemnify Elwell from such a claim and offer so to do. Neither Walker, or Tyler, Lamb & Co., who were intermediate purchasers, and who might have an interest in the matter are made parties, and although by the amended bill the complainant asks "that a subpoena may issue to Elwell, and he be made a party defendant hereto," it does not appear from the bill, why or for what purpose he is in this manner made a party, as there are not found in the bill any charges in relation to him, nor is he named in the prayer, or is the court in any way advised what remedy, if any, is brought against him. His default does not appear to the court to afford any support to the bill as it stands, as there are no averments or charges against him, to which the default is applicable.

The bill admits that the stock was sold "expressly free from all incumbrances." This is denied in the answer. The bill of sale of stock, executed on the day of sale as the written contract of sale, purports to convey the stock itself, and certain averments of the assignee are found contained in said bill of sale, but none whatever relating to the title or freedom from incumbrances. It is claimed by defendant, that parol evidence is inadmissible to vary the averments; that the bill of sale is the only evidence of the contract and liabilities of the party; but as all the parties to the contract are not now before the court, we think proper to reserve our opinion as to the admissibility of parol evidence that the sale was made expressly free from all incumbrances, as well as any decision as to the legal operation and effect of the bill of sale

as executed, with the suggestion, that it may perhaps appear on an examination of the authorities, that a third party cannot compel one to avail himself of an objection of this character, if contrary to truth and justice, and the actual agreement of the contracting parties. By insisting on such an inequitable and unjust objection, the vendor might possibly render himself answerable in an action of the case for all the damages sustained from his warranty or representation as to the state of the title at the time of sale, although not set forth in the written contract.

As the bill now is, it cannot be sustained; but if the complainant shall be advised that upon the facts as they existed, he would be entitled to relief upon a bill with proper parties and allegations, upon which it must not be understood that the court has any decided opinion, we are inclined to allow leave to amend the bill in those respects, the complainant relinquishing all costs to the present time.

[NOTE. The bill was amended in conformity with this opinion, and the cause was heard upon the bill, answer, and proofs, the court rendering a decree in favor of the complainant, with costs from September 8, 1870. See Case No. 5,467.]

Case No. 5,467.

GIVEEN v. SMITH et al.

[1 Hask. 358.] [1]

Circuit Court, D. Maine. Sept., 1871.

CIRCUIT COURTS — JURISDICTION — BANKRUPTCY — FRAUDULENT CONVEYANCES — POWER OF DISTRICT COURT TO ORDER SALE OF INCUMBERED PROPERTY — SALE BY ASSIGNEE — BILL AGAINST HOLDER OF INCUMBRANCE — MULTIFARIOUSNESS.

1. The circuit court has original concurrent jurisdiction with the district court to determine the validity of conveyances alleged to be in fraud of the bankrupt act [of 1867 (14 Stat. 517)], and to determine the respective rights of various persons in and to a fund, received by an assignee in bankruptcy from the sale of incumbered property of the bankrupt estate, and held to abide a decision of the court.

2. The district court has power to order the sale of incumbered property of a bankrupt estate discharged of the incumbrance.

3. A sale by an assignee of incumbered property, discharged of the incumbrance, without notice to the holder of the incumbrance of the application for an order of sale, is sustained, the holder of the incumbrance having been present at the sale, and having had ample opportunity to apply to the court for redress, and not having done so, the court having retained a sufficient sum from the proceeds of the sale to discharge the incumbrance on application.

4. In equity, on bill by the assignee against the holder of such incumbrance and the purchasers of the property, who are threatened by such holder with an enforcement of his incumbrance, it is competent for the court to determine the validity of the incumbrance, although the holder of it repudiates all claim to the fund in court, and disavows all liability of the assignee to himself by reason of the sale; and if found to be a fraudulent preference under the bankrupt act, to decree its cancellation, and enjoin its enforcement against both the property and the purchasers thereof.

5. A bill in equity is not multifarious, when brought by the assignee in such case against all parties in interest seeking a determination of the rights of all of them in the premises.

In equity. Amended bill by [Thomas M. Giveen] the assignee of a bankrupt, filed by leave of court granted [Case No. 5,466] against [Joseph Smith] the mortgagee of the stock in trade of the bankrupt and sundry vendees of the same under a title derived from the assignee, who sold the same free of incumbrances under an order of court granted without notice to the mortgagee, seeking to have the mortgage decreed void as a fraudulent preference, and the mortgagee perpetually enjoined from enforcing his mortgage title against the property or the purchasers of the same, or against the funds received from the sale thereof in the hands of the assignee. The bill was taken pro confesso against all the respondents but the mortgagee, who answered, denying that his mortgage was void as a fraudulent preference, and averring that the assignee sold only the right of redeeming the property from the mortgage, and that the same constitutes a valid lien upon the property for the security of the mortgage debt, and disclaiming any intent to hold the assignee responsible for the sale of the mortgaged property, or to assert any lien upon the proceeds of the sale in the hands of the assignee, and denying the jurisdiction of the court in the premises, and asserting that the bill was multifarious. The cause was heard upon bill, answer, and proofs.

William L. Putnam, for orator.

Edwin B. Smith, for respondent Smith.

Before SHEPLEY, Circuit Judge, and FOX, District Judge.

FOX, District Judge. It is certainly a satisfaction to the court, to find this cause, at last, so presented that it will be finally disposed of. The complainant was duly appointed assignee in bankruptcy of E. A. & W. B. Fenderson, who within four months of the commencement of proceedings in bankruptcy against them by their creditors, had, as is claimed by the present bill, given Smith a mortgage on their stock in trade in fraud of the provisions of the bankrupt act. The mortgagee never had the possession of the property mortgaged, but the same was retained by the bankrupts and by them surrendered to the assignee, who obtained from the district court in bankruptcy, without notice to Smith, an order of sale of the stock, which was disposed of to C. J. Walker for $975, Tyler, Lamb & Co. being interested in the purchase. The stock was subsequently sold to Elwell, and by him sold at retail.

This bill is now brought in the circuit court to determine their respective rights against Smith and the various purchasers of the stock.

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

None of the defendants excepting Smith appeared, and as to them the bill was taken pro confesso. The complainant in his bill alleges, "that Smith at the time of the sale notified the assignee that he claimed to hold said stock by virtue of his mortgage and that he has ever since claimed to hold and has set up said mortgage as a valid lien and claim upon said property; that at the sale and previously thereto, the complainant personally and by his attorney represented to Walker and all other persons present, that said property was free from all incumbrances, and that he expressly sold the same free from all incumbrances, and that he expressly offered to sell and did sell the property itself, and not merely an interest in the property subject to incumbrances, and that Walker relying on said representations and statements, bid on said property and paid complainant $975 as the full value of the same, free of all incumbrances, as was then and there expressly agreed and understood between him and your orator; that complainant fears that Smith may claim a lien on the proceeds of the sale, or that he may commence a suit against the vendees, in which latter event said vendees claim, and as the complainant is advised and believes, they would be entitled to be protected from the fund, or by your orator, as he is advised and believes they have a specific claim against the fund and your orator by reason of the premises, to the extent of any claim, if any there is, against them, or either of them by virtue of said alleged mortgage of Smith; that he has requested Smith not to set up any claim against your orator or any persons claiming under him, with which request Smith refuses to comply, and that by reason of these claims, he is embarrassed and prevented from settling said estate; that notwithstanding the bill of sale to Walker contained no covenants of warranty of title, that the claims of the vendees to be protected against Smith's mortgage are complete and perfect according to the agreement of the parties and the principles governing courts of equity; that the proceeds of the sale are held by the assignee, $700 of the amount being deposited in the savings bank, by order of the district court to abide the result of this cause, which sum is more than the amount claimed by Smith under his mortgage." The case finds that amount is deposited in the savings bank, but there is not in the record any legal evidence of any order of the district court that it should be so deposited.

The bill concludes with an offer to give Smith security to pay his mortgage if found valid, or deposit in court a sum sufficient to cover the same with costs, and prays that the court will determine "whether any of the defendants have any claims as aforesaid on the fund or your orator, and will ascertain and determine whether the mortgage to Smith is or not valid, and if valid the amount due thereon, and after payment of same, to decree and adjudge that none of said defendants have any further lien or claim on your orator or said fund, and that said Smith may be enjoined from setting up said mortgage against your orator or any person claiming through or under him, or by said sale."

The complainant having given bond to pay Smith the amount due on his mortgage if the same should be adjudged valid, a preliminary injunction was granted against him.

Smith in his answer, denies that his mortgage was in fraud of the act, or that the Fendersons were at that time insolvent, and he avers, "that he claims it to be and does still set it up as a subsisting valid incumbrance on the property mentioned therein, made as security for a debt for present considerations otherwise valid; that he is informed and believes that the sale was only of the alleged bankrupt's interest in said stock, and not of the unincumbered property, and that he caused the persons attending the sale of the stock to be notified of his title and of his claim thereon; but he denies that he ever proposed or now intends to institute any suit at law or in equity against the complainant for the sale of said stock made by him in his official capacity, and that since the former hearing he has given him a written engagement to that effect; that he has never made any claim against said assignee on account of his sale of said stock, and never will make such claim; that by the sale the complainant devested himself of all interest in the stock, and hath therefore no right to maintain this bill; that there is no existing enforceable agreement as to this mortgage between the complainant and the other respondents, as the bill of sale contains no covenants of title, and parol evidence cannot be received to contradict or modify its terms; that all the complainant did or could sell was the bankrupt's interest in said property, subject to said mortgage and all legal incumbrances; that Walker and the other purchasers have no right to have their title protected from the proceeds of said sale, nor have they any specific claim upon the fund arising from said sale, and that he has never done aught to prevent the distribution of the assets among the creditors, and that he claims only such rights under the mortgage as belong to a mortgagee after the equity of redeeming the mortgaged property has been sold; and he expressly disavows any claim to the proceeds of said sale by reason of said mortgage, and denies that he has ever claimed or does now claim any lien thereon, all which liens and claims it belongs to the district court to determine."

Walker's testimony proves that at the time he paid for the stock, he notified the assignee that he bought the stock free and clear, and should look to him for indemnity and protection, and if he should have to pay anything on account of Smith's claim, he should demand it of the assignee. The order from the district court to the assignee was to sell the stock; that in pursuance of such order he did sell the absolute property in the stock free of all incumbrances; and that the vendee thus

purchased the same, is from all the testimony beyond question; and it is equally clear, notwithstanding the denial found in Smith's answer, that he was well aware that the stock was thus sold. This fund is now held by the complainant as assignee, partly in the usual bank of deposit, and the residue in the savings bank as a special deposit to abide this controversy; and although Smith in his answer now exonerates both the assignee and the fund from all claim or liability directly to him as the mortgagee, it is evident that he intends to follow the purchaser by a suit at common law the moment he shall be relieved from the injunction he is now under in this cause, and his answer is so drawn, that we can find nothing therein which would debar him from such a proceeding. If successful, the vendee would of course attempt to obtain redress from the assignee. Under these circumstances, shall this protracted, vexatious litigation, the costs and expenses of which must exceed the claim itself, be permitted to continue, or is this court authorized to determine finally in this suit the rights of the respective parties?

The learned counsel for this respondent has with much confidence again urged upon us the objection that the circuit court has not jurisdiction of this cause; that as presented by the bill, the question is, whether any lien exists or can arise against the fund now held by the assignee, and that the district court is alone authorized to determine this question. It is beyond dispute, that under the first section of the bankrupt act, the jurisdiction of the district court extends to "the ascertainment and liquidation of the liens and other specific claims on the assets of the bankrupt," because such is the express language of that section. But we find nothing in the act which vests this jurisdiction exclusively in that court; on the contrary, by the second section of the act, it is provided that "the circuit court shall have concurrent jurisdiction with the district court of the same district, of all suits at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt, transferable to or vested in said assignee."

In our opinion, the case as made by the bill is directly within the authority and jurisdiction thus conferred on the circuit court. The bankrupts' stock in trade, by them turned over to the assignee, has by the assignee been sold, and a claim is made against this fund by the vendees of the stock, on the ground that this defendant held by a mortgage from the bankrupt an older and better title to the property sold, and by this bill, the assignee has brought before the court all parties who can in any way have any adverse interest in the stock or the proceeds therefrom, in order that their rights may all be ascertained and determined and protected from the proceeds of sale, which in a court of equity are substituted for and held in lieu of the stock itself. This is clearly a controversy between the assignee and the vendees, touching an interest claimed against the estate of the bankrupt. As has been repeatedly decided, the proper remedy to have been adopted in the district court to determine the rights of those parties would be by a bill in equity against the identical parties, respondents in the present cause, and in such suit an appeal could be taken from the decree of the district court to this court. That original concurrent jurisdiction, over these parties and the subject of controversy, exists also in the circuit court, is clear to our minds from the language of the act, as well as from the authorities. See opinions of Lowell, J., in Foster v. Ames [Case No. 4,965], of Clifford, J., in Knight v. Cheney [Id. 7,883], and in Morgan v. Thornhill, 11 Wall. [78 U. S.] 65.

The eighth section of the bankrupt act of 1841 [5 Stat. 446] conferred on the circuit court concurrent jurisdiction with the district court in the very same words as are now found in the second section of the present act. In McLean v. Lafayette Bank [Case No. 8,885], Mr. Justice McLean declares that the jurisdiction vested in the circuit court by this language "is ample, and reaches every possible controversy which can arise in the collection and distribution of the effects of the bankrupt. Of whatever nature his rights may be, the assignee may invoke the jurisdiction of the circuit court for relief."

In Ex parte Christy, 3 How. [44 U. S.] 316, Mr. Justice Story says, "It must be admitted, that under the eighth section (act of 1841), a bill in equity may be brought by or against a creditor in the circuit court to redeem, or foreclose, or to enforce or to set aside such a lien, mortgage, or other security. If it can be, then the lien, mortgage or other security is not saved from the cognizance of the circuit court having jurisdiction in bankruptcy, but the most simple remedies lie there; and although the rights of such creditors are to be protected, they are subject to the entire examination and decision of the court as much as they would be if brought before the court, in the exercise of its ordinary jurisdiction."

Had the district court, under all the circumstances, authority to order a sale of the stock, notice of the application to the court for such order not having been given the mortgagee as required in case of proceedings under the twenty-fifth section of the act? Such notice not having been given, his doings and the authority of the court derive no aid from the provisions of that section, and if valid, they must depend on the general principles of law as administered in courts of equity, in connection with the other provisions of the bankrupt act, as we have heretofore decided in this cause.

In Foster v. Ames, before cited, Judge Lowell has made a very critical examination of the bankrupt act, and he there decided that the district court in bankruptcy may authorize the assignee to sell mortgaged property discharged of the incumbrances. The power of the court to order such sale on petition of the assignee does not depend on section 25 of the bankrupt act, and is not limited by the proviso of that section, but may be exercised, notwithstanding the mortgagee asserts a right of immediate possession of the goods, and intends to bring, or does bring an action for the recovery of possession.

Such sales were ordered by the court in Re Stewart [Case No. 13,418]; Re Barrow [Id. 1,057]. In Re Columbian Metal Works [Id. 3,039], Blatchford, J., held that "the district court has full power to order the sale of encumbered assets in such manner as it chooses to direct." In Huston v. City Bank, 6 How. [47 U. S.] 486, it was decided by the supreme court that under the bankrupt act of 1841, the district court had power to order a sale of the property of the bankrupt under mortgage and make a title free from the mortgage, marshalling and disposing of the proceeds according to the priorities of those interested.

The authority conferred upon the district court to control and dispose of the assets of the bankrupt under the present act, instead of being in any respect diminished or restricted, is in fact more extensive than that conferred by the act of 1841, as will clearly appear from an examination of the several acts; and the court can entertain no doubt that the district court, under its general authority conferred by the bankrupt law, could authorize the sale of encumbered property of the bankrupt, and is not restricted to the authority and manner prescribed in section 35. The only distinction which is perceived between the foregoing cases and the present is, that in those, notice of the application for the order of sale was given to the mortgagee or the lien creditors, whilst in the present case it does not appear, and is not claimed, that such notice was given, the court not being advised at the time of the application that there was this alleged incumbrance. Does this fact of want of notice vary the case and devest the court of its authority, which was otherwise conferred upon it to order the sale of the stock itself? And is the sale for this reason to be restricted to a transfer of the mere equity of redemption of the stock from the mortgage, and not to be held as a transfer of the property unencumbered?

The order of sale as granted by the court May 3d, was to sell at public or private sale the stock itself. It was so advertised in the public prints May 4th. The mortgagee was fully aware of the order of sale, and of its legal effect and authority, as claimed by the assignee. The sale was adjourned from May 15th to the 21st, and again to the 27th, and no steps were taken by the mortgagee to revoke the order; on the contrary he was present at the sale on the 27th, notified the parties of his claim by mortgage, was informed by the assignee that the stock was to be sold unconditionally, free of all incumbrances. The sale having thus been effected and a special deposit made of a portion of the proceeds, sufficient to discharge the amount claimed under the mortgage, and to abide the result of this cause, for the security of the mortgagee, he has been fully protected and can in no way suffer any detriment from the sale, if his mortgage can be upheld, and we think it is now too late, under these circumstances, to raise the objection of want of notice of the application to the court for the order of sale. At most it would have been a merely formal act, and of no possible benefit to the mortgagee, as the district court had full authority, according to the decisions before cited, to order the sale whether the mortgagee assented or not, as the whole matter was in the discretion of the court. In this case, no doubt can be entertained that it was for the interest of all parties to thus dispose of the stock, and the district court we think would have so ordered, although the mortgagee had appeared and offered the petition. If by the sale the vendees have obtained an absolute unincumbered title to the property, and the mortgagee has thereby been devested of all his rights thereto, the proceeds being substituted and held therefor by the assignee subject to all valid liens and claims which existed against the stock itself, what are the rights of the respective parties in this suit?

We are still inclined to hold as we did at the former hearing, that if the mortgagee was the only respondent to the bill, and he by his answer had estopped himself from any claim on the proceeds, or against the assignee, and it did not appear that he had ever made or threatened such a claim, this bill could not be maintained against him; for although by process of law, he had lost his title to the specific property, yet the proceeds were subject to his claim if he chose to assert it for his security, and if he had never claimed any right or interest therein, but legally and in an obligatory manner, disavowed such claim and right, so as to afford full protection to the estate and the assignee, it does not appear equitable that he should be subjected to the trouble and expense of defending this bill. But the case now before us is essentially different. Although by his answer, as we think, he is estopped from maintaining a claim on the fund or assignee, he nevertheless insists on his rights as a mortgagee to follow the property, and it is clear to our minds that such is his purpose. Under these circumstances the vendees claim that they will be injured by the actions of the mortgagee, and will look to the assignee

or the fund for their indemnity. Their claim to indemnity depends wholly on their liability to the mortgagee. In an action against them at common law in favor of the mortgagee, they could defend on both grounds, the invalidity of the mortgage, and also that by the sale under the order of the district court, they had acquired an unincumbered, absolute title to the stock; and in the present cause, we are inclined to the opinion that the complainant is also entitled to the protection of the fund in his hands, and the decree of the court that the vendees have no claim against him or the estate, both because the sale passed to them the absolute title to the property, and because Smith's mortgage was fraudulent and void.

Suppose that the district court, not having given notice to Smith of the petition for order of sale, could not, as against Smith's mortgage if valid, convey to the purchasers an unincumbered title, and that Smith has his election to look to the fund, or follow the property and the vendees, and that his answer is to be deemed an election on his part, to seek his remedy against the vendees. Are they entitled to claim an indemnity from the fund or the assignee? The counsel for the mortgagee contends that they are not, as there are no covenants of warranty of title found in the bill of sale of the stock, and parol evidence is inadmissible to supply such covenants. In our view, the rights of the vendees are not dependent on the question of covenant of title, and whether parol evidence of this nature is or not admissible.

The case most clearly demonstrates that the court ordered the sale of the entire and unincumbered stock. Such was the order in effect. It was "that the stock in trade of said bankrupt be sold." The assignee offered for sale and represented that he did sell the whole stock, the purchaser so understood it and bid for the whole stock, and the bill of sale conveys the stock to him, and the assignee now holds the full amount realized from the sale of the entire and absolute property. This amount is a fund to be distributed; and the question is, whether it shall go to the general creditors of the bankrupt as assets, or whether other parties have a prior and better claim to any portion of it; and this depends on the title of the assignee to the property thus sold by him. If he had a perfect title, then he could dispose of it and confer a valid title to the whole estate and the proceeds and assets of the estate. If he had an incumbered title, a mere equity of redemption, and his sale did not convey anything but the equity, although he undertook to sell the property itself and has been fully paid for it, then his vendees are liable to the holders of the mortgage, and they certainly have a better right to indemnity and protection from the fund, than the creditors have to its distribution among them. Their money has gone to pay for property which the assignee had no right to dispose of. Whether there are covenants or not in their bill of sale is of no consequence, as the court is bound to refund to them their property, for which they have received no consideration to the extent at least of the failure in that respect.

If the assignee had sold to them a case of boots deposited as a bailment with the bankrupt, and to which the assignee acquired no title, and the vendees had subsequently been required to restore the goods or their value to the owner, can there be any doubt that the district court, although there were no covenants of warranty of title to the vendees, would, on the petition of the vendees, order the assignee to refund to them the amount they had paid for the boots to the assignee, if the proceeds were in the assignee's hands undistributed? A court of equity would never sanction the distribution, as assets, of money thus received by the assignee from sales of property of strangers, especially against the remonstrance of the vendees, when his liability to such persons was clearly established. In the case of In re Hitchings [Case No. 6,542], this principle was acted upon by Cadwalader, J., and the assignee was ordered to refund to the purchaser from the funds in his hands the value of certain articles to which he had not acquired a valid title.

It is apparent that these vendees, or some of them, are to be harassed by Smith with further controversy as to this property, unless he is prevented from so doing by this court; and that if successful, and his action is maintainable, and his mortgage is valid, and the defendants should be mulcted in damages, they will claim indemnity from the fund now held by the assignee, and it is our duty to determine whether Smith has such a valid mortgage as would afford him redress against them, and a recourse by them to these funds; and this depends on whether his mortgage constitutes a fraudulent preference within the provisions of the bankrupt act.

Smith in his answer swears that "it was given in good faith, being a mortgage given as security for a debt for present considerations otherwise valid, &c." We regret to be under the necessity of noticing the apparent recklessness of statement in various parts of this answer in respect to matters within Smith's knowledge, which are not only untrue, but which from all the evidence we are satisfied the respondent must at the time have known to be untrue. This mortgage was not given for any present considerations, given at the time of its execution; but was made on the 17th day of February, 1869, to secure a note given to him by the Fendersons February 1, 1866, payable on demand. So, also, the respondent states in his answer "that he is informed and believes that the sale was only of the bankrupt's interest in the stock, and not of the unincumbered property." We do not question that he was so informed, and we are as certain that with the knowledge he

had of the transaction, that no man of common sense could have believed that the assignee sold merely the equity of redemption of the stock from this mortgage.

Such statements in the answer compel us to receive with doubt and distrust all assertions we find therein contained, which are in conflict with, or not corroborated by other evidence; and as this conveyance was of all the bankrupt's property, to secure a pre-existing debt, and was not in the ordinary course of business, it was prima facie fraudulent, and the burden of its support rests with the respondent. Scammon v. Cole [Case No. 12,432].

We are of opinion, as we announced at the former hearing, that this mortgage was a fraudulent preference and void under the provisions of the bankrupt act. The objection of multifariousness finds no support in any of the authorities. McLean v. Lafayette Bank [Id. 8,885]. Decree for complainant, with costs since September 8, 1870.

GIVEN (UNITED STATES v.). See Cases Nos. 15,210 and 15,211.

GIVINGS (UNITED STATES v.). See Case No. 15,212.

GJESSING v. The HANSA. See Cases Nos. 6,036-6,038.

GLAB (UNITED STATES v.). See Case No. 15,213.

GLADDING (CATLIN v.). See Case No. 2,520.

GLADDING (CHILDS v.). See Case No. 2,678.

Case No. 5,468.

GLADDING v. CONSTANT.

[1 Spr. 73.] [1]

District Court, D. Massachusetts. March, 1844.

PLEADING IN ADMIRALTY — DENIAL OF ALLEGATIONS OF ANSWER—SEAMEN SHIPPED IN FOREIGN PORT—MASTER AND MATE—DUTY—ORDERS OF MASTER—WAGES.

1. Where the libellant intends merely to deny the truth of the allegations in the answer, a supplemental libel in replication is not necessary. But when the allegations of the answer are intended to be avoided by new facts, the matter in avoidance should be put upon the record.

[Cited in The Edwin Baxter, 32 Fed. 296.]

2. It is not necessary that a seaman shipping in a foreign port should sign articles.

3. A mate who had been improperly put off duty by the master, and charged by him, without sufficient reason, with incompetency and acts of impropriety, is not thereby justified in refusing to return to duty, upon the order of the master.

4. There is no inflexible rule requiring the court, in all cases, to withhold wages for a wrongful refusal of duty, but the judge may look into the circumstances, and exercise his discretion.

[Cited in Swain v. Howland, Case No. 13,661.]

In admiralty.

R. H. & E. T. Dana, for libellant.

Lorings & Dehon, for respondent.

SPRAGUE, District Judge. This is a libel for wages by the mate of the bark Montgomery. The answer relies upon three grounds of defence: (1) Incompetency; (2) negligence and disobedience; (3) a persistent refusal to perform any duty.

The first is not proved. The second is disproved. The third is admitted, with allegations to justify or excuse it. The real contestation is upon this justification or excuse, and yet that issue is not presented by the pleadings. This is irregular. Where the libellant intends merely to deny the truth of the allegations in the answer, a replication is not necessary. But when the allegations of the answer are admitted, and intended to be avoided by new facts, the matter in avoidance should be put upon the record. This is usually done by a supplemental libel, though sometimes by replication. As both parties came prepared to try the question of justification or excuse, I have, at their request, as matter of indulgence, consented to proceed in the hearing, in the same manner as if that issue had been presented by the pleadings. It appears that the libellant shipped at Manilla, for a voyage to Boston, as mate. He went on board about the 4th of November, and performed his duty to the best of his ability, but not very efficiently, until the bark arrived at St. Helena, about the 4th of February. In departing from that port, the master was dissatisfied with the manner in which the vessel was got under way. On the day following, after some conversation, the mate was put off duty. Soon afterwards the captain requested him to return to duty; the mate replied that he would do so, upon the condition of better treatment; the master would submit to no conditions, declaring that if he performed well, he should be treated well, and that if he did not, he should be treated as he had been, or worse. The mate declining to go to duty, the master peremptorily ordered him to do so. The mate refused, saying that he had not signed the articles, and did not belong to the ship. The master replied, that he did not think his services of much value, and that he should thereafter consider him a passenger. It is here to be remarked, that both seem to have labored under a mistake, as to the legal obligations of the mate. He shipped at Manilla, for a voyage home. This is alleged in the libel, and admitted in the answer. It was not necessary that he should have signed the articles, in order to make this contract obligatory. The statute of 1790 [1 Stat. 131] does not extend this requirement to shipments of seamen in a foreign port; and although the statute of 1840 [5 Stat. 394] makes it the duty of the master to apply to the

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

consul, and cause the name of every seaman shipped abroad to be entered upon the articles, and his contract set forth, it does not require the signature of the seaman. Some difficulty had arisen between the master and the libellant, before arriving at St. Helena, but its nature and extent are left in great obscurity. No sufficient reason has been shown for disrating the mate. The cause assigned at the time, was incompetency and certain acts of impropriety and misconduct, which have not been set up in the answer, nor supported by the evidence. On the other hand, there were no sufficient grounds of justification for the refusal of the mate to return to his duty; and it does not appear that he ever offered to return. Has he forfeited his wages? There is no inflexible rule, requiring the court in all cases to withhold wages for a refusal of duty; but they may look into the circumstances, and exercise a sound judicial discretion, according to the merits of the case. Indeed, by the general maritime law, even a desertion, without a full justification, does not compel the court, under all circumstances, to deprive a seaman of all antecedent wages. In considering what forfeiture should be inflicted upon the libellant, it is to be added that the second mate was not qualified for his station, and the master was thus left to make a winter's passage, to a Northern port, without the aid of a first officer, and with an incompetent second officer, and was thereby subjected to much personal hardship. In behalf of the libellant it is to be observed, that after having rendered service to the best of his ability for three months, he had been wrongfully turned off duty by the master, that the master had imputed to him misconduct of which he was not guilty, and was unyielding in his requisitions, and would neither say nor do anything to soothe the feelings which he had wounded, and that the mate acted under a mistake as to his legal rights. I think justice will be done, without inflicting an entire forfeiture of wages, and that the libellant should recover one-third of his wages, for the time he rendered service. Decree for one month's wages, $30, and costs.

NOTE. Whether new matter (before Adm. Rule 52) should be pleaded by replication, or by supplemental libel, see Taber v. Jenny [Case No. 13,720]; Ben. Adm. § 482; Conkl. Adm. 239; but now by the rule, it is by amendment of the libel. That seamen shipping in a foreign port need not sign articles, see Curt. Merch. Seam. 39; Gardner v. The New Jersey [Case No. 5,233]; Abb. Shipp. 607, note. That the court is not compelled to pronounce a forfeiture of the entire wages, see The Moslem [Case No. 9,875]; Smith v. Treat [Id. 13,117]; Sprague v. Kain [Id. 13,250]; Drysdale v. The Ranger [Id. 4,097]; Macomber v. Thompson [Id. 8,919]; The Maria [Id. 9,074]; Thorne v. White [Id. 13,989]; The Mentor [Id. 9,427]; Scott v. Russell [Id. 12,546]. Contra, The Blake, 1 W. Rob. Adm. 87.

GLADDING (STEVENS v.). See Cases Nos. 13,399 and 13,400.

GLADIOLUS, The (ALBANY DREDGING CO. v.). See Case No. 132.

Case No. 5,469.

GLADSTONE et al. v. CHAMBERLAIN et al.

[1 Am. Law Rev. 587.]

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

PAYMENT "IN CASH"—CONSTRUCTION OF CONTRACT—USAGE.

[The question whether a written contract, made at Ceylon, to pay "in cash" for goods deliverable at New York, means a payment in specie,—gold or silver,—is one of intention; but the intention is to be reached by the court from the terms of the contract, either as the words themselves import, or as they are explained by local custom, or usage.]

[This was a suit on a charter party by Lawrence Gladstone and others against William Chamberlain and others. See Case No. 5,471.]

NELSON, Circuit Justice. The real question in this case is embraced under the issue presented by the second plea, and to which there is a demurrer. That question is, whether or not the contract at the island of Ceylon, in the charter party, to pay for goods deliverable at New York, "in cash," means a payment in specie,—gold or silver. My opinion is, if that is the true interpretation of the agreement, then the libellants are entitled to specie, or its equivalent in New York. The question does not turn upon the intention of the parties outside of the terms or words of the agreement: they are to be interpreted by the court; and such conclusion is to be arrived at as the words themselves import, or as the words, explained by local custom or usage, import.

There is another difficulty arising out of the second plea, and that is as to the effect of the payment and acceptance as averred therein. To disembarrass the case from the pleadings, and enable the parties to present the real question to the court, we shall give judgment in favor of the demurrer, and against the special plea, leaving the case to be tried on the general issue, when the meaning of the phrase "to be paid in cash" may be explained by the usage and custom of the trade, if any such custom or usage exists.

[See Case No. 5,470.]

Case No. 5,470.

GLADSTONE et al. v. CHAMBERLAIN et al.

[7 Blatchf. 207.][1]

Circuit Court, S. D. New York. April 8, 1870.

CHARTER PARTY — CONSTRUCTION — PAYMENT IN SPECIE—PAPER CURRENCY.

Where a charter party for the charter of a vessel was made in Ceylon, in November, 1862, the charter money to be $29,000, "to be paid in cash, on right and safe delivery of the car-

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

go" at New York. *Held*, that, in view of the circumstances which led to the contract, and under which it was made, and of its terms, the amount to be paid must be regarded as having been agreed to be paid in gold or silver and not in the lawful paper currency of the United States.

This was an action on a charter party, brought by the plaintiffs [Lawrence Gladstone and others], as owners of a vessel, to recover an amount claimed to be due by the defendants [William Chamberlain and others] on a charter of such vessel, made by the plaintiffs to the defendants, at Ceylon, in November, 1862, by which the defendants agreed to pay, as charter money, $29,000, "to be paid in cash, on right and safe delivery of the cargo" at New York. The defendants tendered the $29,000 in the lawful paper currency of the United States but not in gold or silver. The tender was accepted, and, it having been agreed that such acceptance should be without prejudice to the right of the plaintiffs to claim that the payment should have been made in gold or silver, this suit was brought to recover the amount of the premium on $29,000 of gold at the time the tender was made. At the trial, before Judge Smalley and a jury, the court left it to the jury to determine, as a fact, what was the intent of the parties at the time the charter party was made, as to the currency in which the charter money was to be paid. The jury found a verdict for the plaintiffs. [Case No. 5,471.] The defendants now moved for a new trial.

Daniel D. Lord, for plaintiffs.
Townsend Scudder, for defendants.

NELSON, Circuit Justice. I have looked into this case, and into the briefs of the learned counsel, and am satisfied that the words in the charter party, "freight for the same to be a lump sum of twenty-nine thousand dollars, which amount to be paid in cash, on right and safe delivery of the cargo," mean a payment in gold or silver. The addition of the words "which amount to be paid in cash" would otherwise be without effect, and surplusage; for, if they are left out, the contract is complete to pay in any lawful currency of the country, at the city of New York, where the cargo was to be delivered and the freight paid.

I do not give any effect to the evidence as to the intent of the parties, at the time the charter-party was entered into, or to the evidence as to the conversation between them at, and previous to, its execution. Such evidence was, I think, inadmissible. The circumstances which led to the contract, and under which it was made, were competent and proper, and tend, in some measure, to explain the meaning of the word "cash" in the connection in which it is found; and, in view of them, and of the terms of the contract, I am quite satisfied that the plaintiffs were entitled to the verdict.

The errors of the judge, which I do not deny, did not work any prejudice to the defendants, as my opinion is wholly independent and irrespective of them. The motion for a new trial is denied.

[See Case No. 5,469.]

Case No. 5,471.

GLADSTONE et al. v. CHAMBERLAIN et al.

[4 Int. Rev. Rec. 130.]

Circuit Court, S. D. New York. 1866.

PAYMENT IN SPECIE.

Payment of moneys falling due in the United States under a charter executed in a foreign country must be made in specie.

This was an action brought to recover an amount alleged to be due upon a charter. The plaintiffs [Lawrence Gladstone and others] were the owners of the ship John O'Gaunt, which the defendants [William Chamberlain and others], in November, 1862, chartered at Ceylon to bring a cargo to this port for the lump sum of $29,000, which by the terms of the charter was to be paid "in cash upon due delivery of the cargo." On the arrival of the ship gold was at premium and the present controversy arose—the plaintiffs claiming to be paid in gold and the defendants offering payment in legal-tender notes. By an agreement between the parties, the $29,000 in legal tender was paid, and the action was brought to recover the difference. Testimony was given as to what was said between the parties at the time the charter was made, one testifying that it was agreed at the time that "in cash" meant gold or silver, and the other averring that nothing whatever was said about it.

Mr. Lord, for plaintiffs.
Mr. Scudder, for defendants.

SMALLEY, District Judge (charging jury). This is an action brought upon a charter party executed in November, 1862, at the island of Ceylon. It stipulates that the plaintiffs' ship shall receive a cargo of goods to be delivered in the city of New York, for the round sum of $29,000 in cash, to be paid upon delivery. It seems that the goods were received on board of the ship; that they were delivered in the city of New York. When they arrived here, a controversy arose between the consignee of the goods, or rather between one of the parties to this charter, and the plaintiffs as to what this $29,000 should be paid in. Our government had passed a law which the courts have upheld, making it binding and obligatory in this country, that certain paper familiarly called "greenbacks" should be received in discharge of all contracts, and the defendants claimed that they had a right to extinguish their obligation under the charter party by paying these notes, while the plaintiffs claimed that

they were entitled to receive this $29,000 in the great standard of value, gold or silver, which is acknowledged as a standard value throughout the commercial world. The $29,000 greenbacks was paid under an agreement that the reception of it should not affect the rights of either side; that if under their contract the defendants were bound to pay in what is regarded as the great standard of value, gold or silver, the plaintiffs should still have their claim upon them for the balance, which was stipulated to be fourteen thousand and odd dollars; if on the contrary, the plaintiffs were obliged to receive this $29,000 legal-tender notes, then the obligation was extinguished. You, gentlemen, are to determine what did these parties mean, in the island of Ceylon, at the time they made this charter party—how did they understand this payment was to be made? As I have already intimated, if it was a legal question—one party being a foreigner, and it being made at a foreign port, where gold and silver was the standard of value—I should hold that the presumption of law would be that this must be paid in gold or silver, although it might be made between citizens of the United States, and while in relation to their own matters at home it has been held to the contrary; but for the purposes of this trial the court would charge that between citizens of this country in a foreign country, if they make a contract with reference to greenbacks, with the understanding that it may be paid in that, the law is constitutional and the debt should be so discharged. The plaintiffs in this case are owners of a British vessel; the standard of value in Great Britain and throughout Europe is gold and silver; the contract was made in the port of Ceylon, where the standard of value is gold and silver.

Our government may pass laws which, in regard to our local matters, may make something else the standard of value, but they would not control the commercial world. When you consider that this contract was made in a foreign port, and the goods to be delivered here, the question to be answered by you is, from looking at the contract itself, and from all the evidence in the case, what do you understand the parties meant by the word "cash." If the word "cash" had been used in New York six years ago there would be no doubt about what was meant; you would all say gold and silver; although bills were convertible, yet if they were refused, they were not legal. But after congress made legal-tender notes, it was different. The question, therefore, is how did these parties in a foreign port understand it? Did they mean it should be gold or silver, or in the legal currency of the United States? Did they intend to confine it to the standard currency of the world or to the legal currency of the country? If it was the understanding that it was to be gold or silver, it is the duty of these parties to live up to it and they ought not to be absolved from it, nor will the court permit them to protect themselves under legal currency of our own. But if, on the other hand, the word "cash" was merely inserted as discriminating between cash and credit, and that they intended it might be performed by the payment of anything that was legal tender here, our currency will be sufficient.

It is very ingeniously argued by counsel for the defendants that the word "cash" is used merely in contradistinction to "credit." If it had been said, "$29,000 payable on delivery," it would have expressed everything without that word. Why that word "cash" was used it is for you to consider and come to a conclusion upon this part of the case.

Then there is some evidence. You have the evidence of Capt. Stanton, who was an agent on the part of the plaintiffs, and who acted as a broker or go-between, and he testified that he understood gold and silver was meant. The defendants read the testimony of Capt. Howe, who acted on their part; and whatever he said at that time binds the defendants. If he understood at that time that it was to be gold or silver, the defendants understood it in the eye of the law; he acted for them. It is argued on the part of the defence that this statement of Howe contradicts the statement of Stanton, while on the other hand, the plaintiff argues that the testimony of Howe is set entirely aside by the testimony of Gladstone, Stanton and others. There is also an affidavit read, taken in Liverpool, to the effects that Howe stated differently from what he states here, and that gold was understood. Now that is not evidence in chief. If they had not made Mr. Howe a witness the court would have excluded it. But the defendants have put him upon the stand; they rely upon his testimony; therefore these declarations of his made upon other occasions, contrary to what he stated in court, are to be received in evidence; not as evidence in chief, but to be considered by you in weighing his evidence.

The case is very simple. Considering the position of the parties, the place where the contract was made, the condition of the country at the time, the testimony of the witnesses and the conversation of the parties, what do you think the parties understood by using this word "cash?" If there had been no local laws of the United States, such as I have referred to, every one would have understood that it meant money; but it is claimed that inasmuch as there was at that time, or very soon after, a legal-tender currency which was not gold or silver here, it would be satisfied by that. If you believe that Capt. Stanton so understood it when he made the contract on the part of the plaintiffs, and that Capt. Howe so understood it when he made the contract on the part of the defendants, you will give a verdict for the defendants. If, on the other hand, at the time the contract was made it was under-

stood between the parties that it was to be gold or silver, you will return a verdict for the plaintiffs for $14,500 with interest from the 18th of April, 1863.

The jury found a verdict in favor of the plaintiffs.

[For subsequent proceedings, see Cases Nos. 5,469 and 5,470.]

GLADWISH, The W. E. See Case No. 17,355.

Case No. 5,472.

The GLAMORGAN.

[1 Spr. 273.] [1]

District Court, D. Massachusetts. Dec., 1854.

SLAVE TRADE—FORFEITURE AND CONDEMNATION—DISTRIBUTION OF PROCEEDS.

Where a vessel is condemned for a violation of a statute of the United States, and a moiety of the proceeds is given to the officers and crew of the ship of war which made the seizure, such moiety is not to be paid into the treasury of the United States, but must be distributed by the court.

[Cited in Rice v. Thayer, 105 Mass. 261.]

In admiralty.

B. F. Hallett, Dist. Atty., in support of the motion.

SPRAGUE, District Judge. This is a libel of information against the brig Glamorgan and cargo, alleging a violation of the statute of the 20th of April, 1818 (3 Stat. 450), for the prevention of the slave trade, and claiming a forfeiture.

A forfeiture was decreed by the court, and the proceeds ordered to be paid, one half to the United States, and the other half to the officers and crew of the United States armed brig Perry, who had seized the Glamorgan, on the high seas. The court further ordered, that the moiety of said proceeds, which was to be paid to the said officers and crew, should be delivered to Benjamin F. Hallett, Esq., their proctor, to be by him distributed among them, according to law. The district attorney now moves the court that so much of the order as directs a moiety to be delivered to the proctor for the officers and crew, be rescinded, and that the same be paid into the treasury of the United States. It is understood that this motion is made by instructions from the secretary of the navy, and that the view taken by that department is, that the moiety which has been awarded, ought to be paid into the treasury of the United States, in the manner in which prize-money is to be paid in, by virtue of the 8th section of the act of March 3, 1849 (9 Stat. 378), "making appropriation for the naval service," &c. The statute of March 3, 1819 (3 Stat. 533), in addition to the acts prohibiting the slave trade, provides that, in cases of vessels seized under the slave acts, by an armed vessel of the United States, the proceeds shall be divided equally between the United States, and the officers and men who shall seize, take and bring the same into port for condemnation. And the section then proceeds to say, that "the same shall be distributed in like manner as is provided by law for the distribution of prizes taken from an enemy."

The previous statute of April 29, 1800 (2 Stat. c. 45, § 6), prescribes the manner in which the "prize money, belonging to the officers and men, shall be distributed"; that is, it determines the proportion to which they shall severally be entitled. But it says nothing, as to the custody of the money previously to the distribution, or the person, or authority, by which the distribution shall be made; thus leaving the proceeds in the registry of the court, until paid out, by order of court. The 8th section of the act of 1849, before referred to, provides that all prize-money arising from captures made by the vessels of the United States, "received by the marshal, who shall make sale of such prizes, shall, within sixty days after such sale, deposit the net proceeds * * * into the treasury of the United States * * * to be distributed, as now provided by law."

It will be observed, that this does not change the distribution, but expressly declares that it shall be distributed, as now provided by law; that is, according to the previous statute. But it changes the custody of prize-money, previously to distribution, from the registry of the court, to the treasury of the United States. And it also changes the officer by whom the distribution is to be made, substituting the secretary of the navy for the prize agents.

The case now before the court is not one of prize, but of forfeiture of an American vessel, for the violation of a statute of the United States.

The forfeiture has been decreed in this case, not upon any prize proceedings, but upon a libel of information for the violation of a statute. The statute of 1818, which created this forfeiture, provides that the proceeds shall be divided between the United States and the informer. The statute of 1819, before referred to, in case a forfeited vessel has been seized by an armed vessel of the United States, divides the proceeds between the United States and the officers and men of such armed vessel; and then provides for the distribution among such officers and men, by declaring that "the same shall be distributed, in like manner as is provided by law for the distribution of prizes taken from an enemy."

It does not make this to be a prize proceeding, or in any manner change its character, but merely adopts the rule for distribution in the case of prizes, as the rule for distribution in the case of forfeiture; and

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

the statute of 1849, leaves the rule of distribution, in case of prize, as it was prior to the statute of 1819.

The 8th section of the statute of 1849, is confined to prize-money, as to which it has changed the place of deposit, and the officer to make the distribution; but as to the proceeds of forfeitures for the violation of the statutes of the United States, it has not changed the place of deposit, nor the officer to make the distribution, nor the rules for the distribution.

But if it should be thought that the statute of 1849 changes the manner of distribution, the question would arise, whether the distribution of the proceeds, under the statute of 1819, is to be governed by the manner existing at the time of passing that act, or by the manner provided by the subsequent act; the statute of 1819 says, that the distribution shall be in the same manner as is provided by law, &c., not as shall be provided by law. It, by reference, makes the preëxisting rule to be the rule of that statute, and it may well be doubted whether a subsequent repeal or alteration of the rule, in cases of prize, can affect the statute of 1819.

It seems to me, that there is no error in the order heretofore passed by this court.

Motion denied.

[For a subsequent hearing in the circuit court, affirming an order of the district court disallowing an appeal, see Case No. 15,214.]

GLAMORGAN, The (UNITED STATES v.). See Case No. 15 214.

Case No. 5,473.

GLANCY v. MOORE.

[Nowhere reported; opinion not now accessible.]

Case No. 5,474.

In re GLASER.

[2 Ben. 180;[1] 1 Am. Law T. Rep. Bankr. 57. 1 N. B. R. 336 (Quarto, 73); 15 Pittsb. Leg. J. 265.]

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

ARREST OF BANKRUPT — PROTECTION — POWER OF THE COURT — GENERAL ORDER NO. 27 — HABEAS CORPUS.

1. The "protection" spoken of in the fourth section of the bankruptcy act [of 1867 (14 Stat. 519)] means protection to the bankrupt from being arrested in cases where he is not liable to arrest, under the twenty-sixth section.

2. The provisions of general order No. 27, so far as they authorize the discharge, from arrest or imprisonment, of a bankrupt arrested on process founded on a claim provable in bankruptcy, where that claim is one from which his discharge in bankruptcy will not release him, are not warranted by the twenty-sixth section of the act.

3. The granting of such protection is an act done "under and in virtue of the bankruptcy." So, also, is the enforcing of such protection.

4. The district court has jurisdiction, therefore, under the first section of the act, to enforce such protection.

[Cited in Re Carow, Case No. 2,426; Re Brinkman, Id. 1,884.]

5. The court also has power, if a bankrupt is arrested in violation of the twenty-sixth section of the act, to release him from imprisonment, by habeas corpus, under the act of February 5, 1867 (14 Stat. 385).

[Cited in Re Ghirardelli, Case No. 5,376; Ex parte Schulenburg, 25 Fed. 212.]

6. Where a bankrupt was arrested in an action in a state court on allegations of fraud in contracting the debt to recover which the action was brought, and gave bail, and applied to this court, on affidavits denying the allegations of fraud, for an order discharging him from arrest, and discharging the bail: *Held*, that the court was competent to give him the relief sought, provided his arrest was founded on a debt from which his discharge in bankruptcy would release him.

[Cited in Re Alsberg, Case No. 261; Re Smith, Id. 12,976.]

7. The court must inquire into that question of fact, and decide it on this application.[2]

[Cited in Re Devoe, Case No. 3,843; Re Wright, Id. 18,065.]

In this case, the bankrupt [Louis Glaser] filed his voluntary petition in bankruptcy on the 13th of January, 1868. Among the debts set forth in his petition was one to Townsend & Yale, of $451.20, for merchandise sold by them to him. On the 5th of February, 1868, Townsend & Yale commenced a suit against him in the superior court of the city of New York, to recover the debt. The complaint in the suit was founded solely on a sale and delivery of goods to the amount of the debt. On the same day the bankrupt was arrested by the sheriff of the city and county of New York, on an order of arrest granted by the state court on the 4th of February, 1868, which required him to be held to bail in $650. The ground of arrest, set forth in the affidavit on which the order of arrest was granted, was that the bankrupt was guilty of a fraud in contracting the debt, and the circumstances alleged to constitute the fraud were set forth in the affidavit. The bankrupt now showed to this court, by affidavit, that, on the 15th of January, 1868, he was adjudicated a bankrupt, and received from the register a certificate of protection; that, on his arrest, he gave to the sheriff the bail required; that all the allegations of fraud contained in the affidavit on which the order of arrest was granted were untrue; and that the debt to Townsend & Yale was one provable in bankruptcy, and one from which a discharge in bankruptcy would release him. He therefore

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

[2] In the Case of Kimball [Case No. 7,768], decided in November, 1868, this court modified these views, and held that, if the arrest in the state court appeared, on the face of the papers, to be founded on a debt from which a discharge in bankruptcy would not release the debtor, the bankruptcy court was concluded, and would not inquire into the question whether the allegations in such papers were true or not.

applied to this court for an order discharging him from arrest, and discharging the bail which he had given. The application was founded on the last clause of the twenty-sixth section of the bankruptcy act, which provides that "no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded upon some debt or claim from which his discharge in bankruptcy would not release him." The creditors in this case had not proved their debt in the bankruptcy proceedings, and they raised an objection to the jurisdiction of this court to grant the relief asked by the bankrupt, on the ground that no power was conferred on this court, by the bankruptcy act, to enforce the protection from arrest given by the twenty-sixth section, even though it should find that the bankrupt was arrested after the commencement of the proceedings in bankruptcy, and that his arrest was founded on a debt from which his discharge in bankruptcy would release him. The point taken was, that the circuit court for this district was the proper court to administer the relief sought, and not the district court; and that, under the second section of the act, the circuit court had "a general superintendence and jurisdiction of all cases and questions arising" under the act, and, therefore, of this question, which arose under the twenty-sixth section, and could, on the application of the "party aggrieved, hear and determine the case." It was urged that the jurisdiction invoked by the bankrupt on this application was not within the special grants of jurisdiction given by the first section of the act to the district court; that this was not a case or a controversy arising between the bankrupt and a creditor who claimed a debt or demand under the bankruptcy; that it did not concern the collection of the assets of the bankrupt; that it did not concern the ascertainment or liquidation of any lien or other specific claim on any of such assets; that it did not concern the adjustment of any priority or conflicting interest, in the sense in which that language was used in the first section; that it did not concern the marshalling or disposition of any of the funds or assets of the bankrupt; and that it did not concern any act, matter, or thing to be done by this court under or in virtue of the bankruptcy, within the meaning of that language in the first section.

Henry Morrison, for bankrupt.
John J. Townsend, for creditors.

BLATCHFORD, District Judge. The first clause of the first section of the bankruptcy act gives to the district court original jurisdiction in this district in all matters and proceedings in bankruptcy, and authorizes it to hear and adjudicate upon the same according to the provisions of the act; and that general grant of jurisdiction is followed by a special grant, extending such jurisdiction "to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." Registers are, by section 3, to be appointed, "to assist the judge of the district court in the performance of his duties" under the act. By section 4, power is given to every register, and it is made his duty, "to grant protection." This undoubtedly means protection to the bankrupt from being arrested in cases where he is not liable to arrest—protection from arrests, to which, by the twenty-sixth section, he is not liable. The justices of the supreme court have so construed it, for not only have they, by general order No. 5, defined one of the powers of a register to be to grant protection on the surrender of a bankrupt, but they have, by general order No. 4, provided that a bankrupt "may receive from the register a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court." So also they have, by general order No. 27, provided that, if a bankrupt is "committed after the filing of his petition, upon process in any civil action founded upon a claim provable in bankruptcy, the court" (meaning the court in which his petition is filed) may, upon his application, "discharge him from such imprisonment"; and that, "if the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of habeas corpus to bring him before the court, to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and, if so provable, he shall be discharged, if not, he shall be remanded to the custody in which he may lawfully be." These provisions of general order No. 27, so far as they authorize the discharge from arrest or imprisonment of a bankrupt arrested on process founded on a claim provable in bankruptcy, where the claim is one from which his discharge in bankruptcy will not release him, are not warranted by the twenty-sixth section of the act. By the tenth section of the act, the justices of the supreme court are required, subject to the provisions of the act, to frame general orders for carrying the provisions of the act into effect, but they are not authorized to extend the exemption of a bankrupt from arrest beyond the limits prescribed by the twenty sixth section of the act. By the thirty-third section of the act, a debt which cannot be discharged is yet made provable. By the twenty-sixth section, though a debt is provable, it may, if not dischargeable, be the foundation of an arrest. The twenty-seventh general order goes beyond the act, by making exemption from arrest coextensive with the provability of a debt. But the

twenty-seventh general order, in so far as it is consistent with the act, and in so far as it applies to debts or claims which will be released by a discharge in bankruptcy, is a clear indication that the justices of the supreme court understand the act as giving to the district court power to enforce the exemption from arrest to which a bankrupt is entitled under the act. The twenty-sixth section confers such exemption. One of the means prescribed by the act for securing it, is a protection against arrest, as a muniment or safeguard. The giving of this protection by the court or a register is an act done "under and in virtue of the bankruptcy." The enforcing such exemption from arrest, when a bankrupt is entitled to it by section 26, whether a protection has been granted or not, and whether a protection granted has been violated or not, is an act done "under and in virtue of the bankruptcy." The exemption from arrest is conferred by section 26, because the party is adjudged a bankrupt by the district court; and the enforcing of such exemption by affirmative action is clearly an act "to be done under and in virtue of the bankruptcy." Being such, the jurisdiction of the district court in which the bankruptcy proceedings are pending, clearly extends, under the first section of the act, to the doing of this act by any appropriate method. Where the bankrupt is not in close custody, a habeas corpus may not be necessary. A simple order may suffice to give the requisite relief. The order will be an order in bankruptcy, and, by the first section of the act, full authority is given to the court to compel obedience to all orders and decrees passed by it in bankruptcy, "by process of contempt and other remedial process." In some cases, a habeas corpus may be necessary, and such a remedy is contemplated by one provision in general order No. 27. Irrespective of that provision, if a bankrupt is arrested in violation of the twenty-sixth section of the act, and is thus restrained of his liberty in violation of a law of the United States, this court, or the judge thereof, has power, under the act of February 5, 1857, entitled "An act to amend 'An act to establish the judicial courts of the United States,' approved September twenty-fourth, seventeen hundred and eighty-nine" (14 Stat. 385), to issue a writ of habeas corpus and release him from his imprisonment. It follows, therefore, that this court is competent to grant to the bankrupt in this case the relief sought by him, provided his arrest was founded on a debt from which his discharge in bankruptcy would release him. This court must necessarily inquire into that question, and decide it for itself on this application. It is a disputed question of fact, which cannot be decided on ex parte affidavits, whether the debt in this case was contracted by the fraud of the bankrupt, and is, therefore, one from which his discharge in bankruptcy would not release him. If the bankrupt desires it, a reference will be ordered, under section 38 of the act, to take testimony on the question, and the application will be heard and decided on the testimony so taken.

[See Case No. 5,475.]

Case No. 5,475.

In re GLASER.

[1 N. B. R. 241 (Quarto, 18).][1]

District Court, S. D. New York. Jan. 14, 1868.

AFFIDAVIT TO STAY PROCEEDINGS IN STATE COURTS.

In bankruptcy.

"Siegmund Spingarn being duly sworn says, he is one of the copartners of the firm of Morrison, Lauterbach & Spingarn, attorneys at law. That Henry Morrison, one of the said firm, is the attorney of record of the said Louis Glaser, the petitioner for adjudication of bankruptcy. That the petition of said Louis Glaser was filed on the 13th day of January, 1868, by this deponent. That before the filing of said petition, several creditors of the said Louis Glaser commenced actions for the recovery of money due and owing to them from said Louis Glaser. That on the 9th day of January, 1868, one L. H. Mandlebaum commenced an action in the Second district court of the city of New York, which action is now at issue and placed for trial. That on the same day a creditor named James Cohen commenced an action in the same court against the said Louis Glaser, the summons in which case is returnable on the 15th day of January, 1868. That on the same day George C. Eyland commenced an action in the marine court of the city of New York, against the said Louis Glaser, which action is now pending. That on the same day the firm of A. Altmayer & Co. commenced an action in the same court, to wit, the marine court, in which action the summons is returnable January 17, 1868. That on the 10th day of January, 1868, Isaac Van Deusen, John Van Deusen, and Henry Boehmer commenced an action in the supreme court of the state of New York, against the said Louis Glaser. Deponent further says, that the petitioner, Louis Glaser, has no valid and legal defence to interpose in any of these cases, and that they will recover judgment, unless restrained by order of this honorable court. Deponent further says that all these actions are brought to recover debts due by the said petitioner, Louis Glaser, which are set out in the schedule attached to the petition for adjudication of bankruptcy. That they are all debts provable under the act of congress passed March 2, 1867 [14 Stat. 517], and from which the petitioner may be discharged in bankruptcy. Sieg. Spingarn.

[1] [Reprinted by permission.]

"Sworn to before me, this 14th day of January, 1868. R. E. Stilwell, U. S. Commissioner."

[See Case No. 5,474.]

Case No. 5,476.

In re GLASER.

[2 N. B. R. 398 (Quarto, 129).] [1]

Circuit Court, S. D. New York. 1869.

CONTEMPT — EXAMINATION OF WITNESSES UNDER COMMISSION—BANKRUPTCY PRACTICE.

On an application for attachment of witnesses for contempt in not making answers on examination under a commission, *held*, that attachment must be refused, for the reason that no written interrogatories accompanied the commission, and no information furnished as to the particular enquiry.

[In bankruptcy. In the matter of Samuel Glaser.]

Martin & Smith, for application.
Benedict & Boardman, opposed.

BLATCHFORD, District Judge. The commission issued by the district court for the southern district of Ohio, not being accompanied by any written interrogatories, and not furnishing any information as to what the enquiry is, to which the examination of the witnesses named in it is to be directed, so that I can determine whether the questions which the witnesses have refused to answer, are or are not pertinent to such enquiry; it is impossible for me to hold that the witnesses have refused to answer any pertinent or proper question. The application for the attachment is, therefore, refused.

GLASGOW (HOTCHKISS v.). See Case No. 6,717.

GLASS (LESLIE v.). See Case No. 8,275.

Case No. 5,477.

GLASSELL'S ADM'R v. WILSON'S ADM'R.

[4 Wash. C. C. 59.] [2]

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

VENDITIONI EXPONAS—MOTION TO SET ASIDE SALE BY STRANGER TO THE SUIT—SUIT BY FOREIGN ADMINISTRATOR.

1. Motion to set aside a sale of land, which had been sold under process of execution out of this court. The motion was made on behalf of persons not parties to the suit, claiming title to the land adverse to that of the defendant in the execution. By the Court: The claimant of the land sold under a venditioni exponas can in no way become a party to, or connect himself with, this case. If he has a title to the land, he will not be prejudiced by the sale, and he may assert his right in a proper suit to maintain it.

[Cited in Hitchcock v. Roney, 17 Ill. 233.]

2. By the practice in Pennsylvania, an administrator acting under letters of administration granted in another state, may institute a suit in this state without taking out letters of administration here.

[Cited in The Boston, Case No. 1,669.]

[See Allen v. Philadelphia Sav. Fund Soc., Id. 234.]

Rule to show cause why the levy and sale of the land under a venditioni exponas should not be set aside. Suit was brought by Glassell against James Wilson in 1797, and judgment was entered in 1798; soon after which, Wilson died, and administration on his estate was granted to Bird Wilson. In 1819 Glassell died, and a scire facias, to revive the judgment, was sued out in the name of Mr. Swan, a citizen of Maryland, his administrator. The scire facias issued against Petit, as administrator de bonis non of James Wilson, who confessed judgment in November, 1819, and a fieri facias issued, which was executed on certain lands, which were sold under a venditioni exponas.

Rawle and Tilghman (who admitted that they appeared on their own behalf, the land levied on belonging to them, and not as counsel for defendant) assigned as reasons in support of the rule: (1) That the levy was made on land which, they could prove if allowed, belonged to them, and not to Mr. Wilson's estate; and (2) that it did not appear that the plaintiff had taken out letters of administration in this state; consequently that he could not be a proper party to revive the judgment. [Fenwick v. Sears' Adm'rs] 1 Cranch [5 U. S.] 259.

Edward Ingersoll, against the rule, objected: (1) That the administrator of Wilson not objecting to the judgment and execution, a mere stranger to the suit can not; (2) that the law of this state does not require that letters of administration should have been granted to the plaintiff in this state. 1 Bin. 63; 3 Mass. 515.

WASHINGTON, Circuit Justice. It is not sufficient to point out errors in these proceedings, unless it is done by a person who can introduce himself regularly into the case as a party authorised to question their regularity. Now in this case, the counsel who obtained this rule do not appear for Mr. Bird Wilson, or for the purchasers at the sale, but they claim title in themselves to the land which was levied on and sold. At present, however, they appear before the court as entire strangers to this transaction, and can in no other way connect themselves with it but by showing their title to the land, and that it is better than that of Mr. Wilson. But is this an inquiry proper for the court to enter upon under this rule? Is it competent to this court to decide such a question? We think not. In cases like the present, or

[1] [Reprinted by permission.]

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

where they are complicated, and particularly if there be contradictory evidence, we should think it most proper to leave the parties to contest their rights in a more regular course of proceeding, on the law or equity side of the court.

As to the case of Fenwick v. Sears' Adm'rs, 1 Cranch (5 U. S.) 259, it proceeded entirely upon the law of Maryland, which required administration to be taken out in that state, and that law was adopted by congress as the law of that part of the District of Columbia which was within the county of Washington. We find by the case from 1 Bin. 163, that the laws of Pennsylvania do not require a person who has obtained letters of administration in another state to obtain them also in this state, and we sit here to administer the laws of the United States, and of this state so far as they are adopted by the laws of the United States. Rule discharged.

Case No. 5,478.

The GLAUCUS.

[1 Lowell, 366.] [1]

District Court, D. Massachusetts. July, 1869.[2]

COLLISION—STEAM AND SAIL—LOSS OF CARGO—DAMAGES—FREIGHT.

1. Quaere, what is the true construction of Act July 25, 1866 [14 Stat. 228], which requires ocean-going steamers and those carrying sail, to have one white light as prescribed by the act of 1864 [13 Stat. 58], and requires coasting steamers to carry two such lights, the fact being that many coasting steamers are ocean-going and carry sail?

2. If a sailing vessel and a steamer are crossing at an angle of forty-five degrees, and the pilot of the steamer sees both lights of the sailing vessel at any considerable distance, and the steamer is going twice as fast as the sailing vessel, and puts her helm so as to increase the distance between them, it is impossible that any act done on board the sailing vessel after both her lights were thus seen, should bring the vessels together, stem and stem.

3. If a vessel is capsized in a collision, and the master and crew abandon her to save their lives, and in the exercise of due care and skill the master decides not to try to save her, the loss is presumed to be total.

4. If the owners of a vessel send her to a foreign port for a cargo, which the master procures by barter, the damages for a loss of the cargo are what the master paid for it, to the person of whom he bought, and not what it cost the owners, on the whole, to obtain it by the adventure.

5. To this may be added an allowance in the nature of freight for the voyage from the foreign port, which has increased the value of the goods, and has been destroyed by the collision.

6. If the owner of a vessel injured by collision, has repaired his ship, with prudence, skill, and diligence, and acting as a wise owner would, if not insured, the wrongdoer may, in some extreme cases, be liable for even more than the value of the ship, if the excess is made up by an unexpected amount of demurrage.

[Cited in The Cambridge, Case No. 2,334; The Venus, 17 Fed. 926; The Rabboni, 53 Fed. 957.]

At about ten o'clock, on the night of the first of February, 1868, the schooner Electric Flash, with a full cargo of frozen herring on board, was beating up Long Island Sound on her voyage from Newfoundland to New York, and was off New Haven. She was making about five and a half knots, and was close-hauled on the port tack, heading about northwest by west, the wind being a whole-sail breeze from west southwest. The large propeller steamer Glaucus was bound from New York to Boston, with a full cargo, and was making about eleven knots, heading east by north. The moon and stars were shining and the night was clear. The vessels came together, and the schooner received a very severe wound in the larboard bow, which cut her down on that side, and started many of the planks on her starboard bow as well; she filled and capsized, and her crew saved themselves in their boat and were brought to Boston by the steamer, it being thought upon examination that she could not be towed into a port of safety by the Glaucus. She was afterwards taken to New London by salvors. Both vessels had the proper side-lights, and the steamer had two white lights, one at her bow and one at her mast-head.

J. C. Dodge, for libellants.

F. C. Loring and M. F. Dickinson, Jr., for claimants.

LOWELL, District Judge. The libellants cite the statute of April 29, 1864 (13 Stat. 58), which prescribes for steamers only one white light at the foremast-head, and prohibits all lights not prescribed. The claimants say that all the Sound steamers carry two, and rely on Act July 25, 1866, c. 234, § 11 (14 Stat. 228), which enacts: That the provision for a foremast head-light for steamships, in the former act, shall not be construed to apply to other than ocean-going steamers and steamers carrying sail; and that all coasting steamers and those navigating bays, lakes, or other inland waters, shall carry, besides the red and green lights, a central range of two white lights, one of which is to be at the head of the vessel, &c. It is not shown that the two lights of the Glaucus did not conform to this later statute, nor that the misfortune was in any way attributable to the state of her lights. I refer to this point because the law of 1866 has not been cited here before, and because its language does not seem to be very happily chosen. It puts ocean steamers and steamers carrying sail, in one class with one sort of lights, and coasting steamers in another, with a different sort, whereas most of the coasting steamers on the Atlantic coast, are both ocean-going and carry sail, so that it may sometimes be difficult for the persons concerned to know to which order they belong. For-

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

[2] [Affirmed in Case No. 683.]

tunately, however, nothing turns upon this distinction in the present case.

The Glaucus was bound to see the schooner on such a night as this in good season, and to avoid her; and if it be true, as is testified, that propellers of this size and class are slow in minding the helm, this only makes it the more essential that the greatest vigilance should be exercised by their officers and crew to discover sailing vessels at the earliest possible moment, for it cannot change the law, nor can it be so great an obstacle as to excuse the steamer altogether, and except her out of the general rule of law on such a night as this. All this is well understood by the claimants; and they aver that the steamer took all proper measures, but that the schooner ported her helm, and thus caused the collision.

The pilot, second mate, and quartermaster of the steamer were in her pilot-house, and there was a man forward on the lookout. The pilot testifies that he saw a red and a green light about four points on his starboard bow, thought the vessel was a steamer, but that there was no danger, and starboarded a little; presently observed that the green light was shut in, and saw sails on the vessel, and then ordered the wheel hard a starboard, and afterwards finding he could not run ahead of the vessel stopped his engine. He estimates the distance at which he first saw the lights, at three-quarters of a mile. The testimony of the second mate and quartermaster is substantially similar. The lookout saw only the red light; he makes no estimate of the distance at which he first perceived it. They all think the schooner changed her course, and that is the disputed question of the case. The appearances on which they rely are, that the sails were more and more plainly seen as the vessels approached each other, and that the green light disappeared.

I have carefully considered the claimants' evidence on this point, and am not satisfied that the fact is proved. The steamer changed her course, and it was impossible for her crew to say whether the schooner did so or not, unless they had something besides their own vessel to compare her with, or unless the effects which they saw could not be accounted for by their own change of course. They feel very sure that she did change, and none the less so, because if she did not the steamer must have been in fault. That the sails on the port side of the schooner were seen more plainly as the vessels approached each other is accounted for by the fact of approach. If both lights were seen, and then only the red light, and the steamer kept her course, the schooner must have changed hers; but the steamer did not keep her course, and I doubt if they ever saw both lights. The witnesses who depose to this were mistaken in two of their suppositions, and may have been so in a third; they took the Electric Flash for a steamer, and they thought her not dangerously near. In this case neither vessel could see both the side-lights of the other until she was crossing her bow. Seeing both lights means that you are on the course of the vessel whose lights you see. If two vessels are on opposite courses, each is on the other's course; but here the vessels were approaching at an angle of forty-five degrees, and neither could see along the line of the other's course till she was crossing her bow. If the steamer then was across the bow of the schooner when she first made her out, and was going twice as fast as she, and so manoeuvred as to increase the distance between them, all which is averred by the claimants, a collision was impossible, whatever the schooner might do, unless the vessels were so near when the steamer first discovered the lights that it was already almost inevitable; and however near they may have been, their bows could hardly come together under those circumstances. I repeat that the pilot's account that he saw both lights of a vessel four points on his starboard bow and starboarded his helm, and was going twice as fast as the other vessel, which by porting her helm struck his stem, is incredible, unless it all happened in less than one minute; and if this heavy and slow-working steamer had swung three points to port under the influence of her starboard helm, it would seem that some considerable time must have elapsed. No sudden or accidental change of the schooner's course to bring both her lights to view is possible, because such a change must have been to windward, and she was close to the wind and did not tack. I cannot but believe that the men in the steamer's pilot-house were either mistaken in thinking they saw both lights, or else that they have much overstated the time that elapsed. The lookout, who should have seen the schooner first, saw only the red light; and this is precisely what he should have seen, on the theory of the libellants.

The libellants' witnesses are clear and consistent in declaring that the schooner's course was not changed. (The judge here examined the evidence on this subject.) I am satisfied that the steamer has not only made out no sufficient justification, but that the facts show affirmatively that she was in fault. She is in the dilemma that she should either have slowed her engine, and, if necessary, have stopped and reversed, as the statute requires; or if it was too late for that, and she took the most prudent course after seeing the schooner (which I am inclined to believe), she should have seen her sooner. Interlocutory decree for the libellants.

On the coming in of the assessor's report, the case was again spoken to by the same counsel.

LOWELL, District Judge. The report of the assessor in this cause is excepted to by both parties. It seems that the schooner belonged at Gloucester, and was sent thence to Fortune Bay in Newfoundland, by her owners, for a cargo of frozen herring, which was

obtained, partly by purchase and partly by barter; and while on her voyage to New York with this cargo on board, she was run into in Long Island Sound on a dark and windy night and sunk to the water's edge by the steamer Glaucus, and was abandoned by the master and crew, and picked up after some days and taken into New London, where she was repaired.

The respondents maintain that they should not be made responsible for the loss of the cargo, because it might, by due diligence, have been saved. This is an important point of fact which affects a part of the damage to the vessel as well as the whole of that to the cargo, and the assessor has reported the evidence; upon consideration of which I agree with him, that the master acted in good faith and with reasonable skill and diligence in the premises. He was of opinion that his schooner would sink before she could be towed into the nearest port, and the master and pilot of the steamer appear to have been of the same opinion; and the mate of the Glaucus, after examination, reported that the steamer could not safely undertake to tow her. It was only the extreme and unusual coldness of the weather, which kept the fish frozen, that prevented the schooner from going down within an hour or two after the disaster occurred. The general rule of "post hoc propter hoc" applies in these cases, and it is for the vessel in fault to show that the negligence or want of skill of the libellants, or their agents, has aggravated the damages which would have naturally followed their own wrongful acts. I affirm the report on this point.

In ascertaining the damage to the cargo, the assessor has made a careful and ingenious computation of the cost of the voyage to the owners, as being the actual cost to them of this cargo. This is too speculative a mode of ascertainment when the price paid for the cargo is in proof, because it makes the value depend not on what the cargo cost in fact, but on the results of a different though connected adventure. I decided in the case of The Monticello [Case No. 9,739], that the prime cost and interest was the rule; this the assessor was well aware of, but saw that these libellants had really lost more than that sum. This does not change the rule of damages nor the price of the cargo. The purchaser cannot have paid for these herrings more than the seller received, which was $1.68 per barrel. The cost of getting that sum to the place where the bargain was made is no part of the price. The loss was later, and was in the nature of freight from Newfoundland. The owners who load their own vessel are held responsible for freight, eo nomine, in ascertaining the limit of their statute liability in collision cases. Allen v. Mackay [Id. 228]. If, therefore, they had wrongly injured the steamer, they would be held to be earning freight, and when the other party is in fault they should have a corresponding advantage. The assessor, therefore, may allow such a sum as would be the fair net freight, above expenses, for the voyage from Fortune Bay to New York, though not the freight or expenses from Gloucester to Fortune Bay, which is the form in which the account has been made up; or, what is the same thing, he may consider the goods as increased in value by that amount. In this assessment the market value, if there be one, will be the guide; that is, what the charter-money for such a voyage would be, less sailing expenses.

The only remaining exception of the respondents is that the repairs of the vessel and the demurrage together, as allowed, amount to more than the value of the vessel immediately before the collision. They contend that the extreme limit of damages is what would be assessed for a total loss. The assessor finds that the schooner was carefully surveyed, and that the libellants acted in good faith and with care, skill, diligence, and fidelity; that the excess of price over the estimates could not have been foreseen, and that this excess and the demurrage were enhanced by the unusually bad weather which happened to set in while the work was going on. The repairs themselves cost much less than the value of the schooner, and appear clearly by the report to have been such as a prudent owner would have undertaken. Under these circumstances I affirm the allowance of demurrage, even though this brings the total damages to a higher point than they would have reached if the schooner had been abandoned in the first instance. The case of The Empress Eugenie, Lush. 138, cited in argument, rests upon the principle that the wrongdoer shall not be held responsible for the repairs which a prudent and well-advised owner would not have undertaken, and in that point differs materially from this case.

Neither party having excepted to the amount of the demurrage, I assume that it was reckoned upon the proper basis. In collision cases demurrage is to be allowed for such time, if any, as the evidence shows that the vessel could have been employed, and at the net freight she might have earned less the expenses.

The exceptions of the libellants that the commissioner did not assess the value of the cargo in New York, and that he did not reckon deterioration of the vessel on her voyage from Gloucester to Newfoundland are overruled.

The report must be recommitted to the commissioner to find the amount of net freight which should be charged on the principles above stated, unless the parties can agree on it. The means for ascertaining the value of the cargo are already contained in his report. Order accordingly.

Affirmed on appeal, October term, 1870 [Case No. 683].

GLAUCUS, The (AYER v.). See Case No. 683.
GLEASON (CODWISE v.). See Cases Nos. 2,938 and 2,939.
GLEASON (UNITED STATES v.). See Cases Nos. 15,215 and 15,216.

Case No. 5,479.

The GLEN.

[Blatchf. Pr. Cas. 375.][1]

District Court, S. D. New York. July, 1863.

PRIZE—WRONGFUL ARREST—DISCHARGE.

Vessel and cargo discharged from seizure and restored to the claimant, with costs and damages, because of a wrongful arrest.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured at sea, June 20, 1863, by the United States gunboat Columbia, and were sent into this port for adjudication. The defence to the action is, that the vessel was a British bottom, lawfully on a voyage from Yarmouth, Nova Scotia, to Matamoras, Mexico, on the voyage upon which she was seized. The papers returned with the prize are, a certificate of British registry executed to Nehemiah K. Clements, of Yarmouth, Nova Scotia, as owner of the vessel, showing that she was built at Nova Scotia, August 4, 1859; a shipping agreement, entered into with the crew in November and December, 1862, for a voyage from Yarmouth, Nova Scotia, to a port or ports in the British West Indies, thence to a port or ports to which the vessel may lawfully go, for a term not to exceed six months, to her final discharge in Nova Scotia; a certificate of the entry and clearance of the vessel by the British vice-consul at Matamoras, April 22, 1863; a journal or log account of the voyage of the vessel from Matamoras, commencing in June, 1863; and a manifest of 84 bales of cotton from Matamoras to Nassau, N. P., dated May 23, 1863.

From the proofs in preparatorio it seems that the vessel was on her voyage from Matamoras to Nassau, but was a bad sailer, and, owing to the state of the weather, was unable to make her course across the Gulf Stream; that it was attempted by her master, with the consent of her supercargo, to carry her to the port of New York; that her master was attempting so to navigate her when she was seized; that she was not making for any other port; and that when seized she was, as was supposed, from 80 to 100 miles off Cape Hatteras. Her ship's company were all British subjects, and none of them had any interest in the vessel or cargo. The vessel was loaded with cotton alone. No reasonable suspicion against the integrity of the voyage is made to appear upon the testimony, either from her position or her lading, or the conduct of the crew previously, or when she was captured, or her consorting with or being connected with any other vessel or voyage. Nor is it indicated to the court, by any argument, brief, or suggestion on the part of the United States, that the captured vessel committed any culpable act on her voyage. It is, therefore, ordered and decreed, that the vessel and cargo be discharged from seizure and be restored to the claimant, with costs and damages, because of the wrongful arrest. Decree accordingly.

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

GLEN (MAIN v.). See Case No. 8,973.

GLENDALE ELASTIC FABRICS CO. (SMITH v.). See Case No. 13,050.

GLEN IRON WORKS. See Case No. 17,636.

GLENN (ATKINSON v.). See Case No. 610.

Case No. 5,480.

GLENN v. HUMPHREYS.

SWIFT v. SAME.

[4 Wash. C. C. 424.][1]

Circuit Court, E. D. Pennsylvania. Oct., 1823.

STATE INSOLVENT LAWS — CONSTITUTIONALITY — EFFECT OF DISCHARGE—PRACTICE.

1. A state insolvent law, which discharges the debt, and the person of the insolvent, is unconstitutional as to the debt, but not as to the person.

[Cited in Woodhull v. Wagner, Case No. 17,975.]

[Cited in Trustees of Pub. Schools v. City of Trenton, 30 N. J. Eq. 684.]

2. The United States are not affected by discharges under state insolvent laws.

[Cited in Cook v. Moffat, 5 How. (46 U. S.) 316.]

3. Practice of this court in discharging on common bail, where the defendant has been discharged under state insolvent laws.

Rule upon the plaintiffs to show their cause of action, and why the defendant should not be permitted to appear on common bail, having been discharged as an insolvent under the laws of the state of Maryland. The case was as follows: Swift, being a debtor to the United States in a considerable sum, applied to the secretary of the treasury to be discharged as an insolvent, upon surrendering all his estate to the United States, agreeably to the provisions of the act of congress. Swift received his discharge by an instrument under the hand and seal of the secretary, bearing date the 4th of December, 1819, and on the 6th of the same month and year, he executed to the secretary an assignment of all his estate, real, personal and mixed, for the use of the United States. The defendant was a debtor of Swift, by three notes of hand, one bearing date at Barbadoes the 17th of July, 1819, payable three years after date, at a certain bank in the city of Baltimore; and by two others, dated in Baltimore the 4th of December, 1819, payable eighteen months after date, and the 26th of October, 1819, payable

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

three years and a half after date, which last notes were indorsed in blank. The first note was indorsed to Glenn, the district attorney of the United States for the district of Maryland, for the use of the United States, in whose name one of these suits is brought; and the other two in the name of Swift. On the 7th of September, 1820, the defendant paid a part of the first note to Mr. Glenn, which is credited on the face of it. Mr. Glenn states in his deposition, that at the time of the delivery of these notes to the district attorney, he believes the insolvency of Humphreys was not contemplated. On the 6th of September, 1820, the defendant was duly discharged, as to his person, by the commissioners of insolvent debtors for the city and county of Baltimore, and, on the 31st of August, 1821, he was finally discharged by the same tribunal from all debts, &c., due or owing by him before the 6th of September, 1820, provided, that any property he might acquire by gift, descent, or in his own right by devise, or in a course of distribution, should be liable to the payment of his said debts.

It was contended by the district attorney, that the United States are not subject to, or affected by the insolvent laws of the states under which their debtors may be discharged. U. S. v. Wilson, 8 Wheat. [21 U. S.] 253. And if they were, that the Maryland law, authorising the discharge of a debtor from his debts, is unconstitutional and void. If not so, still, as it may be doubtful upon the deposition which has been taken, whether the defendant did not, after his discharge, agree to pay these notes to the United States; the court ought to discharge on motion, but should put the defendant to plead his discharge as an insolvent.

Joseph R. Ingersoll, for the rule, in answer to the first point, insisted, that the case cited, applied to original debtors of the United States, and not to those who have been turned over by assignment to the United States; who, in such a case, can claim no higher privilege than the person could under whom they claim. (2) That the final discharge from the debts of the insolvent, may be unconstitutional; but the personal discharge is not, and this is sufficient to warrant the court in making the present rule absolute. 16 Johns. 233; 17 Johns. 108; 18 Johns. 54. As to the last point, he relied on the practice of this court, to discharge on motion, in all cases.

Charles Ingersoll, for plaintiffs.
Joseph Ingersoll, for defendant.

WASHINGTON, Circuit Justice. The unconstitutionality of the law of Maryland, so far as it attempts to authorise a qualified discharge of an insolvent from his debts, does not affect, or invalidate that part of the laws which discharges the person of the insolvent from imprisonment. As to the objection to the mode of proceeding in this case, there is nothing in it. It is consistent with the practice of this court, in the many cases which come before us. This practice rests in the discretion of the court, and is acted upon where there are no material facts in controversy between the parties. Where there are, and the court cannot satisfactorily decide upon them, I should, in such cases, refuse to interfere in a summary way, and leave the defendant to plead his discharge. In the one now under consideration, there is no fact material to the question of bail, about which a doubt can exist. It is not even insinuated in the deposition which has been taken, that the defendant entered into a new contract at any time with the United States, after his discharge, to pay this debt. He assented to the assignment by Swift of his notes, to the United States; but such assent was unnecessary, and even that preceded his discharge. But I am of opinion, that the case of U. S. v. Wilson [supra] is in point to show, that the United States are not affected by state insolvent laws, which profess to discharge the persons of their debtors, and that it is strictly applicable to this case. The debts due by the defendant to Swift, were equitably transferred to the United States on the 6th of December, 1819, and his notes were assigned in the year 1820, long before the discharge, and were before the contemplated insolvency of the defendant, as is proved by the witness. His person, then, never was discharged from these debts before the United States became his creditors; at which time, he stood in relation to the United States, for what was due to Swift, in the same situation as an original debtor. Rule discharged.

GLENN (STUDER v.). See Case No. 13,558.

Case No. 5,481.

GLENN et al. v. UNITED STATES.

[Hempst. 394.] [1]

District Court, D. Arkansas. April, 1849.[2]

LAND GRANTS—SPANISH CLAIMS.

Spanish claim rejected (1) because conditions not complied with, and (2) because there was no survey of the grant.

In Supreme Court.

1. In 1796, when Delassus was commandant of the post of New Madrid, he exercised the powers of sub-delegate, and had authority, under the instructions of the governor-general of Louisiana, to make conditional grants of land. He made a grant to Clamorgan, who stipulated on his part to introduce a colony from Canada to cultivate hemp and make cordage for the use of the king's vessels; but these conditions the grantee failed to perform. By the Spanish laws and ordinances, these conditions had to be performed before the grantee could obtain a perfect title. If the Spanish governor would have refused to complete the title, this

[1] [Reported by Samuel H. Hempstead, Esq.]
[2] [Affirmed in 13 How. (54 U. S.) 250.]

court, acting under the laws of congress, must likewise refuse.

2. After the cession of Louisiana to the United States in 1803, Clamorgan could not legally take any step to fulfil the conditions; and the case must be judged of as it stood the 3d March, 1804.

3. The difference between this and Arredondo's Case, 6 Pet. [31 U. S.] 706, explained. The Cases of Arredondo, Id. 691; Soulard, 10 Pet. [35 U. S.] 100; Wiggins, 14 Pet. [39 U. S.] 334; Menard v. Massey, 8 How. [49 U. S.] 293; and Boisdoré, 11 How. [52 U. S.] 63, cited and approved.

Petition [by John Glenn and Charles M. Thurston, claiming under Jacques Clamorgan], under act of 17th June, 1844 [5 Stat. 676], for the confirmation of a Spanish claim.

Albert Pike and D. J. Baldwin, for petitioners.

S. H. Hempstead, Dist. Atty., for the United States.

JOHNSON, District Judge. In this case, I do not deem it necessary to give reasons at length for the decree I shall render, because the decision must depend mainly on principles already decided in Winter v. U. S. [Case No. 17,895], and in De Villemont v. U. S. [Id. 3,839]. It is true that this is in some respects different; but that difference is rather formal than substantial. I deem the claim invalid upon two grounds: First, that the conditions of the grant were not complied with; and I will merely remark that I cannot subscribe to the argument that it was a grant without conditions; second, that there was no authoritative survey of the grant, which was undoubtedly required by the Spanish regulations. For my reasons on this point, I refer to the opinion in the case of Winter v. U. S. [supra]. Nor do I deem the calls of the grant sufficiently certain to separate any land from the royal domain without a survey.[3] On these two grounds, the claim must be rejected. Decreed accordingly.

NOTE. From this decree the petitioners appealed to the supreme court; and at the December term, 1851, the case was argued there by Mr. Webster and Mr. Johnson for the appellants, and Mr. Crittenden, Atty. Gen., for the United States. It is reported in 13 How. [54 U. S.] 250.

Catron, Circuit Justice, delivered the following opinion:

In August, 1796, James Clamorgan petitioned Colonel Delassus, then acting as commandant of the post and dependency of New Madrid, for a grant of land fronting on the Mississippi river for many miles, and running back to the western branches of White river, including a section of country equal in area to 536,904 arpens, as was afterwards ascertained by measurement. To obtain title and possession of this large quantity of land, Clamorgan represented that he was a merchant residing in St. Louis; that he had been strongly encouraged by the governor-general of the province of Louisiana to establish a manufactory of cordage, fit and proper for the use of his Spanish majesty's vessels, and especially for the necessities of the Havana, to which place his excellency desired the petitioner to export the cordage, under his (the governor-general's) protection; of which facts the commandant was advised, so that he might exercise his power to favor an enterprise likely to become very important to the prosperity of the dependency, and very lucrative to all the inhabitants of Upper Louisiana. Furthermore, that the petitioner (Clamorgan) was then connected in correspondence and interest with a powerful house in Canada, which might procure for him a sufficient number of cultivators to teach in that region the manner of cultivating hemp, and fabricating it into various kinds of cordage, in the most perfect manner, so as thereby to respond to the views of the general government, which desired the prosecution of this enterprise by all proper and honest means that possibly could be used to exempt his majesty from drawing in future from foreigners this article, so important in the equipment of his vessels.

Clamorgan further stated that "it is with this hope that the petitioner has actively made the most pressing demands to obtain from his correspondents in Montreal a considerable number of people proper for this culture, who must of necessity by inducement be attracted hither, although at this moment the political circumstances of Canada appear to oppose it, but in more favorable times hereafter, this object may undoubtedly be obtained. Notwithstanding which, the petitioner is obliged to assure himself in advance from you, monsieur, a title which may guarantee to him the proprietorship of a quantity or arable land proportioned to his views, in order to form an extensive establishment as soon as the time shall appear favorable to his enterprise, and as soon as his correspondents shall be able, without compromitting their sense of duty, to cause to emigrate to this country the number of people necessary to give birth to this culture, so much desired by the government. Considering, monsieur, this expectation of the petitioner, and the particular recommendations of his excellency, the governor-general of the province, the petitioner hopes that you will be pleased to grant him the quantity of land which he desires to obtain, as well in order to favor him, the execution of all which may contribute to the future success of his project, as to furnish him the means of attracting hereafter from a foreign country an emigration of cultivators, which may not perhaps be obtained until after a considerable lapse of time, and upon promises of rewards which the petitioner will be obliged to fulfil in their favor." The land solicited is then described; the petitioner proceeds to set forth the title he desires: "To the end that as soon as it may be in the power of the petitioner he may be able to establish and select, in the tract of land so demanded, those portions which shall be best fitted to improve for the culture of hemp; because, inasmuch as a great tract of said lands is now drowned in swamps and unimprovable lowland, making it impossible to fix establishments in the whole extent; all to be done that the petitioner may enjoy the land, and dispose of it always, as a property belonging to him, his heirs, or assigns; and also may distribute them, or part of them, if he thinks fit, in favor of such person or persons as he may judge proper, to attain, as far as on him depends, the accomplishment of his project; and the petitioner will never cease to return thanks for your favors."

To this demand of Clamorgan, the commandant responded, and proceeded to grant as follows: "Since, by the exposition contained in this petition, the means of the petitioner are apparent to me, and his new connection with the house of Todd, which will be able to facilitate to him the accomplishment of the enterprise proposed, the profit whereof, if it succeed, will redound in part to the advantage of this

[3] The supreme court, it will be seen, overruled this point, holding that the grant was sufficiently described to fix its locality.

remote country, miserable on account of its small population; and I giving particular attention to the recommendations which Señor El Baron de Carondelet, governor-general of these provinces, has communicated to me when he thought fit to appoint me commandant of this post and its dependencies, 'to seek by all means the mode of increasing the population and of encouraging agriculture in all its branches, and particularly the cultivation of hemp,' it appearing to me that the propositions which the petitioner makes are conducive to the attainment of this last recommendation. In virtue of this I concede to him and his heirs the tract of land which he solicits, in the place and with the boundaries that he prays for, provided there is injury to no one; and so that the same may be established, he shall cause a survey to be made, not obliging him to accomplish this immediately, as from the excessive extent of space it would cause him great expense if it were done before the arrival of the families which he is bound to cause to come from Canada, but so that, on their arrival and being put in possession, it shall be his duty to secure his property by means of exercising the power of survey, in order afterwards that he may make application to the governor-general to obtain his approval, with the title in form of this his concession." By various conveyances the foregoing claim was vested in Glenn and Thurston, who filed their petition in the district court of Arkansas, seeking to have it confirmed according to the act of 1844. They set forth Clamorgan's application, the commandant's decree thereon, and the mesne conveyances. The attorney of the United States answered, and among other grounds of defence set up, alleged that he was totally uninformed as to the several statements and allegations contained in the petition; that he denied said statements and allegations, and required full proof thereof, as well as of all other matters and things necessary or material to establish the validity of the claim of said James Clamorgan. On these issues the parties went to trial.

The petitioners established by proof that Clamorgan's application and the governor's decree thereon were genuine, and also proved a due execution of the several conveyances vesting title in Glenn and Thurston. No other evidence was introduced by either side. The district court dismissed the petition; and from that decree an appeal was prosecuted to this court. No controversy has been raised drawing in question the validity of the mesne conveyances; nor do we suppose there is any difficulty in locating the land demanded in Clamorgan's petition. Prima facie, its locality is sufficiently described to authorize a survey thereof, according to the Spanish usages. As regards the commandant's power to make the concession to Clamorgan, there is more difficulty. In 1796, when Delassus was commandant at the post of New Madrid, he also acted as sub-delegate, and exercised the faculty of granting concessions for, and ordering surveys of, land. In the exercise of his functions, he was directly subordinate to the governor-general at New Orleans, and acted according to his instructions. Nor was he in any degree dependent on the lieutenant-governor of Upper Louisiana, residing at St. Louis, as appears by letter of August 26, 1799, from Morales to Delassus, reciting the facts. The letter is found in document 12, Senate Documents, 2d Sess. 21st Cong. (page 29), and filed as evidence by Judge Peck, preparatory to his trial before the senate of the United States. In a deposition of Delassus, forming part of the documents filed before the board of commissioners for Missouri in 1833, and afterwards returned by them for the consideration of congress, Delassus states the fact that he, as commandant at New Madrid, exercised the powers of sub-delegate. Document No. 59, p. 17, House Reports, 1st Sess. 24th Cong. This commandant's powers were therefore coextensive with those of the lieutenant-governor at St. Louis, in distributing the public domain. Having acted under the governor-general, to whose orders and instructions the commandant was bound to conform, it becomes necessary to ascertain what these instructions were in the present instance; and taking the facts stated in Clamorgan's memorial and in Delassus' decree thereon to be true, as we are compelled to do, it is sufficiently manifest, as we think, that the commandant did stipulate with Clamorgan, in accordance with the governor-general's instructions. That the governor-general had power thus to contract, was held by this court when the agreements of Maison Rouge and Bastrop were before it for adjudication; and having done the same through his deputy in this instance, the acts of that deputy cannot be called in question on the assumption that he exceeded his powers. In the document No. 59, above referred to, Delassus states what his practice was in giving out concessions. He kept no books in which the fact was recorded. All he did was to indorse his decree on the petition and return it to the party demanding the land, and the party might hand it to the surveyor or retain it at his option. That he (Delassus) believed the surveyor made a note of the concession of record, but whether before or after the survey was made, he knew not, as that matter did not concern the deponent. That no time was limited within which the party was bound to survey. Thus it appears that Clamorgan got the paper title relied on in the ordinary form, and which he retained in his own hands until after Upper Louisiana was delivered to the United States in March, 1804. No possession was taken of the land, or any part of it; nor was it surveyed during the time Spain governed the country; nor has any claimant under Clamorgan ever had possession, so far as this record shows.

The surveys produced to us are private ones, and of no value in support of the claim. And this brings us to the consideration of the mere title paper, standing alone. On its true meaning this controversy depends. (1) The petition of Clamorgan, and Delassus' decree on it, must be construed together, there being a proposition to do certain acts on the one side, and an acceptance on the other, limited by several restrictions. (2) What is stated in either paper, as to facts or intent, must be taken as true. Such are the rules laid down in Boisdoré's Case, 11 How. [52 U. S.] 87, and which apply here. The country was vacant, and greatly needed population, which could only be drawn from abroad; and this population Clamorgan stipulated that he would supply, and establish a colony from Canada on the land. That he would introduce cultivators of hemp, and artisans skilled in the manufacture of cordage, and would grow hemp and make cordage to an extent so large as to be of national consequence. On the faith of these promises the grant was made. As already stated, no step was taken by Clamorgan to perform the contract; all that he did was a presentation of his petition, and the obtaining of Delassus's approval and decree on it. This paper he retained about thirteen years, when it was assigned to Pierre Choteau May 2, 1809, by a deed of conveyance for the land claimed. In view of these facts, several legal considerations arise. It was held in Arredondo's Case, 6 Pet. [31 U. S.] 711, that by consenting to be sued, the United States had submitted to judicial action, and considered the suit as of a purely judicial character, which the courts were bound to decide as between man and man litigating the same subject-matter; and that, in thus deciding, the courts were restricted within the limits and governed by the rules congress had prescribed. The principal rules applicable here are, that in settling the question of validity of title, we are required by the

act of 1824 [4 Stat. 30] to proceed in conformity with the principles of justice, according to the law of nations, the stipulations of the treaty by which the country was acquired, and the proceedings under the same; the several acts of congress in relation thereto, and the laws and ordinances of the government from which the claim is alleged to have been derived.

When deciding according to the law of nations, and the stipulations of the treaty, we are bound to hold that such title as Clamorgan had by this concession or first decree stood secured to him as private property; and that the claim being assignable, the complainants represent Clamorgan. And this brings us to the question as to what right was acquired by the concession, according to the laws and ordinances of the Spanish colonial government existing and in force when the grant was made. By these the commandant, Delassus, had authority to contract and give concessions, and make orders of survey, by first decrees, either with or without conditions, as this court held in the case of Soulard v. U. S., 10 Pet. [35 U. S.] 144, provided the concession was founded on a consideration prima facie good; either past when the concession was made, or to follow in future. Here the consideration was to arise by future performance on the part of the grantee. But it is insisted, forasmuch as a title vested in Clamorgan by the grant to him, even admitting it was encumbered with conditions, still as their performance was to happen subsequent to the vesting of the estate, the want of performance could only be taken advantage of by a proceeding instituted by government for that especial purpose; nor could want of performance be set up as a defence in this suit. If the premises assumed were true, the conclusion would necessarily follow; and Arredondo's Case [supra], is relied on in support of this position, and as governing the present case. That proceeding was founded on a perfect title, having every sanction the Spanish government could confer. It was brought before the courts according to the 6th section of the act of May 23, 1828 [4 Stat. 285], which embraced perfect titles, and was only applicable to suits in Florida. The subsequent condition there relied on to annul the grant was rendered immaterial, and perhaps impossible, by the grantor himself, as this court held, and the grantee discharged from its performance. But in Clamorgan's case, the conditions to occupy and cultivate were precedent conditions; they addressed themselves to the governor-general, and their performance was required in advance. Before any right existed in Clamorgan to apply for a complete title, or even to have a public survey, preparatory to such application, he was bound by his contract to establish his colony on the land, and furthermore to set up his manufactory to make cordage, and to supply it with hemp grown on the land, unless these conditions were waived on the part of the Spanish government. And as we are called on by the complainants to adjudge the validity of this claim, and to order that a patent shall issue for the land in the name of the United States, it necessarily follows the same duty is imposed on us that would have devolved on the governor-general, had the Spanish government continued in Louisiana. By the Spanish regulations, Clamorgan was not recognized as owner of a legal title without the further act of the king's deputy, the governor-general, or the intendant-general, after the power to make perfect grants was conferred on him. Until this was done, the legal title remained in the crown; and the same rule has been applied in this country. No standing can be allowed to imperfect and unrecognized claims in the ordinary judicial tribunals until confirmed either by congress directly, or by a special tribunal constituted by congress for that purpose. For our opinion more at large on this subject, we refer to the case of Menard v. Massey, 8 How. [49 U. S.] 305-307. As we are asked to decree the final title, and bound to do so, in like manner as the Spanish governor-general or intendant was bound, it follows we may refuse for the same legal reasons that they may refuse. And the question presented is, whether we are bound to refuse, according to the face of the contract sued on, and in conformity to our previous decisions in other cases depending on similar principles?

Very many applications made for perfect titles to the district courts, under the act of 1824, have been resisted, because subsequent conditions had not been complied with; first, such as mill grants in Florida, where the usual quantity of 16,000 acres was given by concession, with a condition that the mill should be built within a specified time; second, where grants were made for the purpose of cultivation, and no cultivation followed, as in the Cases of Wiggins, 14 Pet. [39 U. S.] 334, and Boisdoré, 11 How. [52 U. S.] 63; third, where by concession parties were required by special regulations to levee and ditch on the river's front in Lower Louisiana. These were subsequent conditions, just as much as the introduction of a colony of hemp-growers, and the manufacture of cordage by Clamorgan; and yet no one has ever successfully maintained that a party having such concession could hold the land and obtain a perfect title, although he did not build the mill, nor occupy and cultivate, nor levee and ditch, founded on the assumption that performance was unnecessary. In all these cases it was held that performance was a condition precedent, and the real equity on which a favorable decree for a patent could be founded under the act of 1824. If Clamorgan's concession carries with it conditions similar in principle, it must abide by this settled rule of decision. This depends on the true meaning of his contract with the Spanish authorities. He agreed to establish a colony, by introducing a foreign population, and to grow hemp and manufacture cordage, to an amount so large as to make it a national object. By these promises he obtained a concession for more than half a million of arpens of land. A promise of performance was the sole ground on which the Spanish commandant made the concession; and actual performance was to be the consideration on which a complete title could issue. So far from complying, Clamorgan never took a single step after the agreement was made, and in 1809 sold out his claim on speculation for the paltry sum of $1,500. Under these circumstances, we are called on to decide in his favor, according to the principles of justice, this being the rule prescribed to us by the act of 1824 and the Spanish regulations. To hold that an individual should have decreed to him, or to his assignees, a domain of land more than equal to seven hundred square miles, for no better reason that that he had the ingenuity to induce a Spanish commandant to grant the concession founded on extravagant promises, not one of which was ever complied with, would shock all sense of justice. And such conclusion would be equally contrary to the policy pursued by Spain, which was to make grants for the purposes of settlement and inhabitation, and not to the end of mere speculation. We so held in Boisdoré's Case, 11 How. [52 U. S.] 96, and the principle applies even more strongly in this case than it did in that; as there something was done towards compliance, and here nothing has been attempted.

The remaining ground on which the complainants demand a confirmation is the following: "Because if the concession was upon conditions which should have been complied with in order to vest the estate as against Spain, whilst the conditions were practicable and might have been performed by the grantee, the estate vested without such performance, because the province was ceded by Spain before the time for

performance had expired, and because of the change of government, manners, &c., consequent on that cession." That Clamorgan could take no step after the change of government, is not open to controversy. By the 14th section of the act of March 26, 1804 [2 Stat. 287], which establishes the territories of Orleans and Louisiana, Clamorgan was prevented from doing any further act in support of his title, had he been disposed to do so. He was positively prohibited from making settlements on the land, or making a survey of it, under the penalty of fine and imprisonment. But no advantage resulted from this provision to claimants, whose concessions carried with them conditions that had not then been complied with. The 1st section of the act of 1824, in conformity to which we are now exercising jurisdiction, limits the courts as to the validity of title and standing of the various claims, to the condition they held before the 10th of March, 1804. By the 3d article of the treaty of cession by which Louisiana was acquired, it was stipulated that the inhabitants of the ceded territory should be admitted as soon as possible and become citizens of the United States, and be maintained in the free enjoyment of their property in the mean time. But no time was provided by the treaty within which conditions appertaining to imperfect grants of land might be performed; this was left to the justice and discretion of our government; and in a due exercise of that discretion, the acts of 1804 and 1824 were passed, and to these acts of congress the 2d section of the act of 1824 commands us to conform. The treaty addressed itself to the political department; and up to the passing of the act of 1824, that department alone had power to perfect titles and administer equities to claimants. And when judicial cognizance was conferred on the courts of justice to determine questions of title between the government and individuals, the limits of that jurisdiction were prescribed, namely, that no act done by the Spanish authorities, or by an individual claimant, after the 3d day of March, 1804, should have any effect on the title, but that its validity should be determined according to its condition at that date. All claims lying within the territory acquired by the treaty of 1803, which have been brought before the courts according to the acts of 1824 and 1844, have been compelled to abide by this test. Great numbers have been rejected because the conditions of occupation and cultivation had not been complied with before the restraining act of 1804 was passed, or before the 10th day of March, 1804. Nor have the claimants under Clamorgan more right to complain than others. His neglect extended through nearly eight years, during the existence of the Spanish government; whereas many similar claims have been rejected where the neglect was not half so long. If Clamorgan could come forward because of the prohibition, and be heard to excuse himself from performing the onerous conditions his contract imposed, so could every other claimant who had neither taken possession, nor in any manner complied with his contract, do the same; and on this assumption, concession issued by France or Spain would be without condition, and a simple grant of the land described in the paper. Its genuineness, and proof of identity of the land, would settle the question of title. No tribunal has ever accorded any credence to this claim. Two boards of commissioners have pronounced it invalid, the first in 1811, and the second in 1835; the latter on the ground that the conditions of the grant had not been complied with. By this decision it fell into the mass of public lands, according to the third section of the act of July 9, 1832 [4 Stat. 567], which declares that the lands contained in the second class (being that rejected) shall be subject to sale as other public lands. By the act of the 17th of June, 1844 [5 Stat. 676], another opportunity was afforded to apply to the district court for a confirmation. That court agreed with the board of commissioners, and again declared the claim invalid, because the conditions had not been complied with, and dismissed the petition; and with this decree we concur. Decree affirmed.

GLENN (UNITED STATES v.). See Case No. 15,217.

GLENNY v. The GLOBE. See Case No. 5,484.

GLENS FALLS INS. CO. (DAVEY v.). See Case No. 3,590.

GLENS FALLS PAPER CO. (AMERICAN WOOD-PAPER CO. v.). See Cases Nos. 321 and 321a.

Case No. 5,482.

GLIDDEN et al. v. MANUFACTURERS' INS. CO.

[1 Sumn. 232.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1832.

MARINE INSURANCE—DEVIATION.

A vessel was insured from A to B, and her port of discharge in the United States. She went to C, and took in a return cargo for D, and stopped at S on the return voyage. The underwriters signed a memorandum, that the deviation to S should not prejudice the insurance, the vessel having sailed from thence to E. There was a total loss by shipwreck. *Held*, that the memorandum did not help the deviation of going to C instead of B; and that the mis-statement of the return voyage being to E, made the memorandum of no effect.

Assumpsit [by John Glidden and others] on a policy of insurance. At the trial, which was upon the general issue, there was a demurrer to the evidence, upon which the cause was submitted to the decision of the court.

Messrs. Webster and Kinsman, for plaintiffs.

Mr. Sohier, for defendants.

STORY, Circuit Justice. On the 4th of August, 1830, John Kendrick & Co. caused a policy to be underwritten, for whom it may concern, payable to them in case of loss (on account of the plaintiffs), two thousand dollars on the schooner Orono, from Newcastle, Maine, to her port of discharge in Martinique, and at and from thence to her port of discharge in the United States, at a premium of five per cent. (the vessel being valued at $3000), against the common perils. The vessel had sailed on the voyage on the 11th of June preceding. Instead of going to Martinique, she went to Mariegalante and arrived there on the 14th of July of the same year. She there disposed of her cargo, and took on board a return cargo, without going to Martinique, and departed from thence on the 15th of August, on her return home, being bound to Damariscotta in the state of Maine, and not to Boston. She arrived off, and touched at, St. Eustatia on the

[1] [Reported by Charles Sumner, Esq.]

17th of August, and on the 12th of September was shipwrecked and lost, on Lenikin's Neck, in Booth's Bay in Maine, while proceeding towards Damariscotta. An abandonment was duly made, but not accepted; and a claim is now made for a total loss.

These facts are admitted upon a demurrer to the evidence; and if these constituted the whole of the plaintiffs' case, it would be very clear, that they would not be entitled to recover; for there was a deviation from the voyage stated in the policy, the schooner never having gone to Martinique; and, of course, the return voyage of the policy never commenced. But on the 11th of September, 1830, it having been ascertained, that the vessel had been at St. Eustatia, the following memorandum was, by consent of all parties, added to the policy. "Boston, September 11th, 1830. It is now understood, that the within insured vessel has been to St. Eustatia, and sailed thence for Boston about twenty-five days since, which deviation shall not prejudice the within insurance." The question is, whether this memorandum helps the plaintiffs' case. I am of opinion it does not. In the first place, it waives nothing more than the deviation from the voyage by going to St. Eustatia, and not that by going to Mariegalante, and not going to Martinique. In the next place, this waiver is only upon a statement in the memorandum, that the voyage was from St. Eustatia to Boston; whereas it was in fact to Damariscotta. So that, whether the memorandum is taken to be a conditional waiver, or whether it is taken to be substantially the substitution of a new risk, namely, a voyage from St. Eustatia to Boston, the objection is equally fatal. There was either a deviation not waived, or a non-inception of the new voyage. Upon the demurrer to the evidence, therefore, judgment must pass for the defendants.

GLIDE, The. See Case No. 2,159.

GLIDEWELL (LOWENSTEIN v.). See Case No. 8,575.

Case No. 5,483.

The GLOBE.

[2 Blatchf. 427;[1] 15 Law Rep. 421.]

Circuit Court, N. D. New York. Oct., 1852.[2]

ADMIRALTY—JURISDICTION—GREAT LAKES—ACT OF FEB. 26, 1845—SERVICE IN PERSONAL ACTIONS—SUITS IN REM—FOREIGN VESSELS—MARITIME LIENS—SUPPLIES AND MATERIALS—PRIORITY.

1. The extension of admiralty jurisdiction to the lakes, by the act of February 26, 1845 (5 Stat. 726), did not take away the concurrent remedy which existed at common law, and which is to be sought in the jurisprudence of the states, and usually in the state courts.

[Cited in The Henrietta, Case No. 6,121.]

[Cited in Randall v. Roche, 30 N. J. Eq. 222.]

2. As a general if not universal rule, in order to bind a defendant, or to confer any rights upon a plaintiff, by force of a judgment in a personal action, the former must be served with notice of the institution of the suit, so that he may have an opportunity to appear and defend.

[Cited in Daily v. Doe, 3 Fed. 918.]

3. But a proceeding in rem forms an exception to the general rule, and binds the res in the absence of any personal notice to the party interested.

[Cited in Kearney v. Kearney (Cal.) 15 Pac. 770.]

4. A foreign vessel was attached by a proceeding in rem, under a law of Ohio, in a court of that state, for repairs made and supplies furnished, and sold upon a judgment duly recovered in pursuance of such attachment: *Held*, that the judgment was conclusive upon the transfer and disposition of the vessel, in whatever place she might be found, and upon the title to her, by whomsoever it might be questioned, and whether involved directly or collaterally. This was especially so where the owner of the vessel at the time appeared in the suit in the Ohio court, and contested the proceedings throughout.

5. The case of The Chusan [Case No. 2,717] commented on and explained.

6. The rule in respect to maritime liens against vessels for supplies and materials furnished to her master at a foreign port is, that the party first instituting legal proceedings for the purpose of enforcing his claim against the vessel, is entitled to satisfaction out of the proceeds of her sale.

[Cited in The Young Mechanic, Case No. 18,180; The Pathfinder, Id. 10,797; The William T. Graves, Id. 17,759; The Minnie R. Childs, Id. 9,649; The Frank G. Fowler, 8 Fed. 333; The J. W. Tucker, 20 Fed. 130; The Arcturus, 18 Fed. 744; The Lady Boone, 21 Fed. 733.]

7. The true meaning of a maritime lien is, that it renders the property liable to the claim without a previous judgment or decree of the court sequestering or condemning it or establishing the demand, as at common law, and the action in rem carries it into effect.

8. The appropriation of the property to that end becomes absolute and exclusive on suit brought, unless superseded by some pledge or lien of paramount order.

9. The first action by which the property is seized is entitled to hold it as against all other claims of no higher character.

[Cited in The Edith, Case No. 4,282.]

10. The "lien," so termed, is, in reality, only a privilege to arrest the vessel for the demand, which, of itself, constitutes no incumbrance on the vessel, and becomes such only by virtue of an actual attachment of the same.

11. G. filed a libel in rem in the admiralty in New-York, under the act of February 26, 1845 (5 Stat. 726), against a vessel, to recover for supplies and materials furnished to her in New-York, as a foreign vessel, owned in Michigan. Before the filing of the libel, she had been sold in Ohio upon a judgment recovered in a state court in Ohio, for supplies and materials furnished to her by C. subsequently to the time when G. furnished his supplies and materials. The Ohio judgment was recovered in a proceeding in rem against the vessel by attachment under a law of Ohio, she being then also a foreign vessel, owned in Michigan: *Held*, that the priority of time in the furnishing of the supplies and materials by G. gave him no paramount lien on the vessel over the lien of C.

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

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

[2] [Reversing Case No. 5,484.]

William H. Glenny filed a libel in rem, in the district court, against the steamboat Globe, to recover the sum of $445 49, for supplies and materials furnished to said steamboat at the request of her master, at the port of Buffalo Creek, in the Northern district of New-York, between the 13th day of June, 1848, and the 10th day of September, 1849. The libel was filed on the 11th of May, 1850, under the act of congress of February 26, 1845 (5 Stat. 726), extending the admiralty jurisdiction in certain cases to the lakes, and navigable waters connecting the same. The Globe was a foreign vessel, owned and registered at Detroit, in the state of Michigan, from before the 13th of June, 1848, until after the 31st of December, 1849.

The claimant, in his answer, set up a title to the steamboat, derived under a sale of it by execution upon certain judgments recovered in February, 1850, in the superior court of Cleveland, in the state of Ohio, which sale took place on the 9th of March, 1850. It was claimed that this sale extinguished any lien which the libellant might otherwise have had upon the vessel.

The Ohio judgments were recovered by virtue of a statute of that state, passed February 26th, 1840, entitled "An act providing for the collection of claims against steamboats and other water-craft, and authorizing proceedings against the same by name," and of an act explanatory thereof, passed February 24th, 1848. These acts provided, that steamboats and other water-craft navigating the waters within or bordering upon the state, should be liable for debts contracted on account thereof by the master, owner, steward, consignee or other agent, for materials, supplies or labor in the building, repairing, furnishing or equipping the same; that any person having such demand might proceed against the owner or owners, or master of such craft, or against the craft itself; that, when suit should be commenced against the craft, the plaintiff should file his precipe to that effect, naming the craft or giving a substantial description of her, and with it a bill of the particulars of his demand, verified by affidavit; that, thereupon, the clerk should issue a warrant, returnable as other writs, directing the seizure of the craft and the detention of the same until discharged by due course of law; that the master, owner, steward, consignee, or other agent of the craft, might discharge her on giving security that she should be forthcoming to answer the judgment under the seizure; that, on the return of the writ, proceedings should be had as in other cases of process served and returned; that, after judgment, the vessel might be sold upon execution to satisfy the judgment, and the overplus, if any, should be paid over to the owner, master or agent, as in other cases of execution; and that an appeal, as in other cases, might be taken from any judgment rendered against the vessel.

The Globe was seized and sold in Ohio in the due course of proceedings against her under these statutes, for debts contracted on her account for repairs made and materials, supplies, &c., furnished to her between the 20th of September, 1849, and the 31st of December, 1849. She was purchased at the sale by one Elisha T. Sterling, the highest bidder, for the sum of $14,000, on the 9th of March, 1850, and, on the 26th of April, 1850, the claimant purchased her from Sterling for the sum of $17,000.

The above facts, with such others as are stated in the opinion of this court, are all that are necessary to an understanding of the case, in the view taken of it by the court.

The district court pronounced for the libellant [Case No. 5,484], and the defendant appealed to this court.

Isaiah T. Williams, for libellant.

William H. Greene and Solomon G. Haven, for claimant.

NELSON, Circuit Justice. The extension of admiralty jurisdiction to the lakes by the act of congress of February 26, 1845 (5 Stat. 726), did not take away the concurrent remedy that existed at common law. Indeed, that act saves, in express terms, this concurrent remedy, where it is competent, and also any concurrent remedy which may be given by the state laws. It was also saved by the general act of 1789, conferring exclusive admiralty jurisdiction upon the district courts of the United States. 1 Stat. 76, 77, § 9; New-Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, 389, 390.

The remedy at common law is to be sought in the jurisprudence of the states, and usually in the courts of the states. It may be administered in the federal courts in cases where the citizenship or residence of the parties enables those courts to entertain the jurisdiction. Act Sept. 24, 1789 (1 Stat. 78, 79, § 11). The modes of proceeding in pursuing this remedy are different in the different states, as it respects both the commencement of the suit and the steps taken in conducting it. Undoubtedly, as a general if not universal rule, in order to bind the defendant, or to confer any rights upon the plaintiff, by force of the judgment, in any personal action, the former must be served with notice of the institution of the suit, so that he may have an opportunity to appear and defend. But a proceeding in rem forms an exception to the general rule, and binds the res in the absence of any personal notice to the party interested. Story, Confl. Laws, c. 14, § 549, and cases cited, and chapter 15, §§ 592, 593; Boswell's Lessee v. Otis, 9 How. [50 U. S.] 336.

There can be no doubt, therefore, that the judgments in this case, acting in rem, must be held conclusive upon the transfer and disposition of the vessel in question, in whatever place she may be found, and upon the title to her, by whomsoever it may be questioned, and whether involved directly or collaterally.

The case of The Chusan [Case No. 2,717], which was referred to upon the argument, contains nothing in conflict with these views. That was the case of a libel in Massachusetts, for materials furnished in the port of New York to a foreign vessel; and one of the grounds of defence was, that the statute of New York respecting the lien of a materialman, provided that the lien should cease when the vessel left the state. This ground of defence was overruled by Mr. Justice Story, for the reason that, in the case of a foreign vessel, the lien attached by force of the maritime law, which entitled the party to come into a court of admiralty to enforce it, and that the jurisdiction of the admiralty, thus acquired, could not be taken away or controlled by the state law. This is very clear. As it respects foreign vessels, the jurisdiction of the admiralty is not dependent upon the state law, but upon the law of the seas. No matter what may be the regulations of the state on the subject, as regards the jurisdiction of her own courts, they cannot affect that of the admiralty; and any state law which should attempt to control the admiralty jurisdiction would be unconstitutional and void.

The question, what would be the effect of any concurrent remedy given by the state law, when it should be enforced against the vessel by a court of the state, was not involved in the case of The Chusan [supra], nor was it examined by Judge Story. The only remark made by him in that case, from which an inference could be drawn in conflict with the views I have expressed in this case, is, that the statute of New-York would be unconstitutional if applied to foreign vessels. But that remark was made in answer to the argument that the statute controlled the jurisdiction of the admiralty; and, in that view, the statute would have been unconstitutional.

It may be remarked, however, that it is unnecessary to place the decision of this branch of the case upon the ground that the Ohio judgments, acting in rem, would be conclusive in the absence of any personal notice to the party interested, because Robinson, the owner of the vessel at the time, appeared in the suits in the court in Ohio, and contested the proceedings throughout.

These views dispose of the case, so far as the claims of the libellant upon the vessel are concerned, unless the fact that his supplies and materials were furnished to her prior to the time when the repairs were made and the materials furnished to her by the Ohio creditors, gives him a lien which, in judgment of law, overreaches the proceedings and judgments in the Ohio court, and which he is entitled to enforce in the admiralty.

It has been argued, that this maritime lien against a vessel, for supplies and materials furnished to her master at a foreign port, is an abiding lien, and adheres to the vessel, and may be enforced over all claims of a like nature subsequently accruing in the course of her employment. I cannot assent to this position. On the contrary, I am satisfied that the true rule upon the subject is that, in respect to maritime liens of this description, the party first instituting legal proceedings, for the purpose of enforcing his claim against the vessel, is entitled to satisfaction out of the proceeds of her sale. Upon any other view, the vessel would afford no reasonable security to the merchant in making advances or furnishing the necessary supplies; as, for aught he could know, the existing claims against her might exceed her value. It is apparent that, to give to this maritime lien the efficacy claimed, would greatly embarrass and obstruct the commerce and navigation of the country. It would deprive the master, in distant ports, of the means of meeting the exigencies of the service, because the vessel would furnish no adequate security for the necessary supplies or repairs.

The question has been the subject of examination by the learned district judge for the Southern district of New York. In a case which came before him in 1841, he held that the true meaning of a maritime lien was, that it rendered the property liable to the claim without a previous judgment, or decree of the court, sequestering or condemning it, or establishing the demand, as at common law, and that the action in rem carried it into effect; that the appropriation of the property to that end became absolute and exclusive on suit brought, unless superseded by some pledge or lien of paramount order; that it resulted from the nature of the right and the proceedings to enforce it, that the first action by which the property was seized was entitled to hold it as against all other claims of no higher character; that the lien, so termed, was, in reality, only a privilege to arrest the vessel for the demand, which, of itself, constituted no incumbrance on the vessel, and became such only by virtue of an actual attachment of the same.[3]

I concur fully in this view, and, therefore, hold, in this case, that the priority of time in the furnishing of the supplies and materials by the libellant gave him no paramount lien on the vessel over the liens of the creditors in the Ohio suits.

The error of the learned judge below consisted, I think, in holding (1) that the proceedings and judgments in the Ohio courts were void on account of the absence of notice to the party interested; and (2) that the lien of the libellant for the supplies and materials furnished by him to the vessel was paramount and overreached the judgments and sale under the laws of Ohio.

The decree of the district court must, therefore, be reversed, and a decree be entered dismissing the libel, with costs.

[3] The case referred to is that of The Triumph, in the district court for the Southern distr ct of New York, July 27, 1841 [Case No. 14,182].

Case No. 5,484.

The GLOBE.

[13 Law Rep. 488; 3 Am. Law J. (N. S.) 337; 8 West. Law J. 241.]

District Court, N. D. New York. Dec. 18, 1850.[1]

ADMIRALTY—PROCEEDING IN REM UNDER STATE STATUTES—EFFECT—SALE ON EXECUTION—PRIORITY OF MARITIME LIENS.

1. A judgment in rem rendered in a court of the state of Ohio, in virtue of the act of the general assembly of that state, entitled "An act providing for the collection of claims against steamboats and other water crafts, and authorizing proceedings against the same by name," passed February 26, 1840 [38 Laws Ohio, p. 35], and the act explanatory thereof, passed February 24, 1848, is to be regarded as a nullity by judicial tribunals in other states, unless the owner of the vessel proceeded against appeared in the suit and had an opportunity to make a defence.

2. The title, if any, acquired by the purchaser at a sale of the vessel on execution, in virtue of such a judgment, is subordinate to the lien in favor of a material-man, conferred by the general maritime law of the United States and the act of congress of February 26, 1845, c. 20 [5 Stat. 726].

[Cited in Putney v. The Celestine, Case No. 2,541.]

3. A judgment recovered in a proceeding under the statute of Ohio, in a court of that state, for supplies, is not a bar to a subsequent suit in rem in admiralty, for the same supplies.

[Cited in Ashbrook v. The Golden Gate, Case No. 574.]

4. Quere—Whether the provisions of the statute of Ohio are not repugnant to the constitution and laws of the United States.

In admiralty.

I. T. Williams, Chas. H. S. Williams, and Mr. Talcott, for libellant.

Green & Havens, contra.

CONKLING, District Judge. This is an action against the steamer Globe for the value of certain supplies furnished by the libellant, William H. Glenny, at Buffalo, between the 13th of June, 1848, and the 10th of September, 1849, while the Globe was owned in the state of Michigan, enrolled and licensed at the port of Detroit, and employed in the business of navigation and commerce on the lakes. A claim was interposed by Joshua Maxwell, as owner, and a defensive allegation was brought in his behalf, in which it was pleaded that the Globe had, on the 26th day of April last, been sold and duly conveyed for the sum of $17,000 by Elisha T. Sterling; by whom, on the 9th day of March last, she had been purchased at a public sale made by the sheriff of Cuyahoga county, in the state of Ohio; that such sale was in virtue of an execution issued by the supreme court of Cleveland, on a judgment rendered in February last, in favor of the Cuyahoga Steam Furnace Company, for the sum of $3,836.40 damages, and $106.86 costs; that such judgment was recovered in a proceeding instituted on the 20th of September, 1849, against the Globe, under an act of the general assembly of the state of Ohio, passed February 26, 1840, and an act explanatory thereof, passed February 24, 1848, authorizing proceedings against steamboats and other vessels navigating the waters within or bordering on that state; which acts are set forth in extenso in the defensive allegation. And it is thereby also further pleaded that, during the same month of September, other suits of the same kind were in like manner instituted against the Globe, by other citizens of Ohio, wherein judgments were also recovered at the same term, and on which executions were successively issued to the sheriff of Cuyahoga county, all before the sale by him to Sterling. These judgments amounted in the aggregate to the sum of $13,442.50, leaving a balance of only $457.50 of the sum for which the Globe was sold; which sum was probably absorbed, chiefly, if not entirely, in poundage and interest. The claimant also further alleges that, on the first day of November, 1849, a proceeding of the same nature was instituted by the libellant against the Globe, in the same court, for the identical cause of action on which the present action is founded, and that a judgment was recovered therein for the sum of $522.02, besides costs. It is necessary here to observe that two other actions for supplies are pending against the Globe before this court, commenced simultaneously with this—the one by the firm of Willard & Munger, citizens of Buffalo, and the other by the Buffalo Steam Engine Company; which, by agreement of parties, were brought to a hearing conjointly with this, and in which the pleadings and allegations of the parties are the same as in this—the libellants in these two latter causes having also, simultaneously with the libellant Glenny, instituted proceedings and recovered judgments against the Globe under the Ohio statute. The aggregate amount of these three judgments is about $2,766.91; upon neither of which does it appear that any execution had been issued, nor has either been satisfied wholly or in part.

It is unnecessary to refer particularly to the evidence given at the hearing, because there is little controversy concerning the facts on which the rights of the parties depend. It appears that the supplies for which the libellant claims compensation were in fact furnished, and that he is therefore entitled to have their value decreed to him, unless the matters insisted on, as already stated, by the defendant, the truth of which is also established, constitute a valid defence. This, therefore, is the point to be determined. It was strenuously and ably argued by the counsel for the claimant, 1st, that in virtue of the sale by the sheriff of Cuyahoga county to Sterling, and of his subsequent sale and conveyance to the claimant, the latter acquired an absolute title to the Globe, dis-

[1] [Reversed in Case No. 5,483.]

charged of the maritime lien which the libellant is seeking in this action to enforce; and 2d, that, conceding the reverse of this proposition, the lien was extinguished, on the principle of transit in rem judicatam, by force of the judgment recovered by the libellant in Ohio.

The questions thus presented for decision are novel and important, and I have accordingly felt it to be my duty to bestow upon them a careful scrutiny and deliberate consideration.

The sale of the property of a defendant, by execution on a judgment in a personal action, invests the purchaser with such title and interest only as the defendant possessed at the date of the judgment or levy. If the defendant had no title, the purchaser acquires none; and if the property was previously incumbered, the incumbrance remains. There can be no doubt, therefore, that the lien or privilege conferred by the maritime law upon a material-man would still adhere to the ship, notwithstanding its sale by execution on a judgment against the owner. But it was argued by the counsel for the defendant, that the judgment under which the Globe was sold, was a judgment in rem, and that as such it was conclusive against all the world. That the suits in the Ohio court were, in form at least, against the Globe in specie, and therefore in rem, is certain. The first section of the act under which they were instituted, declares that for demands like those of these Ohio creditors, the vessel shall be liable; and by the second section it is enacted, that "any person having such a demand may proceed against the owner or owners or master of such craft, or against the craft itself." The third and fourth sections of the act prescribe the mode of proceeding against the vessel. A precipe is to be filed against it by name, accompanied by a bill of particulars verified by oath; whereupon a warrant is to be issued against the vessel, directing its arrest and detention until it shall be discharged by due course of law. The records produced at the hearing show that these creditors elected this form of remedy, and that the steps prescribed by the act for that purpose, were, or were intended to be pursued. Not only so, but, according, it seems, to the practical construction given to a provision contained in the sixth section of the act, that "the pleadings and proceedings shall be as in other cases," the Globe was personified in the pleadings, as the contracting party defendant—the materials and supplies being alleged to have been furnished at her request, and she being alleged to have promised to pay for them. She is represented, moreover, as having appeared by attorney, and pleaded the general issue and notice of set-off—no real person being named in the record as a party to the suit, except the plaintiff. The pleadings and judgment which led to the sale of the Globe were therefore literally in rem; and it must be conceded, also, as a general rule, that what in the authorities, cited at the hearing, are denominated judgments in rem, are followed by the legal consequences ascribed to them by the defendant's counsel. The question is, whether this rule is applicable to the present case. This is denied by the libellant's counsel; who insist, in the first place, that the judgment was of no validity whatever, for want of any notice to the owner of the vessel; and they have referred to numerous authorities in support of this proposition. The authorities relied on by them consist of a series of decisions in the national and state courts, asserting, with one voice, the necessity of notice in some form, to the party to be affected adversely, by judicial proceedings in whatever form; and it is undeniable that when the rights of the litigants depended on a judgment, unless it appeared either that such notice had been given, or that the defendant or party in interest had in fact appeared and had an opportunity to defend his rights, the judgment has uniformly been treated as a nullity, by the courts both of England and of this country. Thus in the case of Fisher v. Lane, 3 Wils. 297, which was an action of assumpsit for goods sold and delivered, the defence was, that the money for which the action was brought had already been once paid, in consequence of a judgment and execution upon a foreign attachment in London against the defendants as garnishees, in a suit against Fisher, the plaintiff. But it appearing that no personal notice of the suit had been given to Fisher—the custom of London, as it was shown, not requiring such notice—although the judgment in the principal suit was not rendered until after four defaults, nor that against the defendants as garnishees, until after summons to show cause, the defence was overruled. "Customs of particular cities" observed Lord Chief Justice De Grey, "may deviate from the course of the common law, but a custom contrary to the first principles of justice can never be good; so this custom not to summon or give notice to a defendant in a suit commenced against him, is contrary to the first principles of justice, and (in my opinion as at present advised) cannot be good." A verdict for the plaintiff subject to the opinion of the court having been taken, the whole court concurred in this opinion, and gave judgment for the plaintiff.

In the case of The Mary the same doctrine is asserted by the supreme court of the United States. "It is," said Chief Justice Marshall, "a principle of natural justice, of universal obligation, that before the right of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him." 9 Cranch [13 U. S.] 126, 3 Cond. R. 306. In the case of Bradstreet v. Neptune Ins. Co. [Case No. 1,793], referring to a case of seizure and condemnation under a municipal

law of Mexico, Mr. Justice Story declared it to be "a rule founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defence before his property is condemned." "If," he added, "a seizure is made, and condemnation is passed without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defence, the sentence is not so much a judicial sentence, as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of a foreign nation. It ought to have no intrinsic credit given to it, either for its justice or its truth, by any foreign tribunal. It amounts to little more, in common sense and common honesty, than the sentence of the tribunal which first punishes and then hears the party—'castigatque auditque.' It may be binding upon the subjects of that particular nation. But upon the eternal principles of justice it ought to have no binding obligation upon the rights or property of the subjects of other nations; for it tramples under foot all the doctrines of international law; and it is but a solemn fraud if it is clothed with all the force of a judicial proceeding. I hold, therefore, that if it does not appear, from the face of the record of the proceedings in rem, that due notice by some public proclamation, or by some notification or monition, acting in rem or attaching to the thing, so that the parties in interest may appear and make defence, and in point of fact the sentence of condemnation has passed upon ex parte statements without their appearance, it is not a judicial sentence, conclusive of the rights of foreigners, or to be treated, in the tribunals of foreign nations, as imparting verity in its statements or proofs." This language of Chief Justice Marshall and Mr. Justice Story was applied to the proceedings of foreign courts, and is to be considered as having been intended to refer especially to such proceedings. But language of the like import has been repeatedly held, and the principles it inculcates enforced, with respect to the judgments of the courts of other states. 1 Kent, Comm. (3d Ed.) 261, note c, and the case here cited. The constitution of the United States, it is true, declares that "full faith and credit shall be given in each state to the public acts, records and proceedings of every other state" (article 4, § 1); and congress, in pursuance of authority for that purpose conferred by the constitution, has, by the act of 26th May, 1790, c. 11 [1 Stat. 122], declared that such records and judicial proceedings, authenticated in the manner prescribed by the act, "shall have such faith and credit given to them in every court of the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." But this does not prevent an inquiry into the jurisdiction of the court, in which the original judgment was rendered, to pronounce the judgment, nor an inquiry into the right of the state to exercise authority over the parties, or the subject-matter, nor an inquiry whether the judgment is founded in and impeachable for a manifest fraud. The constitution did not mean to confer any new power upon the states; but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other states domestic judgments to all intents and purposes; but only gave a general validity, faith and credit, to them as evidence. No execution can issue upon such judgments, without a new suit in the tribunals of other states. And they enjoy not the right of priority or privilege, or lien, which they have in the state where they are pronounced, but that only which the lex fori gives to them by its own laws, in the character of foreign judgments. Story, Confl. Laws, § 609; Story, Const. c. 29, § 1307; 1 Kent, Comm. 261, note c; McElmoyle v. Cohen, 13 Pet. [38 U. S.] 312; 1 Greenl. Ev. § 548; Id., and notes. To this extent, then, the judgments of other states are to be regarded as foreign.

Now the term "jurisdiction," when applied to a personal action, imports a rightful authority over the cause or subject-matter, and over the person of the defendant; and when applied to a proceeding in rem, it imports the like authority over the res, and, so far at least as the res is concerned, over the person. See 1 Greenl. Ev. §§ 540, 541, 651, and the cases there cited. In general, and with certain exceptions which it is unnecessary here to notice, jurisdiction over the subject-matter will be presumed. Rose v. Himely, 2 Cranch [6 U. S.] 241, 2 Cond. R. 98; Bloom v. Burdick, 1 Hill, 130. But, as already observed, no judicial tribunal can acquire a rightful jurisdiction over the person or thing without due notice of the proceeding; and this must appear in the record itself, or else it must be shown that the defendant or party in interest did in fact appear and have an opportunity to be heard in his defence. Bradshaw v. Heath, 13 Wend. 407; Bradstreet v. Neptune Ins. Co. [supra]; Sawyer v. Maine F. & M. Ins. Co., 12 Mass. 291, 295. But in the case before the court, no notice in any form appears on the face of the record, nor is it pretended that any was in fact given. Indeed, the act under which the proceeding took place, requires none; and this novel feature of the act is rendered still more remarkable by another provision contained in it, which purports to make the judgment to be rendered, in effect, a judgment in personam as well as in rem; by directing, in case of a deficiency of proceeds from the sale of the vessel, to satisfy the judgment, that "the balance shall remain to be collected on execution as upon other judgments." It does appear by the record, however, as already observed, that a gentleman

appeared as the attorney of the vessel, and it was admitted at the hearing that he was employed by her owner. The latter resided at the time at Detroit, in the state of Michigan, and his appearance by attorney affords an answer to the objection of want of notice, to the extent of his interest in the Globe.

After what has been observed, it is unnecessary to add, that, but for the appearance by attorney of the owner of the Globe, it would have been my duty to hold the judgment in question a nullity. If it is valid, it owes its validity, therefore, to a fortuitous circumstance not provided for or contemplated by the act, and would doubtless have been rendered if there had been no appearance in the case. It was, I perceive, for the precise amount claimed by the plaintiff, and this is all that could have been adjudged had the judgment been taken by default. It is upon the act itself, therefore, that the objection really falls.

We have seen why it is that notice is held to be indispensable to the exercise by judicial tribunals of a rightful jurisdiction; and why, when this ingredient is wanting, their judgments are without extra-territorial force. Is the great principle of justice by which this condition is enjoined, less obligatory upon the legislatures of the several states of the American Union, than upon their courts? It is declared by Chief Justice Marshall to be "of universal obligation." Can it, by any reasonable intendment, be supposed that the people of the state of Ohio designed to invest their legislature with authority to disregard it? And if they did, are such acts of legislation binding upon the judicial tribunals in other states? But it was intimated by the counsel for the claimant, that the extra-territorial obligation of this act might be maintainable, on the ground that every nation possesses the power of confiscation over all property situate or coming within its territories; and authorities were cited in support of this doctrine. I confess my surprise that such an argument should have been pressed into this discussion. Confiscation is either an act of penal justice for the punishment of great crimes against the state (Bl. Comm. 299), or the exercise of a belligerent right against the property of public enemies (Kent, Comm. 61–66); not the arbitrary seizure of the property of one person, whether citizen or stranger, for the benefit of another person. So long as it shall be the pleasure of the legislature of Ohio to suffer this act to remain unrepealed, and the courts of that state shall deem it to be their duty to carry it into effect, its unavoidable evils must be submitted to; but beyond the limits of that state there can be no obligation founded, either in law, justice, or comity, unnecessarily to aggravate those evils. It is my desire, not less than my duty, nevertheless, to abstain from any animadversions upon it, not required by the actual exigencies of the case before me; and if it is true, as it was further argued by the counsel for the libellant, that conceding the validity, in the ordinary sense of the term, of the judgment in question, it falls short of the legal effect attributed to it by the advocates of the claimant, it is unnecessary, so far as the sale of the Globe is concerned, to determine whether the judgment under which the sale took place, was valid or not. Was this, then, such a judgment in rem as is or can properly be held to work an indefeasible change in the thing proceeded against? The act itself furnishes no answer to this question. It is therefore to be determined by the application of general principles; and looking at it in this light, it does appear to me that the answer which ought to be given to it is not even doubtful.

The proceedings prescribed by the Ohio statute are sui generis, and therefore anomalous. They have some resemblance to the proceeding usually denominated "foreign attachment," and some also to that prescribed in the New England states, whereby the property of the defendant may be attached and held in custody on mesne process in a personal action to satisfy the judgment, if any, to be obtained by the plaintiff. But they differ essentially from both, and they are still more unlike the proceedings of a court of admiralty, or of the English court of the exchequer in cases of municipal seizure, whose decrees and sentences in rem are said to be binding on all the world.

Law is said to be the perfection of reason. It would be strange, therefore, if the maxim "cessante ratione cessat lex" had not found a place among its axioms. Now the well known reason, why a judgment in rem is held to be conclusive upon all interests and titles in controversy before the court, is, that all persons having an interest or title in the subject-matter, are, in law, deemed parties; and they are deemed to be parties, because they are permitted, and, by the more effective forms of notice of which the case is susceptible, are summoned to become so in fact. The mode of procedure differs slightly in different countries. In this country it is as follows: If it is in behalf of the United States for a forfeiture, there must always have been a previous public seizure and detention of the thing proceeded against. This is followed, and when the proceeding is at the suit of a private person, the action is commenced by the exhibition in court of a pleading setting forth the grounds of the proceeding, and praying process of arrest and monition, which is accordingly issued. In virtue of the warrant of arrest, the marshal takes into his custody the vessel or other thing, and in obedience to the command of the writ of monition, which however is usually incorporated with the warrant, he posts a notice, embracing the substance of the libel, on a conspicuous part of the thing, and publishes it in one or more newspapers near

the place of arrest, calling on all persons having any right, title or interest in that thing, to appear in court on a certain future day, and assert their claims, on pain of being pronounced in contumacy and default. The right to do this by suitable allegations is fully recognised and guarded, untrammelled by technical niceties, not only during the pendency of the original suit, but until the final disposition of the proceeds of the sale of the property, should a sale be decreed. Such, in brief, is the proceeding in rem, which is held obligatory in its results upon all the world. To those not familiar with it, it may seem to be an exception in this respect to the rule which limits the binding force of judgments at common law to the actual parties and their privies. But in reality it is not; for it binds only those who are at least potentially parties to it, and who have an opportunity, if they choose to avail themselves of the privilege, not only to contest the claims of the libellant, but to supersede him by setting up superior claims of their own. After what I have already said of the proceedings prescribed by the Ohio statute, it is hardly necessary to add, that, with the exception of being in form a proceeding in rem instead of in personam, it is the reverse of that which I have described, and wholly wanting in the peculiar element on which the conclusive effect of the latter depends. Admitting, therefore, that this court is bound to treat the sale of the Globe to Sterling as valid, it follows, that to ascribe to it any efficacy beyond that of a sale on execution under a judgment recovered in an ordinary personal action, would be to ascribe to it an effect without a cause, and would, as I believe, be repugnant alike to law and to common sense. Such a doctrine would be less sweeping, and therefore less mischievous in its consequences, and might even appear to derive some countenance from analogy, if the remedy had been limited to those demands for which a lien is conferred by the maritime law. But the act not only makes no distinction between foreign and domestic vessels, but subjects all to "seizure" for debts contracted by the owner, steward, consignee or other agent, as well as by the master, "for injury done to persons or property by such craft;" and "for any damage or injury done by the captain, mate, or other officer thereof, or by any person under the order or direction of either of them, to any person who may be a passenger or hand" on board. The argument is, that a sale in virtue of a judgment for any one of these causes of action, has the effect of displacing and extinguishing the lien of a mariner or material-man, so highly favored in law as to be held paramount, not only to the title of a bonâ fide purchaser, without notice, but to that of the government acquired by forfeiture. To such a doctrine I cannot yield my assent.

But there is a farther objection to this part of the defense, not adverted to at bar, but which appears to me well worthy of consideration. The constitution declares that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction;" and by the judiciary act of 24th September, 1789 [1 Stat. 73], the district courts are invested with "exclusive cognizance of all civil causes of admiralty and maritime jurisdiction." The constitution also confers upon congress power "to regulate commerce with foreign nations among the several states, and with the Indian tribes:" and this power is also held to be exclusive. The admiralty and maritime jurisdiction conferred by the constitution, having been held to be limited to cases arising on the high seas or on tide-waters, and experience having at length, as it was supposed, demonstrated the necessity of extending the admiralty forms of remedy to certain cases arising on the lakes, this was done by the act of 26th February, 1845, c. 20 [5 Stat. 726]. These constitutional and legislative provisions do not interfere with the common law jurisdiction of the state courts, but leave the suitor at liberty to pursue his concurrent common law remedy in these courts, whenever he sees fit. But I doubt whether it is competent for a state legislature to interpose by creating new remedies unknown to the common law, and calculated to supersede and defeat those provided by the constitution and laws of the United States, thus exhausting the sources of federal jurisdiction, and, by local regulation, introducing discord and confusion where the common good requires that harmony and regularity should prevail. In this very case, but for this Ohio statute, the Cuyahoga Steam Furnace Company, on whose execution the Globe was sold, would probably have instituted a suit in admiralty in the district court of Ohio; and in that case all the Ohio and New York creditors with whom this suit has made us acquainted, could, at little expense, have intervened for their interest, and justice would not have been violated by the appropriation of the whole proceeds of the sale of the Globe to the satisfaction of the furnace company and of the other creditors who had the good fortune, by being on the spot, seasonably to learn that the Globe had been arrested, to the total exclusion of those, who, by their remoter residence, were left in ignorance. Indeed, as the suits in favor of the Ohio creditors were not simultaneously commenced, it was only because the Globe brought enough to satisfy them all, that some of them got paid at all; for it was shown at the hearing to be the practice, when several suits are instituted, to assign priority of payment to the parties according to the order of priority among them in point of time. The act, moreover, as already intimated, makes no provision for intervention at any stage, and when the vessel is once sold upon

a notice of ten days—the only notice required by the act—whatever balance of the proceeds may remain after satisfying the execution, is peremptorily directed by the act to be paid over to the owner by the sheriff, without, as I understand the act, any judicial order for that purpose, and without any provision, therefore, for ascertaining to whom the vessel really belonged. But a state law authorizing such proceedings must necessarily interfere, if it does not directly conflict, with the authority and policy of the national government; and it seems too obvious to require further demonstration, if the proceedings under the act in question are to have the conclusive effect attributed to them by the counsel for the claimant, that they will, to the extent of their operation, render that authority and policy nugatory. It should be remembered, however, that this act was passed in 1840, five years before the act of congress extending the admiralty forms of remedy to our inland waters; and it seems but reasonable, as it is but respectful, to hope that it will ere long be repealed—its objectionable provisions being supplied, if it should be deemed necessary, by giving a limited and carefully regulated lien in favor of ship-wrights and material-men, like that given by the laws of Pennsylvania, the New England states and New York, which may be enforced, as it generally is in the states I have mentioned, in common with the lien given by the general maritime law, by the district court of the United States.

It remains now to determine whether the judgment recovered by the libellant against the Globe, under the Ohio statute, is a bar to this action. It is obvious that this judgment is obnoxious to all the objections which have been urged against the validity of that under which the Globe was sold; and there is also a further objection arising from the alleged irregularity of the proceedings under the act in this instance. It is very clear that, if the judgment is without validity, it can be no impediment to the libellant's right to maintain this action. But for obvious reasons I choose to abstain from any further discussion on this point, unless it is necessary to the just decision of the case before me; and in my opinion it is not necessary. It has already been observed that the fund, arising from the sale of the vessel, was exhausted in satisfying the claims of the creditors; who, being prior in point of time, were entitled, by the laws of Ohio, to priority of payment. This, therefore, is not a vexatious suit—there being no pretence of satisfaction, either actual or potential; for it is unnecessary to re-assert the utter futility of the right which the act purports to secure, of resorting to an execution against any other property or against the person of the owner; nor can it be necessary to enter into a formal refutation of the suggestion that he may be sued on the judgment. It does not purport to be a judgment against him, nor did he by his appearance to defend his interest in the Globe render himself personally amenable to the court. Bissell v. Briggs, 9 Mass. 468; Story, Confl. Laws, § 549; 1 Greenl. Ev. § 542. Precisely under what view of his interest it was that the libellant saw fit, during the pendency of the proceedings by the Ohio creditors, to institute his suit in Ohio, does not appear. It seems reasonable to conclude, however, that, hearing of these proceedings, he was induced by the fear of losing his demand, and the hope that by that means he might secure it, to try the experiment to which he resorted. It may, or may not, be a hardship to the claimant to be obliged to pay this debt; this depends on circumstances unknown to the court. But be this as it may, there can be no injustice in allowing the libellant to enforce the lien, which as a material-man he acquired in virtue of the act of congress and the general maritime law. He has, on his part, established a right, primâ facie, to a decree in his favor. The prior judgment is set up as a defence purely technical in its nature, having no equity to recommend it, and to result, if successful, in actual injustice to the libellant. On the other hand, it is an established general rule of law, that when any matter has once been put in suit, and decided upon in a court of competent jurisdiction, the same subject cannot again be brought into litigation. The reasons on which this rule is founded are (1) that no one ought to be twice harassed on account of the same cause of action; (2) that it is the interest of the public that there should be an end of litigation. In the case of a judgment recovered, as in the present case, on a contract, a further technical reason is also assigned; viz., that the plaintiff has, by his voluntary act, converted his contract into the higher security of a judgment, and that the contract has thereby become merged.

It is true, as argued at bar, that courts of admiralty are bound, in the exercise of the limited jurisdiction that belongs to them, to conform their decisions to the principles of equity, and in general to disregard mere technicalities. But there are some axioms of jurisprudence, so deeply founded in considerations of general expediency, that they ought to be enforced even at the occasional expense of particular injustice; and they accordingly are so by courts of equity, as well as by courts of law. And, considering the magnitude of the evils which the rule in question is designed and adapted to prevent, and the danger of relaxing it, there is great reason for classing it among those axioms to which I have referred. But, in order to determine its applicability to the case before the court, it is necessary to attend to one of the limitations which define its 'scope. This limitation excludes whatever may properly be denominated a "collateral or concurrent remedy." It is hardly

necessary to cite an authority for this proposition; but it is distinctly stated by Lord Ellenborough, C. J., in the following terms: "A judgment recovered in any form of action is still but a security for the original cause of action, until it is made productive in satisfaction to the party; and therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have." Drake v. Mitchell, 3 East, 251, 258. To render a judgment recovered at bar, it must appear that the former suit was founded on the same identical cause of action. When it is on a contract, it must be on the same identical contract. Thus, if the contract be joint and several, the better opinion appears to be, that the judgment in an action against one is no bar to an action against all; and, on the other hand, that a judgment against all, jointly, is not a bar to a subsequent action against one alone. 1 Greenl. Ev. § 539a; U. S. v. Cushman [Case No. 14,908], and the authorities there cited, particularly Lechmere v. Fletcher, 1 Cromp. & M. 623. So also it has been held, that a judgment in an action of covenant on a mortgage is no bar to an action of debt on the accompanying bond. Another qualification of the rule is, that a party is not to be concluded by a judgment recovered in a prior suit or prosecution, when, from the nature and course of the proceedings, he could not avail himself of the same means of redress which are open to him in the second suit. 1 Greenl. Ev. § 524. Though it is true, therefore, with respect to real as well as personal actions, that a judgment is a bar to another action of the same or the like nature for the same thing, yet this is true only where the second action is of the same or of inferior degree; for if it is of a higher nature, the former judgment is not a bar. A judgment in either of the other forms of real action, therefore, is no bar to a writ of right. Kitchen v. Campbell, 3 Wils. 304, 305.

These principles and the reasons on which they rest are, in my judgment, decisive against the operation of the former judgment in the present case. The action was against the Globe, in specie; the cause of action, as set forth in the declaration, being an assumpsit by the vessel herself. The proceeding had its origin and its sanction in a local municipal law alone. The very foundation of the action was a fiction, which was rendered effective by a form of procedure unknown to the common or civil law. It was a proceeding in rem, not in the ordinary sense of that phrase, and is to be so denominated only because it acted directly upon a thing instead of a person. The means of redress it promised consisted in the right to have the particular thing proceeded against, sold subject to all valid antecedent incumbrances, and to receive the proceeds of the sale if any should remain after satisfying all prior claims upon the fund. Neither the person nor any other property of the owner could be reached through the judgment to be obtained. As a security, therefore, the judgment was inferior to a judgment against the owner of the vessel in a personal suit, and it will not be pretended that such a judgment would be a bar to this action. On the contrary, the present action is grounded on a lien or privilege conferred by the general maritime law of the United States, extended by force of an act of congress to the lakes. This lien results from an implied hypothecation of the vessel by the act of the master; and it has priority over all common law liens; over the title acquired by purchase or by forfeiture; and it yields only to the lien of the mariner derived from the same source. I am of opinion, therefore, that this action is to be regarded as a collateral concurrent remedy, to which the libellant had a right to resort notwithstanding the former judgment. There must accordingly be a decree in his favor, and a like decree in each of the other actions which I have mentioned, for the sums proved or admitted at the hearing to be due to the libellants respectively.

[Subsequently, on appeal to the circuit court, the decree of the district court was reversed, and the libel dismissed, with costs. Case No. 5,483.]

Case No. 5,485.

The GLOBE.

[11 N. Y. Leg. Obs. 327; 35 Hunt, Mer. Mag. 447.]

Circuit Court, S. D. New York. Oct., 1853.

COLLISION.

1. *Held*, that where the case of the party claiming damage for collision occurring during a dark night was sustained alone by the evidence of the pilot, who was also the only lookout, the same was not sufficiently reliable.

2. A more competent and reliable lookout might have been stationed to discharge this duty.

3. The vessel charged with fault had by a greater number of witnesses maintained the defence set up.

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

[This was a libel by the steamer Splendid against the scow Globe for damages caused by collision. The district court entered a decree dismissing the libel, without costs to either party (case unreported), and the libellants appealed to this court.]

For the Splendid it was set up (1) that she had kept a sufficient lookout during the night in question, and navigated safely from New York. (2) That after rounding Magazine Point, she had steered for Cold Spring light to make her usual land, and saw the scow bearing down to the westward of a line from Stony Point to Magazine Point. (3) That the scow at 500 yards began sheering to the eastward. (4) That the steamer slowed, stopped,

backed, and got stern way on her when just past the rocks Brothers, and the wind acting upon the saloon built upon her upper deck aft, swung her stern to the eastward, and her head to the west. (5) That while in this position, and within 100 feet of the rocks, the scow struck her stem. (6) That the steamer had not been sheered to the eastward, although her retrograde movement and the swing of her lights might have had that appearance from the scow.

For the scow it was alleged (1) That she had seen the lights of the Splendid sheer off to the east when off Magazine Point, and saw at the same time the light on another steamboat sheer off to the west shore. (2) That she was ignorant that the Splendid was making the Cold Spring landing. (3) That she luffed to give her more room. (4) That when the Splendid attained a position to the east of her about two lengths, and some hundred yards south, she suddenly sheered west and hailed the scow to put her helm up, which was done, that she had barely felt the change when the collision took place.

D. McMahon and W. Q. Morton, for the steamboat.

E. C. and C. W. Benedict, for the scow.

NELSON, Circuit Justice. The libel was filed in this case by the steamboat against the scow to recover damages for a collision that occurred on the North river, on the 6th November, 1850, about eleven o'clock at night, opposite the Two Brothers, a ledge of rocks a little below Cold Spring. The steamboat was going up the river with a load of passengers for Hamburg, her place of destination, and the scow was descending with a cargo of lumber. The scow struck the steamboat nearly head on against her stem, a little to the starboard, knocking the stem out and breaking the planks so that she was obliged to be run on to the west shore, where she filled and sunk. The testimony is quite contradictory in the case, in respect to the management and course of the respective vessels; the persons on the steamboat maintaining, that after she had rounded Magazine Point, and was in her usual course for Cold Spring, one of her stopping places, and on the eastern shore of the river, the scow in descending the river on a course off her larboard bow, suddenly changed it more easterly, and persevered in the same until the collision occurred; while those on board the scow insist that she pursued her course down the river, giving a wide berth to the steamboat to pass on her larboard side; but that, as the two vessels neared each other, the steamboat took a sheer to the west and persevered in it till a collision was unavoidable. The night was very dark and the wind fresh from the northwest, the scow moving from five to six knots the hour, and the steamboat about eight. There were four hands on board the scow,—the captain, first and second pilots and steward,—all of whom saw the steamboat at a considerable distance, and were on the lookout from the time she was first discovered until the collision, who concur in maintaining the position and course of the scow, and fault of the steamboat. While on the other side, the pilot was the only person on board who saw the scow until the moment of the collision. In this conflict of evidence, whatever may be the real truth of the course and management of the vessels preceding, and at the time of the accident, it is impossible for us to say, as the case stands, that the scow was in fault, so as to hold her responsible for the consequences. The misfortune of the steamboat is, that under the circumstances of the night and weather, she had no proper lookout on board, and hence, in addition to this neglect of prudence and of the established nautical rule, she is deprived of the usual and most important witness on these occasions as to the position and course of the two vessels. Although the pilot may be a witness deserving great consideration in respect to the course of his own vessel, he is not, from the necessity he is under of attending specially to his own peculiar duties, the best witness in respect to the position and course of the approaching vessel in a dark and cloudy night. A competent lookout, at a station the most favorable to discharge his duty, is much more reliable under such circumstaces. The scow has decidedly the advantage in this respect. Her master, in consequence of the darkness of the night, gave his helm to the pilot, and took the post of lookout himself; and as a consequence is enabled to give us a clear and intelligible account of the circumstances that led to the unfortunate accident, and he is confirmed by the other hands on board; and also, as far as they go, by the hands on board the sloop Index, in the vicinity at the time.

The gravamen of the libel is, that while the steamboat was on her course N. E. to Cold Spring, and passing in a direction as near the Two Brothers as was safe, the scow changed her course from her direction down the river to the eastward, which compelled the former to slow, and stop to avoid running upon the rocks, which with the wind had the effect to change her position, by swinging her bow westward, and while in this condition she was run into by the scow, which, at this time had come close to the rocks, and having the wind free, and should have borne further towards the middle of the river. But the difficulty is, the weight of the proofs is against this theory. No persons having been stationed on board the steamboat to look out, the night being dark, and none of the hands, but the pilot, having seen the scow till in the midst of the alarm, upon the ringing of the bells to slow and stop, we have no intelligible or reliable account of the transaction from her; and the persons on the dock at Cold Spring knew nothing about it, as the night was too dark for them to see it. It has also

been urged that the scow made a wrong manoeuvre at the time of the collision, by ordering the man at the helm to keep hard away, thereby bearing more to the eastward; but the hands upon the scow all agreed that this order was given from the steamboat, and was followed at the moment of the peril, in deference to the supposed superior opportunity and skill of those on board of her. Without pursuing the examination of the case further, I am satisfied the decree of the court below is right, and should be affirmed, but with costs of this court only.

GLOBE, The (FLORA v.). See Case No. 5,484.

GLOBE, The (SCHARLOCK v.). See Case No. 12,439.

GLOBE, The (The SPLENDID v.). See Case No. 5,485.

GLOBE BANK (BARNEY v.). See Case No. 1,031.

Case No. 5,486.

GLOBE INS. CO. v. CLEVELAND INS. CO.

[14 N. B. R. 311;[1] 8 Chi. Leg. News, 258; 4 Am. Law Rec. 652; 13 Alb. Law J. 305.]

Circuit Court, N. D. Ohio. April 7, 1876.[2]

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—WHEN VOID—BANKRUPT ACT.

1. A general assignment for the equal benefit of all creditors is void, as against an assignee in bankruptcy, being at war with the policy of the bankrupt law [of 1867 (14 Stat. 517.)].

[Approved in Re Beisenthal, Case No. 1,236. Cited in Macdonald v. Moore, Id. 8,763; Re Croft, Id. 3,404; Re Kimball, Id. 7,770; Re Seeley, Id. 12,628; Platt v. Preston, Id. 11,219.]

2. The same rule was applicable to the law of 1841 [5 Stat. 440].

3. Such has always been the rule under each successive English act, and is now a matter of statutory provision in England.

4. The rule, that where a statute is taken from another country or state which has received a judicial interpretation, the presumption will be that such interpretation is also adopted, *held* to be applicable, in this instance, with more than ordinary force.

5. In the law of 1867, the judicial interpretation which in England held general assignments to be void, as against a claimant, under the bankrupt law, has been expressly adopted by adding the words, "or to defeat the operation of the act." It was this effect in England which the courts declared avoided such transfers.

[In error to the district court of the United States for the Northern district of Ohio.]

In bankruptcy.

Mr. Follett and Mr. Ingersoll, for Globe Ins. Co.

Willey, Turrell & Sherman, for Cleveland Ins. Co.

EMMONS, Circuit Judge. Upon this writ of error, if there are any facts which prevent a decision upon the abstract question of law which we discuss from being a complete disposition of the case, they have not been called to our attention. The sole question for our determination is, whether the general assignment, for the benefit of all creditors equally, made by the Cleveland Insurance Company, is an act of bankruptcy, and void under the statute. For a number of years the anomalous condition has existed of a special local rule, in the Sixth circuit, in reference to general assignments under the bankrupt law, which pertains in no other part of the Union. In deference to an opinion expressed by Justice Swayne, soon after the enactment of the law, in a case where the point did not arise, the district and circuit judges, in conflict with their own opinions, have refused to interfere with such conveyances. A letter from our Brother Swayne desired us to decide the question as we deemed right, that it might be ultimately settled by the supreme court. A recent judgment by that tribunal—Mayer v. Hellman [91 U. S. 496]—refers to, but expressly waives, an expression of opinion upon the point. That tribunal is not accustomed thus to treat questions it deems too plain for discussion. In these circumstances, having been unable to change the views which we have always entertained upon this subject, as well under the law of 1841 as the present statute, we have deemed it proper to accompany the judgment which we render with a somewhat full statement of the reasons upon which we rest it. The very efficient aid which the learned counsel for the Globe Insurance Company have rendered us enables us to do so with more fullness than otherwise would have been possible.

The following are a portion only of the cases which have been decided by the circuit and district courts, declaring a general assignment void under the act of 1867. We do not take pains to exhaust the references upon this subject. Perry v. Langley [Case No. 11,006] was an assignment which had been recorded under the laws of Ohio, five days before the bankrupt law came into operation. It is treated by the court like an ordinary general assignment. Judge Leavitt, erroneously, we think, holding that the statute had a retroactive effect, decided that a general assignment, for the equal benefit of creditors, was void, because it transferred the property to a different course of administration, and gave the appointment of the trustee to the debtor instead of to the creditors. He refers to Deacon on Bankruptcy (pages 72 and 73) and Griffith on Bankruptcy (pages 107, 119, 120) to show that such had always been the interpretation of the English statutes; and to the American judgments which had given a like construction to the law of 1841. We hereafter notice the judgment of Justice Swayne reversing this decision. In Re Goldschmidt [Case No. 5,520] Judge Blatchford

[1] [Reprinted from 14 N. B. R. 311, by permission.]

[2] [For disposition of the case by the supreme court, see note at end of case.]

holds a general assignment an act of bankruptcy, and as grounds for refusing a discharge. In Re Randall [Id. 11,551], Judge Deady makes precisely the same ruling. It does not detract from the effect of these judgments upon the principal point that other tribunals have not deduced the same consequences from such an act of bankruptcy. Judge Cadwalader, in Re Pierce [Id. 11,141], rules the principal point in the same way, although he thought it was not such a fraud as prevented a discharge. Hardy v. Bininger [Id. 6,057] was a petition in review before Judge Woodruff. An insolvent firm had procured in chancery a transfer of all their property to a receiver. This was held an act of bankruptcy, because it defeated the operation of the act by transferring the property to a different course of administration. The learned judge says it is immaterial that the citizen may select a better and more economical mode than that pointed out by the bankrupt law; and, after enumerating many of the leading features of the latter, in reference to the settlement of claims, the investigation of fraud, and the punishment of wrongs, the declaration of dividends, and other features, says: "None of these are secured by a transfer made by the bankrupt himself, whether fraudulent or not; it is enough that it defeats the operation of the act, to avoid it." In Re Smith [Id. 12,974], Judge Hall had previously ruled, that a general assignment was an act of bankruptcy, resting his judgment upon reasons nearly identical with those of Judge Woodruff. These and other similar rulings in the Second circuit show how differently the judges there considered the decision of Judge Nelson, in Sedgwick v. Place [Id. 12,622], from the interpretation which has been given it when cited to sustain a contrary ruling. They do not refer to it as bearing upon the question. In re Union Pac. R. Co. [Id. 14,376] contains an intelligent statement of the English doctrine, which has uniformly held a general assignment to be an act of bankruptcy, and adds an opinion that our law should receive the same interpretation. Judge Lowell thinks the creditors, and not the bankrupt, should have the power of selecting the trustee. In Re Mendelsohn [Id. 9,420], Judge Hillyer, in holding an assignment void because it created a preference, says that the weight of authority is in favor of the invalidity of even a fair general assignment for the benefit of creditors. See Spicer v. Ward [Id. 13,241]. In Re Burt [Id. 2,210], Justice Miller, sitting with Circuit Judge Dillon, deciding a case upon review, held that a general assignment was an act of bankruptcy. The point was fully raised. Barnes v. Rettew [Id. 1,019], in an elaborate judgment, which goes over the English and American history of this question, and ably considering it upon principle and authority, holds that a general assignment for the equal benefit of creditors is per se an act of bankruptcy. The judgment is drawn up by Judge Cadwalader, and concurred in by Circuit Judge McKennan. We recur to it again more fully in connection with our statement of the English law.

Opposed to these concurring judgments directly upon the point is that of Justice Swayne in Langley v. Perry [Case No. 8,067], and his dictum in Farrin v. Crawford [Id. 4,686]. We are not aware of any other judgment under the law of 1867, so holding. There are a few dicta. We repeat only criticisms frequently made when it is said the point did not arise in Langley v. Perry. The assignment was made before the bankrupt law was in operation, and the latter could have no effect upon it. That it could not will hardly be doubted, but it has been frequently ruled. Day v. Bardwell, 97 Mass. 246; Chamberlain v. Perkins, 51 N. H. 336; 37 Cal. 208. This is familiar law, and would not have been overlooked by the learned justice, but for the accident that the district court had ruled the point, and the rectitude of his judgment in that regard was not discussed or questioned in the circuit court. The report of the judgment is very meager and is manifestly imperfect. We infer from what little we have of it that the argument turned mainly upon the question of fraud under the statute of Elizabeth, and at common law. In Farrin v. Crawford [supra], his honor expressly says the point does not arise, and he remarks only, that he supposes the judgment in Langley v. Perry to be right. The opinion of Judge Nelson is elsewhere shown not to be opposed to our present ruling. In Re Marter [Case No. 9,143], Judge Brown, of the Eastern district of Michigan, saying that he withheld an expression of his own opinion, followed that of Justice Swayne, in Langley v. Perry [supra], as have all the judges in this circuit since it was rendered up to the present time. He refers to the judgment of Judge Hall in Re Wells [Id. 17,387], as in accord with that of Judge Swayne. Judge Hall decided only that, as the intent to delay creditors was denied upon the record, and no issue was taken upon that intent, he was precluded by the averments from going into the question at all. He expressly disclaims a decision upon the question before us, whether a general assignment is or is not an act of bankruptcy. That he did not intend to decide, as our Brother Brown supposes, is entirely clear, from his able judgment deciding this point as we now rule it, in Re Smith [Id. 12,974]. A reference is also made to a like opinion by Judge Treat, of Missouri. In the report no opinion is given. It is simply said such a judgment had been rendered. That this is not the law administered in that district appears from the concurring judgments of Justice Miller, of the supreme court, and Judge Dillon, already referred to.

Upon mere authority, therefore, being released from the obligation of following the precedent in our own circuit, this review shows we have no choice of judgment. Jus-

tice Miller, in a case where the point arose, and the entire body of circuit and district judges in the circuit and district courts, have followed the uniform decisions in England and in this country from the earliest periods of the bankrupt law, and have decided with entire unanimity that a general assignment for the equal benefit of creditors, and all similar transfers procured by operation of law, are acts of bankruptcy and a fraud upon the act.

Under the law of 1841 several decisions of this precise question were made. During the administration of that law, when at the bar, we had occasion to examine it. Few doctrines were more generally acquiesced in at that time than that general assignments for the benefit of creditors had become unlawful. Every lawyer of large practice will be enabled to say that the practice was abandoned throughout the country. The local judgments were then less frequently reported than now, or they would have been as numerous in the books as they are under the law of 1867. We are quite confident there are others, but our want of time enables us now to refer only to the two cases following, which ruled the precise point upon a general assignment. As we soon notice, however, the identical principle is involved in all those numerous judgments under both acts which hold similar assignments under local statutes to be acts of bankruptcy. When they are considered, it will abundantly appear that the act of 1841 was interpreted as we construe the present law. In McLean v. Johnson [Case No. 8,883] the precise point was presented under the law of 1841, and the assignment was declared to be a fraud upon the act, and the assigned property was directed to be delivered up to the assignee in bankruptcy. That act contained no clause providing that transfers should be void which defeated the operation of the act, like our present law; but it was held to be so by implication, in conformity to the English precedents. McLean v. Meline [Id. 8,890] involves the same question and was decided in the same way.

The cases already referred to in terms involving a general assignment are by no means all which pointedly and directly decide this very matter. All the numerous cases which have held that state insolvent laws are suspended by the enactment of a national bankrupt law, necessarily involve this identical principle. There is not a scintilla of difference distinguishing one class of judgments from the other. It is but an immaterial accident that in the one what is prohibited by the bankrupt law is effectuated by a voluntary general assignment, and in the other that a similar transfer is made in conformity with the state law. Such statutory conveyances are not held void as against the policy of the bankrupt act, because of the state enactment, but on account of what those statutes authorize to be done. Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 122; Ogden v. Saunders, 12 Wheat. [25 U. S.] 213; and Cook v. Moffat, 5 How. [46 U. S.] 295, 308, and the long list of federal and state concurring judgments,—abundantly show that state legislation is authorized until congress acts; and that such legislation is suspended so far only as it comes in conflict with federal legislation. In determining whether it does so come in conflict, the very question asked in this case has to be answered. Is the matter which is authorized in conflict with the general policy and the mode of its execution provided by the national law? If the state statute authorized a transfer of all a debtor's property for equal distribution among his creditors, in the language of many of the cases, "acting upon the same persons and property," a transfer under it is void; not because the distribution is different or because the proceedings are less plenary, but for the sole reason that a different tribunal is selected than that provided by congress. The reasons given by the most learned judges who have discussed this subject are so strikingly like those found in the British decisions declaring general assignments void as against the English bankrupt law that were they interchanged the opinions would be equally sustained. The remark is equally true of the American rulings, where a general assignment has been called in question. When, therefore, it is decided that a state insolvent law is suspended, because it takes the property of a bankrupt from the control of the national courts, a decision has been made which not only completely covers and declares void a general assignment, but goes very far beyond the doctrines necessary for its invalidity. They demand only that a different tribunal shall be sought, and for a much greater reason is an assignment void which not only seeks such other tribunal, but chooses the trustee by the uncontrolled election of the debtor, and practically avoids all the guards which the provisions of the statute are intended to throw around the rights of creditors.

In referring to the judgments deciding what proceedings are in conflict with the bankrupt law, when authorized by state enactments, it is manifest that we are not at all concerned with the differences in opinion between those judges who think the state provision is wholly suspended, and those who think proceedings under them are good until called in question by an assignee in bankruptcy. All are unanimous in declaring that transfers under them are void, when questioned in that mode. It is this consistent feature in them all to which we point as determining the question now before us. It would lead to most unwarrantable prolixity were we to analyze and reproduce the provisions of the various state statutes, for the purpose of showing, by their particulars, that all of them, with slightly varying forms, simply take the estate of the debtor, transfer it to trustees, convert it into money, and distribute the proceeds among the creditors. They all do substantially, but in a better and

more protective form, what a general assignment does, and, we repeat, it is for this reason only they are adjudged to be in conflict with the bankrupt law. A perusal of the judgments we cite under this head will show that the reasons upon which they rest are literally and substantially precisely those which, in England and in this country, sustain like decisions in reference to the invalidity of general assignments. It should be noticed particularly that no distinction whatever is made between those local systems which do and those which do not discharge the debt itself. It is the custody and appropriation of the assets which constitute the wrong. Maltbie v. Hotchkiss, 38 Conn. 80, was a contest between an assignee, under a state law, and a levying creditor. The court reaffirms its judgment in Hawkins's Appeal, 34 Conn. 548, that the state proceeding is good until some right is asserted under an adjudication in bankruptcy. But, in reconciling its judgment with just relations to the federal judiciary, the court, by Carpenter, J., in a thoroughly argued opinion, shows that a general assignment for the equal benefit of all the creditors, either with or without a local statute, is void under the bankrupt law, and that if an assignee claims the property from the state tribunal, it would necessarily be transferred to him. This learned court identifies the two cases of a statutory and a general assignment, holding both to be equally void. This case shows how grossly the case of Hawkins's Appeal is misunderstood by those courts which have cited it as sustaining the validity of a general assignment against the bankrupt law. As construed by the court which pronounced it, it said no more than that the assignment would be upheld until questioned by proceedings in the national court. In re Reynolds [Case No. 11,723] is amongst the most intelligent discussions of the subject that we find in the more recent decisions. It reviews the leading cases, and holds that a state insolvent law which appropriates all a debtor's property, and distributes the proceeds ratably amongst his creditors, although it does not discharge the debtor, is wholly suspended by the enactment of a bankrupt law. It was said, the state law took the entire assets from the court of bankruptcy, and deprived the creditor of the protection which the federal law was intended to secure. The following cases upon this subject arose under the bankrupt law of 1841: Griswold v. Pratt, 50 Mass. [9 Metc.] 16, in deciding that the state law is, ipso facto, suspended without any proceedings in bankruptcy by the enactment of the bankrupt law of 1841, held that the two laws could not act upon the same person and the same property cotemporaneously; and as the state law could not act without being subject to be defeated at any time, it ought not to be enforced at all. Ex parte Eames [Case No. 4,237] says that Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 122, and Ogden v. Saunders, 12 Wheat. [25 U. S.] 213, established the doctrine that the enactment of a bankrupt law suspended all state insolvent laws as to future cases, where the administration of the latter acted upon the same persons and property, thus divesting the jurisdiction of the federal and giving it to the state tribunals. And see 19 La. 497; 5 Rob. [La.] 27; 15 La. Ann. 602. Thornhill v. Bank of Louisiana [Case No. 13,990] applied the same principle to an insolvent corporation being wound up under the local law. Com. v. O'Hara [6 Phila. 402] Dist. Ct. Pa.; Martin v. Berry, 37 Cal. 208, Sup. Ct. Cal.; Van Nostrand v. Carr [30 Md. 128] Sup. Ct. Md.; Cassard v. Kroner, 4 N. B. R. 569, Sup. Ct. Md. Martin v. Berry [supra] is a very full consideration of this subject. Van Nostrand v. Carr, 30 Md. 128; 21 La. Ann. 446; Barber v. Rodgers, 71 Pa. St. 362; Cassard v. Kroner [supra]; In re Stubbs [Case No. 13,557]; Reed v. Taylor [32 Iowa, 209]. Nothing is gained in agreement by further analysis of this numerous class of adjudications. They all depend upon a like reason, and that is substantially and literally applicable to the case of a general assignment irrespective of a state statute. There is nothing in conflict with these decisions worthy of citation or criticism.

The entire body of the law in reference to state legislation upon general subjects, cognizance of which is given to congress, is equally forcible to show that a general assignment is void as against the bankrupt law. When the inquiry is made whether a state regulation is in conflict with federal enactments regulating commerce, the militia, establishing a currency, or any other subject of national control, it is answered by the precise mode of inquiry and investigation demanded in this instance. The degree of conflict tolerated in those instances, and that which is held to be inconsistent and void, afford precedents for decision here. Were this a novel question, and need arose to go beyond adjudications of the precise thing, an argument equally demonstrative would be deduced from the facts and literal reasonings in Brown v. Maryland, 12 Wheat. [25 U. S.] 419; Wynne v. Wright, 1 Dev. & B. 19; McCulloch v. Maryland, 4 Wheat. [17 U. S.] 316; Gilman v. Philadelphia, 3 Wall. [70 U. S.] 713; and the numerous other judgments of this class. They all go upon the ground that when congress has regulated a subject, a state shall not regulate the same subject. And, we add, much less can a citizen, of his own volition, so regulate the same matter as to take himself and his estate without the operation of the federal law.

The course of English adjudication upon the successive bankrupt laws of that country, the language of the British statutes and of our own which have adopted them, constitute an argument against the validity of a general assignment, for the equal benefit of creditors, which we should be unable to resist, were the

question wholly novel and uninfluenced by any adjudication in this country. Barnes v. Rettew [Case No. 1,019] is so full and satisfactory a history of English legislation and decision upon this subject, that we omit the somewhat extended analysis of the British statutes and judgments which we had prepared. The following is a brief condensation of its able argument, with, in some instances, a slightly more full quotation of statutory provisions. The assignment was made under the law of Pennsylvania, and although its peculiar provisions are considered, for the purpose of showing their antagonism with the bankrupt law, it is expressly said, as it is quite manifest upon principle, they are no more so than the general course of administration under an assignment to a trustee uncontrolled by statutory regulations. Judge Cadwalader shows, that from the time of James I., down to 1867, when our present law was enacted, there had been no substantial change in British legislation upon this subject. The act of James, unlike our own, contained no clause invalidating transfers which defeated the operation of the bankrupt law; but was simply a provision that if any trader should "make or cause to be made any fraudulent grant or conveyance of his lands, goods, etc., to the intent or whereby his creditors shall or may be defeated or delayed for the recovery of their just and true debts," he shall be deemed a bankrupt. This was farther simplified, in 1825, by an enactment that if a trader should make "any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, * * * with intent to defeat or delay his creditors," he shall be deemed to have thereby committed an act of bankruptcy. It is shown that under these provisions it has been uniformly, by numerous judgments, held that a general assignment, for the benefit of all creditors equally, was an act of bankruptcy, upon the ground that such transfers were fraudulent, not at common law, or under 13 Eliz., but because they defeated the rights of creditors, secured by the bankrupt law, to the choice of a trustee, to the summary jurisdiction of the court, and to the ample control which the law intended to give them over the estate of their insolvent debtor. The familiar rule is invoked, that where a law is adopted from a neighboring state or country, which has received a judicial reading, the presumption of law is, that its interpretation is also included; and the rule is said to be applicable with great force to so long and often repeated a construction of a succession of statutes adopted by congress. And what is of still more significance, attention is called to the fact that congress did not leave the adoption of this rule to an implication of law, but by express enactment adopted nearly the words of the British decisions, by adding, in the law of 1867, that a transfer of property should be an act of bankruptcy, not only where it was fraudulent and to delay creditors, but if it was "to defeat the operation of the act." This "defeating the operation of the act," and this "putting the assets in a different course of administration," and this "transferring them to another tribunal," are the reasons given in the English judgments why a general assignment is fraudulent. The following citations here noted in the order in which they occur in this careful opinion, have all been re-examined, and we can say, with confidence, they fully sustain the conclusive argument, a mere outline of which we have suggested: 9 East, 487; 1 Cromp., M. & R. 779, 780; Twyne's Case, 3 Coke, 80b; Ex parte Bailey, 3 De Gex, M. & G. 534; Smith v. Cannan, 2 El. & Bl. 35; 16 Ves. 148; 17 Ves. 197; 1 Atk. 91; Id. 88; Kettle v. Hammond, Cooke, B. L. 111; Cowp. 123; 8 Durn. & E. [8 Term R.] 140; 4 East, 230; 1 Christ. Bankr. [2d Ed.] 188; Stewart v. Moody, 1 Cromp., M. & R. 777; Wilson v. Day, 2 Burrows, 827. The learned judge successfully shows that the judgments of Justice Swayne, in Langley v. Perry and Farrin v. Crawford [supra], and that of Justice Nelson, in Sedgwick v. Place [supra], do not necessarily decide this point. Ex parte Alsop (1859) 1 De Gex, F. & J. 289. Upon appeal, Lord Justice Turner, for the court, said: That under the several bankrupt laws anterior to 1859, it was well established that a general assignment, for the benefit of creditors equally, was an act of bankruptcy; and that the only question left to be discussed was whether the act of that year had changed the law, and proceeded to show that it had not. In Worseley v. Demattos, 1 Burrows, 467, upon motion for a new trial, in an issue out of chancery to ascertain whether an assignment was an act of bankruptcy, Lord Mansfield held it to be such, upon two distinct grounds: First, because there were features in it which made it void at common law, and under the statute of Elizabeth; and second, because it gave the debtor the choice of trustee, and took the assets to another tribunal. And in Pickstock v. Lyster, 3 Maule & S. 371, Le Blanc, J., holding that a general assignment was good at common law, takes pains to say that the bankrupt law was not in question, as no proceedings had been taken under it. This distinction between a conveyance void under the statute of frauds and one illegal because at war with the policy of the bankrupt law, is common to nearly all the British judgments. These two are referred to for the purpose only of showing how distinctly it is taken.

The following are but part of the older English judgments additional to those cited in [Case No. 1,091], reaffirming, in varying circumstances, the principle that an assignment of all a debtor's property, whereby its conversion into money and its distribution among his creditors is given over to a trustee of his own selection, is an act of bankruptcy, and void under the statute. Lindon v. Sharp, 7 Scott, N. R. 730; Hassel v. Simpson, 2 Dickens, 583, 1 Doug. 89; Butcher v. Easto, Id. 295; Porter v. Walker, 1 Man. & G. 686; Ex parte Bland, In re Murgatroyd, 6 De Gex, M. & G. 757. The elementary books are equally full. Eden, Bankr.

Law, 28; Roche & H. Bankr. 375 et seq. The force in this country of these English adjudications must not be weakened by the supposition that any latitude of construction is indulged in there not applicable in our own tribunals. It is as familiar law in England, as here, that all acts of bankruptcy must be expressly declared by statute. See Dutton v. Morrison, 17 Ves. 194; Ex parte Mavor, 19 Ves. 539, and Roche & H. Bankr. (Ed. 1873). When, therefore, it is held that a general assignment is void, it is a determination that it comes within the express provision of the statute declaring that conveyances to hinder or delay creditors shall be void. When the following very recent judgment was rendered, the doctrine which it reannounces had become a part of English statutory law. It is referred to only as an authoritative exposition of the past history of this question there. In Re Wood, 7 Ch. App. 302, the question was whether the transfer of all a man's property to secure a past debt was an act of bankruptcy. Mellish, Lord Justice, in arguing that the statute of 1869 had not altered the law in that respect, goes over the old principles, and enumerating what had been well established, at page 306 says: "There were various conveyances which the court held to be fraudulent: a conveyance which was void under the statute of 13 Elizabeth was one; so was a conveyance of a man's whole property for the benefit of all his creditors." After stating other instances, he adds that in all of them "the law assumed that such acts were of necessity done with intent to defeat or delay creditors."

In view of this long and uninterrupted judicial reading, where our own re-enactment has in such unambiguous terms used language which plainly includes it, by inhibiting conveyances "which defeat the operation of the act," it may well be asked, with emphasis, why shall not the American law be construed like the English, from which it was taken? Why shall not the familiar rule be applied, that where a judicially construed law is adopted, the construction is approbated by implication? We can imagine no conditions where the following language of the supreme court of the United States is more applicable: They say, where English statutes are adopted, "the known and settled construction of those statutes has been considered as silently incorporated into the acts." Pennock v. Dialogue, 2 Pet. [27 U. S.] 2. And see [Fisher's Lessee v. Cockerell] 5 Pet. [30 U. S.] 263; 5 Ohio, 74; 1 Kan. 226; 4 Kan. 353; 3 Ill. 288; 13 Ill. 17; 19 Ill. 151; 21 Vt. 256; 41 Mo. 453; 21 Wis. 274. This rule is one upon which the lawyer and the citizen have a right to rely, because, in ninety-nine cases in the one hundred, it is followed by courts. We understand it to be among the well-settled canons of construction which will not, without pressing reasons, be departed from. It is not, of course, constraining and so obligatory as to be yielded to in instances where the home interpretation has become unsatisfactory and productive of manifest evils. There are some such instances. But if anything were needed to complete and clinch the argument in favor of its application in this instance, it is found in the fact that, in the revision of the British law in 1869, the entire satisfaction of English judges and statesmen with the judicial interpretation which we have followed, in this opinion, is testified by inserting in the law an express provision making it an act of bankruptcy "that the debtor has in England or elsewhere made a conveyance or assignment of his property to a trustee or trustees, for the benefit of his creditors generally." This, then, is no accidental and hasty interpretation, calling for dissent and review by our courts. It embodies the results of hundreds of years of experience, with commercial conditions strikingly like our own, and with a people whose modes of action and sense of justice are so kindred as to make their well-matured and long-administered rules of civil conduct the very highest evidence of their substantial fitness here.

To our mind, one of the leading arguments against the validity of a general assignment grows out of the criminal features of the bankrupt law. They are pointedly referred to by Judge Woodruff in Hardy v. Binninger [Case No. 6,057], by Judge Hall in Re Smith [Id. 12,974], expressly, and in more general form in other judgments. These crimes cannot be punished at all without an adjudication in bankruptcy against the offender. This is quite plain, and was so ruled in U. S. v. Prescott [Id. 16,084]. If a general assignment is good against the bankrupt law, then every debtor clearly subject to criminal punishment would transfer his entire property to an assignee, thus leaving nothing to pay the expenses of proceedings in bankruptcy. It is certain creditors already sufficiently injured would not, without any hope of reimbursement, incur the expenses of an adjudication, simply for the purpose of punishment. It would seem that an act so protective of a criminal debtor, and throwing such impediments in the way of prosecution under the federal law, must be considered in conflict with it. The power to pass a bankrupt law is specifically given. But little argument would have been needed to have deduced it from the power to regulate commerce between the states in all instances of inter-state trade. Our active industry, and the great interests of trade, our bills of exchange, the transit of our grain crop, and the productions of our mines absolutely refuse to obey the behest of any class of politicians and stop at state lines. We do not believe there is a state in the Union in which commercial centers have not far more intimate relations with similar points in other states than in their own. Not one bankruptcy in fifty finds all the creditors in a single district. The subject to be regulated is one essentially national. Commerce in a most compendious sense is not more so. Owing to the imperfections of the present

law, the general argument which this department of the subject ought to enable us to put forth is somewhat wanting. But even the present system, with its protections against preferences, the choice of a trustee, the distant proof of debts without the personal appearance of witnesses, the extraordinary efficiency in examining into past, and preventing contemplated frauds, the summary examination of a debtor, and the full examination of his books, securities, and correspondence, all of which pass to the assignee in bankruptcy, the criminal jurisdiction, dependent wholly upon an adjudication, and the other safeguards intended to protect the mutual rights of creditors and debtor, when contrasted with that old, chronic instrumentality of fraud and delay known as a general assignment for the benefit of creditors, is so additionally protective as to dominate the latter by the mere force of its superiority and increased beneficence. A debtor, the fallacy of whose apparent propensity is known only to himself, having transferred to members of his own family a large portion of his estate, may, by one of these assignments, selecting his own trustee, render it morally certain that his fraud will never be successfully examined. The creditors, divided by distance, unknown to each other, and without concert of action, are seldom willing individually to incur the enormous expense of such litigation. The mode of probing the fraud by bill in equity is cumbersome and even awkward. The history of the law's administration shows that more such transactions are set aside in a single year, under the bankrupt law, than in ten by the old modes. The most frequent objection to the national law comes from those practitioners who advise the local debtor, and are therefore either interested against its efficiency, or, for want of familiarity with the practice under it, and that of the distant tribunals in which it is enforced, have no share in the profits of its administration. If it is long enough continued to become well understood throughout the country, and means are provided still further to carry into localities the performance of duties now executed at a few places only, an American bankrupt law will become as necessary a part of our civilization and commerce as is that of England to her people, and that of every civilized commercial country in Europe to their respective subjects.

After much professional experience under previous laws, and judicial familiarity with the administration of this one, we believe the bankrupt law had far better be repealed than have it established that it is at the option of every debtor in the United States to determine whether he will or not submit himself and his assets to the control which the statute intends to give his creditors over them. Inevitably he first knows of his own insolvency. In every instance, therefore, he has the power of selection. When that selection is once made, such is the embarrassment by citizens of other states, growing out of the doctrine of parties in transferring causes from the state to the federal courts, that, in a vast majority of instances, the debtor may compel his widespread creditors, in the distant commercial centers where he has incurred his debts, to come to the county courts of the state for the settlement of those important questions, for the trial of which the bankrupt law secures a different tribunal. It is no disrespect to these local courts to call attention to the universality with which citizens of other states prefer a tribunal removed from the local influences which so naturally interfere with complete impartiality. They prefer a jury from the whole district, instead of the narrow vicinage in which the liberality of their debtor, by which their property has been squandered, has rendered himself personally popular. Every one of the great leading reasons which underlie the federal jurisdiction between citizens of different states, in all cases, those which led to the conferring upon congress of this bankrupt power, at the outset, for the regulation of this eminently national subject, forbid an interpretation of the present statute which would enable an attorney of the most common intelligence utterly to defeat every practical benefit intended to be secured by its adoption.

[NOTE. The Cleveland Insurance Company sued out a writ of error to this decision of the circuit court, and it came before the supreme court on a motion to dismiss said writ. 98 U. S. 366. Under section 4986, Rev. St., the circuit court had "general superintendence and jurisdiction" of all bankruptcy cases arising in the district court. No particular form of proceeding is required in order to take a case to the circuit court for review under this jurisdiction. Chief Justice Waite dismissed the writ of error for want of jurisdiction in the supreme court, for that tribunal has no control over the circuit court in bankruptcy matters. It is otherwise when the record discloses a suit at law or in equity. Mr. Justice Clifford, in a lengthy opinion, dissented from this view, upon the ground that the circuit court had not properly exercised the supervisory jurisdiction according to the bankruptcy act.]

GLOBE MUT. LIFE INS. CO. (COBB v.). See Case No. 2,921.

GLOBE MUT. LIFE INS. CO. (GARBER v.). See Case No. 5,214.

GLOBE MUT. LIFE INS. CO. (WININDGER v.). See Case No. 17,874.

GLOCESTER, The (MAHOON v.). See Case No. 8,970.

GLOUCESTER, The (KEANE v.). See Case No. 7,632.

GLOUCESTER CO. (SICKLES v.). See Case No. 12,840.

Case No. 5,487.

GLOUCESTER INS. CO. v. YOUNGER.

[2 Curt. 322.] [1]

Circuit Court, D. Massachusetts. May Term, 1855.[2]

ADMIRALTY JURISDICTION—MARINE INSURANCE—APPEAL—FACTS FOUND WITHOUT EVIDENCE—ABANDONMENT—ACCEPTANCE BY UNDERWRITER—STATE DECISIONS ON GENERAL LAW—CONSTRUCTION OF POLICY.

1. In this circuit it must be taken to be settled that the admiralty jurisdiction over policies of insurance exists, until some contrary decision shall be made by the supreme court.

[Cited in Jackson v. The Magnolia, 20 How. (61 U. S.) 335; The Sarah Jane, Case No. 12,349; Insurance Co. v. Dunham, 11 Wall. (78 U. S.) 35; Id., Case No. 10,155; Coast Wrecking Co. v. Phoenix Ins. Co., 7 Fed. 242; The San Fernando v. Jackson & Manson, 12 Fed. 342; Insurance Co. of Pennsylvania v. The Waubanshene, 24 Fed. 559; The Gilbert Knapp, 37 Fed. 210.]

2. The practice of bringing admiralty cases into this court by appeal, without the evidence, upon the facts found by the district court, disapproved.

[Cited in The Chatham, 3 C. C. A. 161, 52 Fed. 397.]

3. If the underwriter, after an abandonment, takes possession of and repairs the vessel, this amounts to an acceptance of the abandonment.

[Cited in Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 433, 10 Sup. Ct. 941.]

4. The decisions of the highest court of the state do not govern this court upon questions of general commercial law; nor are they evidence of a local usage, which controls the law.

5. The clause in the policy giving to each party the right to act in recovering, saving, and preserving the property, applies only to its relief from present peril, and the temporary care of the property.

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

This appeal from the district court [Case No. 18,183] came before this court on the following agreement:—

"This is a libel founded on a policy of insurance, which comes before the court on appeal from the district court, and under an agreement filed early in the case, and in the anticipation that much testimony would be produced on both sides, that the finding of the judge of the district court upon the facts in evidence should be conclusive, but that in the appellate court all matters of law should be open to both parties. The agreement of the parties and the opinion of the district judge are annexed, and in case of any discrepancy between them and the 'facts' hereinafter stated, are to be preferred. But as the facts are not all fully stated in the opinion, it was deemed necessary in order to present the case intelligibly, to make the following statement. It was admitted or appeared that the libellant [Oliver Younger] was part owner of the schooner E. P. Howard, and that his interest was insured by the defendants by a policy which makes part of the case. The other owners with the master, were also insured by the defendants and the Gloucester Fishing Company, which is also sued in other libels, and in their doings in relation to this vessel both offices acted together. The libellant offered evidence to show that on the 29th of September, 1853, while at anchor off Chittacamp, in the Bay of St. Lawrence, a gale arose in which the vessel dragged her anchors, struck upon a ledge and was, as libellant alleges, but it was not admitted, very seriously damaged, and the master fearing she would sink or go to pieces, slipped his cables and ran the vessel ashore on a sand beach. Several vessels were driven ashore at the same time, and all but one got off. The libellant introduced evidence to show, that the vessel was so much injured that she could not be got off and permanently repaired at that place, and that there were not means at that place to put temporary repairs upon her, and that she could not be taken with reasonable safety to another port until the following summer, if at all. The respondents offered evidence to show, that she might have been got off without any difficulty, by her own crew, that she was very slightly damaged, and that men and materials to make her safe to go to Canso, sixty miles off, or to Pictou, one hundred miles off, where permanent repairs could have been made, or to Gloucester, were to be had there. The master proceeded to strip the vessel, and stored the sails, rigging, and outfits there, and left the vessel in charge of the Jersey Company and came home. While at Chittacamp, the master wrote to one McKean, at Canso, who, on receipt, sent a telegraphic despatch to one of the directors of the fishing insurance company, in the following words: 'October 5, E. P. Howard stranded at Chittacamp, bilged, no prospect of getting her off, master waiting instructions.' On receipt of which the insurers telegraphed to one William Tarr, who was usually there, as follows: 'Do all that you can, with the advice of the shippers, that will be to the advantage of all concerned and draw on the office. Please report. Get the vessel off if possible.' On arrival at Canso, October 8, the master sent to the defendants a telegraphic despatch as follows: 'Schooner E. P. H., ashore, tide ebbs and flows into her, keel injured badly, started out of wood ends by striking on a reef of rocks, strained badly, I abandon her to you and claim a total loss.' On receipt of this the two insurance companies sent to him the following despatch, which was not received by him: 'Unless the vessel and materials can be sold at private sale for about one thousand dollars, strip her and store the sails and rigging, outfits, &c., at some proper place, say with the Jersey Company, or at Port Hood.' The companies subsequently received information, which led them to suppose that the vessel was not much damaged,

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

[2] [Affirming Case No. 18,183.]

and then telegraphed and wrote to said Tarr to get her off and bring her home. The master had previously returned and had an interview with the insurers. No exception was taken at the time of the receipt of the master's despatch to it, as being an informal or unauthorized abandonment, nothing being said about it.

"November 28. The insurers made an agreement with four persons at Gloucester, to go down and get the vessel off and bring her home; this was done, and the vessel arrived in Gloucester in February, with the outfits on board; there was no evidence that they were tendered to the owners. The insurers caused her to be repaired at an expense less than half her valuation, and tendered her to the owners, March 15, 1854, who refused to take her, insisting upon a claim for total loss, and that she was not thoroughly repaired, nor in reasonable time. No evidence was introduced on the part of the owners, of any express abandonment other than that of the master's despatch, or of any express demand of payment of the sums insured up to March 14. Evidence was at hand, on both sides, as to the cost and sufficiency of the repairs made, and the reasonableness of the time of the tender, but those questions not being deemed material by the court in the posture of the case, they were not gone into. It is agreed that the first of the above-named causes shall be tried in the district court, and that if either party is dissatisfied with the decision of the court upon any question of law, he shall have the right to appeal, but that the findings of the court upon matters of fact shall be conclusive, and that no evidence shall be introduced in case of appeal in the appellate court, except the opinion of the judge of the district court on a statement of facts made thereon; but all questions of law, including inferences of law from facts proved, are to be open on appeal. The other cases shall be continued to abide the result of the one tried, and decrees therein shall be entered accordingly without appeal. Provided, however, that if in the case tried, the libellant shall fail on any technical objection or matter of form or proof not decisive of the other causes, they may be opened in the district court so far as those objections are concerned.

"(Signed)

"R. H. Dana, Jr., for Libellants.

"F. C. Loring, for Respondents."

SPRAGUE, District Judge. In this case, two principal questions arise, depending partly on law and partly on facts; first, whether there has been abandonment, and second, whether the abandonment has been accepted. I find it more convenient to consider the latter question first, namely, if there has been an abandonment, has it been accepted? The respondents took possession of the vessel and repaired her, and offered to return her to the owner upon his paying a portion of the expenses of repairs, intending, no doubt, the one third new for old, and perhaps a part of the expense of getting her off, as a general average claim. The libellant contends that this was an acceptance. The case of Peele v. Merchants' Ins. Co. [Case No. 10,905], is a direct decision to the point, that if the vessel is abandoned, and the underwriter takes possession, repairs and offers to return her, it is an acceptance of the abandonment, by operation of law, although he refuses in terms to accept it. The taking possession and repairing is an acceptance, notwithstanding the actual intention, or the declaration, to the contrary. This decision of the circuit court I adopt as binding on this court. In the state courts of Massachusetts, the doctrine is that the underwriter may, after an abandonment, refuse to accept it, and take possession of the vessel and repair her, and if the loss is proved to have been less than fifty per cent. may return her to the former owner within a reasonable time. This doctrine is peculiar to Massachusetts. I believe it is not to be found anywhere else, either in the decisions of the federal courts, or in the state courts of any other state, or in the law of England, or of the continent of Europe. But the other principle is the law of the courts of the United States, and of the other states of the Union.

The great controversy in this case, therefore, is whether there was an abandonment. I am of opinion that the master, as master, has no authority to abandon the vessel. There must be a legal authority to transfer the property to the underwriters. It is urged that the acts of the insured are a waiver of the defects in the abandonment. The underwriter may waive informalities, and may waive his right to any thing which he is entitled to have. For instance, he may waive a notice of the nature of the loss, or may waive an objection to want of reasonable time; and if he does acts which are justifiable only under an abandonment, he waives all such objections to its sufficiency. But here it is not the insurer's right, but the owner's right, that the person who makes the abandonment shall have authority to do so. The underwriters cannot waive the owner's right, and get property in the vessel without the owner's consent. But an act by an agent may be subsequently ratified and confirmed by the principal. Has there been such a ratification here? There is no doubt that there has been an assent, at some time, as a demand for a total loss was made prior to the commencement of the suit. An abandonment must be in a reasonable time. This is a material right possessed by the underwriter. Must the ratification be governed by the same rule, as to time, with the original abandonment?. The ordinary rule of the law of agency is, that a ratification may be made at any time. But is there not something peculiar in the case of an abandonment?

The reason why an abandonment is justified and held good in a case not actually one of total loss, is that the underwriter may take the vessel and use her to the best advantage. Therefore, the insured should give the underwriter, at the earliest reasonable time, all the benefits in his power. Until a valid abandonment is made, the underwriter can exercise no act of ownership upon the vessel. Consequently, as the owner may ratify or not, at his pleasure the act of the master, the question remains undecided in the interval; and if the owner shall refuse to ratify the abandonment, the acts of ownership exercised by the underwriter would be illegal. It is clear therefore, that the ratification by the owner must be within such reasonable time, as to give the underwriter the opportunity to decide early, whether to accept or not, and if he does accept, the opportunity to make the best use he can of the wreck. The same reason which requires the abandonment to be made seasonably, requires the ratification of the act of assumed agency to be made seasonably. The owner is not obliged to abandon on mere rumor. He may wait a reasonable time to ascertain the actual state of things respecting the disaster. But he is not to wait in order to ascertain what his interests may be, in the state of the market, or as developed by subsequent events. Was the ratification in this case made within a reasonable time? If we confine ourselves to the direct evidence, it has not been shown, when the libellant first knew of the loss and of the act of Howard. He does not appear in the case, until the letter of the respondents to him, tendering him back his vessel. His reply to this letter by his proctor, shows that he had claimed a total loss, and relied upon the abandonment. On the direct evidence, therefore, there is no proof of unreasonable delay. But the proper course of inquiry includes also the circumstantial proof. It appears that before the master's despatch, the news of the disaster had been communicated to the respondents by Mr. Tarr. They replied to him, authorizing him to get the vessel off if possible, at their expense. They also authorized Capt. Howard to strip the vessel and store the rigging and outfits, and to sell in a certain contingency. No act was done in consequence of these despatches, but this was not by reason of an invalidity in the abandonment. Late in October, Capt. Howard returned, and Capt. Reed and others returned, who had been at the place. Full inquiries were made of all these parties, and the respondents, as far as they thought it expedient, made their contract with Reed and others to get off the vessel. She was got off and brought to Gloucester in February. She was then repaired and tendered to the former owners in March. The respondents do not complain that they were delayed at all in their action. On the contrary they say that the vessel was got off, repaired, and returned, within a reasonable time. There is nothing to indicate that they have not had all the advantages they could have had if the abandonment by Howard had been authorized. This series of acts by the underwriters shows that they treated the abandonment as valid. By the contract of insurance, the underwriter gets no property in the vessel, and no right of possession. It is a mere contract of pecuniary indemnification. He cannot interfere and take control of the vessel to prevent a loss, or to change the character of a loss. His right to possession and control is derived solely from the abandonment. The owner keeps control of the vessel and of the wreck, until he chooses to abandon it to the insurer, and he need not abandon in any case, unless he chooses to change the property in the remnants, into money. Even under the doctrine of the supreme court of Massachusetts, the insurer cannot take possession and repair, before there has been an abandonment. No case has gone the length to assert such a right. One reason given by the Massachusetts court for their rule is, that the insurer may show by the repairs, that the loss alleged to be over fifty per cent., was in fact, less than that amount. This assumes that the owner has abandoned. The acts of the respondents in this case, can, under neither rule, be reconciled with any other view than that they considered the vessel legally abandoned to them; and it seems that they had all the advantages of a valid abandonment. When both the insured and insurers have treated the abandonment as valid, an objection by the insurers to its original validity, becomes little else than a formal objection.

I will now look at the acts of the owners, to see if they did not, in fact, make a seasonable notification. The owners and underwriters, the master and most of the crew, and Mr. Tarr and Capt. Reed, all reside in Gloucester. It is not a very large place, and it is quite improbable that the owners did not know of the facts as they occurred. The vessel was brought to Gloucester, kept in the possession of the respondents some six weeks, undergoing such repairs as the respondents thought proper. The owners did not interfere or object to any of these acts. The course of conduct on both sides can only be reconciled with one hypothesis, and that is that each understood that the vessel was abandoned and a total loss claimed, and that the only question was, whether the facts were such as to justify it. After such an acquiescence, the owners would not be permitted to deny the authority of Howard, and treat the insurers as trespassers. Since the decision of Peele v. Merchants' Ins. Co. [supra], a clause has been introduced into the Boston policies, and is found in this policy, in the following words: "The acts of the insured or insurers, in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered as a

waiver or acceptance of an abandonment." The respondents have referred to this clause as justifying their acts. But the object of this clause is to enable either party, after an abandonment, to labor in rescuing and preserving property, without fear of the effect of their acts as evidence of an acceptance or waiver. The clause supposes an abandonment. The acts of the underwriters in getting off the vessel and bringing her to Gloucester, including temporary repairs for that purpose, might be protected by that clause of the policy. But they went much further. Having brought the vessel to the home port, they kept possession of her for six weeks, and made repairs of a permanent character, confessedly for the purpose of tendering her back to the owners as a fully repaired vessel. These acts are not protected by the clause. Such seems to have been the view of this clause taken by the supreme court of Massachusetts.

It is argued that the implied authority given to Capt. Howard to sell, was only for the purpose of obviating the effect of a restriction specially introduced into this policy, in these words,—"In case of loss in the Bay of St. Lawrence, no sale of the vessel to be made on their (insurers') account," and to leave the master to act as by the common maritime law. But the restriction is not on his right to sell as master, on the owner's account, but upon sales on the insurers' account, after abandonment. A release from that clause authorizes a sale on the insurers' account, and implies an abandonment. Moreover, the despatch is not confined to authorizing a sale. It gives orders in answer to his request for orders, as to what shall be done with the vessel and her outfits, in case she is not sold. There is another view that may be taken of this matter of the abandonment. Subsequent events, after an invalid abandonment, may justify a new one; as condemnation after capture, or new events altering the nature of the original loss. Now, I am by no means certain that, if there had been no valid abandonment before the insurers got off the vessel and brought her to Gloucester, their subsequent acts, which amounted to a conversion of the vessel to their own use, would not have justified a new original abandonment. The offer to return the vessel is accompanied by a claim upon the owner for the payment of a sum of money to be afterwards ascertained. The letter of the libellant's proctor treats this as a conditional offer. He desires to know what the amount is, which his clients are required to pay, saying that if it is not too large, and that if the vessel is found sufficiently repaired, they may, waiving no right, be willing to accept the vessel, as a compromise. The reply of the respondents does not waive this demand. I am of opinion that there has been a sufficient abandonment, treating Capt. Howard only as master. On this abandonment, the acts of the respondents are in law, an acceptance. It is not therefore necessary to go into the other questions which have been opened. On the point of jurisdiction, I consider the jurisdiction of the admiralty over policies of insurance to be the settled law and practice of this circuit. Decree for the libellant, for a total loss.

The court directed the question of jurisdiction to be first argued; and it was argued by R. H. Dana, Jr., in support of the jurisdiction, and by F. C. Loring and S. Bartlett, contra.

CURTIS, Circuit Justice. In Delovio v. Boit [Case No. 3,776], decided in 1815, Mr. Justice Story, after an elaborate and very learned examination of the subject, held that the admiralty jurisdiction of the district courts of the United States extended to suits on policies of insurance. In Peele v. Merchants' Ins. Co. [Id. 10,905], in the year 1822, the question was again before him, he reaffirmed the jurisdiction, and made a decree for the libellant. An appeal was taken, but for some cause was not prosecuted to a hearing before the supreme court. In Hale v. Washington Ins. Co. [Id. 5,916], in 1842, that learned judge again declared that he adhered to the doctrine of Delovio v. Boit, and he again made a decree, in a suit in the admiralty founded on a policy of insurance. In numerous cases, in this circuit, the doctrines of Delovio v. Boit [supra], have been still further examined and affirmed. Andrews v. Essex F. & M. Ins. Co. [Case No. 374]; Plummer v. Webb [Id. 11,233]; The Tilton [Id. 14,054]; The Volunteer [Id. 16,991]; The Tribune [Id. 14,171]; Drinkwater v. The Spartan [Id. 4,085]; Steele v. Thacher [Id. 13,348]; The Huntress [Id. 6,914]. And, so far as I am informed, the jurisdiction has not been here questioned. On the other hand, it must be admitted, that, either from want of confidence felt by the bar, in the ultimate establishment of the jurisdiction by the supreme court of the United States, or from some other cause, the jurisdiction of the admiralty over policies of insurance has been very infrequently resorted to. It is believed that since Peele's Case, a libel on a policy of insurance has not been filed in this district, where the amount in dispute would allow an appeal. Though this question has never come before the supreme court of the United States, other inquiries concerning the extent of the admiralty jurisdiction conferred by the constitution, have there arisen, and given rise to great research and much acute criticism. They have resulted in pretty wide differences of opinion among the individual judges. Waring v. Clarke, 5 How. [46 U. S.] 441; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344; The Genesee Chief, 12 How. [53 U. S.] 443. In Cutler v. Rae, 7 How. [48 U. S.] 729, it was held by a majority of the court, that a

libel, in personam, would not lie by the owner of a ship against one of the consignees of cargo, who had received his goods, to recover a sum of money, due by way of contribution to a general average loss. This decision certainly goes pretty far towards overruling the decision in Delovio v. Boit, and is undoubtedly irreconcilable with some of the positions which are reported therein. But it does not cover the precise question, whether a policy of insurance is one of those maritime contracts, which are within this jurisdiction. It rests on the ground, that after the goods have been surrendered to the consignee, the lien is gone, and therefore there is not admiralty jurisdiction to enforce a lien; and that the promise by the consignee to contribute, is implied, if at all, by the common law; that it is not a creature of the admiralty law, and is not to be enforced in a court of admiralty. All this may be true, and yet a policy of insurance may be such a maritime contract as comes under the jurisdiction of the admiralty, while an implied promise to contribute in general average does not. Undoubtedly, it would be somewhat remarkable, if the admiralty were held not to have jurisdiction over an implied promise to contribute to a general average loss, but to have jurisdiction over an express promise to do so; or that it had not jurisdiction over an express promise to contribute to such a loss, but had jurisdiction over an express promise, in a policy of insurance, to indemnify one for what he might be obliged to contribute. Still, an inquiry into the extent of the admiralty jurisdiction, under the constitution of the United States, is, to some extent, at least, an historical question; and whether a particular class of contracts is within that jurisdiction, is to be determined, not by reasoning a priori, but by examining into the actual extent of that jurisdiction, as exercised in this country prior to the formation of the constitution. This may lead, as, comparing the cases of New Jersey Steam Nav. Co. v. Merchants' Bank, and Cutler v. Rae, and The Genesee Chief [supra], it may, perhaps, be said, it has led, to theoretical anomalies, which can scarcely be reconciled, but which may, nevertheless, be sound deductions from correct premises.

The preliminary question which I have to determine is, whether I ought to examine this subject, and pronounce my own individual opinion thereon; or whether, sitting here, I should allow the question, which has been thus decided by my very learned and distinguished predecessor, and which has been so long settled in this circuit, to remain, as he left it, until it shall come before the supreme court of the United States. I confess I have felt not a little doubt concerning what my duty requires of me; but I have come to the conclusion, that, sitting here, I shall best discharge my duty by treating the inquiry as to the jurisdiction as not to be further gone into on the circuit, holding myself free to go into it at large, and with all the aids of more recent investigations, when it shall arise in the appellate court. The objection to the jurisdiction is, therefore, overruled, and the case must be heard on its merits.

The cause was then argued on its merits, by S. Bartlett and F. C. Loring, for appellants, and R. H. Dana, Jr., contra.

CURTIS, Circuit Justice. This is an appeal from a decree of the district court, in the admiralty, founded on a policy of insurance. The question of jurisdiction has heretofore been raised and decided. The appeal comes before me under an agreement of the parties, which is as follows: "It is agreed that the first of the above-named causes shall be tried in the district court, and that if either party is dissatisfied with the decision of the court upon any question of law, he shall have the right to appeal, but that the findings of the court upon matters of fact shall be conclusive, and that no evidence shall be introduced in case of appeal in the appellate court, except the opinion of the judge of the district court on a statement of facts made thereon; but all questions of law, including inferences of law from facts proved, are to be open on appeal. The other cases shall be continued to abide the result of the one tried, and decrees therein shall be entered accordingly without appeal. Provided, however, that if in the case tried, the libellant shall fail on any technical objection or matter of form or proof not decisive of the other causes, they may be opened in the district court so far as those objections are concerned."

The substance of the agreement between the parties is, that no question of fact is to open on this appeal, but the law arising on the facts found, shall be here reviewed. I do not approve of this mode of bringing admiralty appeals before this court. It is, substantially, the mode originally provided for by the twenty-second section of the judiciary act of 1789 (1 Stat. 84), but was found to be attended with so many difficulties, that the act of March 3, 1803 (2 Stat. 244) gave an appeal. See Wiscart v. Dauchy, 3 Dall. [3 U. S.] 321; Oliver v. Alexander, 6 Pet. [31 U. S.] 143. Some of these embarrassments are felt in this case. The respondent's counsel insist that, inasmuch as all questions of law are agreed to be open on the appeal, they have a right to take the opinion of this court, upon those matters of law which determined or influenced the district court to find the facts. Certainly, all legal questions, belonging to the case, cannot be here raised and decided, if these are excluded. But they must be excluded, to execute the agreement of the parties to produce no evidence here and make the finding of the district court of all matters of fact conclusive. They

would no more be conclusive, if open to objection by reason of alleged errors of law, than they would be if either party were at liberty to insist that the evidence did not warrant the conclusions of the district court. Indeed, this is, in substance, the real objection made; for that objection is, that upon correct principles of law, the evidence does not warrant the conclusions of fact made by the court below. But I am of opinion that the agreement of the parties precludes the respondents from all objections to the findings of the district court concerning any matter of fact. I offered to discharge the agreement in the case and allow it to stand open on the appeal, but as neither party desired this, I have taken the case into consideration, and will decide it,—but I wish it to be understood that I have encountered much embarrassment in doing so, and shall execute a similar agreement hereafter with much reluctance, if at all. An appeal in the admiralty should come before this court, either upon the evidence, or upon an agreed statement of facts.

On examining the opinion of the judge of the district court it appears he has found: (1) An offer by the master to abandon the interest of the assured in the vessel, seasonably ratified by the assured. (2) That the insurers took possession of the vessel for the purpose of repairing and restoring it to the insured, and in the execution of that intention, brought the vessel to the home port and there made repairs rendered necessary, by perils within the policy.

The fact that an offer of abandonment was seasonably made, by the ratified act of the master being found, the principal question is, whether this offer of an abandonment was accepted by the insurers. There can be no doubt, that if what was done by them was in the exercise of rights derivable only from an accepted offer of abandonment, their acts are conclusive evidence of such acceptance. Peele v. Merchants' Ins. Co. [Case No. 10,905]; Badger v. Ocean Ins. Co., 23 Pick. 355; Griswold v. New York Ins. Co., 1 Johns. 205, 3 Johns. 321; Maryland & P. Ins. Co. v. Bathurst, 5 Gill & J. 235. Upon the same principle the supreme court held that an offer of abandonment would be waived by an assertion of ownership inconsistent therewith. Chesapeake Ins. Co. v. Stark, 6 Cranch [10 U. S.] 272; Columbian Ins. Co. v. Ashby, 4 Pet. [29 U. S.] 144. Nor is there any doubt that this court decided, in Peele v. Merchants' Ins. Co. [supra], that if the insurer take and retain possession of the vessel for the purpose of repairing it, he does thereby accept an offer of abandonment. But the insurers insist, that the contract in question was made, and was to be executed in the state of Massachusetts; and that by nature of the law of that state, the insurers had, under this policy, a right to take possession of the vessel when an offer of abandonment was made, and seasonably repair and restore it to the insured, and thus perform their contract. It must be admitted that the law of the place of this contract determines the rights which the insurers have, upon an offer to abandon; and also that the supreme court of Massachusetts have held that the insurer has the right which is here insisted on. But this court held in Peele v. Merchants' Ins. Co., that the insurer had no such right. And this being a question, not of mere local municipal law, but arising under the law merchant, though this court must consider with unaffected respect the decisions of that court, on this question, yet they are not binding on our judgments, and we have no right to conform to them, when we believe they do not announce the true rule. This is the settled doctrine of the supreme court of the United States, and has been frequently applied in this court. Swift v. Tyson, 16 Pet. [41 U. S.] 1; Carpenter v. Providence Washington Ins. Co., Id. 495; Foxcroft v. Mallett, 4 How. [45 U. S.] 379; Williams v. Suffolk Ins. Co. [Case No. 17,738]. Being satisfied of the correctness of the decision of this court in Peele v. Merchants' Ins. Co., and of its conformity with sound principles, I cannot overrule it, because the highest court of the state has, subsequent to that decision, taken a different view of the rights of insurers. The laws of the place of the contract being the general law merchant, I am bound to declare that in my opinion, it did not confer on the underwriter the right claimed, to take possession on an offer of abandonment, and repair and restore the vessel, and thus perform his contract.

It has been argued, that these decisions of the supreme court of Massachusetts, are evidence of a local usage by which this contract should be governed. A judicial decision, founded on a local usage, may be evidence of its existence at the time the decision was made. Cookendorf v. Preston, 4 How. [45 U. S.] 326. But the supreme court of Massachusetts have not rested their decisions upon any local usage, but upon their understanding of the principles of mercantile law. It is also urged, that we may fairly presume that a practice, in conformity with these decisions has grown up, amounting to a local usage. If this argument were so far sound as to determine this case, it would preclude all inquiry in every case, as to the correctness of any decision respecting any contract, where time enough had elapsed since it was made to have a practice in conformity with it, obtain. No doubt it is a strong argument against overruling a decision, that it has been practiced on, and rights acquired in conformity with it. But this is a practical view only; and I have never understood that there was also a theoretical objection, quite conclusive, if well founded, that the decision proved a local usage, which, though not in pursuance of a rule of law, bound the parties. I do not think any such effect can be allowed to a decision, which professes to de-

clare a rule of commercial law. It must stand or fall upon its reasoning and its authority, not upon the strength of a local usage supposed to have grown up under it. And especially must this be so, where, as in this case, there is no presumption that there has been any other practice than to conform to the law of the land on the subject, and the very question is, what that law allows. Nor do I think the clause giving to each party, the right to act in recovering, saving, and preserving the property insured, confers on the insurer the right here claimed. It seems to me to have no reference to any other repairs, than such as may be needful for the temporary preservation of the property, and its relief from perils within the policy. And such I understand to have been the view taken of it in Reynolds v. Ocean Ins. Co. 1 Metc. [Mass.] 160. I am also strongly inclined to the opinion that the respondents do not bring the case within the rule held by the supreme court of Massachusetts. For they did not tender the vessel to the insurer, except upon condition of his paying a part of the expense of the repairs. As I understand that rule, the insurer has not the right to prescribe this condition; but I would not be understood to speak with confidence concerning it. Considerable embarrassment in the application of the rule would seem to exist, in a case like the present, where a part owner obtains separate insurance. But I do not rest the decree on this ground, and therefore do not pursue the inquiry. Decree of the district court affirmed.

GLOUCESTER MANUF'G CO. (SICKLES v.). See Case No. 12,841.

GLOUCESTER MARINE INS. CO. (YOUNGER v.). See Case No. 18,183.

Case No. 5,488.

The GLOVER.

[Brown, Adm. 166.] [1]

District Court, N. D. Ohio. Oct., 1872.

DEMURRAGE—CONSIGNEE—CUSTOM.

1. Where no "lay days" are provided in the charter party or bill of lading, and there is no express stipulation as to the time of unloading, the consignee is not liable for delays occurring without his fault.

[Cited in Bowen v. Decker, 18 Fed. 752; Houge v. Woodruff, 19 Fed. 138; The J. E. Owen, 54 Fed. 187.]

2. If it is a custom at the port of delivery for vessels to be unloaded through an elevator, each vessel waiting its turn, such custom becomes part of the contract, and the master takes upon himself the risks and delays incident to such a method of unloading.

[Cited in Finney v. Grand Trunk Ry. Co., 14 Fed. 172; Barrett v. Oregon R. & Nav. Co., 22 Fed. 452; The Mary Riley v. Three Thousand Railroad Ties, 38 Fed. 255.]

The libel in this case was filed in personam to compel the payment of demurrage by the consignee Thomas Walton, for seven days' detention of the schooner Glover, in unloading a cargo of barley in the port of Cleveland. The bill of lading was in the usual form, but did not provide for "lay" days, nor for compensation for detention. It was general in its form, such as is customary on the lakes. From the proof it appeared that the vessel arrived at 10 o'clock a. m., on Wednesday, October 4th, and was forthwith reported to Thomas Walton, the consignee. That upon inquiry, both by Walton and the captain, no elevator could be found in the port that would agree to unload her before the next Friday. That on Friday, the 6th, the vessel was at the Erie Elevator and commenced unloading, but the cargo of barley was found to be wet, caused by leaking through the hatches, and they therefore ceased unloading; that by the next Tuesday the barley, by throwing open the hatches and by other means, became dry enough to commence unloading; that about one-half was unloaded, when some of the machinery of the elevator broke, and the barley was not entirely unloaded until Thursday. It was also established by the proof that it was a general and uniform custom along the lakes, including this port, that the consignee should have twenty-four hours, after the arrival of a vessel at the docks, to provide a place and prepare for its unloading; that all grain should be unloaded by means of an elevator, and that, in unloading at an elevator, every vessel should take its turn in the order of its arrival. Under this state of facts the libellants, on the one hand, claimed to recover damages for the detention of the vessel, at the rate of $75 per day, the agreed value, and, on the other hand, the respondent and consignee claimed that he was not liable for such detention, as it was not caused by his fault or neglect.

Willey, Cary & Terrell, for libellant.
Prentiss & Vorce, for respondent.

SHERMAN, District Judge. The liability of the consignee in this action turns upon the question whether the law imposes upon him the payment of damage when the detention was not caused by his actual fault or neglect. Originally it was held that damage could only be recovered when it was expressly stipulated for in the contract of affreightment or bill of lading; but of late years it is established that it may also be recovered when there is a breach of an implied covenant or duty on the part of the consignee. In former times, all charter parties and bills of lading, stipulated on behalf of the freightors or consignees, that a certain number of days should be allowed for unloading, and that, after their expiration, an agreed price per day should be paid for demurrage. The courts before whom such contracts came, uniformly held that the consignee was liable for such demurrage, no matter for what reason or whose fault caused the detention. They so held, because it was the contract of the parties, but chiefly because it was a contract mutually entered into, and

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

the consignee could have provided for a large number of days, or could have stipulated against a liability for delay caused by means and occurrences over which he had no control. Randall v. Lynch, 2 Camp. 352, 12 East, 179; 1 Par. Shipp. 314. In other cases, where, according to modern usage, there is no stipulation for "lay days" or demurrage in the charter party or bill of lading, the courts uniformly, both in England and America, hold that where there is no express stipulation as to the time of unloading, a consignee is not liable for delays occurring without his fault, or a failure on his part to comply with some of the obligations imposed on him by law or a custom of the port as to unloading. 2 Camp. 483; Burmester v. Hodgson, Id. 488. Chief Justice Mansfield, in the last case, said: "Here the law could only raise an implied promise to discharge the ship in the usual and customary time for unloading such a cargo. That has been rightly held to be the time within which a vessel can be unloaded in her turn into the bonded warehouses." The same doctrine is fully sustained in Abbott on Shipping (pages 311–313); also, in The Mary E. Taber [Case No. 9,209]; Philadelphia & R. R. Co. v. Northam [Id. 11,090]; Towle v. Kettell, 5 Cush. 18. In the late case of Strong v. Quantity of Wheat [Case No. 13,541], in the United States district court, Northern district of New York, in manuscript, Judge Hall held that a master of a vessel was bound to know the custom of the port to which he conveyed a load of grain, and if the custom prevailed at the port that all grain should be unloaded at an elevator, and that the vessel should wait its turn, that the custom entered into and became part of the contract, and that the master was bound by that custom.

This distinction between the liability of consignees, when "lay" days and demurrage are provided for in bills of lading, and their liability where they are not mentioned and provided for, is fully recognized in all the reported cases. It is not recognized in rather a popular elementary work, because of the well known carelessness and want of research by its reputed author, and hence has grown up an extended misapprehension of the law on this subject. Bearing in mind this distinction, and the fact that this bill of lading was a general one, with no provision for "lay" days or demurrage, the question arises: Did Walton, by his neglect or fault, cause detention of this vessel? The detention from Wednesday to Friday, in waiting its turn to get to the elevator, was, according to the above authorities, and especially that from Judge Hall, of the Northern district of New York, a part of the contract, was in compliance with the custom of the port, and Walton, the consignee, was not liable. On Friday, after the elevator commenced to take in the cargo, finding the barley was wet, its managers refused taking it in until it was dried. The libellant claimed that the elevator stopped taking it in because of the orders of Walton, who wanted to consult the insurance company. The captain of the vessel so swears. Walton swears the contrary, and states positively that the elevator people refused to take it because of its condition. The burden of the proof of the fact is on the libellant, but the testimony is balanced, and I must assume that Walton did not order as claimed. If so, then the detention of the vessel from Friday to the next Tuesday was not Walton's fault, but was rather the fault of the master of the vessel, who permitted his cargo to become wet by the defective state of his hatches. Nor was it Walton's fault that the vessel was further delayed until next Thursday in consequence of the breaking of the machinery of the elevator, while it was engaged in taking in the barley. The master was aware of the well known and uniform custom in all the ports on the lakes: that grain is only unloaded from a vessel by and through an elevator, and that such was contemplated when he made his contract, and therefore he takes upon himself all the risks and accidents incident to such a method of unloading.

I am of the opinion, therefore, that Walton, the consignee, is not liable in this action. Libel dismissed.

NOTE. It seems to be assumed in this case that an action in personam will lie in admiralty against the consignee to recover demurrage occasioned by his default, and such appears now to be the law.

It has been lately decided by Judge Lowell, of the Massachusetts district, that a suit in rem will lie against the cargo to recover damages for delay in unloading. The Hyperion's Cargo [Case No. 6,987]. See, also, Tapscott v. Balfour, 1 Asp. Marit. Law Cas. 501; Ford v. Cotesworth, 3 Marit. Law Cas. 468.

GLOVE, The (GLENNY v.). See Case No. 5,484.

GLOVER (BAKER v.). See Case No. 769.

GLOVER (JOHNSON v.). See Case No. 7,385.

GLOVER (OWEN v.). See Cases Nos. 10,629 and 10,630.

GLOVER (RINGGOLD v.). See Case No. 11,845.

GLOVER (SMITH v.). See Case No. 13,051.

GLOVER (UNITED STATES v.). See Case No. 15,218.

GLOYD (McCLEOD v.). See Case No. 8 697.

GLYN, In re. See Case No. 6,322.

GLYN (POLAND v.). See Case No. 11,243.

GOBBOLD (LANE v.). See Case No. 8,051.

Case No. 5,488a.

GOBLE v. DELAWARE, L. & W. R. CO.

[3 N. J. Law J. 176.]

District Court, D. New Jersey. April Term, 1880.

CARRIERS OF PASSENGERS—RAILROAD COMPANIES—NEGLIGENCE—PERSONAL INJURIES—DAMAGES.

[1. Railroad companies carrying passengers by the powerful and dangerous agency of steam

are held to the greatest possible care and diligence to carry them safely, and are responsible for the direct consequences of any negligence or want of care or skill on the part of an employee.]

[2. The fact that an injury results from a railroad collision without any fault of the passenger is prima facie evidence of carelessness, negligence, or want of skill on the part of the company, and the burden is upon it to prove that the accident was not occasioned by the fault of its agents.]

[3. The company is responsible for the safety of passengers in any place which it provides for their accommodation, and the fact that a passenger chooses to ride in the smoking car, next to the locomotive, which is perhaps not the safest place in the train, is not contributory negligence.]

[4. The elements of damage in case of injury to a passenger are: (1) The bodily injury; (2) the pain undergone; (3) the effect on health, according to degree and probable duration; (4) the expense incidental to attempts to cure or lessen the injury; (5) the pecuniary loss sustained by inability, whether temporary or permanent, to attend to business.]

This action was brought [against the Delaware, Lackawanna & Western Railroad Company] to recover damages for injuries sustained by the plaintiff by reason of a collision on the defendant's road. The plaintiff was a dentist by profession, residing near Madison, N. J. On the evening of January 8, 1879, he entered the defendant's cars at Hoboken, on an express train, to go to Madison. He appeared to be in the enjoyment of ordinary health. There was no evidence that he was then, or had been for some months previously, suffering from any special physical infirmity. Just before reaching the Summit station the two rear cars were as usual uncoupled from the main train with the design of attaching them to another locomotive, to proceed upon the West Line road. The plaintiff was sitting in the car next to the engine, which was divided into two compartments, the first being used for baggage and the rear part as a smoking car. The plaintiff occupied the second or third seat from the forward end of the smoking car, with his back to the locomotive, engaged in a game of whist with some friends. While thus seated the main train stopped and the two cars which had been detached came into contact with the rear end of the last car of the train with sufficient force to attract general attention, to upset one if not two water coolers, and to cause some degree of disturbance among the passengers. The plaintiff at the moment of the concussion was sitting in his seat. He had just straightened himself up to draw his overcoat around him when he was thrown violently first forward and then backward with such force as to cause him to bite in two a segar that was in his mouth. His first sensation was a pain in the stomach which produced nausea, dizziness and general uneasiness. He walked home with some difficulty, went to bed and sent for his physician. After a few days he got up and attempted to resume his business, but was unable to do so, and soon after was prostrated, from injuries to the spinal cord. He is paralyzed and altogether incapacitated from any mental or physical labor. The plaintiff is a dentist and testified that his income was $5,000 a year.

Wm. T. Hoffman and A. Q. Keasbey, for plaintiff.

Moses Taylor Pine, Mr. Odell, Wm. L. Dayton, and J. D. Bedle, for defendants.

NIXON, District Judge (charging jury). The action is to recover damages for injuries which the plaintiff alleges he has sustained from the negligence of the agents of the defendant corporation. Railway companies in the transportation of their passengers do not insure their lives; but they do undertake to use the greatest skill and diligence in carrying them safely, and are responsible for the direct consequences of any negligence or want of care or skill on the part of an employee. The supreme court of the United States, nearly thirty years ago, announced their view of the responsibility of railroad corporations in cases of this kind. The judges all concurred in saying that when carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence, and whether the consideration of such transportation be pecuniary or otherwise, the present safety of the passenger should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of "gross." This language has been approved and reaffirmed in several cases since, and there has been no disposition shown to relax the strict rule of accountability therein announced. But although they are held to the greatest possible care and diligence, they are not liable, even when chargeable with negligence, if it appear that the accident arose from the want of ordinary and reasonable care on the part of the plaintiff, in consequence of which he contributed to the injury by his own fault. There is also, gentlemen, another principle of law to be carried in your mind in determining a suit for personal injuries received. It is this: Where it appears that the injury complained of was the result of a collision without the fault of the complaining party, that fact is prima facie evidence that there was carelessness or negligence or want of skill on the part of the company, and there is upon them the burden of proving that the accident was not occasioned by the fault of their agents.

Now, after these somewhat general observations, let me remark that the case involves the consideration by the jury, in the first place, of two questions. First, was the injury of the plaintiff caused by the negli-

gence or the lack of carefulness and skill on the part of the defendant? Secondly, did the plaintiff contribute to the injury by any fault or carelessness on his part? Now, if the first of these questions is answered in the affirmative and the second in the negative, the only remaining inquiry is, what amount of damages under the circumstances, as shown in the evidence, should be awarded? * * * If you come to the conclusion, gentlemen, that the injury to the plaintiff sprang from the collision of the cars, your next inquiry will be whether it was brought about by the negligence of the defendant company.

Now, what is negligence? It is easy, of course, to say in a general way, it is an omission of duty; it is a violation of the obligation which enjoins care and caution in what we do. It ordinarily excludes design, and hence a man, however honest he may be, cannot excuse himself from the consequences of not doing what he ought to have done by saying, "Why, I did not act because I did not think there was danger." It is his duty to think, and if he fails to use the efforts or take the precaution which an ordinarily prudent man would employ in like circumstances, he is guilty of negligence. Upon the question of contributory negligence, the judge said: "It may be suggested and has been suggested that as the forward smoking car was not the safest place in the train, the plaintiff must take the consequences of being there." But that is not the law. The railway company is responsible for the safety of its passengers in any place which they have provided for their transportation. If a passenger takes the risk of a ride upon the engine and gets hurt, it is his fault and not the fault of the company, as they have not agreed to carry passengers safely upon the engine. But a smoking car is intended for passengers where they can indulge their tastes and appetite without offending the olfactory nerves of their more fastidious (shall I say "more cleanly"?) fellow passengers. You thus come to the last and probably most difficult inquiry: What amount of damages shall be awarded? I can give you no help except to aid you with a few suggestions. In the first place, this is no case for vindictive or exemplary damages, for there is no pretense that there was any willful neglect. The plaintiff is only entitled to what the law calls "compensatory damages." I do not mean by this that you must try to make the plaintiff whole, or put him in as good condition as he was before the accident. In the very nature of the case that is impossible. No amount of money, gentlemen, can compensate for loss of health or physical suffering. But then you can do something, and my duty is to tell you what the elements of damages are which you ought to consider in making up your verdict. This is a difficult thing to do, and I know of no rule which I can lay down which is applicable to every case. During the progress of the case my attention has been called to a recent case in the English high court of justice (Phillips v. Southwestern Ry. Co. [4 Q. B. Div. 406]), in which elements of damages which the jury ought to consider are so clearly laid down by Chief Justice Cockburn that I am quite willing to adopt them in charging you. He says in his opinion that the elements of damages are: First. The bodily injury sustained. Secondly. The pain undergone. Thirdly. The effect on the health of the sufferer according to its degree and its probable duration, as likely to be temporary or permanent. Fourthly. The expense incidental to attempts to cure or to lessen the amount of injury. Fifthly. The pecuniary loss sustained through inability to attend to a profession or business, which again may be of a temporary character or may be such as to incapacitate the party for the remainder of his life. I have not seen lately, as it seems to me, a more clear, succinct and excellent rule upon the subject of damages than is thus laid down in this recent opinion of one of the highest courts of Great Britain.

The jury rendered a verdict for the plaintiff for $12,000.

GODARD (ROOT v.). See Case No. 12,037.

GODBOLD (UNITED STATES v.). See Case No. 15,219.

Case No. 5,489.

GODDARD et al. v. ARTHUR.

[13 Blatchf. 438;[1] 22 Int. Rev. Rec. 257.]

Circuit Court, S. D. New York. June 22, 1876.[2]

CUSTOMS DUTIES — CASH PRICE — INTEREST — DISCOUNT.

1. The invoice on which an entry of imported goods was made read thus:

"Merchandise, frs.....	8670 25
Discount for cash, on gross am't, 2 p. c.....	175 30
Frs	8494 95

Terms cash; if not paid cash, interest to be added at the rate of 6 per cent." The collector refused to allow the 2 per cent. discount, and the goods were appraised at 8670.25 francs, and duty was exacted thereon. The net invoice price was the actual market value of the goods in the country of exportation: *Held*, that the duty on the 2 per cent. was improperly exacted. [See note at end of case.]

2. The sale was, on the face of the invoice, a sale for cash at the lesser price, without credit, interest to be paid for delay.

[This was an action at law by Joseph W. Goddard and others against Chester A. Arthur, for the recovery of duties illegally exacted by him as collector of the port of New York.]

William G. Choate, for plaintiffs.

George Bliss, Dist. Atty., for defendant.

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

[2] [Affirmed in 96 U. S. 145.]

WALLACE, District Judge. The invoice upon which the plaintiffs entered an importation of merchandise was as follows:

"Merchandise, frs.....	8670 25
Discount for cash, on gross am't, 2 p. c.....	175 30
Frs.	8494 95

Terms cash; if not paid cash, interest to be added at the rate of 6 per cent." The collector refused to allow the two per cent. discount, and the merchandise was appraised as of the invoice price, at 8670.25 francs. This action is brought to recover the duty exacted on the two per cent. disallowed, and the only question is, whether or not the discount should have been allowed, in ascertaining the invoice price, it being conceded that the net invoice price was the actual market value of the goods in the country of exportation. As I construe the invoice, it evidences a sale for cash, at the price of 8494.95 francs. The purchaser has no term of credit, but the price is due on delivery, and, for any delay in making payment, the interest is stipulated at the rate of six per cent. The transaction is materially different from a sale on credit, where, by the terms, a discount is to be allowed, if cash is paid before the term of credit expires, and is, therefore, distinguishable from Ballard v. Thomas, 19 How. [60 U. S.] 382. In such case, the purchaser has an option to pay the regular price for the goods, or to satisfy the contract at a reduced sum, by performance at an earlier day than the contract day. In the present case, if the rights of the parties are to be controlled by the contract evidenced by the invoice, (and no other evidence was presented to the collector, or on the trial,) the purchaser has no option, and the vendor can in no event exact more than the net price and interest.

It is urged, that the appraisal is conclusive as to the value of the merchandise, and, even if erroneous, in the absence of fraud, authorized the collector to exact the amount which he required to be paid. But, the return of the appraisers shows that the market value of the merchandise was not a subject of inquiry. They attempt to return the invoice price, and the form of the return is such as to present simply the question for the consideration of the collector, whether the gross or the net price was the invoice price.

Judgment for plaintiff.

[NOTE. Upon an appeal by the defendant to the supreme court, the judgment of the circuit court was affirmed in an opinion by Mr. Justice Hunt (96 U. S. 145), in which it was held that the entered or invoice value spoken of in the statute of March 3, 1865 (13 Stat. 494), was held to be the cash value as stated in the invoice. The fact that the price was to bear a certain interest until paid for had no influence upon the question of their value. Nor was it the province of the appraisers to make and decide a legal question.]

GODDARD (BANK OF THE UNITED STATES v.). See Case No. 917.

GODDARD (BARRETT v.). See Case No. 1,046.

GODDARD (BOWLEY v.). See Case No. 1,736.

Case No. 5,490.

GODDARD et al. v. COFFIN et al.

[2 Ware (Dav. 381), 382.] [1]

Circuit Court, D. Maine. April Term, 1849.

PRACTICE—MOTIONS AND RULES—EFFECT OF DIVISION OF OPINION IN THE COURT—RENDERING JUDGMENT.

1. When there is an equal division of opinion in the court, on a motion for any rule or order, the motion is not allowed, and fails.

2. If the motion be such that an affirmative decision is indispensable to the progress of the cause, the case stops, and the parties go out of court.

3. If it be such as only arrests the progress of the cause, and there is an equal division, the motion not being allowed, is in effect overruled, and the case proceeds as though no motion had been made.

4. When there has been a verdict and the motion has been made for a new trial on which the court is divided, the motion is overruled, and no new trial is allowed. But whether judgment can be entered on the verdict or not, depends on the state of the case when the motion is made.

5. If, after verdict, there is any rule or order, general or special, for judgment nisi, no new motion being made, the party in whose favor the verdict is, is entitled to judgment.

6. If there be no such general rule, and no special order has been made for judgment nisi, and the court is equally divided on a motion for a new trial, the case stands precisely as though no motion had been made.

7. The rendering of judgment is a judicial act, and must be done by the court, and the record must show that it is the judgment of the court.

8. In this court, judgment is rendered only upon the motion of the prevailing party. If no motion is made the case stops. And upon such a motion, the court being equally divided in opinion whether judgment should be rendered, it seems that nothing can be done but to dismiss the case without costs and without prejudice.

This case was tried before the district judge, and a verdict having been rendered for the plaintiff for $8,353.52 damages, a motion was made by the defendant for setting aside the verdict and for a new trial. On this motion, after argument, the court were divided in opinion; one of the judges being for, and one against the motion. After the judges had delivered their opinions, a question arose and was shortly spoken to by counsel, whether judgment could be entered on the verdict, the motion for a new trial having been overruled by an equal division of opinion. The circuit judge was in favor of rendering judgment. The district judge doubted whether this could be done as a matter of course, the court being divided, and desired

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

time to consider the question; and it was ordered to stand over for argument, before the district judge, on the 21st of October, the circuit judge having directed an entry on the docket, that he was in favor of rendering judgment, he having been in favor of overruling the motion for a new trial. At the same time it was agreed that the case should be considered as open for any motion by either party; and each party be at liberty to take such steps in the case as he should be advised were for his interest. At the adjournment no counsel appeared for the plaintiff. Hobbs, counsel for the defendant, appeared and spoke shortly to the case, and read an argument in writing by Benjamin Rand of the Suffolk bar. After the adjournment, and before any opinion was given by the district judge, the counsel for the plaintiff desired to be heard and the case was continued to the next term of the court. The counsel appeared, no motion was made and none was before the court; but the counsel contended that the motion of the defendant having been overruled, judgment for the plaintiff followed as a matter of course, and ought to be entered by the clerk, without any special motion by the party, or any particular order of the court.

Mr. Appleton, for plaintiffs.
Mr. Hobbs, for defendants.

WARE, District Judge. The plaintiff, in this stage of the cause, makes no motion; he does not ask the court to render judgment; but no motion being before the court, he has addressed to us an argument, as he observed rather as amicus curiae than as counsel, in which he has contended, that it is the duty of the court to render judgment without a motion. If a motion is made for judgment by him, the other party is ready to object, and will object as soon as the motion is made. The case has been very elaborately and ably argued on both sides, and after the most careful consideration that I have been able to give to the arguments, it appears to me to follow, both in principle and as a legitimate inference from all the authorities that have been so copiously cited and ingeniously criticised, that the court can make no movement giving progress to the cause, but on the motion of one of the parties. Whether it is disposed of in one way or the other, it must be at the instance of a party to the suit.

It has been argued for the plaintiff, that the motion for a new trial having been overruled, judgment follows of course, and that the prevailing party, or the clerk as a ministerial officer, may enter judgment without an order of the court. Looking at the question as one resting in general principles, and depending on the order of judicial proceedings, I am unable to see how this can be done. In the English practice there is a general rule of court, by which the prevailing party, after verdict may enter a rule for judgment nisi causa ostensa sit within four days. Clerk v. Rowland, 1 Salk. 399; Tidd, Pr. 813; 3 Bl. Comm. 395. But this is entered under a general rule, established by the court. It constitutes the law of the court (Thompson v. Hatch, 3 Pick. 516), and has the same effect as though such an order was entered specially in the particular case. In this court there is no such rule. The 61st and 62d general rules have always been considered as determining only the time when judgments shall be entered, if not otherwise specially ordered, and not as authorizing a judgment to be entered without an order. Neither in case of verdict or default, is judgment ever entered, but at the instance of the party. The party who has a verdict may have an attachment, to save which, the property must be taken on execution within thirty days after judgment, and he may not be prepared to make the levy within that time; or for other causes he may wish the case to stand for judgment. The court, therefore, never order judgment but at the instance of the party for whom it is to be rendered. He has a right to choose his time for taking his judgment and execution. If there were any general rule analogous to the English four-day rule, under which judgment might be entered, the clerk would be authorized to enter it under the rule. The entry would then be a mere ministerial act as much as though there was a special order, and the judgment would be that of the court under its general rules. But in this court there is no such general rule, and no special order has yet been made. The verdict, therefore, stands naked and alone; and without an order, general or special, it may be asked how the clerk is to make up the judgment, and in what form it is to be entered. The common formula is, "Ideo consideratum est per curiam," it is considered by the court. It is true, as is said by Blackstone (3 Comm. 396), that the judgment is the determination of the law, but the law can only speak through its regular organs, and, therefore, the conclusion of law must be pronounced by the court. But the court has pronounced no conclusion. If the clerk should, therefore, enter the judgment in the usual formula, it would not be according to the truth of facts. It would not be by the consideration of the court. The record must show that it is the judgment of the court, and the record must speak the truth. And, therefore, in the case of Hill v. Tiernam, 4 Mo. 316 (Supp. U. S. Dig. art. "Judgment, II."), it was decided, that an entry by the clerk, that judgment was confessed in open court, and that the amount was liquidated by the clerk at a certain sum, was not a judgment on which a recovery could be had.

The whole question, then, appears to resolve itself into this—whether the rendition

of judgment is a judicial act, to which the direct agency of the court is indispensable, and to which the mind of the court is to be judicially applied; or whether, after verdict has been rendered, it is a ministerial act, which may be performed by the clerk without an order by the court. When presented in this elementary form, the question appears to me exceedingly clear and free from doubt. If there be any one thing done in the progress of a cause, from its commencement to its conclusion, that is peculiarly and emphatically a judicial act, it is the rendition of judgment. Viewed, then, as a question of principle, to be determined by the general analogies of the law, and the practice of its tribunals, it appears to me that the plaintiff cannot have judgment but by the order of the court. He has his verdict, that, the court having refused to set it aside, stands, and he is entitled to all the advantages that may be derived from it. What these may be, beyond the question now before the court, it is not necessary to determine at this time. Certainly judgment does not follow of course; for after verdict, and after a motion for a new trial has been overruled, the party, against whom a verdict has been rendered, may move in arrest of judgment, or he may move for judgment in his favor non obstante veredicto, for matter appearing on the face of the proceedings. Taylor v. Whitehead, Doug. 745, 746; Rex v. Hayes, 2 Strange, 845; Rex v. Holt, 5 Term R. 445; Tidd, Pr. 840; 3 Bl. Comm. 393. This seems to me to be the necessary conclusion from legal principles. But it is supposed by the plaintiff's counsel, that a different conclusion has been established by the decisions of the courts, and a number of new cases have been referred to, which are supposed to sustain his view of the question. In the case of The Antelope, 10 Wheat. [23 U. S.] 66, the vessel had been seized and brought into the United States as a slaver, for an alleged violation of our laws relative to the slave trade. The negroes were claimed as the property of foreigners, and there was a decree of the circuit court for their restoration. On this appeal, the question was, whether this decree should be reversed, and upon this question the court was equally divided. Consequently the judgment stood. The claimant had obtained a decree of a competent tribunal, which remained in force until it was annulled. For an appeal, or writ of error, does not annul, it only suspends the judgment. The question before the supreme court was not whether a judgment could be rendered by a divided court, but whether a valid and subsisting judgment could be reversed and annulled by a divided court. Etting v. Bank of U. S., 11 Wheat. [24 U. S.] 59, is to the same effect. In cases of appeal and writs of error in the supreme court, the question always is on reversing, and not on affirming the decree or judgment. Bridge v. Johnson, 5 Wend. 342. That requires no affirmance, for it stands and is valid, until reversed.

The cases of U. S. v. Daniel, 6 Wheat, [19 U. S.] 542; Packer v. Nixon, 10 Pet. [35 U. S.] 403; Smith v. Vaughan, Id. 366; Davis v. Braden, Id. 286,—were all cases certified to the supreme court on a division of opinion between the judges of the circuit court, not on questions of pure law, but on questions resting in the discretion of the court, and all they decide is, that when the court is divided on such a question, it is not one which can be brought before the supreme court on such a certificate, under the act of 1802, c. 21, § 6 [2 Stat. 159]. In the case of Lanning v. London [Case No. 8,075], it was decided that when the court is divided on a motion for a new trial, the motion fails and a new trial is not granted. So we say; but that decision stops there, and determines nothing as to the ulterior proceedings in the case. The case of the U. S. v. Worrall, 2 Dall. [2 U. S.] 384, 396, requires a more careful consideration. As it seems to have been understood, it is indeed directly in point for the plaintiff. The defendant was indicted for an attempt to bribe an officer of the United States, and a verdict was returned of guilty. A motion was made, by Dallas, in arrest of judgment, on the ground that the court had no jurisdiction over the offense; the act charged not having been made punishable by any act of congress, and it was contended that the court could not take cognizance of it as an offense at common law. On this motion the court was divided; one of the judges holding that the court had jurisdiction, the other that it had not. The court being thus divided, a doubt arose whether sentence could be pronounced, and a wish was expressed from the bench, that the case might be put in such a state that it could be carried to the supreme court for a decision. The counsel for the prisoner declined to enter into any compromise for that purpose; and the court, after a short consultation, sentenced the prisoner to a mitigated punishment. The case has been referred to as establishing the principle that when, on a motion for an arrest of judgment, and for a new trial, the court is equally divided, judgment must be rendered on the verdict, 6 Pet. Cond. R. 222, note. If such is the decision, in my opinion it is not law. But I think no such decision is to be inferred from the report of the case. The reporter has given no rubric of the points which he supposed to be ruled in the case. In the index, though this case is referred to four times, for other minor points raised or ruled, this leading and most important one I do not find noticed; and if it had been understood to have been decided, it certainly would not have escaped the attention of so learned and accurate a reporter as Mr. Dallas; especially as he was counsel in the case for the prisoner, and argued the motion. I think that no such principle was decided; but that, on consultation, one of the judges waived

his opinion and concurred with the other on the main question of the jurisdiction.

Cahill v. Benn, 6 Bin. 99, is another case which was strongly insisted upon. In this, a motion for a new trial, after verdict, had been made, on which it does not appear that any decision had been made, but it may be inferred that it was overruled by a divided court. Afterwards a motion was made for judgment, two judges being present. One ordered judgment to be entered, and the other objected and ordered his objection to be entered on the record. It was held that the judgment was a good judgment. Tilghman, C. J., said that the court considered the dissenting judge, in entering his objection on the record, as merely expressing his opinion that a new trial ought to be granted, and not as intending to arrest a regular course of the law. But he further adds that the judgment is undoubtedly the judgment of the court, and the prothonotary only their agent in entering it. In one view, the decision appears directly in point for the plaintiff. But if that be the decision, it appears to me to be in direct opposition to every other case in the books, and not only so, but the opinion is inconsistent with itself. For the chief justice says that the judgment must be that of the court, and yet says that a judgment which the record shows was not rendered by the court is a valid judgment. The only way of reconciling the apparent contradictions in the opinion is by supposing, what does not appear in the report, that there was some general rule, analogous to the English four-day rule, by which a party, who had obtained a verdict, was authorized to enter an order for judgment nisi. Then the party would be entitled to his judgment, under the general rule, unless it was rescinded. This would require a majority of the court, and the judge, who prohibited the entry of judgment, would be chargeable with an attempt to obstruct the course of justice, as is intimated in the opinion of the chief justice.

When a court, consisting of a plurality of judges, is equally divided on any motion, rule, or order, it seems to be a proposition too plain for argument that the court can do nothing. If an authority is asked, it will be found 12 Coke, 118 (Proctor's Case); 3 Chit. Pr. 10. The whole power of the court, so far as relates to that subject, is paralyzed. So it was considered by congress; and, therefore, it is provided by law, when such a division occurs, that the question on which it takes place, shall be certified for a decision to the supreme court. If an equal division arise in that court, it is a casus omissus, and the law not providing what shall be done, if a decision is indispensable to its progress, the case stops, and the parties must begin anew. In England, as long ago as 14 Edw. III., this difficulty was felt and a remedy provided by parliament. If the court of king's bench or common pleas is equally divided, the case shall be adjourned to the exchequer chamber, and be there argued before all the justices, and if that court is equally divided, it shall be determined by parliament. Com. Dig. "Court, D," 5; Co. Litt. 71.

What will be the precise effect of a division on the cause, depends on the nature of the action, and the position of the case when it occurs. If the question is one which must be decidedly affirmatively, before anything further is done, the cause stops, and the parties must seek other means of settling the controversy. But if the motion or question was only to arrest the progress of the cause, as a motion for an amendment of the pleadings, or the continuance of the action, then if there be an equal division, the motion fails, and the cause proceeds; for the obstacle interposed is removed. This may be illustrated by several decisions of the English court. In Dean of Rochester v. Pierce, 1 Camp. 466, Lord Ellenborough, at nisi prius, ordered a nonsuit. It was carried before the full court by a motion to set aside the nonsuit. The court, on this motion, was equally divided, so that no order could be made. The consequence was that the nonsuit stood. In Iveson v. Moore, 1 Salk. 15, reported also 1 Ld. Raym. 495, a verdict had been rendered for the plaintiff, and an entry made under the general rule, which is the four-day rule of the English practice, for judgment nisi. But a further rule was afterwards obtained by the defendant, that judgment should be arrested nisi. On motion to set aside this latter rule the court were equally divided, and no judgment could be rendered. The last order was for a stay of judgment, and as the court could not agree to rescind it, the rule stood. The reporter (Ld. Raymond) adds, that if the court had been divided on the first motion, the plaintiff would have had judgment. That is, the first order, under the general rule, being entered for judgment nisi, this would have been an authority for the plaintiff to sign judgment, unless it was rescinded and a divided court could not rescind. The remark of the reporter illustrates the latter branch of the proposition and is confirmed by the case of Chapman v. Lamphire, 3 Mod. 155. There the plaintiff had a verdict, and, under the general four-day rule, an order had been entered for judgment nisi. A motion was made for arrest of judgment. The reporter says, "The judges were divided in opinion, two against two, so the plaintiff had his judgment, there being no rule to stay it, so that he had his judgment on his general rule for judgment; but if it had been on demurrer or special verdict, then it would have been adjourned into the exchequer chamber." For, on a special verdict, there must be a rule made for entering judgment, and the court, being divided, could make no rule. And on a demurrer, if the court be divided, the demurrer, it is true, is in effect overruled; that is, it is not allowed. But judg-

ment does not follow, of course, without a rule or order of court; and the judges, who were in favor of sustaining the demurrer, would, for the same reason, be opposed to rendering judgment. If, however, after entry of the general rule, which is always for judgment nisi, a special order be obtained, for a stay of judgment, or that judgment be arrested nisi, this being the last order, the case in Salkeld shows what the result will be. In Walmsley v. Russel, 6 Mod. 203, it is said, "If the case be ruled to be put in paper for argument, or the rule be a curia advisare vult, and the court is divided, there can be no judgment," and, it is added, "the case of Iveson v. Moore stands upon that point to this day."

The other cases, cited in the learned argument for the defendant, both from the earlier and later reports, fully support this view of the case. Vincent v. Preston, 12 Mod. 667; King v. Justices of Leicestershire, 1 Maule & S. 442; Darcy v. Jackson, Palm. 257; Attorney General v. Jefferys, McClel. 270-308; Atkins v. Drake, McClel. & Y. 213-245. In England, when such a division occurs, it is said, when there is much property at stake, or it is for other reasons important to have the question decided, to be usual for one of the judges to withhold his opinion and thus have a pro forma judgment entered, for the sake of allowing an appeal to the house of lords. 3 Chitty, Pr. 10; Deane v. Clayton, 7 Taunt. 536. This case now stands on the verdict alone. There is no subsequent order of the court for judgment nisi, nor for a stay of judgment. All that the court has decided is, that there shall be no new trial. A division of opinion, on a motion for a new trial, is not one which can be carried to the supreme court, on the certificate of the judges. But if a motion is now made for any ulterior proceedings, and the court should be divided, a question will be presented affecting the strictly legal rights of the parties, over which the supreme court may take jurisdiction, under a certificate of the judges. It is argued for the plaintiff, that, a new trial having been refused, he had a right to judgment, without any motion on his part, ex debito justitiae. I think otherwise. A motion for arrest of judgment, in the order of judicial proceedings, comes after one for a new trial, and may be sustained after a motion for a new trial has been overruled. It is certain, therefore, that the court ought not to enter judgment as a matter of course, for then the defendant might be precluded from making such a motion.

In this posture of the case, the counsel ask the court what is next to be done? It seems to me that this question may with more propriety be addressed by the court to the counsel. Ordinarily the court is not expected to act but on the motion of one of the parties. Subject to the rules of law, the parties are to determine what disposition shall be made of their case. But if no motion is made, it appears to me that all we can do is, to dismiss the case without cost and without prejudice to either party. In the case of Veazie v. Williams [Case No. 16,907], in this court, the judges were divided, one being of the opinion that the bill ought to be dismissed with costs, the other that the plaintiff was entitled to a decree in his favor. It was then our opinion that the only decree we could make was an order to dismiss the bill without costs. If I could, consistently with my views of official obligation, waive my opinion on the former motion, I would most cheerfully do it. But having heard the trial, and after the most careful examination which I have been able to give to the subject, having been brought to the conclusion that the interests of justice, and the rights of the parties require that the case should be submitted to another jury, I do not feel that I have any right to withhold from the party the benefit of that opinion. It is true that a motion for a new trial is addressed to the discretion of the court; but this is a judicial discretion, and though from its very nature it cannot be limited by any precise and arbitrary rule, it is to be determined by the judicial conscience of the court; and when that is convinced, by the view of the whole case, that justice requires a new trial to be had, the court is as much bound so to decide it as when the decision of the question before it turns on a positive rule of law. The court has no more moral or judicial right to violate the sanctity of its own conscience, than it has to violate the rules of law. When a question is addressed to discretion, the obligations of conscience are as imperious as those of law when the question is addressed to the law. And if a party is successful in convincing the conscience of the court, that justice, consistently with the rules of law, requires the interposition of its discretionary action, he is as much entitled to it, as when he claims the benefit of the positive rules of law, and the court is as much bound to render that justice which he asks. But though I do not feel at liberty to waive my opinion on the former motion, the plaintiff is not without remedy. He may move for judgment, and if, on that motion, the court should be divided, and it seems to be assumed that it will be, and refuse to enter judgment on the verdict, he may apply to the supreme court for a mandamus, and, if he is right in his view of the law, an order will be sent to this court to enter up judgment. Life & Fire Ins. Co. v. Wilson, 8 Pet. [33 U. S.] 291.

Case No. 5,490a.

GODDARD v. CUNNINGHAM.

[16 Reporter, 7.] [1]

Circuit Court, S. D. New York. June 1, 1883.

TRIAL—CHARGE FOR DEFENDANT—EVIDENCE.

In an action for breach of a contract for the purchase of merchandise, where a finding of the jury in favor of plaintiffs would be contrary to evidence it is not error for the court to instruct the jury to find a verdict for the defendant.

On motion for a new trial. The action was for damages for breach of a contract for the purchase of merchandise, and the defence was that the defendants were deprived of an opportunity to inspect the merchandise within a reasonable time. The court directed a verdict for defendants.

Chamberlain, Carter & Hornblower, for plaintiff.

Knox & Woodward, for defendants.

WALLACE, Circuit Judge. The instruction to the jury to find for the defendants was justified for the reason that a finding that the defendants were given a reasonable time for inspection of the merchandise after its delivery upon the dock would have been contrary to evidence. The defendants attempted to inspect it, but found it had been removed before the time which the plaintiff's agent, by his letter of January 16th, had fixed himself as a reasonable time. In view of the plaintiff's own understanding of what would be a reasonable time as expressed in that letter by his agent, an intelligent jury could have reached but one conclusion. That letter, in connection with the other facts of the transaction, made a case so strong for the defendants that it could not be overthrown. The defence that the plaintiff did not give the defendants a reasonable opportunity for the inspection was distinctly made in the answer, and the issue required the plaintiff to be prepared with the evidence, which he did not produce, and which he now calls newly-discovered evidence. Motion denied.

Case No. 5,491.

GODDARD v. DAVIS et al.

[1 Cranch, C. C. 33.] [2]

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

PLEADING — TRESPASS — GENERAL ISSUE — JURISDICTION.

1. In trespass, the defendant cannot justify under the general issue.

2. This court has jurisdiction in trespass, although the damages do not amount to twenty dollars.

[Cited in Hellrigle v. Dulany, Case No. 6,313.]

Trespass for breaking and entering the plaintiff's house.

THE COURT refused to permit the defendants, upon the issue of not guilty, to give in evidence testimony to prove that they had a warrant for entering the house. Verdict for the plaintiff, ten dollars damages. Motion in arrest of judgment because the damages are less than twenty dollars. Overruled, and judgment for plaintiff.

GODDARD (FOSTER v.). See Cases Nos. 4,969 and 4,970.

GODDARD (LANGDON v.). See Cases Nos. 8,060 and 8,061.

Case No. 5,492.

GODDARD v. MAXWELL.

[3 Blatchf. 131.] [1]

Circuit Court, S. D. New York. Dec., 1853.

CUSTOMS DUTIES—APPRAISEMENT—PORT OF SHIPMENT—REQUISITES OF PROTEST—UNDERVALUATION—PENALTY.

1. Where iron was purchased in Wales, and sent from there to Liverpool, and was afterwards shipped from Liverpool to New York: *Held*, that the appraisement of the iron at its market value in Liverpool at the time of its shipment from that port, was proper, under section 16 of the act of August 30, 1842 (5 Stat. 563), and section 1 of the act of March 3, 1851 (9 Stat. 629), Liverpool being a principal market of the country of the production of the iron.

2. Requisites of a protest against the imposition of duties, under the act of February 26, 1845 (5 Stat. 727), stated.

[Cited in Bangs v. Maxwell, Case No. 841.]

3. Under section 8 of the act of July 30, 1846 (9 Stat. 43), the additional duty or penalty of 20 per cent. for undervaluation in an invoice, is chargeable alike whether the importer avails himself of the privilege given by the section, and adds to his invoice, or whether an appraisal is made upon the invoice as originally made up.

[Cited in Vaccari v. Maxwell, Case No. 16,810.]

This case came by certiorari from the supreme court of New York into this court. It was an action [by Lemuel Goddard] against [Hugh Maxwell] the collector of the port of New York, to recover back duties and a penalty exacted on a cargo of iron. The iron was entered August 25, 1851, on an invoice dated at London, July 2, 1851, stating that the iron was shipped from Liverpool for New York. The appraisers added ten shillings per ton to the invoice prices, to make them equal to the market value. On a reappraisal by a merchant appraiser and the general appraiser on appeal, they also valued the iron at ten shillings per ton above the invoice prices. This valuation having raised the iron ten per cent. above the invoice, a penalty of twenty per cent. was also imposed. The plaintiff subscribed a printed pro-

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

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

test, including also a paragraph in writing against the exaction of the twenty per cent. penalty, and of the duties on the increase in valuation. The protest was exceedingly multifarious, and filled with matters having no relation to the objections made on the argument to the exactions in the case. The material objections stated on the argument were, that the iron was produced and purchased in Wales, and should have been appraised at the market value there in May or June, when it was sent from Wales to Liverpool; that the addition of 2½ per cent. commission, made to the appraisal, afforded no legal ground for imposing the penalty; that the reappraisal was void, because the merchant appraiser was sworn by an official appraiser; that no penalty could be imposed unless the invoice stated the market price at the time of purchase in the country of production; that, under the act of March 3, 1851 (9 Stat. 629), an appraisal did not create a penalty; and that no penalty could be imposed unless the importer added, on his entry, to the invoice price, with a view to raise it to the market value.

THE COURT held: 1. That the appraisement of the iron at its market value in the market of Liverpool at the time of its shipment and exportation from that port, was lawful and proper, under the provisions of section 16 of the tariff act of August 30, 1842 (5 Stat. 563), and section 1 of the act of March 3, 1851 (9 Stat. 629), Liverpool being a principal market of the country of the production of the iron.

2. That the plaintiff was not authorized, by his protest, to except to the competency of the reappraisers, either for the reason that the general appraiser was one of them, or that the merchant appraiser was sworn by a custom-house appraiser, because, by his protest, he did not conform to the requirements of the act of February 26, 1845 (5 Stat. 727), by setting forth distinctly and specifically the particulars constituting their disqualification, and wherein the provisions of sections 16 and 17 of the act of August 30, 1842 (5 Stat. 563, 564), were not complied with by them, or by the collector, and what evidence the collector or the appraisers did not receive, which was offered to be produced to them, and wherein any particular evidence was improperly considered by them,—so that no opportunity was given, within the intent of the act of February 26, 1845, to consider the objections, and correct any errors which might have been committed.

3. That the protest did not object to the allowance of a commission of two and a half per cent., and that it was not made to appear to the court that such commission constituted the ground for charging the penalty of twenty per cent., or that the addition of that commission by the collector was contrary to the reappraisal.

4. That under section 8 of the tariff act of July 30, 1846 (9 Stat. 43), the additional duty or penalty of twenty per cent. is chargeable alike whether the importer avails himself of the privilege given by the section, and adds to his invoice, or whether the appraisal is made upon the invoice as originally made up.

Judgment for defendant.

Case No. 5,493.

GODDARD v. MOCKBEE.

[5 Cranch, C. C. 666.] [1]

Circuit Court, District of Columbia. March Term, 1840.

CONTRACT TO PAY DEBT OF ANOTHER—ENFORCEMENT BY CREDITOR—CONSIDERATION.

If a third person receive money from the debtor to pay the debt due to the creditor, and in consideration thereof promise the creditor to pay it, he is liable to the creditor in an action for money had and received; and the case is not within the statute of frauds, although there be no note or memorandum in writing to charge the defendant.

Assumpsit for money had and received by the defendant for the use of the plaintiff. At the trial the plaintiff [John H. Goddard] offered evidence tending to prove that a certain R. Mockbee, being indebted to the plaintiff in the sum of $110, made his promissory note dated February 1, 1837, payable to the order of the plaintiff sixty days after date, which note was produced by the plaintiff at the trial. That after the date of the note the defendant received from Mockbee a considerable amount of goods, &c., and acknowledged to a competent witness that he had received the said property to pay the creditors of Mockbee, and that there was sufficient for that purpose, especially to pay the preferred creditors, among whom was the plaintiff. That the defendant afterward acknowledged that he had the greater part of the property, and had paid a curtailment on the note to the plaintiff. Whereupon, the defendant prayed the court to instruct the jury that upon the evidence aforesaid the plaintiff is not entitled to recover. But THE COURT (nem. con.) refused.

The defendant then prayed the court to instruct the jury that if they believe from the said evidence that the plaintiff holds the said Mockbee's note for the debt and has never released him from the debt, then the understanding of the defendant was collateral, and the plaintiff is not entitled to recover, although the defendant may have verbally promised to pay the plaintiff, upon a full consideration passed to him by the said Mockbee. Which instruction THE COURT also refused to give.

The defendant then prayed the court to instruct the jury that if they believe, from the evidence aforesaid, that the said Mockbee, be-

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

ing largely indebted, assigned to the defendant certain personal property, upon his assumption to said Mockbee to pay the creditors of the said Mockbee; and that at the time of the said assignment and assumption the plaintiff was the holder of the note aforesaid, and still holds the same, never having released the said debt; but the same being still a subsisting debt in full force; and that after receiving the said property the defendant acknowledged verbally that he had sufficient to pay the preferred creditors of the said Mockbee, among whom was the plaintiff; and afterwards acknowledged that he had sold the greater part of the said property, and had paid the curtails upon the said note; then there is no evidence of any promise in writing by the defendant to pay the debt of the said Mockbee, and the plaintiff is not entitled to recover. Which instruction THE COURT also refused to give.

The defendant then prayed the court to instruct the jury that if they believe that the said note was made and indorsed for the accommodation of the said Mockbee, and that the plaintiff was but an indorser, then, to entitle the plaintiff to recover, it is necessary that he should prove that the said note was discounted, or put into circulation; and that some consideration has been paid by the plaintiff for the note or on account of the same. But THE COURT refused this instruction also.

R. J. Brent, for defendant, cited Weston v. Barker, 12 Johns. 276; Elting v. Vanderlyn, 4 Johns. 237; Marshall v. Bronaugh [unreported], in this court; Rice v. Barry [Case No. 11,751], also in this court; Dewolf v. Rabaud, 1 Pet. [26 U. S.] 475, 501.

Mr. Hoban, for plaintiff, cited Roberts, Frauds, 234; Hughes v. McDermot [unreported], in this court at last term; Olmstead v. Greenly, 18 Johns. 12; 5 Wheeler, 510; Cleveland v. Farley, 9 Cow. 639.

Verdict for the plaintiff.

GODDARD (SALMON FALLS MANUF'G CO. v.). See Case No. 12,263.

GODDARD (STEIN v.). See Case No. 13,353.

Case No. 5,494.

GODDARD et al. v. The TANGIER.

[Brunner, Col. Cas. 602;[1] 21 Law Rep. 12.]

Circuit Court, D. Massachusetts. 1857.[2]

AGENCY—AUTHORITY OF AGENT.

A clerk as such has no authority to bind his employer by an agreement to receive goods from a carrier at an unusual time; nor has a truckman such authority.

[Appeal from the district court of the United States for the district of Massachusetts.

[This was a suit in admiralty by David Goddard, John H. Pearson, and others against the bark Tangier (Charles Richardson and others, claimants). The district court dismissed the libel (case unreported), and the libelants appealed to this court.]

C. B. Goodrich and C. P. Curtis, Jr., for libelants.

R. Choate and J. M. Bell, for claimants.

CURTIS, Circuit Justice. This libel is founded on a bill of lading of cotton, brought by the Tangier, and destroyed at the same time as that of the Salmon Falls Company. The circumstances relied on to distinguish this case from the last [Salmon Falls Manuf'g Co. v. The Tangier, Case No. 12,265] are, that the mate of the bark testifies that, on Wednesday, he informed Solis, a clerk of the libelants, who had charge of receiving and taking away their cotton, that the stevedore would work on Thursday; and that Solis replied, if the stevedore worked, he should. Solis admits that something like this was said, but that he qualified it by saying he would work if the men were willing to do so, and Mr. Appleton would open the store into which they were putting the cotton. He also testifies that he subsequently told the mate he should not take cotton the next day, because Mr. Appleton would not open his store.

Assuming that both the witnesses intend to tell the truth, and that each has related what rests on his memory, and I see no cause to doubt the honesty of either of them, the fair result of the evidence is, that at one time Solis led the mate to expect he would work on the fast-day, but afterwards informed him he should not. And this is confirmed by the evidence of McDonald, who says the mate told him, on Thursday morning, Solis would not be down that day. McDonough says he heard this said by the mate; and Clifford says he heard Solis tell the mate he should not work on Thursday. The master also testifies: "I told Solis, in the course of conversation, on Wednesday, that he should work on fast-day; he said they would take it all away; that they had plenty of stores then." He also testifies that when he applied to Mr. Goddard, on Wednesday, to hasten the removal of the cotton, Goddard referred him to Solis, as having charge of the removal. It is material to observe that neither the master nor the mate say that they were influenced in their action by what Solis said. On the contrary, each informed him, before he had said anything on the subject, that the work would proceed on the fast-day. Still it is competent for a consignee to agree to receive goods at an unusual time, when he is not bound to receive them; and if he should so agree, and they should be made ready for delivery at the agreed time, I think the liability of the carrier would be terminated. But there is no evidence that the libelants themselves agreed to receive their goods on the

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[2] [Reversed in 23 How. (64 U. S.) 28.]

fast-day; and I do not find proof of authority in Solis to make such an agreement for them. All that appears is, that he had charge, as a clerk, of the receipt of the cotton. This must be understood to be an authority to receive it in the usual course of such business. He had no power to bind his employers by an agreement to depart from the usual course of business, and put the cotton at their risk at a time and under circumstances when it would in the usual course of business have remained at the risk of the carrier. Suppose he had agreed to receive it in the nighttime, or on Sunday, would this have affected his principals? And he had no better authority to agree to receive it at one unusual time than at another.

Something was said at the argument respecting the fact that a part of the cotton, which was landed on Tuesday, belonged to Goddard & Pritchard, and was burned. But I do not think it appears that any part which was accessible on Wednesday was allowed to remain. On the contrary, it is shown by the libelants that they had ample storage room, and sufficient men and teams employed on Wednesday, to have removed all their cotton; and that the men ceased work between four and five o'clock p. m., because they could find no more of the libelants' cotton on the wharf. If any was there, it was so mixed with other cotton as not to be accessible with reasonable efforts, and consequently was not ready for delivery. In the case of Pearson the alleged agreement of the truckman to truck cotton on Thursday, if proved, of which I have doubt, cannot avail the claimants. A truckman, as such, has no authority to bind a merchant to receive goods at an unusual time. The result is that the decree of the district court must be reversed, and a decree entered for the value of the cotton lost with costs.

[NOTE. Upon complainants' appeal the decree of the circuit court was reversed, Mr. Justice Grier delivering the opinion. It seems that the goods in question were destroyed by fire while lying on the wharf on the afternoon of the Thursday mentioned in the opinion of the circuit court, which was Thanksgiving Day by appointment of the governor of Massachusetts. The learned justice delivering the opinion of the court remarked that the libelants appeared to have had no conscientious scruples in respect to work on that day, as they received goods from other ships and some from this; but the testimony is clear that, however great the liberty may be for those who choose to convert the day into a voluntary holiday for idleness or amusement, it never has been the custom of vessels discharging cargo on the wharves of Boston to cease work on that day. "On the whole, we are of the opinion, that the bark Tangier has made good delivery of her cargo to the consignee's care to the exigency of the bill of lading." 23 How. (64 U. S.) 28.]

GODDARD v. The TANGIER. See Cases Nos. 12,265-12,267.

GODDARD (UNITED STATES v.). See Case No. 15 220.

Case No. 5,495.

GODDARD v. WEAVER.

[1 Woods, 257;[1] 6 N. B. R. 440.]

Circuit Court, D. Louisiana. April Term, 1872.

BANKRUPTCY—EFFECT OF PETITION ON PENDING EXECUTION—ASSIGNEE'S TITLE TO BANKRUPT'S PROPERTY — DISCHARGE OF LIENS — PROPERTY HELD BY BANKRUPT AS BAILEE — RIGHTS OF SHERIFF AND ASSIGNEE.

1. Where an honest execution is issued against a bankrupt and levied upon his property before a petition for bankruptcy has been filed, the filing of such a petition does not render the execution and all the proceedings under it null and void.

2. The assignee of a bankrupt is not the assignee of his creditors; he takes only the bankrupt's interest in property; he has no right or title to the interest which others have therein, nor any control over it, further than is expressly given to him by the bankrupt act as auxiliary to the preservation of the bankrupt's interest for the benefit of his general creditors.

[Cited in Re Steadman, Case No. 13,330; Maybin v. Raymond, Id. 9,338; Re McKenna, 9 Fed. 34.]

[Cited in Brown v. Brabb, 67 Mich. 22, 34 N. W. 405.]

3. If, at the commencement of proceedings in bankruptcy, the bankrupt has possession of property subject to certain fixed liens, the assignee succeeds to his possession, and may discharge the liens and dispose of the property for the benefit of the general creditors; or, perhaps, he may sell the property before discharging the liens, and distribute the proceeds in the order of priority of the claims upon them.

4. If, at the commencement of proceedings in bankruptcy, the bankrupt has not possession of a particular property except as bailee, but the same is in the hands of the sheriff under an execution and levy, the assignee cannot take such property out of the sheriff's hands without paying the debt, or seeking the aid of the United States district or circuit court sitting in bankruptcy.

[Cited in Thames v. Miller, Case No. 13,860; Kimberling v. Hartly, 1 Fed. 575.]

5. If, in such case, the sheriff proceed to sell the property, there is nothing in the bankrupt act [of 1867 (14 Stat. 517)] which renders void his acts done after the commencement of proceedings in bankruptcy. The possession of the sheriff is a lawful possession; he has a species of property in the thing.

6. The right of the sheriff, in such case to sell, extends to the entire interest of the debtor, and no assignment of that interest in bankruptcy or otherwise can divest the right of the sheriff.

7. If the assignee can show that the exercise of this right by the sheriff will materially affect the interests of the general creditors, the court will interfere, but not otherwise; it would do this if the bankrupt's interest was only that of a coproprietor, and the others were about to do any act to the property by which the bankrupt's interest would be sacrificed or compromitted.

8. When divers persons have divers interests in the same thing, neither has a right to do what will injure the others; and each must submit to judicial restraint imposed for the protection of the others' interests.

9. When any question is made as to the validity of the judgment under which proceedings are being had, the bankrupt court is the appropriate

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

tribunal to investigate it; and proceedings under the judgment will be restrained as a matter of course, until that question is settled.

Bill in equity, submitted on motion for the allowance of an injunction and the appointment of a receiver.

Wm. M. Randolph and M. M. Cohen, for complainant.

Wm. H. Hunt, for defendant.

BRADLEY, Circuit Justice. On the 25th of November, 1871, Joseph D. Weaver filed in the Fifth district court of the parish of Orleans, a petition for executory process against one Francis M. Fisk for the seizure and sale of certain buildings and improvements in the city of New Orleans, upon and in virtue of certain acts of mortgage importing confession of judgment passed, one in 1866, and the other in 1868. On the 27th of November, 1871, an order of seizure and sale was made, an execution was duly issued to the sheriff of the parish, who levied upon and advertised the property for sale. Afterwards, on the 27th of December, 1871, the said Fisk filed in the district court for the Eastern district of New York, a petition to be declared a bankrupt, and was declared such accordingly. The sheriff's sale, however, took place on the 6th of January, 1872, in pursuance of this advertisement, and Weaver became the purchaser of the property for the price of $16,200, a little less than the amount due him for principal, interests, and costs.

The complainant who became assignee in bankruptcy of Fisk has filed this bill to set aside the sheriff's sale, and now moves for the appointment of a receiver to take possession of the property, and receive the rents and profits during the pendency of the suit, and for an injunction to prevent Weaver from intermeddling therewith. The gravamen of the bill is, that the sale was made after adjudication in bankruptcy, that Weaver, the purchaser, knew of such adjudication, and urged forward the sale, notwithstanding an order of the district court of New York to suspend proceedings, and that the property sold for less than its value, having been sold for $16,200, when it was worth $25,000. The defendant has filed an answer, in which he positively denies that he knew of the proceedings in bankruptcy at the time of the sale, denies that the property was worth more than he bid for it, and avers that the sale was made in good faith.

It is admitted, however, by the defendant, that before the sale a paper was served on him purporting to be a copy of a decree in bankruptcy against Fisk, and another paper purporting to be a copy of an order of the New York district court, directing him to suspend proceedings in the collection of his claim; but neither paper was authenticated in any manner, and both he and his counsel believed them to be spurious, and a ruse on the part of Fisk to prevent the sale; and the Fifth district court of the parish of Orleans, being applied to on behalf of Fisk, to stay proceedings, refused to do so upon the unauthenticated papers which were served.

In relation to the value of the property sold, the defendant is corroborated by the affidavits of several respectable witnesses.

The first question arising upon the case is, whether as mere matter of law, all proceedings of the sheriff taken and had after the petition in bankruptcy was filed were null and void.

It is contended that they were null and void, because repugnant to that exclusive control over bankrupts' property which is vested in the bankrupt court. I cannot agree to this proposition.

Where an honest execution is issued against a bankrupt and levied upon his property before any petition for declaring him a bankrupt has been filed, I cannot subscribe to the doctrine that the filing of such a petition renders the execution and all the proceedings under it, null and void. The assignee of a bankrupt is not the assignee of his creditors. He is not the assignee of all the judgments, executions, liens and mortgages outstanding against the bankrupt's property. He takes only the bankrupt's interest in property; he has no right or title to the interest which other parties have therein, nor any control over the same, farther than is expressly given to him by the bankrupt act, as auxilliary to the preservation of the bankrupt's interest for the benefit of his general creditors. It would be absurd to contend that the assignee in bankruptcy becomes ipso facto seized and possessed in entirety, as trustee of every article of property in which the bankrupt has any interest or share. This would give him the king's prerogative which brooks not a divided dominion in property in common with a subject.

If at the commencement of the proceedings in bankruptcy, the bankrupt has possession of property, subject to certain fixed liens, the assignee succeeds to his possession and may discharge the liens and dispose of the property for the benefit of the general creditors; or perhaps he may sell the property before discharging the liens and distribute the proceeds in the order of priority of the claims upon them. Whether in all cases he could do this, it is not necessary to decide.

But if at the commencement of the proceedings in bankruptcy, the bankrupt has not possession of a particular property except as bailee, but the same is in the hands of the sheriff under an execution and levy, I know of no authority which the assignee has to take such property out of the sheriff's hands without paying the debt, or seeking the aid of the district or circuit court sitting in bankruptcy.

And if the sheriff proceeds to sell the property, I am unable to see anything in the

bankrupt act which renders void his acts done after the commencement of proceedings in bankruptcy. The possession of the sheriff is a lawful possession. He has a species of property in the thing.

His right to sell extends to the entire interest of the debtor, and no assignment of that interest in bankruptcy or otherwise can divest this right of the sheriff. If the exercise of the right would materially affect the interests of the general creditors, and the assignee can show this, the court will interfere, but not otherwise. It would do this if the bankrupt's interest was only that of a coproprietary and the other coproprietors were about to do any act to the property by which the bankrupt's interest would be sacrificed or compromitted.

When divers persons have divers interests in the same thing, neither has a right to do what will injure the others; and each must submit to judicial restraint imposed for the protection of the others' interests.

It is upon this principle that courts are authorized to interfere with rights otherwise lawful in regard to property situated as I have supposed. Whilst, therefore, I have no doubt of the court's authority to stay the sheriff's proceedings in such a case, and even to set aside the sale when it can be done without injustice to third parties, I cannot regard the sheriff's acts as absolutely void in law, nor even as voidable, or subject to control, except upon cause shown in a court having bankruptcy jurisdiction. Of course when any question is made as to the validity of the judgment, the bankrupt court is the appropriate tribunal to investigate it; and proceedings under the judgment will be restrained as a matter of course until that question is settled. But in the case before us, no question is made as to the bona fides of the act on which executory process is issued, nor of its validity in any respect. The answer has fully disposed of any charge of bad faith, and of the allegations as to the value of the property. Under the circumstances of this case, I do not think that I ought to appoint a receiver, or to issue an injunction.

The motion is denied.

Case No. 5,496.

GODDEFROY v. The LIVE YANKEE.

[Hoff. Op. 433.]

District Court, N. D. California. Feb. 18, 1857.

GENERAL AVERAGE—CONTRIBUTION—JETTISON OF DECK LOAD.

[1. Where the master, by the notorious and established usage of a particular trade, has the right to carry a part of his cargo on deck without obtaining the consent of the shipper, contribution will be allowed for a loss by jettison.]

[2. If such usage only authorizes the stowage of certain kinds of goods on deck, then, to make the other shippers liable, it must appear that such goods form a usual and customary part of the cargo of vessels in the trade.]

[3. Where goods are carried on deck by special agreement with the owner, and at a lower rate of freight, he cannot have contribution for a loss by jettison, though the practice of carrying deck loads is invariable in the trade.]

[4. Where a cargo of lumber is taken to be carried "on deck and under deck," at a uniform rate for the entire lot, with the understanding that part is to be laden on deck, the rate being less than if the load were all carried under deck, and it is the established usage to carry deck loads by express consent of owners, the shipper is not entitled to general average contribution for a jettison of the deck load.]

In admiralty.

J. P. Haven, for libellants.

Whitcomb, Pringle & Felton, for claimants.

HOFFMAN, District Judge. The libel in this case is filed to recover a general average contribution for goods jettisoned from the deck of the above vessel. It is admitted that the cargo, which consisted of lumber, belonged to the libellants [Goddefroy, Sillem & Co.], and that it was taken on board to be carried "on deck and under deck," at the rate of $8 per M. No difference as to the rate of freight was made between that part of the cargo carried on deck and that carried under deck, but the rate charged was agreed to, with the understanding that part of the cargo was to be laden on deck, and was undoubtedly less than would have been demanded if the shipper had insisted that all his goods should be stowed in the hold. It was clearly established by the proofs that vessels engaged in the lumber trade on this coast universally carry deck loads. Capt. Noyes, the dock master of this city, testifies that for the last four years he has seen lumber vessels arriving almost daily, and that nearly every one brings a deck load. Capt. Swazey and Capt. Cheever testify to the same effect, and E. E. Williams, the agent of the Mendocino Mills, from which the lumber in the case at bar was shipped, states that since 1851 there have been loaded at those mills at least 250 vessels, and that every one carried a deck load. Capt. Badger, a witness called by the claimants, testified that he had made about 100 voyages in the lumber trade, and that he always carried a deck load. It is unnecessary, however, to recapitulate the evidence, for I understand that the existence of a notorious and universal usage on the part of lumber vessels to carry deck loads is not denied. The only question of fact contributed at the trial was whether the presence of a deck load obstructs the navigation or affects the seaworthiness of the vessel. The evidence on this point will be considered hereafter.

The Consulate of the Sea, c. 141 (2 Pard. Lois Mar. p. 155), excludes from the benefit of general average goods stowed on deck with the consent of the owner. But if there

be no such consent the ship and the master are liable, and the claim of the shipper upon the former is preferred to all others, except that of seamen for their wages. The Ordonnance of the Marine contains a similar provision, and by article 12, tit. 1, liv. 2 ("Du Capitaine"), the master is forbidden to carry any goods on deck, without the consent of the merchant, on pain of being responsible for all damages. With regard to the first provision, denying contribution for goods laden on deck, the reasons assigned by Valin are that the goods can only be on deck because there is no room to stow them elsewhere, or by the negligence or fault of the master in not putting them elsewhere, and that it is no more permitted him to overload his ship than to expose goods to the risk of falling into the sea by their improper stowage. He adds that the reason why the article refuses payment by contribution for damage to goods so carried is that, as they cannot but embarrass the manoeuvring of the ship, the presumption is that they have been jettisoned before any necessity for a jettison has occurred, and solely because they hindered and embarrassed the navigation. But this article does not, he says, apply to vessels navigating "au petit cabotage," or going from port to port, where the usage is to load the goods on deck as well as under deck. 2 Valin, Comm. p. 203. With respect to article 12, which prohibits the master from carrying goods on deck without the consent of the shipper, Valin observes: "It is obvious that merchandise on deck runs too great risk in a long navigation, and even whenever the ship is obliged to put out to sea, and no longer sails along the coast." But he says this article does not apply to the navigation "au petit cabotage," where a usage to load perishable articles in boats without decks, or on deck in boats with decks, has always been tolerated, in consideration that otherwise freights would be higher. He then mentions a case in the Admiralty of Rochelle, in which one Rene Riquet, "in consideration of the notoriety of the usage," recovered a contribution from the ship, the freight and his coshippers, for a quantity of flour jettisoned from the deck of a vessel on a voyage "au petit cabotage."

The Code de Commerce, which re-enacts the provision of the Ordonnance prohibiting the master from carrying goods on deck without the written consent of the shipper, also adopts Valin's qualification, and the provisions of the article are declared not to extend to voyage "au petit cabotage." Article 421 of the Code is in the precise terms of article 13 of the Ordonnance, and the owner of the goods laden on deck is denied contribution for their loss by jettison, his only recourse being against the master. A question thus arose whether this provision was of universal application, and contribution for such goods could in no case be claimed or whether the exception as to "petit cabotage" in article 229 was not also to be understood as applying to article 421. Emerigon inclines to the opinion that the general terms of the latter article apply without qualification, and that no contribution can be demanded, and he cites an arret of the cours royale at Rennes, 24th January, 1822. Emer. tom. 1, p. 640. We have seen that Valin's opinion on the point, as it arose under the provisions of the Ordonnance is in favor of the claim, and Boulay-Paty, after citing Emerigon, examines the question, and agrees with Valin in opinion. 4 Boul.-P. Dr. Com. p. 567. But the question has been finally settled in French jurisprudence. By an arret of the court of cassation of May 20, 1845, cited in Rogron's edition of the Code de Commerce (page 761), it is decided that the owner of goods laden on deck on a voyage "au petit cabotage," who by article 229 has no recourse against the master, can, notwithstanding the general language of article 429, recover contribution against other shippers.

We have seen that the master is prohibited by law in France from carrying goods on deck, without the written consent of the owner, in all cases except on the voyages specified. It is, therefore, only in this excepted case that contribution can be claimed. It has accordingly been decided in France that where goods were carried on deck by the consent of the shipper, on a voyage not "au petit cabotage," neither the owner nor insurer has the right to demand contribution from the master. Arret of the court of Bordeaux, cited Rogron, Code de Comm. p. 506. This decision is in accordance with the provisions of the Consolato del Mare, which subjected the owner of goods, who consented to their being laden on deck, to the whole risk of that mode of stowage. Consol. del Mar. ubi supra. It is evident from what has been said that the general question, whether goods carried on deck according to a notorious and general usage of any trade, ought to be entitled to contribution, cannot arise in France, for the courts must apply the terms of the law to all cases not excepted, and the only excepted case is that of "petit cabotage." But the reasons of that exception, as suggested by Valin, and which led to its adoption in the Code de Commerce, are of general application, and the exception should, in our system, which is not fettered by statutory enactments, be extended to all cases which fall within its principle. Voyages "au petit cabotage" in France are defined by statute. They include voyages between French ports on the ocean, or from ports on the channel, to ports in England, Ireland, Scotland, and Holland, and from ports on the Mediterranean to ports as far as Naples on one side and Malaga on the other. Dictionaire de Comm. In these voyages, the conveniences, if not the necessity, of trade, require that goods should be tak-

en on deck—all parties are informed of the practice, and the shipper has no right to object that his goods are carried as allowed by law—nor can he know whether his goods will be on or under deck. As the other shippers participate in the reduction of freight, and as the ship has her capacity increased, it is but just that all should contribute for a sacrifice made for the common safety.

The general question has, however, been determined in England. In Gould v. Oliver, 4 Bing. N. C. 134, it was held that the owner of goods laden on deck, according to the custom of a particular trade, is entitled to contribution from the ship owner for a loss by jettison. It is to be remarked that this principle was asserted, notwithstanding a plea by the defendant that there was no custom that a contribution should be made for such a loss, which plea was demurred to. In Milward v. Hibbert, 3 Adol. & E. (N. S.) p. 120, it was held, in an action against underwriters to recover the amount contributed by the owner of the ship insured for a loss of deck cargo by jettison, that a plea that the cargo was laden on deck was bad. The mere fact that the goods were so laden was held not enough to relieve the underwriter from responsibility, "inasmuch as they may be placed there according to the usage of trade, and so as not to impede the navigation, or in any way increase the risk."

In America, several cases, which are cited in the respondents' briefs, have arisen. In some of them, however, the point under consideration did not arise, nor does the principle on which the decision is based seem to be uniform. In Lenox v. Marine Ins. Co., 1 Caines, 44, note, contribution was denied on the ground that goods on deck embarrass the navigation—and there was, accordingly, an implied agreement not to demand contribution. The same decision was made in Smith v. Wright, 1 Caines, 43, but in that case it appeared that the goods were shipped at lower freights, and the usage appeared to be against the claim. In Lenox v. United Ins. Co., 3 Johns. Cas. 178, it was held that the owners of cargo, under cover, ought not to contribute to the jettison of goods on deck, "as they are not considered part of the cargo in which other shippers are interested." In this case, there was no evidence of a usage to carry a deck load. In Dodge v. Bartol, 5 Greenl. 286, the claim was rejected, on the ground that the goods on deck were carried for half freight, and by the express permission and assent of the shipper. In Cram v. Aiken, 13 Me. 229, it was considered that by the commercial law goods shipped on deck are not entitled to the benefit of general average; that such was the law of France, except, in regard to boats and small vessels; and that no opposing English decision had been adduced. The cases of Gould v. Oliver and Milward v. Hibbert, had not then been decided. The goods in this case paid full freight, and it appeared to be the usage to carry that kind of goods on deck. The claim was rejected, however, on the ground that goods so laden are peculiarly exposed, and increase the danger of navigation. In Brown v. Cornwall, 1 Root, 60, it was held that stock on deck jettisoned for the common safety is entitled to an average loss.

The text writers have generally acquiesced in the recent English decisions as settling the law on the question. They are so treated by the editor of the last edition of Abbott on Shipping. Arnold (volume 2, Insurance, p. 890) says, "On proof of the usage they (i. e. goods on deck) are contributed for like other goods." Mr. Phillips maintains the same doctrine in a learned and elaborate opinion published in 3 Hunt, Mer. Mag. 432, and in the last edition of his work on Insurance (volume 2, p. 74) he says: "Taking into consideration the whole jurisprudence on the subject, the better doctrine, though opposed by some of the adjudications above cited, seems to be that a jettison of a deck load is to be contributed for in a general average, where the stowage of the jettisoned article on deck is justifiable, and the other parties have notice, by the policy or by usage or otherwise, that such articles may be so carried, and there is no plainly established usage negativing the right to claim such contribution." In O'Connor v. Neefus [unreported], in the district court for the Twelfth district of this state, it was held that where the usage in question exists a deck load lost by jettison must be contributed for. Judge Story, in his work on Bailments, seems to recognize the doctrine that in some cases, at least, goods stowed on deck may be contributed for. If, he observes, "they are so taken on board with the consent of the owner, or by a general custom binding him, he must bear the loss, unless, so far as he may be entitled to contribution, as in case of general average." Story, Bailm. § 530.

In this conflict of authority, a brief consideration of the objections to the doctrine contended for will not be inappropriate. The reason for excluding goods laden on deck from contribution, chiefly relied, is that assigned by Mr. Justice Weston, in Cram v. Aiken, viz. that such a mode of stowage increases the difficulty of navigation. But this can hardly be deemed a reason for a universal rule applicable to cases where the fact is otherwise, as it clearly may be, as said by Lord Denman in Milward v. Hibbert. But supposing it to be the case, and that there is some inconvenience attending this mode of transportation, yet, if these inconveniences are incidental to the particular navigation, and well known to be so,—if the usage to carry deck loads is common and notorious,—the case would not seem different in principle from that where the usage justified the stowage of flour with hogsheads of sugar, and the flour was injured in consequence. But the ship was held not to be re-

sponsible, for the shipper knew that his cargo would be stowed as every other cargo of the kind was stowed in a general ship in the particular trade. Baxter v. Leland [Case No. 1,125]. The shipper in this case sustained a loss, by reason of the presence of an article under deck, which injured his goods. But, inasmuch as the article was rightfully there according to usage, he had no ground of complaint. Is the case different if he sustains a loss by reason of the presence of a deck load, which is also rightfully and justifiably on board according to usage?

It is said in Lenox v. Mutual Ins. Co., that goods on deck are not considered part of the cargo, in which other shippers are interested; but if vessels in a particular trade notoriously and universally carry part of their cargo in this manner,—if they are constructed to carry deck loads, and not considered to be fully laden without them,—the goods so carried must be deemed as much a part of the cargo as the goods under deck. In Dodge v. Bartol, it is evidently supposed by the court that the exception in the French law, allowing contribution for deck loads in voyages "au petit cabotage," only applies to boats and small vessels going from one port to the next adjoining port, or for short distances along the coast. But we have seen that voyages to England, Scotland, Ireland and Holland, as well as in the Mediterranean, to Naples, Malaga, Sardinia and the Balearic Isles, are included within the term. If the exception be just as to such voyages, the voyage between this port and Cape Mendocino would seem to be within the reason of the exception. It is not intimated by Valin that deck loads in voyages "au petit cabotage" may not be somewhat more exposed than cargoes under deck, or that the navigation may not be slightly embarrassed in consequence. But they are allowed to be carried, and are contributed for on account of the notoriety of the usage, "which has been tolerated in consideration that otherwise freights would be higher." The principle laid down by Valin therefor, and established by the court of cassation, and in Gould v. Oliver [supra], contemplates a case where a stowage, otherwise improper, is justified by a notorious usage, which the convenience or necessities of a particular trade have given rise to. It would therefore be no answer, in such case, to say that the risk was somewhat increased, or the navigation, to a slight degree, impeded. If this were not the case, there would be no reason for the general rule, and no necessity for seeking a justification in the existence of the usage. Under this view it is unnecessary to examine particularly the evidence as to the effect of deck loads of lumber on vessels of the construction used in the trade. The testimony of the witnesses is conflicting on the point. All agree, however, that deck loads of lumber are invariably carried by vessels in the trade, and this fact may be safely appealed to as showing that the obstruction to navigation cannot be very great, or the safety of the vessel seriously compromised by the practice. It is undoubtedly attended by some inconveniences, and there is, perhaps, more strain and wear and tear of parts of the vessel. But, for this, she is indemnified by the freight on the additional cargo, which frequently exceeds by one-fourth or one-third what she could carry under deck. Whether or not her safety is due to the facility with which she can get rid of her deck load, rather than to her general ability to carry it, may be more doubtful. Deck loads are certainly often jettisoned; but so are under-deck cargoes. Whether, if two vessels have each a full cargo, and one carries her cargo partly on deck and partly under deck, while that of the other is carried in the hold, the necessity for a jettison would sooner arise in the first than in the last case, is not very clear, from the evidence, but it would seem, from the refusal of the offices to insure deck loads except at a very high premium, that the risk was considered greater. It is to be remembered, however, that a jettison of a deck load, when necessary to lighten her, is far more easily effected than if the hatches had to be opened, and cargo taken from the hold during a tempest. But it appears to me, as already stated, that this inquiry does not affect the question of contribution, as presented in this case.

Another reason assigned for withholding contribution is that the law implies an assent on the part of the shipper not to claim it, or rather to assume the risk. But the inquiry is, does the law imply such an assent? It can hardly be argued that the law denies it, because he has consented to waive it, —and his consent to waive it is implied because the law denies it. In cases where goods are taken on deck by special agreement, and at a reduced freight, and where no usage exists justifying the master in carrying goods on deck without the consent of the shipper, it seems to me that his consent to assume the risk may reasonably be implied. In such cases the Consolato del Mare and the Marine Ordonnance deny him the right to contribution,—and the fact that his consent to such stowage is necessary to exonerate the master, seems to show that the goods are not properly on deck, and that there is no usage to carry them there, which would bind the underwriters or the other shippers. It is true that Mr. Phillips observes, in his opinion above cited, that "it does not appear what the rate of freight has to do with the question. The connecting the rate of freight in any way with the question of contribution seems, except in assessing the shipowner, to be entirely forced and fanciful." But, with deference to so great an authority on this branch of law, it is to be observed—1st, that we are now considering the question expressly in reference "to as-

sessing the shipowner"; and, 2dly, that in determining what are the risks assumed by the shipper, when he consents to a lading on deck, the inquiry whether he has received any equivalent for the risk said to be assumed appears rational,—and so it was considered in Smith v. Wright, 1 Caines, 43, and in Dodge v. Bartol, 5 Greenl. 286. Undoubtedly there are other risks, such as damage by sea perils, &c., which the shipper confessedly assumed, and which may be a reason for paying less freight. But still the risk of jettison is clearly the greater, if not the chief, risk with respect to lumber and all other goods not liable to damages by being wetted. And it is only such goods that are usually carried on deck. But in addition, if the existence of a special agreement for stowage on deck, and the payment of a lower freight in consequence, affects the right of contribution as against the ship, it must also affect the right as against co-shippers. For the exemption of the ship, if it be admitted, is on the ground that the shipper has assumed the risk,—and the shipper under deck, who knew that, though the ship might carry a deck load, yet it would be taken by special agreement, and at a reduced freight, and that the ship would not be liable to contribute, has a right to insist that the risk should be borne by the party assuming it. Moreover, if the shipper who, by special agreement, consents that his goods be carried on deck, and in consequence pays a lower rate of freight than the owner of similar goods carried under deck, is allowed a contribution, he is in a better situation than the latter,—for he incurs but the same or nearly the same risk if his goods are not liable to damage by wet, and he has them transported at perhaps half freight. The exception to the general rule, denying to deck goods the benefit of contribution, should, therefore, be restricted to cases falling within the principle of those decided in English and French jurisprudence.

Where the master has, by the notorious and established usage of a particular trade, the right to carry a part of his cargo on deck without obtaining the express consent of the shipper, it is but just that contribution should be allowed. If, as in voyages "au petit cabotage" in France, and in the case of steamboats with us, any of the goods of any shipper may, by usage, be so carried, they are as much part of the "cargo" when so stowed as if under deck. To make the loss by jettison fall solely upon him whose goods happen to be on deck, would be to fix the loss where accident or an improper discrimination on the part of the master, and not justice, causes it to fall. If the usage only authorizes the stowage of certain kinds of goods on deck, then, to make the other shippers liable, it should appear that such goods form a usual and customary part of the cargo of vessels in the trade,—so that the shipper under deck has a right to expect that they will be on board, and, if on board, will be so carried. On the other hand, if it appears that though the practice of carrying deck loads is general, and even invariable, in the trade, yet that they are so carried by a special agreement with the owner, and with his express consent, and at a lower rate of freight, the case seems to fall within the general rule of the Consolato, denying contribution to the owner of the goods who expressly consents to a stowage on deck. When that consent is necessary to be obtained, before the goods can be so stowed without making the ship responsible, and when it has been given, and a lower freight paid, it is but reasonable to construe it as an agreement on the part of the shipper to assume the risk, and shippers under deck, who have paid full freight, ought not to contribute. Such I understand to be the view taken by the learned judge of the Twelfth district court. In his opinion, he observes: "By the usage, no distinction is made in the price. The master has the right to stow the cargo on deck or below deck, as he pleases. Suppose the master fills the hold with his own lumber, and puts the shipper's lumber on deck, shall the latter take the whole risk of vessel and cargo? Suppose two shippers have an equal quantity of lumber on board, is the risk and right to contribution to depend upon the accidental circumstance that the master has stowed the lumber of one on deck, and of the other under deck?" In the case, as presented to that court, this reasoning seems conclusive. But, suppose that one of the two shippers has insisted, as the usage gives him a right to do, that his lumber be carried under deck, while the other has consented that his lumber be carried on deck, but at a reduced freight, it would seem unjust that the risk should be equal, merely because the vessels in the trade are accustomed to carry deck cargoes on such terms.

In the case at bar, it appears that the deck loads are generally, if not invariably, carried. But it is always with the express consent of the shipper, and where, as in this case, all the cargo belongs to one shipper, who consents that part be carried on deck, a uniform freight is charged on the whole,—but less than would be demanded if all had to be stowed under deck. No usage has been proved which authorizes the master to carry any part of the cargo on deck, without the consent of the shipper. It is also stated by several witnesses that the usage and general understanding is that the shipper, by consenting to this mode of stowage, assumes the whole risk, and that deck loads are not contributed for. But the usage which is supposed to establish that deck loads are not contributed for is not without exceptions, and it seems to me rather the general impression as to a rule of law than a usage which should alter that rule. It is, as Mr. Phillips says, "giving the doctrine the name of usage." But the general usage and understanding

with regard to the effect of the express consent given by the shipper that his goods be carried on deck ought not, I think, to be disregarded, especially when it is in conformity with the construction which, if the foregoing views be correct, the law gives to the agreement. If contribution be allowed for goods carried on deck by express agreement with the shipper, the practice would soon become common and ripen into a usage, or what would appear to be such to a court of justice. For the master would be exonerated from liability by the agreement with the shipper, and the latter would be secure of an indemnity by contribution, while at the same time he pays less freight. The salutary rule of the ancient sea laws would thus, in practice, be abrogated, and shippers under deck be subjected to an unjust burden. It seems, therefore, required by sound policy that contribution should be made only in those cases where the usage is of so positive and determinate a character as to allow the master to carry goods on deck without and independently of the express consent of the shipper. I think, therefore, though I affirm the general proposition so ably and zealously maintained by the advocate for the libellants, and consider that deck loads are not always to be denied contribution, yet that the present case does not fall within the exceptional class in which such contribution can be claimed.

GODFREY, Ex parte. See Case No. 13,513.

Case No. 5,497.

GODFREY v. BEARDSLEY.

[2 McLean, 412.] [1]

Circuit Court, D. Indiana. May Term, 1841.

PUBLIC LANDS—RIGHT OF INDIANS TO USE—HOW DIVESTED — TREATIES — CONSTRUCTION — ACKNOWLEDGMENT OF CONVEYANCE—INADEQUACY OF CONSIDERATION—NOTICE OF CLAIM.

1. The fee in unsold lands is either in the federal or state governments. The Indians have only a right of use, which, however, can not be divested, except by purchase or war.

[Cited in McKay v. Campbell, Case No. 8,840.]

2. An Indian treaty, which cedes lands within certain boundaries, reserving certain parts, does, in no respect, change as to such parts the original right. But, if a treaty declares there shall be granted certain tracts designated, to certain persons, and, in the same article, these are referred to as grants, they are held to operate as such.

3. The treaty is best explained by itself.

4. Where, in a treaty, the lands are reserved and granted to individual Indians, the lands can not be conveyed without the permission of the president, and that permission may be given in such form as the president shall think proper. Such permission having been given by the president, his successor can not revoke or annul it, especially where the rights of a third person are concerned.

[Cited in Pickering v. Lomax, 145 U. S. 310; 12 Sup. Ct. 861.]

[Cited in Crews v. Cleghorn, 13 Ind. 439; Steeple v. Downing, 60 Ind. 496.]

5. The acknowledgment and recording of a conveyance of land, in Indiana, operates as proof of the instrument and notice. They are not necessary to the validity of the deed.

6. Inadequacy of consideration no ground to infer fraud, unless it is so great as at once to strike every person with its grossness.

7. Notice of a claim is sufficient if it put the party on inquiry.

8. Evidence of identity, which describes the land so as to distinguish it from other tracts, sufficient for a deed, and, also, in an action of ejectment.

At law.

Smith, Butler & Bates, for plaintiff.

Stevens & Switzer, for defendant.

OPINION OF THE COURT. This is an action of ejectment, brought by the lessor of the plaintiff, to recover possession of a section of land on the St. Joseph river. To establish his title, the plaintiff introduced in evidence an Indian treaty, of a cession of land, held at Chicago, between Lewis Cass and Solomon Sibley, commissioners on the part of the United States, and the Ottawas, Chippewas and Pottawattamies, the 29th August, 1821. In this treaty, among other reservations of land, there was reserved to Pierre Moran, a Pottawattamie chief, one section of land. In the treaty it was provided, that the land therein stipulated to be granted, shall never be leased or conveyed by the grantees or their heirs, to any persons whatever, without the permission of the president of the United States. And such tracts shall be located after the said cession is surveyed, and in conformity with such surveys, as near as may be, and in such manner as the president may direct. A petition of Pierre Moran to President Adams, for leave to sell the land, was offered. That this leave should be given, was recommended by Lewis Cass, governor of Michigan, &c., and Thomas L. McKinney, superintendent of Indian affairs. On the petition was indorsed, "the request of the petitioner, Pierre Moran, is granted." Signed, John Q. Adams, and dated the 28th November, 1826. The copy of a deed was then offered, from Pierre Moran to Richard Godfrey, the lessor of the plaintiff, for the above section of land, dated the 2d February, 1827. The deed was acknowledged and recorded, in Monroe county, Michigan, the same year. The consideration named was three hundred dollars. By consent, the signatures of the witnesses to this deed were proved by persons who were acquainted with their signatures, and who had seen and examined the original deed. The original, with the proceeding thereon, was filed in the land office, and copies, as above, were certified; and, it appeared, that this was the

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

usual course of the land office. On this proof the copy was admitted. A map from the general land office, and several letters from the commissioner of the general land office, to the register of this land district, showing that section five was the land in controversy, were offered, which were objected to, on the ground that the letters of the commissioner were not evidence, as between the present parties. The fifth section of the act, entitled "An act to reorganize the general land office," approved the 4th July, 1836 [5 Stat. 111], provides, that it shall be the duty of the commissioner to cause to be prepared, and to certify, under the seal of the general land office, such copies of records, books and papers, on file in his office, as may be applied for, to be used as evidence in courts of justice. The objection was overruled, and the evidence admitted. Evidence was then offered to show that the consideration was one dollar per acre, and not the amount named in the deed; that the sum of one hundred and twelve dollars was paid, and the residue was to be paid when Godfrey received the patent from the government. Objection being made, that a different consideration can not be proved, from the one stated in the deed, the court said that, in England, the rule seemed to be settled, that where the consideration was acknowledged to be received in the deed, and the grantee, his heirs, &c., were released from the payment of the same, the grantor was estopped from showing, in contradiction to the deed, that the consideration had not been paid. Baker v. Dewey, 1 Barn. & C. 704. But the American rule, with the exception of decisions in Maine and North Carolina, is believed to be different. Where the operation or effect of the deed is not attempted to be impeached, the consideration, named in the deed, is treated like the date, as formal, merely, and a different sum may be shown to have been paid, or agreed to be paid. McCrea v. Purmort, 16 Wend. 460; Goodwin v. Gilbert, 9 Mass, 510; Harvey v. Alexander, 1 Rand. [Va.] 219. The objection was overruled, and the evidence admitted.

To rebut the allegation of fraud set up by the defendant, several witnesses were examined, who stated, at the time the above purchase was made, the land was not considered worth more than one dollar per acre. One of the witnesses stated he considered the land, under the circumstances, worth less than the above sum. And here the plaintiff rested his case. The defendant then offered a deed for the same land to him, consideration named, fifteen hundred dollars, dated 21st April, 1831, and acknowledged on the same day. On this deed there were the following indorsements:

"I certify that the sum of fifteen hundred dollars, for the land within mentioned, has been amply secured by a mortgage on said land. Five hundred dollars are to be paid when this deed is approved, and the balance, of one thousand dollars, to be paid in three equal annual payments; and I respectfully recommend the conveyance for approval. 16th May, 1831. Signed, John Tipton, Indian Agent, &c.

"Washington, 13th January, 1832. I hereby approve and sanction the within deed of conveyance, from Pierre Moran to H. Beardsley; and that, before the same shall be delivered to the purchaser, the Indian agent cause to be paid out of the purchase money, to Richard Godfrey, the sum of one hundred and twelve dollars, the amount paid by him, and received by said Moran. And that the balance of the purchase money the said agent cause to be secured, by a valid mortgage, on the property herein conveyed. Signed, Andrew Jackson."

Several witnesses were examined by the defendant, some of whom stated, when he made the purchase, the land was worth fifteen hundred dollars; and Col. Edwards thinks it was worth three dollars per acre, in 1828. The plaintiff then proved, by several witnesses, and by the confession of the defendant, that, at the time the deed was executed to him, in the office of the Indian agent, and in his presence, Pierre Moran said that he had sold the land to Godfrey, but that he refused to pay him for it, and he would sell it again. The land, it seems, is very valuable, mills having been constructed on a part of it, and also a town.

The facts being before the court, the question was raised as to the validity of the plaintiff's deed, which was argued at length. Three grounds were assumed: First. That the legal title is still in the government, no patent having issued to Pierre Moran. Second. That the sanction given by Mr. Adams to the sale, was informal and invalid. Third. It was revoked and annulled by his successor, Gen. Jackson.

It is admitted that the legal title to their lands has never been considered, by any branch of the federal government, as vested in the Indians. And hence it has been held, that a state might grant the fee in lands, occupied by Indians, subject to their right. The Indian right is that of occupancy; and, until this right shall be extinguished by purchase, no possession adverse to it can be taken. It is also admitted, that a mere reservation of the Indian right to a certain part, within described boundaries, leaves the right reserved, as it stood before the cession. But, on looking into this treaty, there will be found, in the case of Pierre Moran and many others, more than the mere reservation of the Indian right. The first article of the treaty sets out the boundaries of the cession. The second article provides, "there shall be reserved" certain tracts of six, four, and three miles square, for the use of the Indians. And, in the third article, it is declared, "there shall be granted by the United States, to each of the following persons, being all Indians by descent, and to their heirs, the following tracts of land."

(Pierre Moran is enumerated as owning one section, under the above provision.) And, in the conclusion of the third article, the language is, "the tracts of land herein stipulated to be granted shall never be conveyed, &c., except by permission of the president." It is insisted that, although this treaty having been ratified, is the law of the land, it can not operate as a grant. That a patent is necessary to convey the title, and that the words of the treaty, "there shall be granted," evidently referred to the emanation of a patent or act of congress. There is no mode by which the intention of the parties to an instrument can be more certainly ascertained than by comparing the words of the part controverted, with the words used in other parts which are not controverted. Now, in the third article, in which the words, there shall be granted, &c., are used, but two sentences below it, the following words are found: "the land granted to the persons immediately preceding, shall begin," &c. The words immediately preceding, as it regards the grant, are, in no respect, different from the words which follow, and which include the right of Pierre Moran. And if the preceding words amount to a grant, as the treaty expressly declares they do, there can be no doubt as to the character of the titles that follow. This is clearly shown in references to individual grants in the same article. To John B. La Dime, son of, &c., one half section, adjoining the tract before granted. To Jean B. Chardonai, two sections of land, adjoining the tract granted to John B. La Dime. To Pierre Le Clerc, one section of land, above, and adjoining, the tract granted to Moran and his children (referring to the tract now under consideration). To Antoine Roland, one half of a section, adjoining, and below, the tract granted to Pierre Moran. In the same article there are several other references to the lands designated, as given to individuals, which are called grants. But, to give a construction to this part of the treaty, it is unnecessary to rest upon the exposition given in the same article. Other parts of the treaty show how the words, shall be, are applied. In the second article, it is declared "there shall be reserved," &c. Was this an act done, or to be done? The sixth article declares the United States shall have the privilege of making and using a road, &c. Does this grant require any future action to give full effect to it? In the fifth article it is declared, that "the stipulation contained in the treaty of Greenville, relative to the right of the Indians to hunt upon the land ceded, &c., shall apply to this treaty." Does not this right vest, without any further act by the United States? A legislative grant requires no further evidence of title. This treaty is a law, and it has been acted under by the executive, as containing a grant to Pierre Moran. No patent has been issued, nor has one been deemed necessary, to perfect the title. A conveyance of it has been authorized by the president. From the words of the treaty, and the construction which has been given to it, we can entertain no doubt that the fee was vested in Pierre Moran. In the Spanish treaty of 1819, which ceded the Floridas to the United States, the eighth article declared that "all grants of lands, made before the 24th of January, 1818, by his catholic majesty, &c., shall be ratified and confirmed, to the persons in possession of the lands, to the same extent that the same grants would be valid, if the territories had remained under the dominion of his catholic majesty." These words, in the case of U. S. v. Arredondo, 6 Pet. [31 U. S.] 743, were considered as importing a present confirmation. And the same construction was affirmed, in the case of U. S. v. Percheman, 7 Pet. [32 U. S.] 89. In this case the chief justice says: "Although the words, 'shall be ratified and confirmed,' are properly the words of contract, stipulating for some future legislative act, they are not necessarily so. They may import that they 'shall be ratified and confirmed' by force of the instrument itself." And the court overrule a different construction, given to this same clause of the treaty, in the case of Foster v. Neilson, 2 Pet. [27 U. S.] 314.

The second objection, that the sanction to the sale, given by Mr. Adams, was informal and invalid, cannot be sustained. Neither the treaty, nor any law, prescribed the form in which this sanction should be given. The treaty imposed the duty upon the president, and he could execute it in such form and manner as his discretion should dictate. Now, where this power is so exercised, how can the form be objected to? Can the judiciary declare the act invalid, because the form in which it was done is not exactly in the manner they should have prescribed? The executive, as an independent branch of the government, has the same right to adopt its own forms, in the performance of its own duties, as the judicial or legislative departments. The law-making power may prescribe the form in which judicial or executive duties shall be done; but where a duty is enjoined, and this is omitted, the discretion of the department, as to the mode, must be exercised. Except by the permission of the president, Pierre Moran could not convey this land. That permission was obtained before the deed was executed. Now, whether it would have been more judicious to have withheld the sanction until the execution of the deed, is a matter about which differences of opinion may exist. But whether given before, or after the deed, it is equally within the power of the president. It may be proper, however, to remark that, as the conveyance could not be made without the permission it would seem that the permission should precede the execution of the deed.

The last position, that the permission given by Mr. Adams was revoked and annulled by Gen. Jackson, is wholly untenable. Whatever acts may be done under the pretence of

reform by the chief executive, unless such acts depend upon his discretion, and come within his executive duties, they are utterly null and void. They can vest no right, nor afford any ground of justification; much less can they divest private interests—interests which have been acquired under the laws of the country. It is difficult to perceive under what pretence this power was attempted to be exercised by Gen. Jackson. He had the same power as his predecessor, and no greater. The executive function having been exercised on the subject, the power is exhausted. And this is especially the case, where the interest of a third party is involved. Under no notion that the power had been injudiciously exercised by Mr. Adams, or that Pierre Moran had not made a good bargain, or on any other pretext, had Gen. Jackson any right to annul the permission granted. There is, indeed, one ground, and only one, on which this act might be placed, and that is, that it had been inadvertently done without a knowledge of the act of his predecessor. But such a supposition can not arise, as, by the indorsement of Gen. Jackson upon the deed of Beardsley, it seems he had a full knowledge, not only of prior permission to convey, but that, under it, a conveyance had been executed. Indeed, evidence of this remained on file in the general land office. This act of Gen. Jackson can not be placed upon a supposed fraud by Godfrey, in obtaining a conveyance from Moran. If fraud existed, the courts were open to investigate it, as between Moran and his grantee. It was not a matter which the executive could try. Besides, fraud is not to be presumed. That it may be established by ex parte evidence, on inquiry by the executive, and the rights of a party annulled, without notice, would be a principle as new in the law of evidence, as it would be singular as a rule of property. A question is also raised, whether the deed of Moran to Godfrey, never having been acknowledged and recorded within the state of Indiana, as the law requires, can be treated as an operative conveyance. The power of the state is undoubted, in regulating the mode in which real property within it shall be transferred, either by deed or operation of law. Under the statute, the acknowledgment and recording of the deed operates as notice, but is not necessary to its validity.

HOLMAN, District Judge (charging jury). First. That fraud is never to be presumed, but may be proved by circumstances; that, to infer fraud from inadequacy of consideration, it must be so great as to strike any one at once; that, from some of the witnesses, it would seem, the consideration paid, and agreed to be paid by Godfrey to Moran, was the full value of the land, under the circumstances which then existed. Second. That, if the jury believe that Beardsley had notice of the existence of Godfrey's claim, at the time he received his conveyance, or before he paid the consideration, the defendant could not be protected as an innocent purchaser, for a valuable consideration, without notice. Third. That the evidence identifying the land was sufficient, if it showed the situation of the premises, so that they could be distinguished from other tracts of land. That this is a good description in a deed, and, also, in an action of ejectment. Fourth. That, in the opinion of the court, there was no evidence that the one hundred and twelve dollars had been paid to Godfrey, as required by the indorsement on the deed of Beardsley by Gen. Jackson.

The jury, having been out a part of two days, returned into court, and, declaring that they could never agree, the court discharged them, and continued the cause.

GODFREY (CONTEE v.). See Case No. 3,140.

Case No. 5,498.

GODFREY v. GILMARTIN.

[2 Blatchf. 340.] [1]

Circuit Court, S. D. New York. Oct. 15, 1851.

ADMIRALTY APPEALS—JURISDICTIONAL AMOUNT—INTEREST—AFFIRMANCE—COSTS.

1. Where an action in personam is brought in the district court, in admiralty, on a money demand amounting to less than $50, but the libellant's claim, with interest, amounts to more than $50 at the time the decree is made by the district court, and he has a decree in that court for more than $50, an appeal lies to this court from such decree.

2. On such appeal, the action becomes a plenary suit in this court, and, if the decree is affirmed by this court with costs, full costs of this court may be taxed.

This was an appeal [by Jonathan Godfrey] from the clerk's taxation of costs. The suit was an action in personam, brought in admiralty, in the district court, on a money demand amounting to less than $50. The libellant's claim, with interest, amounted to more than $50 at the time the decree was made by the district court, and he had a decree in that court for more than $50. After this court had, on appeal, affirmed the decree with costs, the clerk taxed full costs of this court against the respondent [Daniel Gilmartin], from which taxation he appealed.

THE COURT held that the case was one in which an appeal was allowed by law, and that, on the appeal, the action became a plenary suit in this court and carried full costs of this court.

GODFREY (MORSE v.). See Case No. 9,856.

GODLEY (UNITED STATES v.). See Case No. 15,221.

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

Case No. 5,499.

GODY v. PLANT.

[4 Cranch, C. C. 670.] [1]

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

JUSTICE OF THE PEACE — AUTHORITY TO BIND ORPHAN CHILD.

Justices of the peace have no authority to bind out an orphan child while the orphans' court is in session.

Upon petition of Thomas Gody to be discharged from the service of James K. Plant, who claimed the petitioner as his apprentice, it appearing that he was bound out by two justices of the peace, as an orphan, upon a day in which the orphans' court was in session.

THE COURT discharged the apprentice, being of opinion that under the Maryland Acts 1793, c. 45, and 1794, c. 47, the justices had no power to bind out an orphan while the orphans' court was in session.

GOE (SAVARY v.). See Case No. 12,388.

Case No. 5,500.

In re GOEDDE et al.

[6 N. B. R. 295.] [2]

Circuit Court, S. D. Illinois. 1873.

PARTNERSHIP—FIRM AND INDIVIDUAL CREDITORS —BANKRUPTCY OF PARTNER.

A. and B. were copartners in trade, but A. owned most all of the property put into the firm, in his own individual right, and at the time of the formation of the partnership was in debt to some extent. This property was all he was worth and his individual debts were contracted on the strength of this property. The firm carried on business several years, when the bulk of copartnership property was sold out under a deed of trust given by the firm to secure firm indebtedness, but no formal dissolution took place. A short time afterwards A. filed his voluntary petition in bankruptcy; at this time the copartnership assets consisted of some personal property and a few outstanding accounts from which the assignee realized nothing. *Held*, that the individual and copartnership creditors should share equally.

[Cited in Re Rice, Case No. 11,750.]

The assignee and Fink & Nasse agree that the following is a statement of the facts relating to the bankrupt and his estate, and business connections pertinent to the application of Fink & Nasse for a distribution of the estate to the creditors pari passu as their claims have been proved: On the —— day of May, eighteen hundred and sixty-five, Bernard Goedde and George Scheuneberg became copartners in business under the name of Goedde & Co., for the purpose of carrying on the flouring business. At this time, Bernard Goedde individually was, and until the bankruptcy, remained the owner of the property from which the moneys now in question were realised by the assignee. This was all he was worth at the time his individual debts were contracted, and they were contracted on the strength of this property. Most of the individual debts existed at the time of the formation of the copartnership. The firm continued to do business till January, eighteen hundred and sixty-eight, when embarrassments of a financial character led to a partial stoppage, that is to say, they ceased to manufacture flour, but the copartnership was never dissolved otherwise than as may result in law from the facts here stated. On the second of May, eighteen hundred and sixty-eight, the bulk of the copartnership property was sold out under a deed of trust given by the firm to secure firm indebtedness other than that of Fink & Nasse. On the twenty-second of May, eighteen hundred and sixty-eight, these proceedings began, upon the voluntary petition of Bernard Goedde. No proceedings by or against George Scheuneberg were had by copartnership or other creditors. At the date of the bankruptcy proceedings, the copartnership assets consisted of some personal property and a few outstanding accounts, both of small value. From them the assignee has realized nothing. Scheuneberg at the date of the bankruptcy, had become and was insolvent, on account of the copartnership indebtedness, and so remains. He owed some individual debts, and had little individual property. The copartnership creditors, when their debts were contracted, knew of the ownership by Goedde of the individual property before referred to. Scheuneberg has resided during all the time mentioned in the Southern district of Illinois. The individual creditors who have proved their debts are, John B. Livingstone, Clemens Charles Goedde and Clemens Goedde. The copartnership creditors who have proved their debts are, John Trendly, administrator, Sebastian Pfeiffer, deceased, and Fink & Nasse.

On the foregoing statement of facts, the assignee contended that the individual creditors were entitled to be paid in full, and that only the surplus remaining should be divided among the copartnership creditors. The district court ordered a dividend to be declared, in which the individual and copartnership creditors should share equally. The question, on the application of the individual creditors, was certified to the circuit court for said district for review, and was submitted to the circuit court for review, as on petition, setting forth the facts, with the agreement that the order of the court below might be reversed or affirmed, as the court should see proper.

Lucien Eaton, for individual creditors.

E. P. Johnson, for copartnership creditors.

DRUMMOND, Circuit Judge. It is ordered and adjudged that the judgment of the court below be affirmed.

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

[2] [Reprinted by permission.]

Case No. 5,501.

GOEDGEN v. MANITOWOC COUNTY.

[2 Biss. 328; 2 Chi. Leg. News, 333; 5 Am. Law Rev. 188.][1]

Circuit Court, D. Wisconsin. June Term, 1870.

COUNTY BONDS—MEETING OF SUPERVISORS MUST BE REGULARLY CALLED—OTHERWISE NO AUTHORITY TO SUBSCRIBE FOR STOCK AND ISSUE BONDS—TAX-PAYERS MAY ENJOIN.

1. Where the statute of a state prescribes the manner in which a special meeting of the board of supervisors of a county shall be called, a special meeting held without observing these requirements is not legal.

2. A board thus convened has no authority to initiate a proceeding to subscribe for stock in a railroad company and issue bonds in payment therefor, and procedings based upon the action of such a meeting will be enjoined.

3. Proceedings preparatory to issuing the bonds must as substantially comply with the law, as in levying a tax for the payment of the debt, although in suits brought on such bonds by innocent holders, the court rejects proof of errors in or about the election, or in issuing the bonds. Objections made by tax-payers before the bonds are issued, are in time.

This bill was brought by complainants as aliens, alleging that they own real estate in the county of Manitowoc subject to taxation, of the value of six thousand dollars and upwards. By an act passed by the legislature of this state, approved March 10, 1870 [P. & L. Laws Wis. 1870, p. 527, c. 242], entitled "An act to incorporate the Milwaukee, Manitowoc and Green Bay Railroad Company," it was provided, among other things, that the several counties upon, or contiguous to the line of the road as it may be located, were authorized to aid in the construction of the road by subscribing to the stock of the company, and paying for the same in money, and levying a special tax to raise money for that purpose, or by issuing bonds to said company in payment for said stock, and levying taxes to pay the interest as it accrues upon said bonds, &c., and to establish a sinking fund for the payment of the principal, provided, that before any such aid be granted or contracted for by any such county, the question of granting the same shall be submitted to a vote of the electors thereof. The act further provided, that on a certificate of the president and secretary of the company under the corporate seal to the authorities of any such county that the line of the road has been located through or contiguous to said county, the said authorities might at their discretion call a special election to determine the question of giving aid to the company. Such election should be called, notice thereof given, the form of the ballots prescribed, and all regulations relating to the same determined by the proper authorities of the county, so that the question be fairly submitted to a vote of the electors. A second act, approved April 9, 1866 [P. & L. Laws Wis. 1866, p. 906, c. 365], entitled "An act to incorporate the Appleton and New London Railway Company," authorized the company to construct a railway between those points. And by an amendment to said act the company was authorized to extend its road, and build a branch road to any point where it will intersect the Sheboygan and Mississippi road, and to any harbor on Lake Michigan, with a proviso that nothing in the act shall be so construed as to prevent any city, incorporated village, town, or county, from subscribing to the capital stock of the company; and it authorized any of them to subscribe to such capital stock, and issue bonds in payment for the same, such issue of bonds to be authorized by a majority of the legal votes cast at an election to be previously authorized by the proper boards. It was charged that the election upon the question of subscribing to the stock of those companies was not called nor conducted according to law. It appears that the board of supervisors met on the 30th of March, 1870, in the office of their clerk, six members of the board being present, and one absent; that the ayes and noes were called on the question to submit to the voters of the county the propositions of the two companies, and that five voted in the affirmative and one in the negative. And it was further voted that the clerk of the board and the sheriff of the county be authorized and instructed to give due notice of such election. The last meeting of the board prior to the 30th of March was held on the 18th of that month, which adjourned sine die, and the meeting held on the 30th of March was a called and special session.

Winfield Smith, for complainants.
Wm. P. Lynde, for defendants.

MILLER, District Judge. The statute law of the state requires that a special meeting of the board shall be holden only by request of the members, addressed to the clerk in writing, and specifying the time and place of such meeting, and upon reception of such request, the clerk shall immediately transmit notice in writing to each of the members of the board. These requirements of the act were not observed. The meeting of the board was called by the clerk on the verbal request of members. The legislature thought it proper that special and extra sessions of the board should only be held pursuant to the prescribed requirements. The call in this case was not sufficient in law to authorize the board to meet and initiate a proceeding to result in contracting a debt on the part of the county to be paid by taxation.

The act incorporating the Milwaukee, Manitowoc and Green Bay Company was approved March 10, 1870. On the 30th, the president and secretary of the company certified to the board that the line of the road was located through the county. On that

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 5 Am. Law Rev. 188, contains only a partial report.]

same day notices were issued for the election to be held on the 12th of April. It does not appear that the board of supervisors prescribed the manner of holding the election, or of giving the notice, or the form of the ballots, or any regulations relating to the election. The clerk of the board and the sheriff issued notices of an election in the matter of aiding the two companies, and prescribed the form of the ballots, pursuant to the resolution of the board on the 30th of March, that the clerk and the sheriff of the county be authorized and instructed to forthwith give due notice of such election. And the ballots were printed on the same sheet and not distributed by order of the board. It is apparent that the board had not complied with the act. The whole business seems to have been put through with too much haste to insure accuracy in the proceedings.

The dockets of this court and of other courts of the United States are filed with suits on corporation bonds issued in aid of railroad companies.

It is the settled rule of the courts to reject all proof of errors alleged to have been committed in or about the election, or the issuing of bonds, in actions by innocent holders. The court holds that objections should be made in a proper form by tax payers before the bonds are issued. This bill is brought in time. And I have no doubt the bonds can only be legally issued so as to contract a debt to be paid by taxation, in the manner prescribed by the law. Authorizing and holding the election and issuing the bonds must substantially comply with the law in every particular. The matter of complaint in this case is not technical, but substantial.

Proceedings preparatory to issuing the bonds must as substantially comply with the law as in levying a tax for the payment of the debt and interest.

Printing the two ballots on the same sheet of paper may not, possibly, of itself be illegal, but it would be a more satisfactory compliance with the act to have the question fairly submitted to a vote of the electors by supplying them at the polls with separate tickets.

For these reasons I am bound to grant the injunction prayed for in this bill.

I think complainants are entitled to claim the jurisdiction of this court. They are aliens, and they allege that the value of their estate is six thousand dollars. The principal and interest of the two hundred and fifty thousand dollars of bonds voted for must be paid by taxation. By the laws of this state the property of complainants can be sold for taxes, and also the amount of taxes to be paid on these bonds for interest and principal by complainants would no doubt exceed the sum of five hundred dollars.

NOTE. Consult Mygatt v. Green Bay [Case No. 9,998]; Luling v. Racine [Id. 8,603], and cases there cited; also, Dill. Mun. Corp.

A similar case has recently been decided in the Illinois supreme court, being on a bill to enjoin the issue of county bonds to a railway company on the ground that the proper notice for the election had not been given, and the court held that unless the notice was in pursuance of the statute, the election was invalid and conferred no power upon the board of supervisors, either to make the subscription or issue the bonds, and that the injunction should be granted. Harding v. Rockford, R. I. & St. L. R. Co. [65 Ill. 90]; People v. Tazewell Co., 22 Ill. 147; Fulton Co. v. Mississippi & W. R. Co., 21 Ill. 365; Supervisors of Schuyler Co. v People, 25 Ill. 182; Clarke v. Supervisors of Hancock Co., 27 Ill. 305; Marshall Co. v. Cook, 38 Ill. 44; Wiley v. Town of Brimfield [59 Ill. 306].

Case No. 5,502.

GOELET et al. v. ELIZABETH et al.

[3 N. J. Law J. 14.]

District Court, D. New Jersey. Nov. 25, 1879.

EQUITY JURISDICTION—SUIT BY HOLDERS OF MUNICIPAL BONDS—MANDAMUS TO COMPEL COLLECTION OF TAXES.

Upon a bill in equity against the city of Elizabeth by holders of its bonds, application was made for an injunction and a receiver of the moneys, rights, and credits of the city, on the ground that it was insolvent and had made default in the payment of the interest on its bonds, and that its officers had collected and proposed to collect taxes and had refused to apply them to the payment of the debt. It was *held* that the complainants were not entitled to equitable relief because they had a remedy at law, viz. a writ of mandamus to compel the city to levy a tax for the payment of the debt. The question whether the court of equity could interfere after the remedy at law was exhausted was not before the court.

Bill [by Peter Goelet and others] for injunction and relief.

B. C. Chetwood, for complainants.

R. E. Chetwood and B. Williamson, for defendants.

NIXON, District Judge. This is an application for an injunction against the city of Elizabeth, its officers and agents, restraining them from receiving the debts due to said city, and from paying or transferring any of its moneys or effects, and for the appointment of a receiver or trustee to take charge of the moneys and effects of the corporation for the benefit of its creditors. The grounds on which the application is based are that the city is insolvent; that it has a bonded indebtedness of upward of five millions of dollars and has made default in the payment of the interest which has accrued thereon; that its officers have collected the revenues of the corporation and have neglected and refused to apply the same or any part thereof to the payment of the money due upon its indebtedness, but have expended the same for large salaries to officials and for extravagant public works; and that the official authorities of the city have just imposed an annual assessment for taxes for the current year, and propose to collect and receive thereunder, from the taxpayers large sums of money, which they avow will be devoted to

other purposes, and no part thereof used for the payment of the debt due to the complainants.

The original bill of complaint claims that the complainants hold six bonds of the city of Elizabeth,—four for twenty-five thousand dollars each, one for fifteen thousand dollars, and one for fourteen thousand dollars,—amounting in the aggregate to one hundred and twenty-nine thousand dollars, all bearing date January 1, 1873, and becoming due January 1, 1893, with interest, payable semi-annually on the first days of January and July at the rate of seven per cent. per annum; that they are denominated "funded debt bonds," and were authorized by an ordinance of the city, passed July 15, 1872, and were issued under the authority of an act of the legislature of the state of New Jersey entitled "A supplement to an act entitled 'An act to revise and amend the charter of the city of Elizabeth, approved March 3, 1863,'" and which supplement was approved March 17, 1875 [Laws N. J. 1875, p. 289, c. 146]; and that the city has defaulted in the payment of the interest which accrued thereon July 1, 1879. A supplemental bill filed September 18, 1879, sets up that the complainants, on the sixteenth day of September, 1879, obtained a judgment by default against the city for the sum of six thousand three hundred and seven dollars and twenty-three cents, the amount of interest due and unpaid upon the said seven bonds; that an execution has been duly issued thereon against the city and has been returned nulla bona by the marshal of the district of New Jersey, and that they were without remedy at law for the amount due upon the said judgment.

The difficulty with the complainants' case, as it appears to us, is, that they have no standing in a court of equity. The 723d section of the Revised Statutes of the United States provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." It may be true that the complainants have not "a plain, adequate and complete remedy at law" for all that they ask for, but we think they have for all that they are entitled to. Conceding for the present that they are judgment creditors of an insolvent municipal corporation, and that they have failed to realize upon their execution the amount of their claim, yet their remedy at law is not exhausted. By a long line of decisions in the supreme court, beginning with Knox v. Aspinwall, 24 How. [65 U. S.] 376, and ending with the recent case of U. S. v. New Orleans, 98 U. S. 381, it has been held that under the constitution and law of the United States, and especially by the provisions of the 14th section of the judiciary act [1 Stat. 81], the federal courts may issue the writ of mandamus to compel the proper authorities of municipal corporations to levy a tax for the payment of their debts when no other means have been provided to meet their obligations.

In Knox v. Aspinwall, supra, Mr. Justice Grier, in delivering the opinion of the court, seemed to emphasize the fact that the law which authorizes the issue of the bonds in the payment of the interest of which there had been a default made it the duty of the board of commissioners of the county "at the laying of the county taxes for each year to assess a special tax, sufficient to realize the amount of the interest to be paid each year." He says: "The act provides a special fund for the payment of these obligations on the faith and credit of which they were negotiated. It is especially incorporated into the contract that this corporation shall assess a tax for the special purpose of paying the interest on the coupons. If the commissioners either neglect or refuse to perform this plain duty, imposed on them by law, the only remedy which the injured party can have for such refusal or neglect is the writ of mandamus." But in Loan Association v. Topeka, 20 Wall. [87 U. S.] 655, the same court went further, and held that a statute which authorizes towns to contract debts or other obligations, payable in money, implies the duty to levy taxes to pay them, unless some other fund or source of payment is provided. It hence follows that a mandamus is the appropriate remedy to compel the authorities of a municipal corporation to provide for the payment of an existing indebtedness, by the levy of a tax, whether the law which authorized the contraction of the debt also authorized such levy or not. In U. S. v. New Orleans, supra, the court, in answer to the objection that a mandamus compelling a corporation to levy a tax for the payment of a debt when there was no statute expressly authorizing such levy was the transfer of the law-making branch of the government to the judiciary, said (page 395): "It is always to be presumed, in the absence of clear restrictive provisions, that when the legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that the payment shall not be left to its caprice or pleasure. When, therefore, a power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former, and such implication cannot be overcome, except by express words including it."

It appears from an examination of the charter of the city of Elizabeth that the 64th section of the act amending it, approved March 4, 1863, conferred upon the common council the general power to raise by tax, in each year, such sum or sums of money as they shall deem expedient * * * "for the payment of the interest upon the city debt and upon temporary loans, and such part of the principal thereof as may be due and payable." The supplement thereto, under which

the complainants' bonds are alleged to have been issued, is silent as to providing the means of their payment. The legislature probably thought that the authority in the original charter was ample enough, inasmuch as the supplement gave no power to incur new liabilities, but simply to issue funded debt bonds for the amount of the floating debt already contracted. But whether this was so or not, in view of the opinion of the supreme court above quoted, there can be no doubt that this court has the power at law to compel the corporation to provide, by taxation, the means to pay the accrued interest upon the bonds of the complainants, which is all at the present time that they are entitled to demand.

Whether the court has the right to interfere by entertaining proceedings in equity after the remedies at law have been exhausted, it will be time enough to consider when the exigency arises. It has not yet arisen. It is sufficient to add that, under the circumstances, as they now exist, we think that the suit cannot be sustained, and that the bill of complaint must be dismissed; and it is ordered accordingly.

On December 12, 1879, the following order was entered in the proceedings taken to obtain a mandamus for the executors of Peter Goelet, deceased, plaintiff in the above case, as well as the executors of Robert Goelet, deceased: "The President of the United States ex rel. Robert Goelet et al.; Ex'rs, etc., Robert Goelet, deceased; and Elbridge T. Gerry et al., Ex'rs, etc., Peter Goelet, deceased, v. The City Council of the City of Elizabeth. Ordered by the court that the city council of Elizabeth show cause before said circuit court to be holden at the United States courthouse in the city of Trenton on December 22, 1879, at 10 a. m., or as soon thereafter as the court can attend to the same, why a writ of mandamus should not issue out of and under the seal of this honorable court to the said city council of Elizabeth, to be directed, commanding and enjoining said city council forthwith to meet together and adopt measures for the immediate levying and collecting of a tax for the amount due upon a certain judgment recovered by Peter Goelet and Robert Goelet, both deceased (and of whom these relators are the representatives), against the city of Elizabeth, on September 16, 1879, for the sum of $6,307.23, with interest to the time when the same shall be paid, and the execution issued thereon upon all the property in the said city of Elizabeth."

In the case of the same plaintiffs against the board of assessment and revision of taxes of the city of Elizabeth, a similar order to show cause was also granted, "commanding and enjoining the said board of assessment and revision of taxes forthwith to meet together and assess and levy a tax for the amount due upon a certain judgment recovered by Peter Goelet and Robert Goelet, both deceased (and of whom these relators are the representatives), against the city of Elizabeth, on September 16, 1879, for the sum of $6,307.23, with interest to the time when the same shall be paid, and the execution issued thereon upon all the property within the said city of Elizabeth."

Case No. 5,503.

GOESELE et al. v. BIMELER et al.

[5 McLean, 223;[1] 8 West. Law J. 385.]

Circuit Court, D. Ohio. April Term, 1851.[2]

UNINCORPORATED ASSOCIATION — CAPACITY TO HOLD LAND—CONVEYANCE TO TRUSTEES—LAND BOUGHT BY JOINT LABOR OF A COMMUNITY—DECLARATION OF TRUST — PERPETUITY—COURT OF CHANCERY — FORFEITURE — PENALTY—STIPULATED DAMAGES.

1. A religious association, assuming the name of the "Separatist Society of Zoar," being unincorporated, cannot hold property in the name thus assumed. Nor can the directors and their successors in office, appointed by the society, hold it, as the law recognizes in them no succession.

2. But the conveyance of land to an individual and his heirs, for the use of the society, constitutes him the trustee, and the members the cestui que trusts.

3. Where land has been paid for by the proceeds of the joint labor of a community, each individual, unless the contrary be made to appear, will be presumed to have an equal interest in the land.

4. Under such circumstances, the cestui que trusts may enter into a legal and binding contract among themselves, to relinquish their individual interests in the trust, for a common interest in the whole property, so long as they shall remain members of the association, relinquishing for themselves and their heirs all right beyond that limitation, to the property, and also all claim for their labor, they receiving during their membership, under the distribution of agencies appointed by themselves, provision for their support, of clothing, and in every other particular.

[See note at end of case.]

5. Such an agreement does not require the solemnities of a grant, but is a declaration of trust, which being in writing, is valid.

6. The members of the society reserve to themselves the power to alter the contract at discretion, and through its agents to sell the property, and also to admit new members on the terms of the original association; under such conditions, the contract is not void, as establishing a perpetuity. Its continuance depends on future voluntary contracts, and not on any principle in the original instrument.

[See note at end of case.]

7. A court of equity may not decree a forfeiture. It will relieve against a penalty, but not against stipulated damages.

8. Nor will a court of chancery give relief against a bona fide contract of a party, entered into for a valuable consideration.

[This was a bill in equity by John G. Goesele and others, heirs of Johannes Goesele, against Joseph M. Bimeler and others, for a partition of certain lands claimed by

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

[2] [Affirmed in 14 How. (55 U. S.) 589.]

plaintiffs as the individual property of Johannes Goesele.]

Gholson & Quin, for complainants.
T. Ewing and H. Stanbery, for defendants.

OPINION OF THE COURT. The complainants in this case, claim to be tenants in common in a large property in Zoar, purchased by a religious society called "Separatists," of which their ancestor was a member. From the facts stated in the pleading and evidence, it appears that in 1807 the society having suffered much persecution at Ball, in the kingdom of Wirtemburg, Germany, emigrated to the United States. They arrived at Philadelphia, in a destitute condition, where pecuniary aid was afforded them by the friend Quakers of London and Philadelphia. Whilst there, the society purchased five thousand five hundred acres of land from one Godfrey Hager, on credit, situated in Ohio, to which the charity received enabled them to go, and on which they settled, calling the place Zoar. The purchase was made by Bimeler, one of the defendants, who took the title in his own name, holding the land as he has uniformly declared, in trust for the society.

At this time the association seems not to have contemplated a community of property. The land was paid for by the proceeds of the united labor of the society.

On the 15th of April, 1819, the society entered into articles of association, prefaced by the following preamble: "The undersigned, members of the society of Separatists of Zoar, have, from a true Christian love towards God and their fellow-men, found themselves convinced and induced to unite themselves according to the Christian Apostolic sense, under the following rules through a communion of property; and they do hereby determine and declare that from the day of this date, the following rules shall be valid and in effect:"

1. "Each and every member does hereby renounce all and every right of ownership, of their present and future movable and immovable property; and leave the same to the disposition of the directors of the society elected by themselves."

2. "The society elects out of its own members, their directors and managers, who shall conduct the general business transactions, and exercise the general duties of the society. They therefore take possession of all the active and passive property of all the members, whose duty it shall be at the same time to provide for them; and said directors are further bound to give an account to the society of all their business transactions."

The other articles relate to the duties of the members of the society, the adjustment of difficulties which may arise among them, and an agreement that backsliding members cannot, either for property brought in, nor for their labor in the society, demand any compensation or restitution, except under the order of a majority of the society.

These articles were subscribed by the members of the society generally, and among them is found the name of John Goesele, senior, the ancestor of the complainants. Under this association, the society prospered, made extensive improvements, paid for its lands first purchased, bought other tracts and paid for them, and secured in a high degree the comforts of life. No change was made in the above articles until the 18th of March, 1824. Under the most solemn appeal to the Trinity the society then declares:

"We, the undersigned, inhabitants of Zoar and its vicinity, etc., being fully persuaded and intending to give more full satisfaction to our consciences, in the fulfillment of the duties of Christianity, and to plant, establish, and confirm the spirit of love as the bond of peace and union for ourselves and posterity forever, as a safe foundation of social order, do seek and desire, out of pure Christian love and persuasion, to unite our several personal interests, into one common interest, and, if possible, to avoid and prevent law suits and contentions, or otherwise to settle and arbitrate them under the following rules, in order to avoid the disagreeable and costly course of the law, as much as possible. Therefore, we unite and bind ourselves by and through the common and social contract under the name and title of 'The Separatist Society of Zoar,' and we agree and bind ourselves, and promise each to the other and all together, that we will strictly hold to, observe, and support all the following rules and regulations. New articles, amendments, or alterations, in favor of the above expressed intentions, to be made with the consent of the members.

Article I.

"We, the undersigned, members of the second class of the society of Separatists, declare, through this first article, the entire renunciation and resignation of all our property of all and every dimension, form, and shape, present, and future, movable and immovable or both, for ourselves and our posterity, with all and every right of ownership, titles, claims, and privileges, to the aforesaid society of Separatists, with the express condition, that, from the date of the subscription of each member, such property shall be forever, and consequently also after the death of such member or members, remain the property of the said Separatist society."

Directors were to be elected by the society, who were authorized to take all the property of the individual members and of the society into their disposition, and to hold and manage the same expressly for the general benefit of the society, according to the prescriptions of the articles. They shall have power to trade, to purchase, and to sell, to conclude contracts and dissolve them again, to give orders if all of them agree, with the consent of the cashier, who was to be elected by the society. They were "to appoint agents and

to conduct the entire provision of all and every member in boarding, clothing, and other necessaries of life, in such proportion as the situation, time, and circumstances may require." And the members bound themselves to obey the orders and regulations of the directors and their agents. The children of the members during their minority, were to be subject to the control of the directors, but without the votes of a majority of the society, they cannot bind apprentices out of the association.

The directors are required to take charge of inheritances of deceased members as universal heirs, in the name of the society; to investigate and settle disputes among the members, an appeal being allowed to a board of arbitrators, which was to be elected and to consist of from one to three persons. The arbitrators were bound to observe the economy of the society, and give orders and instructions, to investigate accounts and plans which may have been made by the directors and their agents. All transactions, exceeding in amount fifty dollars, to be valid, required the sanction of the board of arbitration. This board had also the power to excommunicate arbitrary and refractory members, and to deprive them of all future enjoyments of the society.

New members were to be admitted, being of full age, having been approved of by the directors and board of arbitration, by a vote of two-thirds of the society; and on condition that they should resign all their property to the society, as had been done by the original members. Directors and arbitrators were to be elected as often as shall be deemed necessary by the society. "The highest power shall be and remain forever in the hands and disposition of the society, who reserves the right at pleasure to remove and to establish officers, or to place others in their stead; in short, to make any alteration which may be deemed best." "The cashier was bound to keep all the funds of the association, and to apply all moneys which may come to his hands, by the orders of the directors and arbitrators to the benefit of the society—to pay its debts and to liquidate its general wants."

And it is agreed that individual demands by backsliding members, or such as have been excommunicated, whether such demands may be for goods, or other effects, or for services rendered to the society, are abolished and abrogated by the members for themselves and their posterity. These articles are declared to be confirmatory of those of 1819, and extending to a more detailed explanation. The name of Goesele, the complainants' ancestor, was also subscribed to the above articles, with the other members, generally, of the society.

On the 6th of February, 1832, an act of the legislature of Ohio was passed, incorporating Joseph M. Bimeler and others, by the name of "The Society of Separatists of Zoar," with perpetual succession, with power to hold property, purchase and sell, pass by-laws, etc. And afterwards, on the 21st of February, 1846, an amendatory act was passed, modifying a restriction on the income of the society from one to ten thousand dollars. In pursuance of the power given, a constitution was adopted by the society, and other acts conformably to the law were done under it.

There is satisfactory proof that the complainants are the heirs at law of John Goesele, as represented in their bill, who came to this country as a member of the Separatist society, and who continued a member until his death in 1827. It also is shown that the lands purchased were paid for with the proceeds of the labor of the society; consequently, all who contributed, by their labor, to these payments, have an interest in the lands, unless such interest has been relinquished or abandoned. If such right remain and descended to the complainants, the court would presume that the individual claims of the members were equal, unless the contrary were clearly shown.

There was some evidence that Goesele, in Germany, was considered a man of wealth; and that his real estate was worth a large sum. Some of the witnesses state that his property was sold, and from which an inference is drawn that Bimeler received the money. But no facts are proved which authorize this conclusion. On the contrary, it appears that the only money paid for the lands shortly after their arrival at Zoar, was a pittance which some of them had saved of the eighteen dollars which they had each received, as a charity, in Philadelphia.

The legal questions in this case principally arise out of the articles of 1819 and of 1824. The latter articles include, substantially, those of the former, with some additional provisions and a more detailed regulation, in regard to the general government of the society. The right set up in the defense must rest on those articles, as the act of incorporation was not passed until several years after the death of Goesele.

Against the validity of the defense, two grounds are assumed by the complainants' counsel. First, it is objected that there is no grantee; and, secondly, that if there were a grantee, the grant would be void as a perpetuity.

That the lands were purchased by Bimeler for the society, were paid for by it, and are now held in trust by him, is not controverted. The fee is in him, and the members of the society are the cestui que trusts.

It must be admitted that an unincorporated community cannot, in its aggregate capacity, take lands in grant; nor can its directors and their successors in office take them, as the law, under such circumstances, recognizes no succession. A valid grant to such a community, can only be made to the individuals composing it, or to an individual and his heirs, in trust for its use.

The articles of association constitute a dec-

laration of trust, which Bimeler. the trustee, recognizes as binding upon him, though he did not sign either of the articles. This declaration did not require the formalities of a grant; it was in writing, and the application of the trust being distinctly stated, it was not affected by the statute of frauds and perjuries. The members of the society agree with each other that their property of every description should be held and used as a common fund for their general benefit, and they appointed certain agents to manage their concerns and provide for their support. It is true, they relinquished to the society their entire property, but this was done, that, as a community, they might enjoy the benefits of the whole. The agencies which they established relieved the members generally from personal care, but the sum of their enjoyment was not lessened.

The want of capacity in the society, as such, to take by grant, does not invalidate this procedure. The agreement was that the equitable individual right to the trust should be relinquished for a common right with the other members to the entire property. In effect, it was constituting a universal partnership, known to the common law, and which is not in violation of any of its principles. The members of the society, in their own language, "unite and bind themselves by and through this common and social contract, under the name and title of the 'Separatist Society of Zoar,' and they agree and bind themselves, and promise, each to the other, and all together, that they will strictly hold to, observe, and support all the following rules and regulations," etc. The name of the society was used as a designation of the whole body, the same as the assumed name of a firm to designate its partners. Individuality of ownership of the property then possessed by the members of the association was abolished, and also future acquisitions, for the common right of an interest in the whole. This common right was limited to the members of the association; consequently those who left it, or were expelled, forfeited such right. This was a condition voluntarily adopted in the articles of association, and there is no evidence showing unfairness, deception, or fraud in the agreement. And the members emphatically declare, that "the officers shall be elected and established by a majority of the votes; consequently, the highest power shall be and remain forever in the hands and disposition of the society, who does hereby reserve the right, at pleasure, to remove and to establish officers, or to place others in their stead; in short, to make any alteration which may be deemed best."

It would be a novel condition in a grant, that the grantor should exercise a discretionary power over the thing granted, and enjoy all the benefits resulting from it. But, it would not be more novel, than that one or more individuals should make a grant to themselves. And if this be a grant, what other character can be given to it? The relinquishment of individual right, present and future, was to the society—in other words, to themselves—a giving up and surrendering an individual interest in a part of the property, for a common interest in the whole of it. By this arrangement, the members of the association were placed on an equality, as to their interests in the property, and their enjoyment of it. Their minutest wants were alike provided for, through the agencies established; and this was the consideration on which the contract was founded. That, in the absence of all fraud and unfairness, this was a bona fide and legal contract, cannot be doubted. An important part of this contract was, that the property thus surrendered should belong only to the members of the association; consequently the heirs of the members could not claim an interest in the property as heirs, but only as members. Against such a disposition of property, I know of no principle of law or morals. Any individual has the power to divest himself of his property, real and personal, for a valuable consideration.

But it is said if the articles be considered a contract, a court of chancery would not decree a specific execution of it. And reference is made to the personal services to be rendered by the members, and the guardianship of their children in a state of minority. And it is also contended that a court of chancery will never decree a forfeiture.

The form in which the question is put is no test of the principle. Admit that a contract for personal services will not be specifically decreed, as there is an adequate remedy at law; yet it does not follow that an individual who has performed labor, under a bona fide contract for a fixed compensation, may invoke the aid of a court of chancery to pay him again for the same services. And this, too, without any allegation or proof of fraud in the contract. Chancery may not technically decree a forfeiture, but no court of chancery will give relief to an individual, against his own contract, entered into in good faith, without mistake, and for a valuable consideration. It will give relief against a mere penalty, but not against a sum named as stipulated damages. Goesele and the other members, when they relinquished their individual property for a common interest in the whole, and appointed agents to manage the concern, expressly agreed to receive as a consideration for their property and labor, a support for themselves and their families, including clothing and every other provision necessary for their comfort. The acquisitions would necessarily increase their comforts, by enlarging their means of subsistence; but the property was only to be enjoyed while they continued members. This was the substance of the contract, fairly entered into and ratified under the most solemn sanctions, after five

years' experience. There was no grantor or assignee, and none was necessary. It was a partnership agreement among themselves, and was binding upon each individual who entered into it.

If there be no principle of law opposed to such a community of property, it must be held valid, on the rules which apply to partnerships. There are no moral considerations opposed to it. In adopting it, the Separatist society followed the example found in the early history of the Apostles, and which received an awful sanction of heaven.

But it is said, that this association contemplates an enjoyment of the property in perpetuity, that those who shall become members of it, through all time, shall enjoy it, and that this the law will not permit.

The common law is said to abhor perpetuities. The strong national feeling in England against the entailment of estates, as being inconsistent with the free enjoyment of property, influenced the courts to establish the rule that no conveyance should be valid, by executory devise or otherwise, which did not vest in twenty-one years after the termination of lives then in being. And this is an established principle of the common law, modified so as to extend to the fraction of a year beyond twenty-one, to embrace the case of a posthumous child.

The title is vested in Bimeler and his heirs without limitation upon its face; but the use is in the members of the society, present and future, so long as they shall remain members; with power in the directors generally, to sell or purchase property, for the use of the society; and this regulation, if not changed, may be perpetual. The persons through all time, who shall become members of the society, are to participate in the trust, and this is supposed to violate the above rule of law against perpetuities.

It must be observed that the title vested in the trustee from the date of the deed; and the common use, in the society, as fully when the articles were agreed to, as was contemplated at any future period. It is true, that the association could only be perpetuated by the admission of new members. But such admission is not obligatory on the society. An applicant to become a member must first apply to the directors, who bring his case before the board of arbitration, and if he pass their examination, he can only be admitted by a vote of two-thirds of the society. If admitted, it must be on the condition that he shall relinquish his individual property to the members of the association, and with them enjoy a common benefit in the whole. This is matter of contract at the time, as it was at the formation of the society. The perpetuity then, is not created by the first contract, but depends upon subsequent contracts, which may or may not be entered into. No right is derived or can be claimed under the articles of association, until the individual shall have complied with the conditions of his admission. He then becomes a partner in the association, and is subjected to the original articles, not from any intrinsic force in them, but because he has adopted them by contract. Here is the origin of his right, and of his obligation, and the question may well be asked, Is this a perpetuity? If it be a perpetuity, it is a perpetuity that can extend beyond lives in being, only by voluntary contracts. And where are the fetters of such a perpetuity?

But the most decisive objection against this assumed perpetuity is, that the cestui que trusts, in agreeing that their interests in the entire property should be common, reserved to themselves the right "to make any alteration" in the articles of association, "which may be deemed best." Can a perpetuity be subject to the exercise of such a power? A perpetuity must appear upon the face of a grant or will. It may depend upon a contingency, as the birth of a child, after the limitation allowed; but there can be no uncertainty, as to the event on which the right is to attach. And this is made certain by the instrument which creates the estate.

This association, in principle, does not differ from any other partnership, where the members create the capital, by giving up their property to the concern, living upon their profits, applying their surplus to an increase of capital, and receiving new members on the terms of the original association. This, if carried out, may endure for many generations, but it is not a perpetuity, which the law prohibits. The enjoyment of the right, on condition of continued membership, has no necessary connection with a perpetuity. If the condition be broken by a member, it depends upon the individuals and the society whether he shall be restored or not.

There is no line of succession marked out by this association, no postponement beyond the time limited by law, when the right shall vest, no family aggrandizement contemplated, no fetters imposed upon the enjoyment of the common property, except the consent of the society, and that the applicant shall come in on equal terms with other members.

The society is peculiar in its organization. Its members seem to have been influenced by a high sense of religious duty—and they evince a determination to reach "a better inheritance."

The attempt made to impeach the character of Bimeler, by taking the title to the real estate in his own name, and in the management of the general concerns of the society, is not, in my judgment, sustained by the evidence; much less is the imputation against him of immoral conduct sustained. No one acquainted with the imperfections of our nature could expect, from an association like that of Zoar, for any great length of time, an entirely harmonious action. Dissatisfactions under such a system will more or less arise from the contributions of labor re-

quired, or the distribution of the fruits of such labor. The jealousy of the human heart often finds sources of discontent in the ordinary intercourse of life. Words are misconstrued, a look or an act is misunderstood, and many other things are considered as evidence of neglect or intentional offense, when the person charged is entirely innocent of the motive attributed to him. And not unfrequently are such sentiments cherished by persons who are influenced by the base or unworthy motives which they attribute to others. This is generally the conduct of narrow minds, and it may sometimes be found in persons of more enlarged capacity. There is nothing in the evidence, conducing to impeach the conduct of Bimeler, that may not be accounted for on the above principles.

Upon a deliberate consideration of this case, I am brought to the conclusion, that the complainants are not entitled to relief against the contract of their ancestor, entered into bona fide and for a valuable consideration. For the reasons stated, I think the agreement entered into by the members, giving up their individual interest in the property for a common interest in the whole of it, so long as they shall remain members, is not void in law; and consequently the bill of the complainants must be dismissed.

[NOTE. On appeal to the supreme court the judgment was affirmed in an opinion by Mr. Justice McLean who said that the ancestor of these heirs renounced all right of individual property when he signed the articles and did so upon the consideration that the society would support him in sickness and in health which was deemed by him an adequate compensation. Under these articles no right of property descended to his heirs. The articles do not constitute a perpetuity because the society only exists at the will of its members, a majority of whom may dissolve it at any time. 14 How. (55 U. S.) 589.]

GOETINGER (GEIER v.). See Case No. 5,299.

Case No. 5,504.

GOFF et al. v. STAFFORD et al.

[3 Ban. & A. 610;[1] 14 O. G. 748.]

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

PATENTS — FOREIGN SPECIFICATIONS OF PRIOR DATE—TERM—FOREIGN PATENTS—ACT OF JULY 8, 1870.

1. A patented invention cannot be superseded by the mere production of a British provisional specification, though of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains, to make, construct and practice the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent.

2. The provision of the act of July 8, 1870 [16 Stat. 208], that patents taken out in the United States for inventions previously patented in a foreign country shall expire at the same time with the foreign patent, or if there be more than one, at the same time with the one having the shortest term, but in no case shall it be in force more than seventeen years, does not apply to letters patent of the United States granted previous to such enactment. The cases of Weston v. White [Case No. 17,458] and Badische Anilin & Soda Fabrik v. Hamilton Manuf'g Co. [Id. 721], cited.

[Explained in De Florez v. Raynolds, 8 Fed. 444. Cited in Siemens v. Sellers, 16 Fed. 861.]

In equity. Suit was brought by [Darius Goff and others] the assignees of patent No. 50,318, granted to Marcus Brown Westhead, October 3d, 1865 [against William H. Stafford and others]. The object of the invention was stated to be to make up tapes and ribbons and thread for use, in such a manner that the consumer might be able to unwind or rewind them, and retain the coils in a compact form, and the claim of the patent was for "The application of an elastic slip or drag for the purposes above set forth."

Benjamin F. Thurston, for complainants.

Edwin Aldrich and Oscar Lapham, for defendants.

CLIFFORD, Circuit Justice. Redress for infringement may be sought by the owner of a patent in an action at law or by a suit in equity, and the party charged in an action at law may plead the general issue, and having given notice in writing to the plaintiff or his attorney thirty days before, may prove, as a matter of defence, that the invention had been patented or described in some printed publication prior to the supposed invention of the plaintiff. Like defences may also be pleaded in a suit in equity for relief against an alleged infringement, and proofs of the same may be given upon like notice in the answer of the respondent, and with the like effect. 16 Stat. 208; Rev. St. § 4920; Seymour v. Osborne, 11 Wall. [78 U. S.] 539.

Neither party controverts the fact that Marcus B. Westhead, of Manchester, in the kingdom of Great Britain, received a patent in that country as the inventor of an "improved device for arranging tapes, ribbons, and threads for use," nor that he subsequently, on the 3d of October, 1865, took out a patent, in due form, in this country for the same invention. By virtue of the last-named patent, the patentee became, as the complainants allege, the true and lawful owner of the invention, and that he on the 25th of June, 1877, assigned and conveyed all right, title, and interest in the same to one of the complainants, from whom the other two acquired each a one-third interest in common with the original assignee. They charge infringement, and service having been made, the respondents appeared and filed an answer setting up the following defences: 1. That the patentee is not the original and first inventor of the improvement embodied in the patent described

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

in the bill of complaint. 2. That the alleged invention, prior to the patent granted for the same, was fully described in the provisional specification of one Henry Masters, and was known to and used by divers persons, whose names, residences, and the places where such knowledge and use were had are not known to the respondents. 3. That the invention, six months and more prior to the date of the patent, had been patented to the same party in a foreign country, limited to the term of fourteen years, and that the foreign patent had expired previous to the assignment, in consequence of which the patent was null and void. 4. They deny that they have infringed the complainants' patent, but admit that they have been engaged in putting up braids in rolls, and selling the same under the certain patent therein mentioned, and they deny that the same contains the alleged invention of the assignor of the complainants.

Fig: 1.

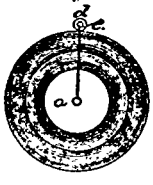
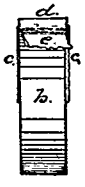


Fig: 2.



[Drawings of patent No. 50,318, granted to M. B. Westhead, October 3, 1855. Published from the records of the United States patent office.]

Before giving a detailed description of the devices, the patentee states that the object of the invention is to make up tapes, ribbons, and other narrow fabrics or thread in such a manner that the consumer may be able to unwind or rewind them and retain the coils in a compact form. Two methods by which the invention may be carried into effect are shown in the drawings. Figures 1 and 2 represent in different forms a coil of tape or ribbon, with the patented improvement applied by means of a block of wood or other suitable material, upon which the tape or ribbon is wound in the usual manner. Through a central hole in the block a strip of rubber is passed which is threaded through a roller, the ends of the strip being then united. Rollers of the kind may be constructed of glass or other suitable material, which is an essential device in the apparatus, to which must be added the elastic band, the function of which is to draw the roller downward upon the coils of tape or ribbon, and to act as a clip to bind the one upon the other. Brief description is also given of the mode of operation, the statement being that the coil may be held in one hand and the end drawn with the other until the desired quantity is unwound, the described clip acting as a drag without any disturbance of the coils, being aided by the elastic band which constitutes side-guides for keeping the coils laterally in their places. If a greater length is drawn off than is required it may be readily wound up again in a compact form by holding the roller in one hand and turning round the coil of tape or ribbon with the other. Single coils of the kind may be combined together, of the same or different widths, or otherwise varying in character, each of which, as the patentee states, may be drawn without disturbance of the complete coils. What he claims is, the application of an elastic clip or drag, for the purposes set forth, which is equivalent to a claim for the described apparatus or the combined devices of which the apparatus is composed, though the patentee states expressly that he does not limit himself to the precise arrangement shown and described.

Power to grant letters patent is conferred by law upon the commissioner, and when that power has been lawfully exercised and a patent has been duly granted, it is of itself prima-facie evidence that the patentee is the original and first inventor of that which is therein described and secured to him as his invention. Availing themselves of that rule of law, the complainants in this case introduced in evidence the patent described in the bill of complaint, which is sufficient to entitle them to a decree, unless the defences, or some one of them, set up by the respondents, can be sustained.

Two propositions of law applicable to the case may be regarded as settled, which require no discussion: I. That the burden of proof is upon the respondents to show that the assignor of the complainants is not the original and first inventor of the improvement described and claimed in his letters patent: II. That the burden of proof to sustain the charge of infringement is upon the complainants.

First. Guided by the first of those rules, the court will proceed to the examination of the defences which involve the validity of the complainants' patent. Support to the first defence, that the assignor of the complainants is not the original and first inventor of the improvement, is attempted to be derived from the publication of the English provisional protection to Henry Masters. But it is evident that the publication in question does not sustain the proposition. Westhead's English patent is dated June 13th, 1863, was sealed December 8th, 1863, and the complete specification was filed December 12th, in the same year. His application for a patent in this country was filed July 15th, 1865, and his patent for the same invention as that patented in England was granted on the 3d of October following. Masters' English provisional specification, never patented, was introduced in evidence by the respondents as superseding both the American and the English patent granted to Westhead.

By the record it appears that that provisional specification, though filed the 24th of February, 1863, was never patented, and was never published until the 17th of the follow-

ing October. Nothing is proved to show why it never went to a patent beyond what appears on its face. It may have been because its statements were inaccurate, or because they were incomplete, or because the apparatus described was inoperative, not new or useful, or not the proper subject of a patent.

Second. Grave doubts are entertained whether such a publication, without more, is sufficient to show that the patentee of an American patent is not the original and first inventor of the improvement described in his patent, but it is not necessary to decide that question, for the reasons which will presently appear. Patented inventions cannot be superseded by the mere production of a foreign publication of the kind, though of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement, in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, and practice the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent. Mere vague and general representations will not support such a defence, as the knowledge supposed to be derived from the publication must be sufficient to enable those skilled in the art or science to understand the nature and operation of the mechanism, and to carry the invention into operation. Seymour v. Osborne, 11 Wall. [78 U. S.] 555; Judson v. Cope [Case No. 7,565]. Apply that rule to the case before the court, and it is clear that the publication in question is not sufficient to support the defence set up in the answer.

In the outset he describes his invention as "improvements in spools, bobbins, rollers and similars," and states that it consists in the construction of spools, bobbins or rollers with springs, plates, clips, or pins for the retention of the material wound on the spool or bobbin. Express reference is made in the specification to the drawings, from which it appears that every one of the spools is furnished with flanges, which limit the quantity of material which can be wound on the spool; nor is there any suggestion, either in the specification or drawings, that the patentee can dispense with the flanges. Unaccompanied, as the provisional specification in this case is, by any claim showing in precise terms what the party supposed he had invented, it is difficult to define the true nature of the same; but it is clear, both from what is written and from the drawings, that the description is not sufficient to bring it within the rules prescribed by the court in the case to which reference has already been made. Howe v. Morton [Case No. 6,769]. Provisional specifications in the British system seldom or never become the basis of a patent, the party being required within six months from filing the same to file a completed specification, the rule being that the party within that period may make such alterations as he sees fit in his provisional specification, even by adding a supplementary improvement. Clarke Patent Steam & Fire Regulator Co. v. Copeland [Id. 2,866].

Third. Suppose that this is so, still it is insisted by the respondents that the patent is null and void because the invention was first patented to the assignor of the complainants in England for the term of fourteen years, which term expired before the title was acquired by the complainants by virtue of the alleged assignment. Section 6 of the act of March 3d, 1839, provides that no person shall be debarred from receiving a patent for any invention or discovery * * * by reason of the same having been patented in a foreign country more than six months prior to his application * * * provided that in all cases such patent shall be limited to the term of fourteen years from the date of publication of such foreign patent. 5 Stat. 354, § 6. Congress on the 2d of March, 1861 [12 Stat. 246], enacted that all patents hereafter granted shall remain in force for the term of seventeen years from the date of the issue, and all extension of such patents is hereby prohibited. Pursuant to that act of congress the patent in this case was granted to the assignor of the complainants for the term of seventeen years from the 3d of October, 1865, without any limitation whatever. 12 Stat. 249. Since then, to wit, July 8th, 1870, congress has provided to the effect that patents here, previously patented in a foreign country, shall expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term; but in no case shall it be in force more than seventeen years. 16 Stat. 201; Rev. St. § 4887. Granted, as the patent in this case was, under the act of the 2d of March, 1861, it is clear that it is valid, and that it will remain in force for the term of seventeen years from the time it was granted. Weston v. White [Case No. 17,458]; Badische Anilin & Soda Fabrik v. Hamilton Manuf'g Co. [Id. 721]. Much discussion of the question of infringement will be unnecessary, as the respondents admit that they have been engaged in putting up and selling rolls of braid under the patent described in the answer. Decree for complainants for an injunction, and for an account.

Case No. 5,505.

GOHEEN v. TEXAS RY. CO.

[The case reported under above title in 3 Cent. Law J. 382. is the same as Case No. 5,507.]

Case No. 5,506.

GOHEN v. TEXAS PAC. RY. CO.

[2 Woods, 346.] [1]

Circuit Court, W. D. Texas. April Term, 1876.

DEATH BY WRONGFUL ACT—COMPENSATORY DAMAGES—EXEMPLARY DAMAGES.

1. The act of the legislature of Texas, of February 2, 1860 [Laws 1860, p. 32], which gave a right of action for damages to the surviving husband, wife, child, children, or parents of any person whose life was lost by the negligence or carelessness of the proprietors, etc., of any railroad, steamboat, etc., entitled the plaintiff to recover compensatory damages only.

2. Said act is not abrogated by section 30 of the constitution of Texas of 1869, which makes "every person, corporation, etc., that may commit a homicide through willful act or omission, responsible in exemplary damages to the surviving husband, widow, heirs, of his or her body, or such of them as there may be, separately and consecutively."

Heard on special exceptions to the plaintiff's petition.

The plaintiff [Patience Gohen], a citizen of the state of New York, and mother and sole surviving parent of Edward L. Gohen, brought suit against the Texas Pacific Railway Company, to recover damages resulting from the death of her son, who was employed as a fireman by the said company, and was accidentally killed while so employed, through the alleged fault and negligence of the company. The question raised by the exceptions was the right of the plaintiff to sue.

W. S. Herndon and George Hill, for plaintiffs.

William Steadman and I. P. Sexton, for defendant.

DUVAL, District Judge. By an act of the Texas legislature, passed February 2, 1860, it is provided: "If the life of any person is lost by reason of the negligence or carelessness of the proprietor or proprietors, owner, charterer, or hirer of any railroad, steamboat, * * * and the act, neglect, unskillfulness or default is such as would (if death had not ensued) have entitled the party injured to maintain an action for such injury, then, and in every such case, the person who would have been liable, if death had not ensued, shall be liable to an action for damages. * * * Every such action shall be for the sole and exclusive benefit of the surviving husband, wife, child, or children, and parents of the person whose death shall have been so caused, and may be brought by such entitled parties, or any one of them. * * * And in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death," etc.

By section 30 of the constitution of the state of Texas of 1869, it is provided: "Every person, corporation, or company, that may commit a homicide, through willful act or omission, shall be responsible in exemplary damages to the surviving husband, widow, heirs of his or her body or such of them as there may be, separately and consecutively, without regard to any criminal proceeding that may or may not be had in relation to the homicide."

It is contended by the defendant that this constitutional enactment repeals the law of 1860, so far at least as the latter gave to a parent a right of action for the death of his or her child, and this position has been ably maintained by counsel.

It is admitted that no right of action, in such a case as this, existed at common law, which is unquestionably true, and that if it can be maintained at all, it must be by virtue of the act of 1860. There is no express repeal of this act. If repealed, it must be so by necessary implication; or, rather, as was held by the supreme court of the United States in Daviess v. Fairbairn, 3 How. [44 U. S.] 636, by a "positive repugnancy existing between the provisions of the new law and that of the old." The question is, does such positive repugnancy exist in this case? Does it follow, because the right of action, which is given to a parent by the act of 1860, is left out and not provided for by the constitutional provision of 1869, that, therefore, the latter repeals the former pro tanto?

To determine this question correctly, I have carefully considered the two enactments, and called to my aid in their construction the able arguments of counsel and authorities cited by them.

In my opinion, the act of 1860 was only intended to give compensatory damages. This, it seems to me, is apparent from the provision which limits the power of the jury in awarding damages to the injury sustained. I take it this means to the actual injury, as determined by the proof, and, therefore, excludes the idea of exemplary or punitory damages.

On the other hand the constitutional enactment, by its very terms, relates solely to exemplary damages; so that it is only by taking them both together, that the whole subject of damages is embraced. The latter cannot, therefore, be held to constitute the only or sole rule on this subject. It simply enlarges the measure of damages in favor of the surviving husband or wife, or the heirs of their bodies. It may be that the enactment of 1869, in authorizing exemplary damages to certain relatives of the deceased, would allow them to recover compensatory damages, upon the principle that the greater includes the less; but this would not operate as a repeal of the act of 1860.

Without attempting to elaborate my views on this subject, my conclusion is, that the constitutional enactment of 1869 does not repeal the act of 1860; that is, it is not positively repugnant to the latter, and that while it does not provide that a parent may

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

recover exemplary damages for the death of a child, it leaves unaffected his or her right to recover compensatory damages, as given by the act of 1860. One is a legislative, and the other an organic enactment in pari materia, and they can, I think, be fairly construed together, so as to give proper effect to both without our being driven to the necessity of deducing a repeal by implication, a result which the law never favors when it can be fairly avoided.

The exceptions are overruled.

[For charge to the jury at subsequent trial, see Case No. 5,507.]

Case No. 5,507.

GOHEN v. TEXAS PAC. RY. CO.

[3 Cent. Law J. 382;[1] 1 Tex. Law J. 97; 23 Int. Rev. Rec. 393.]

Circuit Court, W. D. Texas. April Term, 1876.

NEGLIGENCE—DUTY OF RAILROAD COMPANIES AS TO TRACK AND STRUCTURES — UNFORESEEN EVENTS—LIMIT OF LIABILITY—RULE OF DAMAGES.

1. It is the duty of a railroad company to lay its track and road-bed and to construct bridges, culverts and embankments in such manner, and to keep them in such condition, as to render the same safe for the public use as well as for its employees.

2. This obligation does not require it to provide against dangers which could not reasonably be foreseen, and it is not bound to secure the track against events which could not be anticipated by reasonable men, such as an unprecedented flood, or other unusual visitation. This applies most strongly to new roads.

3. If a particular structure is without fault as to plan, mode of construction and character of material, so that it was originally sufficient for all the purposes for which it was designed, and if the railroad company has it afterwards properly inspected by competent and skillful men, who exercise ordinary diligence to keep it in repair, the company has discharged its duty, and is not liable to an employee for an injury received by reason of a defect in said structure, unless it is shown that the company had actual notice of such defect, and after notice failed to remedy it.

4. Actual damages only can be recovered, and they are to be confined to the pecuniary loss sustained by the plaintiff by reason of the death of her son.

This was an action for damages brought [by Patience Gohen against the Texas Pacific Railway Company] under the act of the legislature of Texas of February 2, 1860 [Laws 1860, p. 32], which is substantially that of 9th and 10th Vict., commonly known as "Lord Campbell's Act."

[Exceptions to plaintiff's petition were overruled. Case No. 5,506.]

Robertson & Herndon, Turner & Lipscomb, and Geo. L. Hill, for plaintiff.

William Steadman and I. P. Sexton, for defendant.

DUVAL, District Judge (charging jury). The plaintiff [Patience Gohen is the mother and only surviving parent of Edward L. Gohen, who died without wife or children][2] brought this suit on the 22d day of December, 1874, to recover of the defendant damages for the death of her son, Edward L. Gohen, which occurred on the 24th of March, 1874. It appears from the evidence that at the time of the death of the said Edward L. Gohen, he was in the employment of the defendant as a fireman on a locomotive engine running over defendant's road, and that while crossing a bridge on the south side of Cypress Bayou in Harrison county, the said bridge gave way, causing the engine to be precipitated into the stream below, and killing the said Edward L. Gohen. The plaintiff avers that this accident and death was solely owing to the fault and neglect of the defendant by reason of the defective construction of said bridge, and its dumps or embankments. [It is now, however, conceded by the plaintiff's counsel in argument, that the bridge in question was, in itself, safe and sufficient, but that the accident was occasioned by an unskillful and defective construction of the dump or embankment on which the bridge rested.][2] And it is for the jury to determine from the evidence before them whether this averment is true or false. I have to instruct the jury, that in constructing and operating a railroad, the law imposed upon the defendant the obligation to make it substantial and safe [so far as human skill and foresight can do so, under the circumstances surrounding its construction. The work should be done without fault as to its plan, mode of construction, or materials used, which should be adapted to, and such as are generally used for, the purpose to which they are to be applied, so as to make it safe, not only for the public generally, but for the employees of the road, and so as to provide against all risks and dangers, of whatever sort or description, which could then be fairly foreseen or apprehended after the exercise of due and reasonable diligence, enquiry and precaution. And when a road has been thus originally constructed, the law requires the company to employ skillful and trustworthy agents to supervise, examine and test it, and to keep it in proper repair.][2] It was the duty of the defendant to lay its track and road-bed, and to construct bridges, culverts and embankments, in such manner, and to keep them in such condition, as to render the same safe for the public use, as well as for the employees of the road. This obligation, however, on the defendant, did not require it to provide against dangers which could not be reasonably foreseen; and it was not bound to secure the track against events which could not be anticipated by reasonable men, hav-

[1] [Reprinted by permission.]

[2] [From 1 Tex. Law J. 97.]

ing the ordinary sagacity required in the business of making railroads, such as an unprecedented flood, or other like unusual visitation or occurrence. This rule applies most strongly to all roads, when recently constructed, and before there has been sufficient time and experience to test the sufficiency and safety of the work done. [This rule applies most strongly to all roads when recently constructed in a new country, whose topography and climatic changes are not then well understood, and before there has been sufficient time and experience to test the strength and safety of the work done.] [2]

On determining the liability of a railroad for defective construction of work, the correct rule to be looked to is whether such work (no matter what the particular structure may be), is without fault as to plan, mode of construction and character of material, so that it was originally sufficient for all the purposes for which it was designed, so far as could then be reasonably determined, and that it employed skilful and trustworthy agents to supervise and examine and test it, and that such duty is performed with frequency, and with such tests as custom and experience have sanctioned and prescribed. When these circumstances all concur and exist, it may be rightly assumed that the road has exercised such care and skill as the law exacts of an employer in reference to his employee, and that no liability can attach to it for a defect in such structure or work by which an employee has sustained injury, unless there has been actual notice or knowledge that such defect existed, and which, unless promptly remedied, would be liable to cause serious or fatal consequences. Tested by this rule, the jury will consider the bridge and embankment in question, and determine from all the evidence before them, whether or not they were without fault as to plan, mode of construction and character of materials, and in these respects met the purpose for which they were designed at the time of their construction, so far as could then be reasonably ascertained and determined by the agents and officers of the road who built them. If the jury came to an affirmative conclusion on these questions, and believe that the defendant employed skilful, prudent and competent agents to inspect and keep said structures in repair, and that said agents or employees did exercise ordinary and usual care and diligence in inspecting and keeping said structures in repair, and that they remained safe for the running of trains over them until the embankments were washed away by an unusual and extraordinary rise of water [such as could not have been reasonably foreseen and provided against when the road was originally constructed],[2] then you are instructed that the defendant was not guilty of negligence, and you will find for the defendant. [Although the jury may believe, from the evidence, that there was negligence and want of care on the part of the defendant in the original construction of the embankment on which the bridge rested, yet, if they further believe from the evidence that A. E. Botto was engineer of the locomotive by the fall of which it is charged that Edward L. Gohen was killed, and that at and shortly before the time of the accident, the water in Cypress Bayou was unusually high, and that, on the evening previous to the accident, Botto was warned by said defendant, or its authority, that the water was high in the bottom, and that he should run slow over the same, and that he did not obey such warning, but did run over the same the next morning without caution, and with his usual and ordinary speed, or at a rate of speed which, under the circumstances, prevented him from having his engine under proper control, then you are instructed that such conduct on his part was negligence tending to produce the accident, and you will find for the defendant.] [2] But if the jury believe from the evidence that the bridge and embankments, or either of them, were not properly made at first, either as respects plan, mode of construction or materials used, by reason of the negligence and want of care on the part of the defendant; and such defect, if subsequently known, was not provided for and remedied by means adequate to the purpose, so far as human skill and sagacity could reasonably foresee, under the circumstances then existing; and in consequence of which negligence and want of care, or failure to apply proper means of prevention on the part of defendant, the said Edward L. Gohen was killed, then you will find for the plaintiff. If the jury should find from the evidence that the defendant was guilty of negligence in the death of said Edward L. Gohen, as alleged in plaintiff's petition, they may, in fixing the amount of damages, take into consideration the age of the plaintiff, the probable duration of her life, the amount of support she might reasonably have expected to receive from the deceased, if this can be determined from the evidence. You can not consider the property or the wealth of the plaintiff, nor her mental anguish or suffering, but you can only allow such damages as you may think proportioned to the injury resulting to plaintiff from the death of her son, as appears from the evidence before you. In determining whether they will find a verdict for the plaintiff or defendant, the jury are the exclusive judges of all the facts in evidence before them. They will take into consideration the manner and mode of testifying by the witnesses; their intelligence and acquaintance with the subject about which

[2] [From 1 Tex. Law J. 97.]

[2] [From 1 Tex. Law J. 97.]

they testify; their interest in the result of the suit, if any, and give to each and every portion of the evidence such weight as they may think it deserves.

GOLD (WOOD v.). See Case No. 17,947.

Case No. 5,508.

GOLD & SILVER ORE SEPARATING CO. v. UNITED STATES DISINTEGRATING ORE CO. et al.

[6 Blatchf. 307; 3 Fish. Pat. Cas. 489.] [1]

Circuit Court, S. D. New York. March 8, 1869.

PATENTS—INTERFERENCE—ACT OF 1836.

1. Two patents interfere, within the meaning of section 16 of the act of 1836 [5 Stat. 123], only when they claim, in whole or in part, the same invention. The interference intended is of the same character with that spoken of in sections 8 and 12 of the same act.

2. Letters patent granted to the assignee of Melchor B. Mason, January 3, 1865, for an "improved method of desulphurizing and oxydizing metallic ores," *held* to interfere with reissue No. 1988 of letters patent granted to the assignee of William E. Hagan, March 8, 1864, for an improvement in stoves; and, in so far as they interfere, the patent of Mason adjudged to be void.

This was a final hearing, on pleadings and proofs. On the 8th of March, 1864, letters patent [No. 41,897] were granted to John B. Gale, as assignee of William E. Hagan, for an "improvement in stoves." On the 6th of June, 1865, this patent was surrendered, and reissued, in two separate reissues, to the Hagan Manufacturing Company, and William E. Hagan, as assignees, by mesne assignments, of William E. Hagan. One of the two, No. 1,988, was for an "improvement in furnaces for treating ores by superheated steam." On the 3d of January, 1865, letters patent No. 45,803 were granted to C. V. De Forest, Amos Howes, and George E. Van Derburgh, as assignees of Melchor B. Mason, for an "improved method of desulphurizing and oxydizing metallic ores." At the time of the bringing of this suit, the legal title to the said reissue No. 1,988, was vested in the plaintiffs, and the legal title to the said patent No. 45,803, for the territories of Nevada, Idaho, and Montana, was vested in the defendant Mason, and, for the rest of the United States, in the other defendants.

The bill alleged, that Hagan was the original and first inventor of the improvements claimed in said reissue No. 1,988; that the invention claimed therein was identical with that covered by said patent No. 45,803; that it was necessary, for the protection of the rights of the plaintiffs, that this court should determine whether Hagan was such original and first inventor; and that the said patent No. 45,803 was invalid, and should be adjudged void. The bill prayed that the said patent No. 45,803 might be adjudged to be void. The answer set up, that the original patent to Gale was not for the same invention as that patented by said patent No. 45,803; that the inventions patented by said last-named patent were not known prior to the invention thereof by said Mason; that the said reissue No. 1,988 was procured for the purpose of fraudulently covering the inventions so made by Mason and patented, and was fraudulent and void; that it was not for the same invention as was the original patent, and was not limited to what was described or made known in the original, or by any filed model which belonged to the application for the original, but was broader than the invention described in the original, and fraudulently covered inventions not described in the original, or represented by any model deposited in the patent office on the application for the original, and fraudulently covered inventions of which Hagan had no knowledge at the time he applied for and obtained the original, and inventions of which Hagan was not the first inventor, and not the original inventor, and of which he knew nothing until he had learned them from the invention of Mason, and inventions which he did not intend to patent by the original, and was expanded beyond any invention described in the original, for the fraudulent purpose of covering improvements of which Mason was the first inventor; that the inventions covered by the said patent No. 45,803, and the inventions sought to be claimed by the said reissue No. 1,988, were made and used by Mason long before any invention thereof by Hagan, or any other person; and that the said patent No. 45,803 was valid. The answer prayed that the court would decree that the said reissue No. 1,988 was void, and that the said patent No. 45,803 was valid.

Charles M. Keller, for plaintiffs.
George Gifford, for defendants.

BLATCHFORD, District Judge (after stating the facts). The jurisdiction invoked by the plaintiffs in this case is that conferred by the 16th section of the act of July 4, 1836 (5 Stat. 123), which provides, that, "whenever there shall be two interfering patents, * * * any person interested in any such patent, either by assignment or otherwise, * * * may have remedy by bill in equity, and the court having cognizance thereof, on notice to adverse parties, and other due proceedings had, may adjudge and declare either the patents void in the whole or in part, or inoperative and invalid in any particular part or portion of the United States, according to the interest which the parties to such suit may possess in the patent, or

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus is from 3 Fish. Pat. Cas. 489, and the statement and opinion are from 6 Blatchf. 307.]

the inventions patented, * * * as the fact of priority of right or invention shall in any such case be made to appear."

The first question to be determined is, whether the reissue No. 1,988, and the patent No. 45,803, are, within this 16th section, "interfering patents." A considerable portion of the argument of the counsel for the defendants was devoted to maintaining the point, that the two patents do not, in whole or in part, claim the same thing, and that, therefore, they do interfere. But no such point is taken in the answer. The bill avers, substantially, that the inventions covered by the two patents are identical. The answer, while it avers that the invention covered by the original patent to Gale was not for the same invention as the patent No. 45,803, no where alleges that the reissue No. 1,988 and the patent No. 45,803 do not claim and cover the same inventions. On the contrary, the answer avers, in substance, that the two do cover and claim the same inventions. It states that the original patent to Gale was reissued for the purpose of covering the inventions patented by the patent No. 45,803; that the reissue No. 1,988 was expanded beyond any invention described in the original, for the purpose of covering improvements of which Mason was the inventor; and that the inventions covered by the patent No. 45,803, and those sought to be claimed by the reissue No. 1,988, were made by Mason long before any invention thereof by Hagan or any other person. If these averments in the answer do not constitute an admission that the two patents, which are claimed to interfere, cover and claim, in whole or in part, the same inventions, they have no meaning. Two patents interfere, within the meaning of the 16th section, only when they claim, in whole or in part, the same invention. The interference intended is of the same character with that spoken of in the 8th section of the same act, which refers to an interference between two pending applications for patents, and to one between a pending application for a patent and an unexpired patent previously granted, and with that mentioned in the 12th section of the same act, which refers to an interference between two applications where "the specifications of claim interfere with other."

Independently, however, of any admission in the answer, there can be no doubt that the two patents in question do interfere with each other, in the sense thus defined.

The claims of the reissue No. 1,988 are three in number: (1) The employment or application of superheated steam, in the manner as, or substantially as, described and set forth, for the purpose of refining or reducing metals, and for the removal of sulphur, arsenic, phosphorus, or other impurities, from ores or minerals; (2) the employment or application of superheated steam, as, or substantially as, described, for the purpose of calcining and disintegrating quartz rock containing silver, gold, or other metals; (3) the employment or application of superheated steam for the refining of iron, and for the converting of iron into semi or pure steel, in the manner substantially as described and set forth.

The patent No. 45,803 contains two claims: (1) The improved process of Mason for removing sulphur, arsenic, phosphorus, and antimony from auriferous, argentiferous, or other metallic ores, and for oxydizing the said ores, by treating them with hydrogen and carbonic acid gases, substantially in the manner set forth; (2) as a part of the improved process of Mason, the admission of steam into the chamber wherein the metallic ores are heated, desulphurized and oxydized, substantially in the manner and for the purpose set forth.

It is impossible not to say that there is an identity, in substance, between the first claim of the reissue No. 1,988, and the first claim of the patent No. 45,803. The former claims the employment of superheated steam, in the manner described, to refine or reduce metals, and to remove sulphur, arsenic, phosphorus, or other impurities—from ores or minerals. The latter claims the process of Mason for removing sulphur, arsenic, phosphorus, and antimony, from metallic ores, and for oxydizing such ores, by heating them with hydrogen and carbonic acid gases, as set forth.

The manner described in the reissue No. 1,988, in which superheated steam is employed to refine or reduce metals, and to remove impurities from ores or minerals, is to discharge superheated steam directly into the body of a fire, so that the highly rarified aqueous vapor shall impinge upon, and be brought in contact with, the incandescent fuel, without admixture of atmospheric air, while, at the same time, combustion is supported in part by the admission of air to the fire by way of draft. The specification states, that, when superheated steam, without admixture of atmospheric air, is caused to impinge directly upon ignited carbon, it undergoes decomposition into hydrogen and oxygen; that, if a reverberating furnace is properly arranged in connection with the fire chamber of such furnace, and mineral ores are placed on the bed of the furnace, and superheated steam is thus introduced into the fire and decomposed, and the liberated hydrogen is thrown in amongst such ores, it will, by its affinity for sulphur, phosphorus, and other volatile substances, in the ores, carry them off in a gaseous form, and, by the combined action of the heat and the hydrogen, the ores will be thoroughly disintegrated and purified, so that they can be crushed with facility. Adequate mechanical means for conducting these operations are described in the specification.

The process of Mason, described in the patent No. 45,803, for removing impurities from metallic ores, and for oxydizing such ores by treating them with hydrogen and carbonic acid gases, is to arrange a furnace with a

chamber for the ores, in connection with a chamber to generate the gases. This last chamber is a chamber of combustion, and the specification states, that superheated steam is to be allowed to escape into the fire in fine jets; that the steam will be decomposed, and the hydrogen in it be liberated, while carbonic acid gas will also be generated, from the fact that a current of atmospheric air is admitted to support combustion; and that the hydrogen and carbonic acid gases will pass into the reducing chamber, and permeate and heat the ores, carrying off the impurities, and desulphurizing and oxydizing the ores. Proper means are described for effecting these results.

The processes in the two specifications are identical, and the first claim in each patent embraces, in effect, a claim to the process of decomposing superheated steam, by so introducing it into the fire that it shall be decomposed, while combustion is supported in part by a current of atmospheric air, and of then throwing the resulting gases which are generated, upon ores, metals, and minerals, to produce such effect as such gases will produce in the way of refining, purifying, and reducing, and working such other chemical changes as must inevitably follow from the contact of such heated gases with the articles so subjected to their action. The first claim of the patent No. 45,803 must, therefore, be held to interfere with the first claim of the reissue No. 1,988.

I do not perceive that the second claim of the patent No. 45,803 interferes with any claim in the reissue No. 1,988. That claim embraces merely the admission of steam into the reducing chamber where the ores are heated, desulphurized, and oxydized, so as to prevent excessive heat, and control and regulate the temperature, and avoid the fusion of the sulphurets which are disengaged from the ores in the process.

The next subject of inquiry is, whether Hagan or Mason was the first inventor of the process which is claimed by each of the two patents. Hagan's evidence rests very much upon two caveats filed by him in the patent office, one on the 3d of February, 1862, and the other on the 28th of February, 1862. The first caveat, which was accompanied by drawings, describes a fire-box; the admission of air thereto; and the introduction of jets of highly heated steam directly into the ignited fuel. It also refers to the fact, that hydrogen and oxide of carbon, and other combustible gases, are evolved in the process. The second caveat states that the steam, admitted in proper quantity to contact with incandescent carbon, will be decomposed; that the intent of the invention is the production of hydrogen and its combustion in a nascent state; and that the objects sought to be attained are economy in heating and warming, the prevention and combustion of smoke, and the deoxydation and desulphurization of mineral ores. Hagan satisfactorily carries back to December, 1858, his invention of applying jets of superheated steam directly to incandescent fuel, unmixed with atmospheric air, but in combination with the application of a draft of atmospheric air to the fuel. He also satisfactorily carries back to January, 1862, his application of the gases evolved by such plan of combustion to metallic ores, for the purpose of desulphurizing them, resulting in their complete desulphurization and disintegration. The apparatus and the process thus used by Hagan were the same as those described in the reissue No. 1,988. That Hagan intended to claim, in the original patent, the specification of which was signed by him, the invention covered by the first claim in the reissue No. 1,988, can admit of no doubt; and that that reissue, so far as the first claim in it is concerned, is for the same invention intended by Hagan to have been patented by the original patent, and was a proper and valid reissue, is equally clear. It is useless to go over the proofs on that subject, as they are uncontradicted, and all tend to the conclusions stated.

The evidence on the part of the defendants, if it tends to show that Mason did anything, prior to his being brought into communication with Hagan, beyond attempting to desulphurize and disintegrate ores by throwing superheated steam into the ore chamber without first decomposing it in the fire chamber, does not go to prove any thing but abortive, inconclusive, and unpractical experiments on the part of Mason, down to a period as late as August, 1864, in decomposing superheated steam, and applying the gases generated in the process to the purification and reduction of ores. The weight of the evidence is very preponderating that Mason borrowed directly from Hagan all that is embodied in the first claim of the patent No. 45,803.

The allegation in the answer, that Hagan was not the first inventor of what is claimed in the reissue No. 1,988, is not sustained by the evidence, so far as respects the particulars in which the reissue No. 1,988 and the patent No. 45,803 are held to interfere, either as regards a prior invention thereof by Mason or otherwise.

The prayer of the answer, that the reissue No. 1,988 may be decreed to be void, and that the patent No. 45,803 may be decreed to be valid, must be denied; and there must be a decree adjudging the patent No. 45,803 to be void, so far as the improved process of the defendant Mason, therein described, for removing sulphur, arsenic, phosphorus, and antimony, from auriferous, argentiferous, and other metallic ores, and for oxydizing the said ores, by treating them with hydrogen and carbonic acid gases, substantially in the manner set forth in said patent No. 45,803, employs or applies superheated steam in the manner as, or substantially as, described in the said reissue No. 1,988.

The defendants must be charged with the costs of the suit.

GOLD & STOCK TEL. CO. (COLGATE v.). See Cases Nos. 2,991 and 2,992.

GOLDBACK (UNITED STATES v.). See Case No. 15,222.

GOLDBERG (UNITED STATES v.). See Case No. 15,223.

GOLDEN (FULTON v.). See Case No. 5,155.

Case No. 5,509.

GOLDEN v. PRINCE.

[3 Wash. C. C. 313;[1] 5 Hall, Law J. 502]

Circuit Court, D. Pennsylvania. April Term, 1814.

BANKRUPTCY—DISCHARGE UNDER STATE LAW—STATE LAWS IN FEDERAL COURTS—RULES OF PRACTICE—LAW OF PLACE WHERE CONTRACT IS MADE OR DISCHARGED—COMITY OF NATIONS—CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS.

1. Action on a bill of exchange, drawn 10th of May, 1811, by the plaintiff, at St. Barts, on himself in Philadelphia, and by him accepted, and afterwards regularly protested for non-payment. The defendant claimed to be discharged from this debt, by a law of the state of Pennsylvania, passed 13th of March, 1812 [Laws Pa. 1812, p. 114], under which he had received a certificate, having conformed to the provisions of the law, and which law declares, that the certificate shall discharge such insolvent from all debts and demands due from him, or for which he was liable at the date of such certificate; and also, from all contracts originating before the said date, though payable afterwards.

[Cited in Woodhull v. Wagner, Case No. 17,975.]

2. The laws of the several states, constitutionally passed since 1789, are binding on the courts of the United States, held within the state in which the same prevail.

[Cited in Gill v. Jacobs, Case No. 5,426; Raymond v. Danbury & N. R. Co., Id. 11,593.]

[Cited in Re Stephens, 4 Gray, 560; Dunne v. People, 94 Ill. 129.]

3. Aliter, as to rules of practice. Every court possesses the power of making its own rules of practice, unless forbidden by law; and the 17th section of the judiciary law [1 Stat. 83], vests, expressly, this power in the courts of the United States.

[Cited in The Unadilla, Case No. 14,332.]

[Cited in Edwards v. Pope, 3 Scam. 470; The Aurora Borealis v. Dobbie, 17 Ohio, 128; Barry v. Iseman, 14 Rich. Law, 129; Sheppard v. Steele, 43 N. Y. 52.]

4. By the comity of nations, the laws of a foreign country where a contract is made or discharged, is considered by the tribunals of other nations, as the law of that contract, and they will decide according to such laws.

5. The bill of exchange upon which this suit was brought, being payable in Philadelphia, had a view to the laws of Pennsylvania.

6. A law which authorizes the discharge of a contract, by the payment of a smaller sum, or at a different time, or in a different manner than the parties have agreed, impairs its obligations, by substituting for the contract of the parties a legislative contract, to which they never assented. Such is the law of Pennsylvania of 13th of March, 1812, and as such, it is unconstitutional and void.

[Cited in Blanchard v. Russell, 13 Mass. 14; State v. Amery, 12 R. I. 66.]

7. It seems to be a safe rule, that where an unqualified power is granted to the general government to do a particular act, the exercise of which, by the state governments, would be inconsistent with the express grant, the whole of the power is granted, and consequently, vests, exclusively, in the general government. The state governments cannot, in that case, exercise it, without showing an express grant; or that it is fairly deducible from the circumstance in which or where the claim is founded.

[Cited in People v. Wilson, 15 Ill. 392; Lafayette, M. & B. R. Co. v. Geiger, 34 Ind. 198.]

8. The exercise of the power by the state governments, to pass bankrupt and naturalization laws, is incompatible with the grant of a power to congress, to pass uniform laws upon the same subjects.

[Cited in Passenger Cases, 7 How. (48 U. S.) 556; U. S. v. Rhodes, Case No. 16,151; Citizens' Savings & Loan Ass'n v. Topeka, 20 Wall. (87 U. S.) 669.]

9. The omission of congress to pass a bankrupt law, does not authorize the several states to pass such laws; but the omission of that body to pass such a law, is, in effect, a declaration that there ought not to be such a law.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867.]

10. The law of Pennsylvania of 13th of March, 1812, is unconstitutional, because it impairs the obligation of a contract; and because congress have exclusively the power to pass a bankrupt law.

[Cited in Ogden v. Saunders, 12 Wheat. (25 U. S.) 295; Ashley v. Board of Supervisors, 8 C. C. A. 455, 60 Fed. 61.]

[Cited in Sheppard v. Steele, 43 N. Y. 57.]

In equity.

WASHINGTON, Circuit Justice. This is an action brought upon a bill of exchange drawn by the defendant, on the 10th of May, 1811, at St. Barts, for value received there, in favour of the plaintiff, on himself, at Philadelphia, 90 days after sight, which was regularly noted for non-acceptance, and protested for non-payment. This action was brought on the 4th of May, 1812; to which the defendant pleaded in bar, his discharge, under a law of this state, passed on the 13th of March, 1812, for the relief of insolvent debtors; obtained provisionally on the 23d of April, and finally, on the 29th of May, 1812. The case agreed, states, that the defendant did not give to the plaintiff, or to any agent of his, notice of the defendant's petition, which was presented on the 20th of April, 1812, although the plaintiff's attorney was informed of the application a few days after it was made; nor has the plaintiff proved his debt under the said proceedings. The act referred to in the plea declares, that a debtor who has conformed to the several regulations of the law, for the purpose of vesting all his property in the assignees, for the benefit of his creditors, and who has received his certificate of discharge from the commissioners, shall be set at large by the

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

sheriff, if he be imprisoned; and that such certificate shall be conclusive evidence of the fact, that such petitioner has been discharged by virtue of that act; and shall be construed to discharge such insolvent from all debts and demands due from him, or for which he was liable, at the date of such certificate, or contract, or originating before that time, though payable afterwards. It is objected to this plea—1. That the act under which the discharge is claimed, having been passed since the year 1789, affords no binding rule for the government of this court:—2. That the law is unconstitutional and void in two respects; as being a bankrupt law—and as being a law impairing the obligation of contracts.

The ground of the 1st objection is, that the 34th section of the judicial act of congress, passed on the 24th September, 1789 [1 Stat. 92], which declares, "that the laws of the several states, except where the constitution, treaties, or statutes, of the United States, shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply," extends only to such laws of the several states, as were in force at the time this law was passed. Admitting this position to be correct, it would not follow, that this law would not, on that account, have a binding force, or furnish a rule of decision in this case. The laws even of foreign countries where a contract is made, are by the comity of nations regarded every where as a rule of decision, in relation to that contract; and it would be strange if the laws of one state, in which a contract was made, should be disregarded in any other state of the Union as a rule of decision. In like manner, the laws of a country, which operate to discharge a contract made in the same country, are regarded and enforced by foreign courts. This doctrine was fully examined in this court, in the case of Camfranque v. Brunell [Case No. 2,342], upon a question of bail. Independent, therefore, of the act of congress, if a contract made in this state, or with a view to its laws, be discharged under a law of this state, against which no constitutional objection can be made; such laws would be regarded as rules of decision by this court, as well that which discharged the obligation, as that under which it was created.

It was denied by the counsel for the plaintiff, that the contract in this case had a view in its execution to the laws of Pennsylvania; but nothing can be more clear, than that the bill in question amounted to a promise, made by the defendant, to pay the sum mentioned in it, in the city of Philadelphia, ninety days after sight. Payment could have been demanded no where but in Philadelphia, in order to enable the plaintiff to recover. The bill in this case, is precisely like that in the case of Robinson v. Bland, 2 Burrows, 1077; and is consequently within the principles laid down in that case. These principles would be sufficient for the decision of this part of the case, without resorting to the act of congress, which has been mentioned; but, as other cases may occur, where the general rule admitted by the comity of nations, may not entirely apply; and, as there appears to us to be no difficulty in giving a construction to the 34th section of this act; it may not be improper to take this opportunity of doing it.

It is to be remarked, in the first place, that the words of this section are general, so as to include, as well the laws of the respective states, which might thereafter be passed, as those which were then in existence. The reason for construing this section prospectively, as well as in reference to the time when this law was enacted, is equally strong. The powers bestowed by the constitution upon the government of the United States, were limited in their extent, and were not intended, nor can they be construed to interfere with other powers, before vested in the state governments; which were, of course, reserved to those governments impliedly, as well as by an express provision of the constitution. The state governments, therefore, retained the right to make such laws as they might think proper, within the ordinary functions of legislation, if not inconsistent with the powers vested exclusively in the government of the United States, and not forbidden by some article of the constitution of the United States, or of the state; and such laws were obligatory upon all the citizens of that state, as well as others who might claim rights or redress for injuries, under those laws, or in the courts of that state. The establishment of federal courts, and the jurisdiction granted to them in certain specified cases, could not, consistently with the spirit and provisions of the constitution, impair any of the obligations thus imposed by the laws of the state; by setting up in those courts a rule of decision, at variance with that which was binding upon the citizens, if the suit had been instituted in the state court. Thus, the laws of a state affecting contracts, regulating the disposition and transmission of property, real or personal, and a variety of others, which, in themselves, are free from all constitutional objections; are equally valid and obligatory within the state, since the adoption of the constitution of the United States, as they were before. They provide rules of civil conduct for every individual who is subject to their power, in all their relations to society; and consequently cannot, in cases where they apply, cease to be rules by which the conduct of those individuals is to be decided, when brought under judicial examination, whether the decision is to be made in a federal or state court. The injustice, as well as the absurdity of the former deciding by one rule, and

the latter by another, would be too monstrous to find a place in any system of government. Thus, for example, if the laws of a state, which regulated the distribution or transmission of property in the year 1789, should be totally varied by a subsequent law, the latter only would be the rule by which property could be distributed or transmitted from the time the law came into operation; and it can never be seriously contended, that a person interested in this property, and from the adventitious circumstance of his residence in another state, entitled to make his claim, either in the federal or state court, should recover more by resorting to the former, than he would have recovered had he applied to the latter court. With respect to rules of practice for transacting the business of the courts, a different principle prevails. These rules are the laws of the court, and are, in relation to the federal courts, laws arising under the constitution of the United States, and consequently not subject to state regulations. It is in reference to this principle, that the 17th section of the same judicial act authorizes the courts of the United States to make all necessary rules for the orderly conducting business in the said courts, provided the same are not repugnant to the laws of the United States; and under this power, the different circuit courts, at their first sessions, adopted the state practice as it then existed, which continues to this day, we believe, in all the states, except so far as the courts have thought proper, from time to time, to alter and amend it. Indeed, the counsel for the plaintiff, in this case, seemed to admit the distinction between general laws affecting rights, and those which relate to the practice of the courts; but still he contended, that the act of assembly in question, afforded no rule of decision for this court, and could not be pleaded in bar of the action, because it was enacted since the year 1789. Now, it is most clear, that a law which discharges a contract, is no more a law of practice, than one, under the sanction of which, the contract was made. If it would bar the action in a state court, it would equally do so in a federal court; although the particular mode of setting up the bar, might depend upon the practice and rules imposed by the state laws upon the former courts, and those which the latter may have thought proper to adopt.

The next question is, whether the law relied upon by the defendant, to bar the present action, is repugnant to the constitution of the United States; and, on that account, is not to be regarded by the court, in this case? We shall reverse the order pursued by the counsel, and consider, in the first place, whether this law is repugnant to the constitution, upon the ground of its impairing the obligation of contracts? It may be proper to premise, that a law may be unconstitutional, and of course void, in relation to particular cases; and yet valid to all intents and purposes, in its application to other cases within the scope of its provisions, but varying from the other in particular circumstances. Thus, a law prospective in its operation, under which a contract afterwards made, may be avoided in a way different from that provided by the parties, would be clearly constitutional; because the stipulations of the parties, which are inconsistent with such a law, never had a legal existence, and of course could not be impaired by the law. But if the law act retrospectively, as to other contracts, so as to impair their obligation, the law is invalid; or, in milder terms, it affords no rule of decision in these latter cases.

The question then is, whether a law of a state, which declares that a debtor, by delivering up his estate for the benefit of his creditors, shall be for ever discharged from the payment of his debts, due or contracted before the passage of the law;—whether the creditor do any act, or not, in aid of the law; can be set up to bar the right of such creditor to recover his debt, either in a federal or state court? We feel no difficulty in saying that it cannot; because the law is, in its nature and operation, one which, in the case supposed, impairs the obligation of a contract. What is the obligation of a contract? It is to do, or not to do, a certain thing; and this may be either absolutely, or under some condition; immediately, or at some future time, or times; and at some specified place, or generally. A law, therefore, which authorizes the discharge of a contract, by a smaller sum, or at a different time, or in a different manner than the parties have stipulated, impairs its obligation, by substituting for the contract of the parties. one which they never entered into; and to the performance of which, they of course had never consented. The old contract is completely annulled, and a legislative contract imposed upon the parties in lieu of it. That a law which declares a subsisting contract to be void, impairs its obligation, will, we presume, be admitted by all men who can understand the force of the plainest terms; or, if not so, then we should be curious to know by what means the obligation of a contract can be impaired? And if this be the effect of such a law; in what respect does it differ from another, which declares, that a debt consisting of a specified sum, and due at an appointed period of time, shall be discharged at a more distant, or indeed at a different time, or with a smaller sum? The degree of injury to the creditor, may not be so great in the one case as in the other; but the principle is precisely the same. That the framers of the constitution were extremely jealous of the exercise of such a power by the state governments, is apparent from other parts of the section, in which the provision we are examining is found. It would have been a vain thing, to prohibit the state

legislatures from passing laws, by which a contract might be annulled, or discharged, by payment of a less sum than is stipulated, if they could emit bills of credit, and make them, or any thing but gold and silver coin, a tender in payment of debts; and, therefore, they are expressly forbid to pass any such laws. And yet, a law, which should make a depreciated paper currency a tender in payment of debts, might be less injurious to the creditor, than one which discharges the debt altogether, upon the payment of perhaps a shilling in the pound, or any other sum less than that stipulated to be paid.

The opinion given upon this last point decides the cause in favour of the plaintiff; and we might well spare ourselves the trouble of examining the other objection made by the plaintiff's counsel to the validity of this law. But, when we observe, from the case under consideration, that a power to pass bankrupt laws is deemed by one state, at least, to be rightfully vested in the state legislature; (for otherwise we must suppose it would not have been exercised;) and when we recollect, that the constitution of the United States contains a grant of other powers to the general government, which may equally with that immediately under consideration be exercised by the state legislatures, if such a right exist in either case; we hold it to be our duty to embrace the first opportunity which presents itself, to express the unhesitating opinion which we entertain upon these great questions, and thus to pave the way for as early a decision of them, as possible, by the supreme national court. No citizen feels a higher respect than we do for the state governments, or would be more cautious in questioning the validity of any laws which their legislatures might think proper to enact. But we should very unfaithfully discharge our duty, were we to remain silent witnesses of designed or unintentional usurpations, by these governments, of powers properly belonging to the general government; when a case comes judicially before us, which demands an expression of our opinion on these subjects. The sooner the limits which separate the two governments are marked by those authorities, which can alone define and establish them, the less danger there will be of serious, if not fatal collisions hereafter, arising respecting essential powers, to which a prescriptive right may be asserted by the one, in opposition to the chartered rights of the other. It is from these considerations that we venture respectfully, yet firmly, to examine the question, whether the power given to congress to pass uniform laws of bankruptcy, be exclusive of such power in the state governments; and whether the latter may exercise it whenever the former has not thought proper to do so.

It would seem, at the first view of this question, that, if an unqualified power be granted to a government to do a particular act, the whole of that power is disposed of, and not a part of it; consequently, that no power over the same subject remains with those who made the grant, either to exercise it themselves, or to part with it to any other government. But, if the application of this principle to the complicated systems of government which prevail in the United States, should be liable to doubt, it will, we presume, be admitted with this qualification; that whenever such a power is given to the general government, the exercise of which by the state governments would be inconsistent with the express grant, the whole of the power is granted, and, consequently, vests exclusively in the general government. In such a case, the people resume the power, which before resided in the state governments as to this subject, without which they could not grant the whole to the general government; and, if resumed, it would seem to follow, that the state governments can in no event exercise the same power, without showing either an express grant of it, or that it is fairly to be deduced from the circumstance upon which the claim is founded. That the exercise of the power to pass bankrupt and naturalization laws by the state governments, is incompatible with the grant of a power to congress to pass uniform laws on the same subjects, is obvious, from the consideration that the former would be dissimilar and frequently contradictory; whereas the systems are directed to be uniform, which can only be rendered so by the exclusive power in one body to form them.

It was admitted, in the argument of this cause, that whenever congress shall think proper to exercise the power granted to that body, to pass uniform laws of bankruptcy, the state governments cannot legislate upon the same subject. But it was contended, that, if congress shall decline to exercise the power, the right to pass such laws results to the state governments. This conclusion appears to us to beg the whole question in controversy. It resigns all claim to a concurrent right in the state governments, and sets up one which is to arise on a condition, not to be found in the constitution, but which is gratuitously interpolated into it. If, then, this claim of the state legislatures is not founded upon any express grant made to them in the constitution, is it to be deduced from the circumstance of a nonuser of the power by congress? This doctrine appears to us to be as extravagant as it is novel. It has no analogy, that we know of, in legal or political science. It must, in some way or other, be likened to the case of forfeiture, which could not, we conceive, answer the purpose; because, if the power of congress is, upon principles purely legal, divested by an omission to exercise a valid right, it would not of necessity result to the state governments, but would more naturally revert to the people. If the forfeiture be political, then this absurdity would follow, that

congress would possess a right to do, by omission, what it must be admitted they could not effect by any direct and positive act:—that is, to delegate to the state governments the power of legislation over a particular subject, of which the people had thought proper not only to deprive the state governments, but to vest exclusively in the national legislature. The inconvenience of dissimilar and discordant rules upon the subjects of bankruptcy and of naturalization, no doubt, suggested to the framers of the constitution, the remedy which that body adopted, of vesting the right to legislate in those cases in the general government; that some uniform system might prevail throughout the United States, if congress should think that any regulations upon those subjects ought at all to be made. Now, it would not only violate the express grant of these powers to congress, but the policy which led the convention to withdraw them from the state governments, if they should be construed to result by implication to the latter, on account of the omission of the former to exercise them.

But let us examine into the reasonableness of this pretension of the state legislatures, and see if the policy which induced the grant of these powers to congress be not effectually answered by the omission of congress to legislate on those subjects as much as if they had done so. Suppose the subject of a bankrupt law to be brought before congress, and the questions to be whether such a system be a wise one under any circumstances, or be at all suitable to the present state of the country; and that body should, in its wisdom, decide negatively on those questions, it would seem to follow, that no bankrupt law ought to exist in the United States, for the reasons which induced the rejection of any plan to establish such a system. In this case, what is congress to do, in order to give effect to this policy? The answer is plain,—reject the bill and do nothing. Then the law of the land would be, that no man is compelled, against his will, to deliver up his property to be distributed amongst his creditors; and, consequently, that he is at all times liable to the payment of his debts, unless discharged by some other legal means. Now, will it be said that the state legislatures, availing themselves of the refusal of congress to act upon this subject, can be at liberty to thwart the very policy which induced it; and pass laws upon the same subject, not only changing the state of the law as congress had constitutionally left it, but impugning the policy which led the convention to deprive the state legislatures of the power altogether, by imposing upon the country at large a variety of systems, instead of one uniform system? To argue, that to prevent such an absurd consequence, congress must legislate upon the subject, is to assert, that in the exercise of a power intended to promote the general good, congress must do some act, which, in its wisdom, it believes will produce a public evil—do wrong that good may come of it—a doctrine, as pernicious in politics as it is wicked in morals. How would state laws upon this subject, and in the case supposed, differ, otherwise than in degree, from similar laws, passed inconsistent with such as congress might think proper to enact upon the same subject? In the one case, the policy and the law of congress might be opposed in part only by the state law. But in the other, the whole policy and law are defeated by inconsistent rules, upon a subject where congress supposed that it was unwise to establish even a uniform rule.[2]

The subject of naturalization, is strongly illustrative of the principles which this course of reasoning is intended to prove. The power to pass laws upon this subject, is found in the same section, and is expressed in words of the same import, with that respecting bankruptcies. Now, suppose congress, deliberating whether the naturalization of foreigners ought, upon any, or upon what terms, to be allowed;—that the deliberations of that body should result in the conviction, that the natural population of the country is most conducive to the public interest; and therefore, that no encouragement ought to be given to the migration of foreigners to the United States.—In what manner is this policy to be rendered effectual? Congress cannot, for the purpose of preventing the state legislatures from interfering in this business, pass a negative law, declaring that foreigners shall not be naturalized; because, if the constitution forbids the exercise of such a power, by the state legislatures, such a law would be worse than unnecessary; and if it does not forbid it, then it would be void. Nothing, then, would remain for that body, but, as in the former case, to do nothing. This, then, according to the argument on the part of the defendant, would be the signal to the state legislatures to commence their operations. Virginia, for example, is of opinion, that for the purpose of settling her extensive waste and uncultivated lands, the migration of foreigners to that state, ought to be encouraged by every means; and in order to favour this policy, she declares, that the residence of a year or a month, without any other restriction whatever, shall be sufficient to entitle all foreigners to the right of naturalization in that state. They are accordingly made citizens; and after the constitutional period, are chosen to represent the people of that state in the national legislature, and emigrating to the other states, with the constitution in their hands, they claim all the privileges of natural born citizens of those states.

The other states might well complain, that, although the people had declared their willingness to admit foreigners to the privileges

[2] The bankrupt law [of 1800 (2 Stat. 19)], passed by congress, and afterwards repealed, is a strong exemplification of these principles.

of natural born citizens, provided the regulations under which this admission is granted, were formed by the united wisdom of the representatives of all the states; yet they had never granted, or intended to grant, to one state, the right of legislation over the other states. They might contend, that the introduction of foreigners to the electoral franchise, and still more into the national legislature; was an experiment dangerous to the tranquility and the welfare of the nation;—that they might be tainted with principles unfriendly to our republican institutions, and with foreign attachments wholly incompatible with their duties as citizens and legislators,—that if admitted at all, they should not only abjure all allegiance to any foreign government, and, if of the order of nobility, should renounce all claim to the same; but that they ought to be men of good moral character, and attached to the constitution of the United States; and finally, that the grant of this privilege should be preceded by a probationary residence in the United States, for a length of time sufficient to afford the necessary proof of the reality of these qualifications in the applicant. To these complaints, what could reason oppose? Nothing;—she must be silent. And is this, then, a case where powers not expressly given by the constitution, are to be assumed by construction and implication? It certainly will not be contended, that the powers to pass bankrupt and naturalization laws, are, by the amendments to the constitution, reserved to the states in cases where they are not exercised by congress; because, this reservation is made only of such powers as are not granted to the general government; if granted, it would seem to follow, that they are not reserved to the states, or to the people. But it is not, in our opinion, correct to say, that congress, by refusing to pass laws on these subjects, has not exercised the powers confided to that body by the constitution, in relation thereto. The refusal amounts to a declaration of the public will, that such laws are unwise, and ought not to exist. And yet, upon the argument in favour of state pretensions, this monstrous doctrine must be maintained, that one or more states may pass laws, not only in opposition to the policy and the legislative will of the general government, but to the laws of the other states, enacted upon the same subjects, which, to a certain extent, they partially repeal. A doctrine leading to such absurd and dangerous consequences, ought to have something more solid to stand upon, than a constructive grant of power.

We are, upon the whole, of opinion, that the law under which the certificate is pleaded, in bar of the action, is altogether unconstitutional, for the reason last mentioned; and is so in reference to this debt, for the first reason. We desire that it may be disunctly understood, that we do not mean to give any opinion on the subject of insolvent laws, acts of limitation, and the like, because they are not now before us; and sufficient to the day is the evil thereof. We have introduced the subject of laws of naturalization, because we find that subject to be, in all respects, precisely like that which is particularly involved in this cause. Judgment for plaintiff.

GOLDEN (RICHARDSON v.). See Case No. 11,782.

GOLDEN GATE, The (ASHBROOK v.). See Case No. 574.

GOLDEN GATE, The (HILL v.). See Cases Nos. 6,491 and 6,492.

GOLDEN GATE, The (McGUIRE v.). See Case No. 8,815.

GOLDEN ROSE, The (BOREAL v.). See Case No. 1,658.

GOLDEN STATE, The (RUDDY v.). See Case No. 12,111.

Case No. 5,510.

In re GOLDER et al.

[2 Hask. 28.] [1]

District Court, D. Maine. Feb., 1876.

BANKRUPTCY—PROOF OF DEBT.

1. Recitals in an agreement between two persons, that the note of one was received by the other in payment of a sum that the former was to furnish the latter to be used in his business, cannot be contradicted by parole.

2. A firm note given by one partner when the firm is insolvent, without the assent of his copartners, is a fraud upon the firm creditors and cannot be proved in bankruptcy against the firm assets.

3. A firm note given by one partner to pay a firm debt after the firm had been dissolved and without authority from the retiring partners does not bind them, and cannot be proved in bankruptcy against the firm assets; but when received under a misapprehension of facts, supposing that such partner had acquired a valid title to the firm assets, when he had not done so, the note may be surrendered, and the claim for which it was received be proved against the firm assets.

In bankruptcy. [In the matter of Dwight C. Golder & Co.] Petition by the assignee to expurge and disallow certain debts proved before Mr. Register Fessenden.

Edward M. Rand, for creditor.
Chas. P. Mattocks, for assignee.

FOX, District Judge. This is a petition by the assignee of this firm for a disallowance of two claims proved against the joint estate by J. W. Stevenson, one founded on a note for $1,500, bearing date October 30, 1873, payable in ten months to the creditor, and signed in the firm name by Golder. This note although made and executed at its date, was not delivered until some months afterwards, when the firm was deeply insolvent. In his proof of debt, Stevenson makes affi-

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

davit that "the consideration of this note was money loaned by him to the firm at its date, at their request;" but this is now conceded to have been untrue.

In August, 1873, Golder and Stevenson entered into a written agreement, which recites that "Stevenson contributed $1,500 to the capital then employed by Golder in his business," for the use of which sum and his personal services Golder agreed to allow him a compensation of $1,000 per year. It was expressly stipulated that this amount was not to be at the risk of the business; and it is quite clear that by this agreement, Stevenson did not become a partner with Golder, but only a servant, having loaned his employer a sum of money to be used in the business, and for which and his personal services, he was to receive a fixed, definite compensation, in no way dependent upon the profits.

The agreement recites that "$850 was paid in cash, and $650 by Stevenson's note to Golder on three months." It is claimed this note was not intended as a payment of any part of the $1,500, but was only a loan for the time being of Stevenson's credit to Golder. This view is directly in conflict with the express language of the written agreement of the parties; and evidence in conflict with its provisions on this point cannot be received. The cash book shows this note was discounted, and that on September 2d Golder realized therefrom $637.91.

On the 24th of September, 1873, D. C. Golder and John T. Rogers entered into a written agreement, by which Rogers was to advance Golder $3,000 to the capital, "and also devote his own time to the business for a compensation of $1,100 per year. The business was to be carried on under the style of D. C. Golder & Co." This arrangement continued until January 29, 1874, when it was terminated by mutual agreement.

In the case of Mattocks v. Rogers [Case No. 9,300], this court had occasion to determine the relation of Rogers to the business transacted under the style of D. C. Golder & Co.; and it was decided that while Rogers and Golder were not partners inter sese, Rogers had rendered himself accountable to all the creditors of D. C. Golder & Co., and that the property acquired in the name of D. C. Golder & Co. was to be held and applied to the discharge of their liabilities; and this decision was affirmed on appeal to the circuit court.

Rogers advanced to D. C. Golder & Co. $2,000 on the 25th of September, and the balance of the $3,000 shortly afterwards. On the 25th of September, Stevenson let Golder & Co. have $650, for which he received a note from Golder, signed "D. C. Golder & Co.," payable in sixty days. This note fell due before his note for that amount given to D. C. Golder on September 2d, and was left by him at the bank for collection, but was subsequently withdrawn at Golder's request.

On the 4th of December, Stevenson received from Golder & Co. $660, the entry of which in Stevenson's hand writing in the cash book is, "Paid note J. W. Stevenson, $660." The controversy here is, whether this amount was received in payment of the note for $650, given by Stevenson to Golder & Co. September 2d, or of the note of $650, given by Golder & Co. to Stevenson September 25th on 60 days, and with which Stevenson then paid his own note. The assignee claims the latter note was thus paid; while Stevenson contends that this amount was directly applied by Golder & Co. in payment of his note for $650 of September 2d, and of which Golder had received the benefit, and therefore that the $650 advanced to Golder & Co. on September 25th has never been repaid.

I am satisfied that Stevenson was repaid with interest on December 4th the $650 he had loaned Golder & Co.; that with this he paid his own note which Golder had discounted at the First National Bank, and which came due that day, and that Golder still remained the debtor of Stevenson for the amount of $1,500 under their contract of August 28th.

The $1,500 note here offered in proof against the firm estate, although filled out and signed October 30th, as is herein before stated, was not completed and delivered until the latter part of January. It is agreed that the facts as established to my satisfaction in Mattocks v. Rogers, supra, shall be considered as in evidence in the present case. In that case, the court was fully satisfied that the firm of D. C. Golder & Co. was deeply insolvent at the delivery of this note. The only consideration for this note being the private debt of an individual member of the firm, and the firm being then insolvent and knowing such to be its condition, it must be deemed a fraud upon the copartnership creditors, and cannot be received as against them to share in the distribution of the copartnership estate.

It is claimed, however, that in October, Rogers was informed by Golder that he had made this note for Stevenson's benefit, and that Rogers assented to its being so done. Rogers is shown to have been wholly without business experience or capacity, and to have been greatly imposed upon by Golder throughout the whole of their business. Rogers in his deposition does answer, "I never saw this note, but knew that it was given. It was done with my assent. We raised money on the note. I don't know whether Golder & Co. ever assumed said note. I did not see the books and don't know positively what debt the note represents. I thought it was for money raised on the note. I was informed by Golder that Stevenson would put in $1,500. This was about the middle of October, 1873. Stevenson did contribute money to the firm, and I think nearly $1,500. So far as I know the money was all given by Stevenson at one time, whether in cash or notes I don't know. I was a member of the firm at the time. I never had any conversation with either Gold-

er or Stevenson about the firm's assuming payment of the note."

These extracts from Rogers' deposition establish most conclusively his entire ignorance of the origin and consideration of the note; that he always supposed the firm received the money from it, and never knew that it was given in payment of an old debt of Golder individually. His assent, therefore, if any was ever given by him, was clearly under an entire misapprehension of the consideration, by having supposed the firm had been benefitted thereby for the full amount of the note. Stevenson says in his examination, "Rogers never became responsible to me for this note unless he did so by becoming a partner." It is quite clear that by reason of that relation simply, Rogers never was answerable upon this demand.

It further appears, that after Rogers became connected with the concern, Golder had some cards printed in the firm name of Dwight C. Golder & Co., with the names of himself, Rogers and Stevenson, in the lower left corner. The evidence is clear that but few of them were ever distributed; and although inquiry has been made upon the subject by the assignee, he has not been able to discover that any of the firm creditors ever gave credit to Stevenson as a member of the firm. Under all the circumstances disclosed, I do not find that Stevenson ever consented to the issuing of such cards and their distribution; and the facts bring the case within Wood v. Pennell, 51 Me. 52, in which it was decided that if one holds himself out as a partner of another, he does not thereby make him in fact a partner, nor render himself liable as such, except to those who are thereby led to believe he is a partner, and who gave credit to the supposed firm upon such belief.

After Rogers withdrew from the firm, Golder continued to carry on the business for a short time under the name of D. C. Golder & Co., and Stevenson remained in his employment. The petition of the creditors was filed against the firm on the 19th of February. On the 10th of February Golder and Stevenson settled their accounts, and Stevenson received a note for $413.75 in settlement, payable by D. C. Golder & Co., in three months. An error of $100 was made in the adjustment, which sum was credited on the note. The balance of the consideration of the note was $28.85 for services rendered by Stevenson to Golder after the dissolution, and $284.90 for services rendered by Stevenson to Golder & Co., as their clerk.

The note, having been given by Golder in the firm name after the dissolution, without any authority from Rogers, was not binding upon him or the firm. The proof of debt made by Stevenson on this claim is in the alternative, either for the allowance of the note, or so much of the consideration therefor as was originally a firm liability. The note having been given without authority, I hold that it was not payment for such services, and that the party is remitted to and may establish his claim against the firm for the amount of the firm liability included in the note. It is said however, that at the time this note was given, Golder individually was carrying on business under the style of D. C. Golder & Co., and that this note was not given or received as a firm liability, but as the individual liability of Golder under the name and style in which he was transacting his business; and I infer from Stevenson's testimony, that such was his understanding at the time he received the note. He supposed Golder had become the owner of all the firm estate by a good and valid title from Rogers, and that the business was to be continued by Golder for his benefit; and trusting to this condition of things, and to Golder's title to the firm estate, he received this note; but by a decree of this court, it has been adjudged that Golder did not acquire a valid title to the firm estate, but that it remained liable, as copartnership effects, primarily to the payment of copartnership debts.

This claim of Stevenson was originally of that description. By mistake of the true relation of the party, he was induced to receive this note in payment of the firm debt, which he would not have done if he had been aware of the real facts of the case. Under these circumstances, I hold that he has a right to surrender the note and make proof for his original claim against the estate.

Some question might perhaps have arisen as to the amount, and whether the whole sum should be allowed at the rate of $1,000 per year, as that sum included the compensation for the use of the loan of $1,500 to D. C. Golder individually; but the assignee does not object to the amount of the claim for this reason. The proof of this claim, viz. $284.90, of which $50 is for personal services, performed within six months next preceding publication of notice of bankruptcy proceedings, is sustained and allowed. The proof of the $1,500 note is vacated and disallowed.

Case No. 5,511.

GOLDHAWK v. DUANE.

[2 Wash. C. C. 323.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

LIMITATIONS—PRESUMPTION AS TO PAYMENT OF BOND—PENALTY—INTEREST.

1. Twenty years creates a presumption of payment of a bond, if no interest has been paid in that time. If a shorter period is relied upon, the presumption should be fortified by circumstances.

[Cited in Thompson v. Phillips, Case No. 13,974.]

[Cited in Cheever v. Perley, 93 Mass. 586.]

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

2. Nothing beyond the penalty of a bond can be recovered, but if more can be given, the damages are in the discretion of the jury, who are not bound by the rule of the contract; and, therefore, may give less than the legal, or agreed interest.

[Cited in Lawrence v. U. S., Case No. 8,145; Brobst v. Brock, 10 Wall. (77 U. S.) 535.]

[Cited in Murray v. Porter, 26 Neb. 288, 41 N. W. 1111.]

Debt on a bond for twelve hundred Sicca rupees, in the penalty of two thousand, executed at Calcutta in 1792, at twelve per cent. interest, payable in twelve months. On the 30th of December, 1794, the defendant published a notice in a Calcutta newspaper, addressed to his creditors, requiring them to bring in their accounts against him by the next day, as he was under compulsion to leave that place for England; and declaring that all accounts not so presented, would be considered as barred. The defendant, some time afterwards, but when was not proved, came to this country, where he has ever since resided. The testator [Nelson] lived not in Calcutta, but somewhere in the country, nor does it appear when he died, but probably in 1804, as the plaintiff then qualified as his executor. It was proved by one witness, that after he received from the plaintiff this bond to collect, he called upon the defendant for payment, who required time to examine his papers, stating, that he had some notion he had discharged it. He called again in about three months, when the defendant said he could find no offset against the bond, and would pay it cheerfully, if it were in his power. Payment was pleaded, and the defendant relied upon length of time, as presumptive evidence, to support the plea. The plaintiff demanded the penalty, which, at fifty cents the rupee amounted to one thousand dollars, with twelve per cent. interest, amounting to about eleven hundred dollars.

THE COURT stated to the jury, that even if the circumstance of the parties residing in different countries, was not of itself sufficient to repel a presumption of payment, and particularly at so great a distance as in this case, still, the acknowledgment by the defendant, was certainly sufficient. In common cases, twenty years creates a presumption of payment, if no interest has been paid in the mean time. If a shorter period is relied upon, the presumption should be fortified by circumstances; but in this case, the circumstances were all the other way, and repelled the presumption.

As to the claim of interest, it was the opinion of THE COURT, that nothing beyond the penalty could be recovered; but as the plaintiff's counsel appeared very confident that the law was otherwise, and had been so considered and acted upon in the courts of this state, THE COURT left it to the jury to find interest, in the name of damages, with a view to the discussion of the point, on a motion for a new trial. But THE COURT stated, that if more could be given, the damages were in the discretion of the jury, who were not bound by the rule of the contract, and that, therefore, they might give less than twelve per cent.

The jury found one thousand dollars debt, and three hundred and sixty-two dollars damages.

Case No. 5,512.

GOLD HILL v. CALEDONIA SILVER MIN. CO.

[5 Sawy. 575.] [1]

Circuit Court, D. Nevada. Aug. 25, 1879.

TAXATION OF MINES—MUNICIPAL CORPORATION.

1. In article 10 of the constitution of Nevada the words "mines and mining claims" do not include the surface improvements on a mining claim. Such improvements are subject to taxation.

2. It being conceded that the legislature has power to establish a municipal corporation and to confer on it a portion of the legislative power, including a power of taxation, this court will not enter upon an inquiry as to whether the defendant, who is taxed by it, is benefited or not by being included within the corporate limits, with a view to determining the validity of the tax. That inquiry is properly a legislative and not a judicial one.

The agreed statement of facts and the evidence together, show that the plaintiff is a municipal corporation, and the defendant a mining corporation, having a mining claim within the corporate limits; that upon this claim there are hoisting works and machinery affixed to the soil; that there is also personal property about the mine used in working it; that a tax for municipal purposes was levied upon the town lots which embrace the surface of defendants' mining claim, upon the improvements and the personal property. This suit is brought to inforce the payment of the tax so levied.

John Harris and Lewis & Deal, for plaintiff.

Stone & Hiles, for defendant.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

HILLYER, District Judge. The defendant resists the payment of the tax levied upon it by the plaintiff on two grounds. Firstly, because the tax is in violation of article ten of the constitution of the state of Nevada, which restricts the power of taxation to the "proceeds alone" of "mines and mining claims." The defendant contends that this article forbids not only the taxation of the body of the mine itself, but also the permanent engines and machinery affixed to the soil, which, it is said, are included in the words "mines and mining claims." It is also claimed that the tax on the personal property used in carrying on the work of the

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

mine is essentially a tax on the mining claim. Whether or not this objection to the tax is well taken depends upon the true sense the words "mines and mining claims" were intended to have as used in the constitution. So far as the personal property, not fixed to the soil, is concerned, there seems to be no reasonable ground for exempting it from taxation as included either in the term mine or mining claim.

The hoisting works, with its machinery, is much more plausibly claimed to be fairly included in the term "mines and mining claims." But even as to them there are satisfactory reasons showing that the framers of the constitution did not intend to exempt the hoisting works and machinery, and generally the surface improvements of a mine from taxation. It cannot of course be denied that under many circumstances the words "mine and mining claim" include both the mine proper beneath the surface and the works above on the surface; but here the question is, under all the circumstances, in what sense did the framers of the constitution use these words? No presumptions are to be made in favor of exemptions from taxation; on the contrary, all the presumptions are against them. Memphis & C. R. Co. v. Gaines, 97 U. S. 697. If the words to be construed will fairly bear a construction narrower than the one claimed by the defendant, we must presume the legislature or framers of the constitution used them in the more restricted sense, inclining to that construction which will trench as little as possible on the state's power of taxation, a power vital to its existence. In the case of Platt v. Union Pac. R. Co., 99 U. S. 48, the supreme court of the United States lays down a rule of construction which can be applied with profit in this case. "There is," says the court, "always a tendency to construe statutes in the light in which they appear when the construction is given. * * * But in endeavoring to ascertain what the congress of 1862 intended, we must, so far as possible, place ourselves in the light that congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances."

From before the organization of the territory of Nevada down to the adoption of the present constitution this was essentially a country of mines and mining claims, and the exemption of mining property to the extent claimed by the defendant would have made it impracticable, probably, to establish a state government. We find from the beginning a distinction taken and kept up in the revenue laws, between the mine or mining claim and the surface improvements. In 1861 "mining claims" were exempted from taxation, while the machinery and improvements on the claim were taxed. Laws 1861, p. 146. See, also, Laws 1862, p. 132; Laws 1864, p. 38. These laws all keep up the distinction between mines and improvements on them, classing the former as real and the latter as personal property.

The first constitutional convention, which met in 1863, framed a constitution which provided for the taxation of all property, including in terms "mines and mining property." This was rejected by the people. The present constitution was framed in 1864, and article 10 provides for the taxation of all property, "real, personal, and possessory, excepting mines and mining claims." The convention of 1864 took the rejected constitution of 1863 as the basis for a new one, and proceeded to alter and amend it; the most important amendment being in article 10. The change is significant. The constitution of 1863 provided for a tax on mines and mining property; that of 1864 excepts "mines and mining claims" from taxation, providing for a tax on the proceeds alone. Why this change of the words "mining property" to "mining claim?" The debates in the convention show quite clearly. It is evident the members had in their minds that distinction between mines and mining property, or improvements, which appears in the previous territorial legislation, and intended by the language used, an exemption of the body of the mining ground only, leaving the proceeds, whenever a mine yielded any, and the mills, hoisting works, engines, and other "mining property," still subject to taxation. A few quotations from the debates will make this apparent. Mr. Banks said that "not only in California, but in this constitution, framed by the former convention, which we have adopted as our basis, there has always been a distinction made between mines and mining property. I propose to preserve that distinction. * * * Mining property is considered to embrace all the improvements on mines, and that is included with and taxed as other property is taxed. Mills, hoisting houses, and all the other property connected with mining operations, which is distinct from the mine itself, have been taxed as mining property. * * * If the members of the former convention had not clearly recognized that distinction they would not have used the two sets of words but would have said 'mining property' alone or 'mines' alone." Con. Debates, p. 224. And he goes on to show why the mines should not be taxed. This position taken by Mr. Banks is nowhere questioned throughout the discussion of article 10. Wherever any allusion is made to the matter, it is such as to show that there was no objection on the part of the mining interest to taxation of improvements on mines.

Mr. DeLong, an ardent advocate of the mining interest, at one time said that for the sake of compromising he was willing to abandon the position he had at heart: "that nothing but the proceeds and improvements of mines and not the mines themselves should be taxed," etc. Debates, p. 321. Again he says: "I believe they (the mines)

are not such property as should be included in taxation beyond the proceeds and the improvements." Id. p. 322. Again: "We are willing to pay on everything that is in sight, or that we know we have got. You may tax every dollar taken from the mines and every building erected upon them; and when you have gone that far we think you have gone far enough." Id. p. 336. See, also, Id. pp. 339, 418.

Throughout the whole discussion of article 10, which was quite general and lasted several days, there does not appear to have been any question raised about the propriety of taxing mills, hoisting works, and all other surface improvements of mines and mining claims. This seems to have been conceded on all sides; it could not justly have been otherwise. There would have been no fairness in exempting from taxation such mining property, having, as it did, a value as easily ascertainable as that of farming property. The contest between the farmers and miners was in reference to taxing the mines considered as a thing distinct from all other property. The miners, with much show of reason, objected to a tax upon the mine, because until proceeds came out of it its value was wholly prospective and uncertain. This was the whole extent of the discrimination asked in their favor. They were willing at all times to be taxed on the proceeds and surface improvements of their mines.

Doubtless very great importance should not be attached to individual expressions of members of the convention, but they may be considered in connection with other surrounding circumstances, and may help to make clear the sense of the words "mines and mining claims" as used in the constitution. When, however, it appears that the words were universally understood by the members in a particular sense, it is difficult to resist the conclusion that the words were used in that sense, although capable of use in another.

The practical construction placed upon article 10, since the adoption of the constitution, has been to preserve the distinction between mining claims and the surface improvements thereon. The first state legislature, using the words of the constitution, exempted "mines and mining claims" from taxation, and under this law the improvements on such claims have ever since been taxed. The evidence in favor of that construction which distinguishes the mine from the improvements on it, consists in the distinction which existed before the making of the constitution, agreeably to which the mine was not, and the improvements were, taxed; the debates in the convention showing the sense in which the words were generally understood by the members; and, lastly, the practical construction placed upon the words from the time of the first state legislature until now. Upon this evidence we think the words "mines and mining claims," as used in the constitution, do not include anything more than the body of the mine or claim itself, and that the hoisting works, engines, and other surface improvements, are subject, like other property, to taxation.

Secondly: The defendant claims the tax to be illegal because the property taxed though within the chartered limits of the town is not within its actual limits; and the defendant, not deriving any benefit from the town government, the tax amounts to a taking of private property for a public use without just compensation.

The testimony shows that the premises taxed have been surveyed into blocks and town lots, and so designated on the town map; that the town had built no roads to defendant's works; that no aid, or aid of a very doubtful kind, could be given in case of fire by the town fire department; and in the opinion of most of the witnesses the defendant derived no benefit from being included in the town limits. The defendant does not question the power of the legislature to establish public corporations for public and municipal purposes, and define their limits; nor to confer on them power to tax property within the corporate limits in general; nor is the town ordinance, passed in pursuance of the charter of the town of Gold Hill, attacked as an illegal exercise of the town's power to tax as a whole. The argument is, that it is proper to inquire whether the defendant is or is not benefited by the town government; and if not, the tax, so far as concerns the defendant, is illegal, as a taking of private property without compensation. Cases from Kentucky, Iowa, and Nebraska, are cited in support of this argument. In Kentucky, where one having thirty-one acres of agricultural or horticultural land objected to paying a city tax, it was held that where the object was to give the border population a "local government and the benefit of police regulations" the tax was valid. The court said, however, that it would have been otherwise if the object had been to tax the property merely in order to increase the city revenues and lessen the burdens of others. Arbegust v. Louisville, 2 Bush, 271; Swift v. Newport, 7 Bush, 37.

The case of Bradshaw v. City of Omaha, 1 Neb. 16, arose on a demurrer to the complaint. The allegation, which must have been admitted by the demurrer, was that the plaintiff's land was two miles from the settled part of the city and one mile from any town lots settled or occupied as such; that the act extending the city boundaries "was passed for the sole purpose of subjecting the lands to the burdens of city taxation and to reduce the taxation on property previously within its limits." It was held that the act extending the city limits to embrace these agricultural lands was unconstitutional and void, as taking private property without compensation. The charter limits of the plaintiff are the same now as when first established in 1862. So in Iowa it has been held that lands, within the corporate limits

used exclusively for agricultural purposes, and not benefited by the current expenditures, are not subject to city taxation. The circumstances show, says the court, that the lands of the plaintiff are sought to be brought within the jurisdiction of the city, solely for the purpose of increasing its revenue, thereby taxing these lands for the benefit of others owning property in the city. Deiman v. Ft. Madison, 30 Iowa, 542.

To bring the present case within the principle of these decisions it will be necessary to find that the legislature of 1862 included the defendant's property within the town boundaries solely for the purpose of increasing the town's revenue, thereby to lessen the burdens of those who inhabited the more settled parts of the town, and not intending to establish a local government for the benefit of all. Unless the fact, if it be a fact, that the defendant is not now benefited by the town proves this, it has not been done.

In Georgia the taxation of agricultural lands within corporate limits is held to be a question for the legislature and not for the courts; that when the law-making power, acting within the scope of its delegated authority, has seen fit to tax such lands, the courts cannot interfere; they can only execute and enforce the law, not make a new one. Linton v. Mayor, etc., of Athens, 53 Ga. 588. Cooley says of the Kentucky, Iowa, and Nebraska decisions, that it seems difficult to harmonize them with the conceded principles governing the law of taxation. "For, 1. They do not question legislation as being in excess of legislative authority, as might be done where taxes are voted for a purpose not public, but they leave the legislation to stand, and only qualify its effects on the ground that it has been adopted on improper grounds and will operate unequally. 2. This is done on an inquiry into the facts and a substitution of the judicial conclusion for the legislative on a subject not at all judicial; a subject, too—the proper limits of city extension—upon which persons are certain to differ widely." Cooley, Tax'n, 120.

The only restrictions on the power of the state of Nevada to tax property within its jurisdiction, and direct the purposes for which taxes shall be raised, are that the assessments shall be uniform and equal and the purpose a public one; with this qualification the extent of taxation is a question for the legislature—it may be carried as far as that body chooses to carry it. The only protection against abuse lies in the fact that the taxpayers are the constituents of those who levy the tax. Gibson v. Mason, 5 Nev. 283, 306. So long as the legislature acts within these conceded powers the courts may not interfere. "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts but to the people by whom its members are elected." Veazie Bank v. Fenno, 8 Wall. [75 U. S.] 533.

The town of Gold Hill is a public corporation created by the legislature for political purposes. It has conferred upon it, by the legislature, a power of taxation. This power extends to all property real and personal within the town "made taxable by the laws of this state for state and county purposes." Given, then, the power of the legislature to establish a municipal corporation and to confer upon it a portion of the legislative power of the state, I cannot see any ground upon which the court can interpose to defeat the legislative will in this case, that will not justify it in substituting its own opinion as to the justice, policy, and expediency of any other law conceded to be within the power of the legislature to enact.

It might not be difficult to distinguish this case from those cited by defendant in some important features. For instance, the property here has been laid off into blocks and lots, and these are numbered on the town map, tending to show that the property is needed for town purposes. The works are within fifteen hundred feet of a fire-plug, and it would be quite possible to lay down that much hose in case of fire. The defendant, too, may be regarded as receiving benefit from the schools, to the support of which a part of the tax is devoted, and from the good order secured by the incorporation of the inhabitants into a town. But it seems to me altogether improper for a court to make inquiry in regard to the benefit the citizen receives from a tax; or into the motive of the legislature in levying the tax; or into the propriety of that body exercising a conceded power in a given way. Such inquiries are very fit for the legislator and very unfit for the judge.

But one point remains. It is admitted that lot 39 and the south two hundred and ten feet of lot 20 are a portion of the surface-ground of the defendant's mining claim. The surface-ground taken up as part of a mining claim is clearly included in the words "mines and mining claims" as used in the constitution; and while the improvements erected thereon may be taxed, such surface-ground cannot. There must be judgment in favor of plaintiff as prayed, less the tax levied on this surface-ground, which is twelve dollars and a half.

Case No. 5,513.

The GOLD HUNTER.

[Blatchf. & H. 300.] [1]

District Court, S. D. New York. Oct. 19, 1832.

MARITIME CONTRACTS—BILL OF LADING—RIGHTS OF PARTIES—LIEN—SALE OF CARGO TO EFFECT REPAIRS — CARRIERS — DEPREDATIONS BY PASSENGERS — PERIL OF THE SEA — MEASURE OF DAMAGES.

1. A bill of lading is a contract maritime in its character, and within the jurisdiction of courts of admiralty, whether it be made on land or on the high seas.

[Cited in The Gilbert Knapp, 37 Fed. 212.]

2. The owner of goods which are shipped and are not delivered according to the bill of lading, has a lien upon the vessel, for the value of the goods, which may be enforced in admiralty by an action in rem.

[Cited in The Boston, Case No. 1,669; Dupont de Nemours v. Vance, 19 How. (60 U. S.) 170.]

3. The owner of cargo, part of which is sold by the master to raise money for the necessary repairs of the vessel, and part of which is consumed by the crew and passengers on the voyage, has a lien on the vessel for the value of what is so sold and consumed.

[Cited in Dupont de Nemours v. Vance, 19 How. (60 U. S.) 170.]

4. Owners of ships which are employed in transporting goods for hire, are common carriers.

5. Depredations on a ship's stores or on her cargo, committed by her passengers or crew, in consequence of a short allowance made necessary by the length of a voyage, is not a peril of the sea, within the meaning of a bill of lading.

6. Where a libel is brought for the non-delivery of goods according to a bill of lading, the measure of damages is the current value of the goods at the port of destination at the time when the goods ought to have been delivered, with interest from that time.

[Cited in The Nith, 36 Fed. 96.]

In admiralty. This was a libel in rem, setting forth that the libellant had shipped at Havre, on board the ship Gold Hunter, 6,084 bottles of wine, consigned to his agent in New-York; that 58 baskets of the wine mentioned in the bill of lading, of the value of $600, had not been delivered; and that, of the wines so missing, a portion was sold at Halifax, where the ship put in, in distress, to raise money for her necessary repairs during her homeward passage, and the rest was embezzled and consumed by the passengers, who were permitted, on their arrival in New-York, to leave the ship with their baggage and effects. The claim was for the value of the wines. The answer of the owners of the vessel, one of whom was the master, excepted to the jurisdiction of the court, alleging that the cause of action, if any existed, arose only upon a bill of lading made at Havre, in France, and not upon the high seas. It also denied the existence of any lien upon the vessel for the demand. It appeared in evidence, as to the wines alleged to have been embezzled, that it became necessary, during the voyage, to put all on board on short allowance; that the passengers were, in consequence, almost in a state of mutiny; and that the master and crew were unable to restrain them from using a portion of the wines of the libellant. Of the wines sold at Halifax, some sold for more and some for less than the current value of the same wines in New-York.

Francis B. Cutting, for libellant.

William Emerson, for claimants.

I. The term "admiralty and maritime jurisdiction" in the constitution, and in the judiciary act, signifies, that jurisdiction which was exercised by the admiralty courts of England at the time of the declaration of Independence. The jurisdiction exercised in the United States at the time of the Revolution, cannot be taken as the standard, since it was too loose and extensive, besides being uncertain and varying in different parts of the country; nor can the jurisdiction exercised in England at the time of the emigration to this country, since the emigration took place at no one fixed time, and it would be equally uncertain with the other. The extensive jurisdiction of the admiralty, in derogation of the trial by jury, was one of the sources of complaint at the time of the Revolution. The terms "admiralty" and "maritime" are synonymous, and do not operate to enlarge or affect each other. Where admiralty jurisdiction exists, it is made exclusive in the courts of the United States, by act of congress; and, therefore, the uniform course of decisions in the state courts upon bills of lading, must be overthrown, if the subject matter is one of admiralty cognizance. At the time of the Declaration of American Independence, the English courts of admiralty had no jurisdiction over bills of lading.

II. Under the circumstances of this case, no lien arose. There was no possession, which is necessary to sustain a common law lien, and no express instrument of hypothecation, and the vessel is discharged, even if a personal liability of the master or owners is shown.

BETTS, District Judge. The point raised, in this case, as to the jurisdiction of the court, is to be determined by the consideration, whether the subject matter of the suit is of a maritime character. Subjects of a maritime nature, which pertain to the cognizance of courts of admiralty, are those touching things done upon, or in relation to the sea; in other words, all transactions and proceedings relative to commerce and navigation, and to damages and injuries done upon the sea. Charter-parties and contracts of affreightment are appropriately considered as within the scope of those powers, and jurisdiction is exercised by admiralty courts

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

over those classes of cases. Policies of insurance and bills of lading are regarded as included within the same principle. De Lovio v. Boit [Case No. 3,776]; Drinkwater v. The Spartan [Id. 4,085].

It is not denied that subjects of the character of the one involved in this action were, at an early period, within the ordinary jurisdiction of the English admiralty. It is supposed, however, that the jurisdiction has, to that extent, been abrogated or restrained by the adjudications of courts of common law, from a period anterior to our Revolution. Johnson, J., in Ramsay v. Allegre, 12 Wheat. [25 U. S.] 621. Although the common law decisions in England, and the prohibitions which followed them, may have suspended or abolished the ancient powers of the admiralty, that fact does not necessarily determine the limits of the jurisdiction under the jurisprudence of the United States. The signification of the phraseology employed in our constitution is not determined by the sense in which the same expressions were used in the English jurisprudence, except as to those terms which had a notorious common law meaning. Those terms which are derived from the civil law, or are expressive of the functions of courts acting under that system, are expounded upon the general principles which govern the interpretation of language, or by historical evidence of the mode in which the same terms were ordinarily employed in the administration of that system. In view of the American authorities on this subject, it cannot be an open question with this court, whether admiralty jurisdiction is to be ascertained by consulting the expositions given by the common law courts of England, or by allowing fair force to the provisions of the constitution and laws of the United States, in connection with the doctrines and administration of the courts of other civil and maritime powers. The admiralty jurisdiction, in respect to contracts, depends upon their subject matter. De Lovio v. Boit [supra]; 2 Browne, Civ. & Adm. Law (Ed. 1799) 150, 169. A bill of lading clearly possesses the characteristics of a maritime contract. It concerns transportation by sea, and the whole service and consideration contemplated by the parties to it, relate to navigation and to maritime employment. The transaction covered by it is one of navigation and commerce on navigable waters—in this case, upon the high seas. The contract is, then, in its essence and nature, maritime, and is subject to the cognizance of this court, whether entered into on land or on water. The Rebecca [Case No. 11,619]. The exception to the jurisdiction is, therefore, overruled.

The questions which remain relate to the measure and mode of relief applicable to the facts, and to the competency of a court of admiralty to administer it. Two principles have an important bearing on the subject, one of which principles rests in the doctrine of the common law, and the other is drawn from the Commercial and Maritime Codes. The first is not open to contestation, and is, that the owner of a general ship is chargeable with the responsibility of a common carrier for goods transported at sea. 2 Kent, Comm. 608, 609; Story, Bailm. §§ 496, 501; Allen v. Sewall, 2 Wend. 327. The other proposition—that the ship is responsible to the shipper, on the undertaking of the master in the bill of lading, for cargo laden on board—is less familiar in the adjudications of the courts, but may now be affirmed to be solidly imbedded in the elements of commercial law. Cons. del Mare, cc. 104–106; Molloy, bk. 2, c. 3, § 9; Abb. Shipp. (Ed. 1829) 94, 170; The Packet [Case No. 10,654]; 2 Browne, Civ. & Adm. Law (Ed. 1799) 156; 3 Kent, Comm. 220. It is becoming an equally familiar principle in this country, that a contract of affreightment is within the admiralty jurisdiction, and that a remedy in rem, against the ship, will be afforded in that court for a default of the master in performing the contract. Bulgin v. The Rainbow [Case No. 2,116]; De Lovio v. Boit [supra]; The Jerusalem [Case No. 7,294]; Zane v. The President [Id. 18,201]; Drinkwater v. The Spartan [Id. 4,085]; The Rebecca [Id. 11,619]. The subject-matter of the contract concerns the navigation of the seas, and affects the ship, her freight and cargo. The lading, transportation and unlading are sea services, and the engagement in the bill of lading, for the performance of those services, is of a maritime character, and imparts a lien, and binds the ship to the performance. The General Smith, 4 Wheat. [17 U. S.] 443; The Jerusalem [supra]; Molloy, bk. 2, c. 3, § 9; Cons. del Mare, cc. 105, 106; 2 Browne, Civ. & Adm. Law (Ed. 1799) c. 5. The lien thus secured is appropriately enforced by process in rem, in admiralty.

Satisfaction is sought, in this action, for the loss of cargo, occasioned by the plunder and consumption of some of the wines on the passage from Havre to Halifax, the port of distress, and also for the portion disposed of by the master at Halifax, to obtain funds for the necessary refitment of the ship. The necessity for the repairs is not questioned, nor is it contended that the master had any resources for their supply in that port, other than the cargo. Under such circumstances, the law justifies the master in appropriating so much of the cargo as may be required for the necessities of the voyage. Cons. del Mare, cc. 105, 106; Laws of Oleron, art. 22; Laws of Wisbuy, arts. 35, 45; The Gratitudine, 3 C. Rob. Adm. 240. Our maritime courts hold that, in such case, the ship is responsible to the owner of the goods, and that a lien for their value arises, which can be enforced in rem, against the ship. The cases of Bulgin v. The Rainbow [supra] and of The Packet [supra] support this proposition. See, also, 3 Kent, Comm. 220. A distinction may be attempted to be drawn between an appropriation of the cargo, in aid of the ship, by the

voluntary act of the master, after her arrival in a port of safety, and a mere failure or neglect to deliver it to the consignee; as the former is an incident of the perils of the sea, and might, perhaps, fall within the exceptions in the bill of lading, against responsibility for losses by those perils. I am inclined, however, to follow the American authorities on this subject; because, although a peril of the sea produced the necessity for the repairs which were made, and thus indirectly led to the use of the libellant's property for the benefit of the ship, yet such peril was not the proximate cause of the loss of the goods. They were disposed of at the option and selection of the master, to raise funds in aid of the voyage, which was interrupted or delayed by such peril. In that view, I think the broad principle would aptly apply, that the ship is answerable for the safe carriage of the goods, and for their delivery to the consignee, even without the aid of the further principle, that the act of the master, in so appropriating the goods for the service of the ship, creates a charge on the ship for their value. The equity of the first mentioned rule is manifest; for the foreign shipper trusts to the ship, as an open letter of credit from her owners, and furnishes supplies on that authority alone, since, ordinarily, he can know nothing of the personal responsibility of the owners.

The same principle covers equally the wines sold by the master in Halifax, and those consumed on the passage by the passengers and crew. Those depredations constitute no excuse to the owners, for the non-fulfilment of their contract of carriage. Abb. Shipp. 222; 2 Kent, Comm. 609; Morse v. Slue, 1 Vent. 190, 238; Schieffelin v. Harvey, 6 Johns. 170. And the value of the property so lost is a charge on the vessel. Cons. del Mare, cc. 209, 212; 2 Molloy, bk. 2, c. 3; American Ins. Co. v. Coster, 3 Paige, 323; Ross v. The Active [Case No. 12,070]. I shall, accordingly, decree to the libellant the value of the deficiency in his shipment, with costs.

The goods having been deliverable here, and only a part of them having been brought to their port of destination, the libellant is entitled, in reimbursement of the deficiency, to recover the market value, at this port, of the goods lost, with interest. That seems to be the measure of damages for deficiency of cargo, except, perhaps, in cases of average adjustment. Watkinson v. Laughton, 8 Johns. 164. And interest is an equitable remuneration to the owner for being deprived of the use of his capital, after the ship was bound to put it in his possession. Neither the price brought by the wines sold at Halifax, nor their invoice cost, nor their value at the place of shipment, furnish the rate of compensation under the contract of affreightment.

An order must be entered, referring it to the clerk to ascertain the value of the goods, under these directions, and also to ascertain, the freight, primage and other necessary charges due from the libellant to the ship; and, if a balance is found due to the libellant, process for its recovery may be awarded at his instance.

Case No. 5,514.

GOLDING v. GOOD.

[Cited in Fenwick v. Grimes, Case No. 4,733. Nowhere reported; opinion not now accessible.]

GOLDING (UNITED STATES v.). See Case No. 15,224.

GOLDMAN (STRONG v.). See Case No. 13,542.

GOLDMAN (UNITED STATES v.). See Case No. 15,225.

Case No. 5,515.

In re GOLD MOUNTAIN MIN. CO.

[3 Sawy. 601;[1] 15 N. B. R. 545.]

District Court, D. California. April 10, 1876.

JUDGMENT LIEN—APPEAL.

Where a creditor had obtained a valid lien on the bankrupt's property by judgment, execution and levy, from which the bankrupt had taken an appeal, but had not executed the bond necessary to cause the appeal to operate as a stay of proceedings, and the property had been sold subsequently to the bankruptcy and the proceeds brought into this court: *Held*, that the creditor was entitled to satisfaction out of the proceeds.

[Cited in Claridge v. Kulmer, 1 Fed. 402.]

In bankruptcy.

W. H. Rhodes, for creditor.

Jos. Naphtaly and R. H. Lloyd, for assignee.

HOFFMAN, District Judge. In this case one Morrison had, before the commencement of the proceedings in bankruptcy, obtained a judgment against the bankrupt, issued execution and levied on property which he was about to sell. At the instance of the creditors, his proceedings were stayed until the appointment of an assignee. An assignee having been appointed the property was sold, and the proceeds brought into court. The judgment-creditor now moves that these proceeds, or so much thereof as may be necessary, be applied to the satisfaction of his debt.

The validity of the judgment is not impeached. The creditor, therefore, had acquired before the bankruptcy a valid lien which this court is bound to respect and enforce.

The only objection urged against his application is that an appeal has been taken from the judgment in question. But no bonds have been executed by the appellant, as required by law, to cause the appeal to operate as a stay of proceedings. The judgment-creditor, therefore, had, at the time of the bankruptcy, the unquestionable right to

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

satisfy his judgment out of the property levied on, or, in other words, a valid lien upon it. This lien was in no respect affected by the bankruptcy proceedings, and the same rights which he would have had in the state courts he can now assert in this court. As his rights there were unaffected by the appeal, they are unaffected by it here. It would be keeping the word of promise to the ear only, if the court should declare that all lawfully acquired liens not dissolved by the bankrupt act [of 1867 (14 Stat. 517)] will be respected in this court, and at the same time inform the holder that he will not be permitted to enforce them, notwithstanding that he clearly has that right under the state laws, and had it at the time of the bankruptcy.

The motion of the judgment-creditor is granted.

Case No. 5,516.

GOLDSBOROUGH v. BAKER.

[3 Cranch, C. C. 48.][1]

Circuit Court, District of Columbia. Dec. Term, 1826.

LIQUIDATED DAMAGES—PENALTY—EVIDENCE.

1. In a covenant by the defendant, dated January 13, 1824, to deliver 5000 perches of building stone at a certain place, by a certain day, at $2 a perch, to be paid as the plaintiff should receive money from the government, and 1000 perches of Rip-Rap stone, by a certain day, and 2000 perches, if plaintiff should give defendant notice before the 1st of May, at $1.80 a perch, and that defendant would not ship any stone on his account from the District of Columbia before the 1st November, then next, and which covenant concludes with these words: "In witness whereof we bind ourselves to pay, each to the other, in case of failure by either of us on this contract, the sum of $2000 in case the said stone shall not be delivered, or, when delivered, paid for as above." This sum of $2000 is a penalty and not liquidated damages; and the contingent quantity of 2000 perches of Rip-Rap stone, includes the 1000 perches mentioned in the same sentence.

[Cited in Williams v. Vance, 9 S. C. 344.]

2. Declarations of the plaintiff, after the date of the contract, may be given in evidence by the defendant to mitigate the damages, as well as to contradict the plaintiff's evidence.

Covenant upon an agreement, dated January 13, 1824, under seal, by which the defendant [John W. Baker] contracted with the plaintiff [Howes Goldsborough] to deliver 5000 perches of building stone at Fortress Munroe at a place called "The Rip-Raps" by the 1st of November, 1824, at $2 a perch, to be paid as fast as money should be received by the plaintiff from the government therefor, and also 1000 perches of Rip-Rap stone, and 2000 perches of Rip-Rap stone, if the plaintiff should require it and give notice to the defendant before the 1st of May, for which the plaintiff agreed to pay $1.80 a perch, and the defendant covenanted that he would not ship any stone on his account from the District of Columbia before the 1st of November then next. And the covenant concluded thus: "In witness whereof we bind ourselves to pay, each to the other, in case of failure by either of us on this contract, the sum of $2,000, in case the said stone shall not be delivered, or when delivered, paid for as above." The breach alleged was on the non-delivery of the 5000 perches of building stone, and the 1000 perches and the 2000 perches of Rip-Rap stone.

Upon the trial the plaintiff claimed the $2000 (reserved in the covenant) as stipulated damages.

But THE COURT (nem. con.) stopped Mr. Key and Mr. Redin for defendant and decided, and so instructed the jury, that the said sum of $2000 was to be considered as a penalty, and not as stated damages; and that the jury, in the assessment of damages, ought to be guided, not by the said sum as stated damages, but the actual damage proved by the plaintiff to have been sustained by him from the breach of the said contract.

And the plaintiff, having given notice, before the 1st of May, 1824, to the defendant to deliver the 2000 perches of Rip-Rap stone mentioned in the contract, claimed damages to be assessed by the jury, as for 3000 perches of such stone, after deducting the quantity actually delivered.

But THE COURT (nem. con.) decided, and so instructed the jury that the said 2000 perches of Rip-Rap stone included the preceding 1000 perches, and constituted the whole quantity of such stone which the defendant had stipulated, by the said contract, to deliver.

The defendant then offered to prove in mitigation of damages, and in contradiction of the plaintiff's evidence, that late in September or early in October, 1824, he requested of the plaintiff an extension of the time for the delivery of the stone; which the plaintiff refused, saying that he had prepared himself to deliver the balance of stone, in case of the defendant's failure; to the admission of which evidence the plaintiff objected, but THE COURT (MORSELL, Circuit Judge, contra) admitted the same.

Verdict for the plaintiff, $100. Bills of exception were taken, but no writ of error was issued.

Mr. Lear and Mr. Jones, for plaintiff, cited Roy v. Duke of Beaufort, 2 Atk. 193; Rolfe v. Peterson, 2 Brown, Parl. Cas. 436; Ponsonby v. Adams, Id. 431; Sandiford v. Tayloe, 7 Wheat. [26 U. S.] 18; Astley v. Weldon, 2 Bos. & P. 346; Sloman v. Walter, 1 Brown, Ch. 418; Cotterel v. Hooke, 1 Doug. 97; Wilbeam v. Ashton, 1 Camp. 78; Fletcher v. Dyche, 2 Term R. 32; 1 Holt, N. P. 20, 43.

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

Case No. 5,517.

GOLDSBOROUGH v. JONES.

[2 Cranch, C. C. 305.] [1]

Circuit Court, District of Columbia. April Term, 1822.

BILLS AND NOTES—DEMAND OF PAYMENT—SUFFICIENCY.

1. If the maker of a promissory note, dated at the city of Washington, resides two miles out of the city, but within the county of Washington, and being a clerk in one of the executive departments of the government of the United States, and usually employed from ten to three o'clock in a room in the public executive buildings with other clerks, comes for that purpose, into the city in the morning, and returns to his house in the country in the evening, his absence from the room in the executive buildings at the time the notary called to demand payment of the note, although within the usual hours of public business, was no excuse for not making a personal demand, or a demand at his dwelling-house.

2. A demand of the bar-keeper of a tavern to which the livery stable was attached, in which he occasionally left his horse while at the office, is not a sufficient demand.

Assumpsit against the indorser of a promissory note for $654.22, payable 1st–4th January, 1820. The maker of the note was, at the time of making it, and for a long time before and after, a clerk in the department of war, and as such was daily employed at the said department in the city of Washington, from 10 o'clock, a. m. till 3 o'clock, p. m., and for that purpose came daily into the city from his dwelling-house in the county of Washington, about two miles out of the city, and returned to his house in the country at the close of office hours, at the said department, at 3 o'clock p. m. The defendant, the indorser, resided in the city. The note was deposited in the Bank of Columbia for collection; and on the last day of grace, between 3 and 4 o'clock p. m. was sent by the bank to the notary public for demand and notice, who went immediately to the room of the war department, wherein the maker of the note was usually employed as such clerk, for the purpose of demanding payment of the note; but being informed that the hours of business at the department were closed, and that the maker had gone home, he did not demand payment of the note at the office, but immediately proceeded to the hotel, where he understood the maker kept his horse while attending as clerk at the office, and, not finding the maker there he demanded of the bar-keeper of the hotel payment of the note, who answered that the maker of the note did not live in the city. Whereupon the notary protested the note, and immediately left a written notice of the dishonor of the note at the defendant's house in the city. On the next day, January 5th, 1820, during the usual office hours at the department, the notary went again to the same room of the war department, and inquired for the maker, and was answered by one of the clerks who wrote in the same office that he was not in; whereupon the notary made a second protest, and immediately left another written notice of the dishonor of the note with a servant at the defendant's house; and on the 6th of January, left a third notice of the dishonor of the note at the defendant's house. The maker never boarded or lodged at the hotel before mentioned.

This case was submitted to the court upon these facts, and it was agreed that if the court should thereupon be of opinion that the demand and notice above stated were sufficient to charge the defendant as indorser, the judgment should be for the plaintiff; otherwise for the defendant.

THE COURT rendered judgment for the defendant.

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

Case No. 5,518.

GOLDSBOROUGH v. McWILLIAMS.

[2 Cranch, C. C. 401.] [1]

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

ARBITRATION AND AWARD—FAILURE TO DELIVER WITHIN TIME PRESCRIBED—ACTION AT LAW BETWEEN PARTNERS.

1. An award, signed by J. Mechlin and John P. Ingle, as an award made in pursuance of a reference to them, will not support an averment of an award or umpirage made by the said John P. Ingle as umpire, upon the failure of the two original arbitrators, J. Mechlin and Charles L. Nevitt, to deliver their award within the time limited by the bond.

2. An award not delivered within the time prescribed by the arbitration bond is not valid.

3. When the time for delivering an award is limited by the arbitration bond, parol evidence cannot be received to show an entension of the time.

4. One partner cannot maintain an action at law against the other partner upon a partnership transaction, unless for a balance struck, with a promise to pay.

Assumpsit for not performing an award, and for use and occupation of a brick-yard, with the common money counts. The condition of the arbitration bond was to "stand to, observe, and fulfil the award, order, arbitrament, final end, and determination of Charles Nevitt and Joseph Mechlin," &c., "so as the award of the said arbitrators be made and set down in writing under their hands and seals, ready to be delivered to the said parties in difference on or before the first day of August next (1819) ensuing the date hereof; and if the said arbitrators shall not make such their award of and concerning the premises within the time limited as aforesaid, then if the said Clement McWilliams, his heirs," &c., "shall well and truly stand to, observe, perform, and fulfil, and keep, the award, determination, and umpirage of John P. Ingle, being a person

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

indifferently named and chosen between the said parties for umpire; so the said umpire do make and set down his award and umpirage in writing, under his hand and seal, ready to be delivered to the said parties in difference, on or before the first day of August next ensuing the date hereof, then this obligation to be void," &c.; dated the 21st July, 1819.

The first count in the declaration, which was the only count upon the award, avers that the parties before the 1st of August, 1819, agreed to extend the time beyond that day, "and to give further time to the said arbitrators or umpire, as the case might be, until the —— day of ——, in the year ——, to make, set down in writing, and deliver the award or umpirage, as the case might be;" and that the defendant promised "to abide by, keep, and perform his part of the award or umpirage, as the case might be, which might or should be made as aforesaid, at or before the expiration of the time last mentioned." That the arbitrators, Nevitt and Mechlin, never made any award in the premises, nor did the said umpire, John P. Ingle, on or before the said 1st day of August, make any award or umpirage; but afterwards, on the 5th of August, 1819, he "made his award or umpirage in the premises in writing, under his hand and seal, and delivered the same in two parts, or duplicate, one to each of the parties in this cause," and thereby awarded the defendant to pay the plaintiff $449, &c.

The award produced and offered in evidence by the plaintiff [C. W. Goldsborough], was dated the 5th of August, 1819, and was under the hands and seals of J. Mechlin and John P. Ingle, and recited that the matters in difference had been submitted to them; and then says, "Now know ye, that we the subscribers having fully examined and duly considered the proofs and allegations of the said parties, do award as follows," &c. It says nothing of the umpirage of John P. Ingle, but proceeds as if he and J. Mechlin were the original and only arbitrators appointed by the parties, not mentioning the name of Charles L. Nevitt.

Mr. Key and Mr. Ashton, for defendant, objected to the award as evidence in this cause, because it was neither an award by the original referees, nor by the umpire as such.

Mr. Lear and Mr. Jones contended that it was, in substance, an umpirage made by the umpire, and was not the worse for being made with the consent of one of the original arbitrators.

But THE COURT (THRUSTON, Circuit Judge, absent) decided, that the award did not support the averment of an umpirage by J. P. Ingle, and rejected it as inadmissible evidence. THE COURT also refused to receive parol evidence of an agreement to extend the time limited by the bond for the delivery of the award.

Mr. Lear, for plaintiff, objected to the reading of a deposition, because, in the caption, this court is called the "Circuit Court of the United States for the County of Washington in the District of Columbia," whereas the style of this court is, the "Circuit Court of the District of Columbia for the County of Washington."

But THE COURT overruled the objection.

THE COURT, at the prayer of the defendant's counsel, instructed the jury that, if they should be satisfied by the evidence, that a partnership existed between the plaintiff and the defendant in regard to the transactions upon which this action is founded, the plaintiff cannot recover unless a balance was struck by the parties, and the defendant promised to pay it; and that the articles of agreement read in evidence, were evidence of such a partnership.

Verdict for the defendant.

Motion, by the plaintiff's counsel, for a new trial, on the ground of error in law in the opinions and instructions of the court. At October term, 1823, the motion came on to be heard, and the point principally urged was, that the articles of agreement, read in evidence, were not evidence of a partnership in the brick-making business. By these articles, the plaintiff rents to the defendant, certain brickkilns, sheds, and yards, and his right to clay, and one half of his right to use a certain patented machine for making front bricks. Each party was to furnish an equal quantity of tools, implements, and labor, and to pay for one half of improvements to the kilns, sheds, &c. The defendant was to work the yard to every advantage, with eight gangs; to pay the plaintiff $200, for one half of his right to use the patented machine; to keep an accurate account, with vouchers, of all expenses, and of all bricks sold, and to pay the plaintiff, as rent for the kilns, sheds, &c., one half of the net profits resulting from the brick-making business, to be paid from time to time out of the sales of bricks, and to be charged to him, and brought into the ultimate settlement of each year's business; which settlements were to be made on the 20th of December of each year. The agreement was to continue as long as the plaintiff should have a right to work the clay, under his agreement with the corporation of Washington, but either party might withdraw at the end of any year.

To show that these articles did not constitute a partnership in the brick-making business, Mr. Lear, for plaintiff, cited Hesketh v. Blanchard, 4 East, 144, and Hoare v. Dawes, 1 Doug. 371.

But THE COURT (THRUSTON, Circuit Judge, absent) was still of opinion that the articles constituted a partnership between the plaintiff and defendant, and overruled the motion for a new trial.

Judgment for the defendant.

Case No. 5,519.

GOLDSBOROUGH v. UNITED STATES.

[Taney, 80.] [1]

Circuit Court, D. Maryland. April Term, 1840.

NAVY—ACTING PURSER'S COMMISSION ON DISBURSEMENTS—CHANGE OF COMPENSATION ALLOWED BY STATUTE—CONSTRUCTION OF LAW BY NAVY DEPARTMENT—EFFECT.

1. An acting purser in the navy, holding no other naval office at the time, is not entitled to a commission of 2½ per cent. upon the money disbursed by him for the government.

2. Where an act of congress declares that an officer of the government, or public agent, shall receive a certain compensation for his services, which is specified in the law, that compensation can neither be enlarged nor diminished by any regulation or order of the president, or of a department, unless the power to do so is given by act of congress.

3. The compensation of an acting purser for services rendered in the ordinary line of his official duty, is regulated by the act of April 18, 1814, c. 143 [2 Story's Laws, 1427; 3 Stat. 136, c. 84], which declares that a purser shall receive $40 per month and two rations a day; and as the secretary could not increase this compensation, by enlarging the monthly allowance, or by increasing the number of rations per day, neither can he do it in the shape of commissions, when no such commissions are given by law.

4. There is no distinction in this respect between a purser and an acting purser; the latter being lawfully in the office of purser, and authorized to perform its duties, is entitled to the compensation which the law has provided for such service, and to nothing more.

5. The construction of a law by the navy department, and the practice under it, cannot be allowed to alter the law, nor to control its construction in a court of justice.

6. The exercise of a power not warranted by law, by the head of a department, cannot create such an equity against the United States, as will be recognised and enforced in a court of justice.

7. The act of congress of March 3, 1809, c. 95 [2 Story's Laws, 1122; 2 Stat. 535, c. 28], does not apply to the office of purser.

8. The plaintiff's intestate, as acting purser, had a right, in his transactions with individuals, to the profits and advances authorized by the regulations of the navy department, which regulations were unquestionably consistent with the law creating the office of purser, and warranted by it, and were, therefore, lawfully issued by the secretary, and binding upon the parties concerned.

[In error to the district court of the United States for the district of Maryland.]

This was an action of assumpsit, brought in the district court, by the United States against [William Goldsborough] the administrator of Charles H. Goldsborough, deceased. The amount in dispute was claimed by the defendant, as a proper allowance for commissions, at the rate of 2½ per cent., upon the disbursements made by the deceased, as acting purser, in the years 1835–1836. The deceased was an acting purser, on a foreign station, at the time the disbursements were made, on which the 2½ per cent. commissions were claimed; he had been appointed by the captain of the ship in which he served, to fill a vacancy, and died without having his appointment confirmed; he held no other naval office than that of acting purser.

At the trial, the defendant offered in evidence the following regulations of the navy department, and the following letters:

Circular. Navy Department, April 1, 1833. Sir: The commissions allowed to consuls, or any foreign agents (now paid by a per-centage), for any business transacted for the navy department, after the first of July next, shall not exceed 2½ per cent. Though the rule formerly was to allow pursers a commission, and especially meant acting ones, it has been discontinued some years in relation to permanent pursers; and after the above period, it is not to be applied even to acting pursers, if they hold any other naval office at the same time. Levi Woodbury.

Allowance to Pursers. "An allowance of commissions of 2½ per cent., upon payments made by pursers, is of ancient date."

Treasury Department, Second Comptroller's Office, Jan'y 19, 1838. Sir: Upon the application of the administrator on the estate of the late Purser Goldsborough, I have attentively considered the question, whether acting pursers are legally entitled to a commission on their disbursements, and I am of opinion, and accordingly decide, that the rule as recognised in the Red Book, chapter 10, Allowance to Pursers, sect. 1, has not been annulled or modified by any law, or subsequent regulation, so far as it relates to such acting pursers as hold no other naval office. I am, sir, respectfully, your obedient servant, Albion K. Parris, Comptroller of the Treasury.

J. C. Pickett, Esq., Fourth Auditor.

Treasury Department, Second Comptroller's Office, Nov. 9, 1838. Sir: In the rules of the navy department, regulating the civil administration of the navy of the United States, published by the secretary of the navy, in March, 1832, is the following (see Red Book, page 18, chapter 10): Allowance to Pursers, sect. 1, "An allowance of commissions of 2½ per cent. upon payments, made by pursers, is of ancient date." Finding this among the rules promulgated for the settlement of navy accounts, I have supposed it was to be taken as a guide by the accounting officers, especially, as in the order by which the regulations were promulgated, it is expressly provided that "circulars, regulations and orders, the contents of which are published in this compilation, though not before published, or not before received, by officers in the naval service, will be considered by them as now officially communicated, and will be their guide on the subject-matter of them, after the receipt of this volume." (See secretary's order on first page, and his letters to the officers of the navy on the second page.) In this opinion, I have been confirmed, by a cir-

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cular of the navy department of April 1, 1833, wherein the rule to allow a commission to acting pursers, who hold no other naval office, is expressly recognised under these two regulations. I have decided in favor of the claims of acting pursers to commissions, and I do not perceive how I can decide differently, according to what I conceive to be the legal interpretation of these two regulations. It has been suggested, that my construction does not accord with the views of the navy department. I should much regret if such were the fact, as it is my anxious wish to administer both the law and the regulations according to their just interpretation, and if possible, without doing violence to the obvious meaning of language, so as to carry into effect the intention of the framers. I have thought it due to the department to make known, in this manner, my construction of these regulations, to the end that if, in the opinion of the head of the department from which they emanated, they can legally receive, and ought to receive, a different construction, I may be so advised, or if they have received their true legal construction, and, in the opinion of the head of the department, it is proper that they may be modified or annulled, that such a course may be pursued as shall be deemed most advisable. I am, with entire respect, your obedient servant, Albion K. Parris, Comptroller of the Treasury.

Hon. J. K. Paulding, Secretary of the Navy.

P. S. If there be doubts in the mind of the secretary as to the correctness of my decision, I have to ask that the opinion of the attorney-general may be requested thereon.

Treasury Department, Fourth Auditor's Office, April 9, 1839. Sir: Your letter of the 4th inst. is received, and herewith you have a reconciling statement of the last settlement of the account of the late Acting Purser Charles H. Goldsborough, deceased, showing the items which compose the balance due to the United States from him. In the settlement made the 13th December 1837, at this office, the charge made for commissions on disbursements was passed to the credit of Mr. Goldsborough, but on the revision of the account by the second comptroller of the treasury, that officer refused to admit that credit, and consequently disallowed it. Therefore, you will find the sum $1248 10 charged in the reconcilement now sent, which will explain why the balance due on the account revised the 12th January 1839, is so much more than the amount due, as you supposed, by that reported at this office in December 1837. I am, sir, respectfully, your obedient servant, A. O. Dayton.

Wm. Goldsborough, Esq., Administrator of Charles H. Goldsborough, Late Acting Purser, United States Navy, Easton, Md.

Treasury Department, Fourth Auditor's Office, Sept. 11, 1839. Sir: In reply to that part of the letter, dated the 30th ult., from Nathaniel Williams, attorney of the United States for the district of Maryland, to the solicitor of the treasury, as relates "to the voucher which claimed $154 91 (for Charles H. Goldsborough, late acting purser United States navy), as a clerk on board the Delaware, and which is rejected as an overcharge," which letter you referred to this office yesterday, I have to state, that the claim referred to is on the pay-roll of the ship Delaware, and is for pay and rations from the 23d February 1833, to 12th February 1834, at $25 per month pay, and one ration or twenty-five cents per day. The muster-roll of the Delaware shows that C. H. Goldsborough, captain's clerk, did not appear on board until the 15th July 1833, from which day inclusively he was allowed pay and rations at the rate before mentioned. The amount of $154 91, charged to him, is for his pay and rations from the 22d February to 14th July 1833. The letter of the district attorney to the solicitor, is herewith returned. I am, sir, respectfully, your obedient servant, F. H. Gilliss, Acting Fourth Auditor.

Albion K. Parris, Esq., Second Comptroller of the Treasury.

Treasury Department, Second Comptroller's Office, Sept. 11, 1839. Sir: I send you a copy of my opinion, given upon the application of the administrator on the estate of the late Purser Goldsborough, presented through Purser Waldron, in January 1838. This opinion was given after the settlement of Purser Goldsborough's accounts, in December 1837, and upon the production of the circular of the secretary of the navy of April 1, 1833, the existence of which circular was not known to this office until a copy of it was produced by Purser Waldron, in January 1838. I also send you a copy of letters on the same subject addressed by me to the secretary of the navy, on the 9th of November 1838, to which I have not received any reply, nor am I advised that any action has been had thereon. From these two papers you will perceive my opinion in regard to the legality of the claims of those acting pursers, who hold no other office, to commissions, under the regulations referred to in my letter to the secretary. I am gratified that the subject is now before the judiciary, and have to request that it may there be fully examined, without any regard to my opinion, so that the question may hereafter be considered wholly at rest. I also send you a letter of this date, from the fourth auditor, relating to the disallowance of $154 91, referred to in your letter to the solicitor of the treasury. I am, sir, very respectfully, your obed't servant, Albion K. Parris, Comptroller of the Treasury.

Nathaniel Williams, Esq., U. S. District Attorney, Baltimore.

P. S. I find, on examining the records, that the $1248 10 was disallowed by the comptroller in the account settled December 1837, and that the account settled January 1839, was admitted, as stated by the auditor, without alteration. I make these remarks in explanation of my letter of yesterday, which was written in haste, without opportunity of reference to records. A. K. P.

The defendant moved the court to instruct the jury that if they should find from the evidence that Charles Goldsborough, the defendant's intestate, was an acting purser on a foreign station, in the employment of the United States, at the time the disbursements mentioned in the said account were made, and that he died before his appointment of purser was confirmed, and that he held no other naval office than that of acting purser, that he was entitled to charge 2½ per cent. commission on the said disbursements. The district court refused to give this instruction, but instructed the jury [case unreported], that the defendant's intestate was entitled to one per cent. on the amount of disbursements made by him in the service and on the station mentioned. To this instruction exception was taken by the defendant, and the case was brought into the circuit court.

R. N. Martin, for plaintiff in error.

N. Williams, Dist. Atty., for the United States.

TANEY, Circuit Justice. This cause is brought here by writ of error from the district court. The point to be determined is, whether an acting purser in the navy, who held no other naval office at the time, is entitled to 2½ per cent. commission, upon the money disbursed by him for the government. It is admitted, that this allowance is not given by any act of congress. It is claimed under a regulation of the navy department; it is, in express and positive terms, allowed in a regulation issued by the secretary of the navy in 1832; and this regulation is repeated, so far as concerns acting pursers holding no other naval office, in a circular instruction from the navy department, dated April 1, 1833. The services in question were performed in 1835–1836, and no regulation or order has ever been issued from the navy department revoking the allowance before mentioned; if, therefore, the department had the power to make these regulations, it is very clear that the plaintiff in error is entitled to the allowance he claims.

There are, certainly, cases in which the compensation to a person employed in a public service may be determined by the president or the head of a department; several cases of this description are mentioned in the opinions of the supreme court, in the cases of U. S. v. Macdaniel [7 Pet. (32 U. S.) 1], U. S. v. Ripley [Id. 18], and U. S. v. Fillebrown [Id. 28], which have been referred to in the argument. In some instances, the power is expressly given by act of congress, as for example, in the act of March 3, 1809, c. 95 [2 Stat. 535, c. 28], and in the act of April 18, 1814, c. 143 [3 Stat. 136, c. 84], both of which have been cited in this discussion. But where an act of congress declares that an officer of the government or public agent, shall receive a certain compensation for his services, which is specified in the law, undoubtedly, that compensation can neither be enlarged nor diminished, by any regulation or order of the president, or of a department, unless the power to do so is given by act of congress.

In the case before me, the commission is claimed as a part of the compensation, to which the deceased was entitled as acting purser, for services rendered in the ordinary line of his official duty. Now the compensation to a purser for services of that description, is fixed by the act of congress of April 18, 1814, c. 143 [3 Stat. 136, c. 84], which declares that a purser shall receive $40 per month, and two rations a day; it is the same compensation which was given by the acts of March 27, 1794, c. 12, § 6 [1 Stat. 351], and July 1, 1797, c. 7 [1 Stat. 524]. And when the law declares that, for certain services, he shall receive $40 per month and two rations per day, by what authority can the head of a department allow him more? The same act of congress, and the same section, that fixes the compensation of a purser, fixes also the compensation of lieutenants, chaplains, sailing masters, surgeons and various other officers in the navy, by giving them a certain sum per month, and a certain number of rations per day. It never has been supposed, that the secretary of the navy was authorized to increase the compensation of these officers, by enlarging their monthly allowance, or adding to the number of their daily rations; and when the compensation to the purser is fixed by the same law, and in language precisely the same, how can his case be distinguished from that of the other officers named in the law? How can the secretary increase his compensation by enlarging his monthly allowance, or adding to the number of his daily rations? And if he cannot do it in this mode, by what authority, or upon what distinctions, can he do it, in the shape of commissions, when no such commissions are given by law? The court can see no ground whatever for distinguishing the case of a purser from that of any other officer mentioned in the act of congress; and as the department is bound by the allowance fixed for them, it is equally bound by that fixed for a purser.

Indeed, the objection to the allowance is made still stronger, by the provisions of the second section of the act of 1814, which authorize the president to make an addition, not exceeding twenty-five per cent., to the pay of the officers, petty officers, midshipmen, seamen and marines engaged in any

service, the hardships or disadvantages of which shall, in his judgment, render such an addition necessary. The power given to make this addition, by necessary implication, excludes the power of making any other or greater addition, or under any other circumstances, than those mentioned in this section; and if such a power could have been supposed to exist, in cases where the law merely fixes the compensation, and says nothing further, yet the well-established rules for the construction of statutes, would exclude it in the present case.

It has, however, been argued, that a purser is neither a commissioned officer nor a warrant officer, and is not so regarded in the navy, and that, therefore, the provisions in the second section of the act of 1814, do not apply to him. In other words, it is insisted, that the purser does not come within the description of an "officer," and, consequently, is not included in the number of persons to whom the president is authorized to make the limited increase of compensation specified in the section.

It would be a sufficient answer to this argument to say, that the compensation of the purser is, undoubtedly, specified in the law, and he is, therefore, within the general principle before stated. But the second section applies to the allowance claimed in this suit, with as much force as it would to the increase of the pay and emoluments of any other officer mentioned in the first section; for, whether a purser is regarded in the navy as a commissioned officer, or a warrant officer, or neither, it is very certain, that he is always included under the description of an "officer," in the acts of congress which fix his compensation. Thus, in the act of March 27, 1794, c. 12, the sixth section declares, "that the pay and subsistence of the respective commissioned and warrant officers, be as follows;" it then proceeds to specify their compensation, from the captain down, and the purser is mentioned among them.

The same language is used in the act of July 1, 1797, c. 7, § 5, and again in the act of 1814 itself, showing clearly that the purser is embraced in the law, under the description of an "officer," and consequently, that the restricted power given to the president, to increase the pay of an officer to a certain extent, under certain circumstances, applies to him as well as to the other officers named in the law, and therefore, carries with it the implied prohibition already mentioned, in his case, as well as in that of other officers. It is, by necessary implication, an implied prohibition to the executive, to add anything to the purser's compensation, greater than the amount specified, or under different circumstances, from those mentioned in the law.

It has been urged, that Mr. Goldsborough was an acting purser only, appointed by the commander of the ship, when abroad, to supply the place of the regular purser, who died when the ship was in a foreign port, and that the case of an acting purser is not provided for by any act of congress, nor his compensation fixed. The regulation of the navy department of April 1, 1833, hereinbefore mentioned, would seem to countenance this distinction; but it can have no solid foundation. By the established usage and practice of the navy, sanctioned by the inferences which may justly be drawn from the legislation of congress upon this subject, the commanding officer may appoint a purser to his ship, when the purser regularly appointed dies while the ship is abroad. The party thus appointed is lawfully in office, and authorized to perform the duties which belong to it, until the ship returns to this country, unless he is superseded by the appointment of some other person. Being lawfully in the office, and authorized to perform its duties, he is entitled to the compensation which the law has provided for such service, and to nothing more. This is the case of all appointments ad interim to offices on shore; and there is no reason why there should be a different rule in relation to the navy, nor a special rule in relation to a purser; the acting purser is nothing more than a purser ad interim, holding the office by an appointment which is temporary in its nature, and intended only to last until the office is regularly filled by a permanent appointment, made by the president.

If it should be said, that the commanding officer of the ship had no lawful authority to make an appointment ad interim, and that Mr. Goldsborough, therefore, was never regularly and lawfully in the office of purser, it would not strengthen the claim of the plaintiff in error to the allowance in question; for if he was not regularly in office, and rendered public service without any lawful authority to do so, then he must look to congress for remuneration, and not to the department.

It is true, that at the time these services were performed, the navy department claimed the right to make this allowance; this is abundantly proved by the regulations of 1832 and 1833, hereinbefore referred to; and at the time the appointment in question was accepted, and the services performed, Mr. Goldsborough, undoubtedly, supposed that he was entitled to the commission now claimed, in addition to the compensation mentioned in the act of congress. But the mistake of the secretary of the navy, or of the party interested, cannot alter the law upon the subject.

The construction given to the act of congress by the navy department, and the long and uninterrupted practice conforming to that construction, must certainly be considered and respected by the court; yet, the construction of the navy department, and the practice under it, cannot be allowed to alter the law, nor to control its construction

in a court of justice, But in this case it is not suggested, that there is any act of congress which can be construed to sanction this allowance of 2½ per cent.; and the power is claimed under the authority of usage, independently of any legislation upon the subject. Now, a usage, which would authorize the secretary of the navy to allow this commission, would, in effect, be a power not to expound, but to repeal the act of congress; for it would allow him to dispose of the public money in opposition to the true construction and meaning of the act, by giving the officer a higher salary than the law authorized; no usage or practice can warrant such a principle. As the case now stands, it is the duty of the court to expound the law, and to disallow the credit in question, unless Mr. Goldsborough is lawfully entitled to it; and in performing this duty the court can recognise no right which is in opposition to the true construction of the act of congress; if the mistake of the department, and the expectations and belief of Mr. Goldsborough as to the extent of his compensation, at the time he accepted the office, furnish any equitable grounds for the allowance of this commission, it is an equity, upon the sufficiency of which congress must judge, and not the court. The exercise of a power, not warranted by law, by the head of a department, cannot create such an equity against the United States, as will be recognised and enforced in a court of justice.

The act of congress of March 3, 1809, c. 95 [2 Stat. c. 28], is supposed, by the district attorney, to bear upon this subject, and its construction has been much discussed in the argument of the case. The district court was of opinion that the office of purser was embraced in the provisions of this law, and that Mr. Goldsborough, under it, was entitled to a commission of one per cent. upon the payments made by him for the United States, and he received that credit in the judgment pronounced by the district court; but after a very careful examination of that law, I am satisfied that it does not apply to the office of pursuer, and on this point I must differ from the court below. Entertaining this opinion, it is unnecessary to speak of the construction of the act of congress in relation to the cases embraced by it.

In my judgment, Mr. Goldsborough, while he acted as purser, was not entitled to any per-centage upon the money disbursed for the government; his compensation from the public was $40 per month and two rations per day, and nothing more; but in addition to this, he had a right, in his transactions with individuals, to the profits and advances authorized by the regulations of the navy department. These last-mentioned regulations are, unquestionably, consistent with the law creating the office of purser, and warranted by it, and were, therefore, lawfully issued by the secretary, and are binding upon the parties concerned.

In this view of the subject, the plaintiff in error has obtained in the district court a credit of one per cent. on his disbursements for the public, to which he is not entitled; but the United States acquiesced in the decree, and no writ of error has been brought on their part. The judgment of the district court must, therefore, be affirmed.

Case No. 5,520.

In re GOLDSCHMIDT.

[3 Ben. 379;[1] 3 N. B. R. 164 (Quarto, 41).]

District Court, S. D. New York. Sept. 22, 1869.

ASSIGNMENT BY BANKRUPT WITHOUT PREFERENCE —REFUSAL OF DISCHARGE.

1. A debtor made an assignment of all his property for the benefit of all his creditors, without preferences. More than ten months afterwards he filed his petition in bankruptcy, and his discharge was opposed on the ground that he had made that assignment "in contemplation of bankruptcy," "for the purpose of preventing his property from being distributed under the bankruptcy act" [of 1867 (14 Stat. 517)]. On being examined, he testified that he made the assignment in good faith, and not in contemplation of becoming a bankrupt; that he was at the time unable to pay his debts, and had suits against him; that he was advised by counsel that he had a right to make such an assignment; and that he had to make it in order to save the property for the creditors generally. *Held*, that the effect of the assignment being to hinder and delay his creditors, its execution was an act of bankruptcy, within the 39th section of the act; that the debtor executed it, therefore, in contemplation of becoming bankrupt, within the 29th section of the act; and that his evidence that he had no contemplation of becoming bankrupt, was of no weight.

[Cited in Re Freeman, Case No. 5,082; Spicer v. Ward, Id. 13,241; Re Marter, Id. 9,143; Re Hannahs, Id. 6,032; Boese v. King, 108 U. S. 385, 2 Sup. Ct. 770.]

2. On the evidence, he made the assignment for the purpose of preventing the property from being distributed under the bankruptcy act; and that, therefore, under the 29th section of the act, a discharge must be refused.

[Cited in Re Pierce, Case No. 11,141; Globe Ins. Co. v. Cleveland Ins. Co., Id. 5,486; Re Wolfskill, Id. 17,930; Re Seeley, Id. 12,628; Re Kraft, 4 Fed. 525.]

[In the matter of Abraham Goldschmidt.]

Brown & Calvin, for bankrupt.

Charles H. Smith, for creditors.

BLATCHFORD, District Judge. In this case, the discharge of the bankrupt is opposed by creditors on a specification alleging that, since the passage of the bankruptcy act, the bankrupt has, "in contemplation of becoming bankrupt, made an assignment of all his property to David Heller, for the purpose of preventing the said property from being distributed under said act in satisfaction of his debts," being the assignment referred to in the schedules annexed to the petition of the bankrupt, as one made by

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him on the 20th of February, 1868, assigning all his property to Heller, "for the purpose of selling and disposing of the same, and dividing the proceeds thereof share and share alike among his several creditors named in Schedule A, No. 3 and No. 5, without preference." This specification is founded on that clause of the 29th section of the act, which provides, that no discharge shall be granted to a bankrupt if he has, in contemplation of becoming bankrupt, made any assignment of any part of his property for the purpose of preventing the property from being distributed under the act in satisfaction of his debts. Three things must concur, under this provision, to warrant the refusal of a discharge: (1) There must have been an assignment of property by the bankrupt; (2) he must have made the assignment in contemplation of becoming bankrupt; (3) he must have made it for the purpose of preventing the property from being distributed under the act in satisfaction of his debts.

That the assignment was made in this case is undisputed. It is in writing, and bears date February 19, 1868, and is executed by the assignor and the assignee, and was acknowledged by both of them on that day, and was recorded the next day. It states that the assignor "is justly indebted to sundry persons in sundry considerable sums of money, and, being unable to pay the same in full, is desirous of making a fair and equitable distribution of his property and effects among his creditors." It then assigns to Heller all the property of the assignor, in trust to sell and dispose of it, and convert it into money, and, out of the proceeds, after deducting the expenses of executing the trust, to pay all the debts of the assignor pro rata, without preferences.

The next question is, whether the assignment was made by the assignor in contemplation of becoming bankrupt. What is meant by the expression, "in contemplation of becoming bankrupt," as used in this clause of the 29th section? An examination of the act, in connection with the forms, shows, that the expression, "becoming bankrupt," means, committing an act of bankruptcy, and that the expression, "in contemplation of becoming bankrupt," means, in contemplation of committing an act of bankruptcy. The act of bankruptcy, the commission of which must be contemplated, is such an act as the statute declares to be an act of bankruptcy. By section 11, the filing of a petition by a debtor, under the conditions therein prescribed, is declared to be an act of bankruptcy. By section 39, it is provided that a debtor who does any one of certain specified things, shall be deemed to have committed an act of bankruptcy. Form No. 5, being the form for "adjudication of bankruptcy upon debtor's petition," is a finding and certificate by the register that the petitioner "has become a bankrupt within the true intent and meaning of the act"—that is, that he has filed a petition, as a voluntary bankrupt, under the conditions prescribed in section 11, and in compliance with the general orders and the forms and the rules of this court. A petition by a creditor, form No. 54, avers that the debtor "did commit an act of bankruptcy." Form No. 58, which is the form for adjudication of bankruptcy on a creditor's petition, adjudges that the debtor "became bankrupt within the true intention and meaning of the act, * * * before the filing of the said petition"—that is, that he so became bankrupt by committing the act of bankruptcy alleged in the petition, being an act the doing of which is declared by section 39 to be the commission of an act of bankruptcy. A debtor may, therefore, become bankrupt, or commit an act of bankruptcy, by filing a petition under section 11, or by doing some one of the things which is declared by section 39 to be the commission of an act of bankruptcy. The question to be determined in this case is, whether the bankrupt, when he made the assignment to Heller, contemplated filing a petition under section 11, or contemplated doing some one of the things which is declared by section 39 to be the commission of an act of bankruptcy. For, it is not necessary, in order that he should have contemplated becoming bankrupt, that he should have contemplated having a petition filed against him, and being adjudged a bankrupt thereon, provided he contemplated committing an act which is defined by section 39 to be an act of bankruptcy.

The petition of the bankrupt in this case, in voluntary bankruptcy, under section 11, was filed on the 28th of December, 1868, ten months and eight days after the recording of the assignment to Heller. There is nothing in the evidence, or in the circumstances of the case, to induce the belief that the bankrupt, when he made the assignment, contemplated filing himself the petition which he afterwards filed, and committing the act of bankruptcy which he thus committed. But he testifies that, at the time he made the assignment, he knew he was not able to pay his creditors in full; that law suits were pending against him at that time, some being at issue; that he was advised by counsel, before he made the assignment, that he had a right to make an assignment of all his property, without preference, for the benefit of all his creditors; that he made it of his own accord, and not on the advice of his creditors in good faith for the benefit of his creditors, without intent to defraud any creditor, and not in contemplation of becoming a bankrupt; that he did the best he could with his property for his creditors; and that he had to make the assignment in order to save the property for the creditors generally. Now, by section 39, it is provided, that a debtor who, after the passage of the act, shall make any assignment of his property with intent to delay, defraud or hinder his creditors, shall be deemed to have committed an act of bankruptcy, that

is, shall be deemed to have become bankrupt. The intent on the part of the bankrupt to delay and hinder his creditors by making the assignment, is proved in this case, as a question of fact. The actual design in his mind to so delay and hinder his creditors, is testified to by himself. For he says that, knowing that he was not able to pay his creditors in full, and suits having been brought against him by some of his creditors, and being pending, he made the assignment of his own accord, after advice by counsel, in order to save the assigned property for his creditors generally. This can mean nothing else, than that he made the assignment in order to prevent the creditors who had sued him from appropriating towards the payment of their claims the assigned property. This would be to delay and hinder such creditors. The fact that the bankrupt made the assignment, as he states, without intent to defraud any creditor, is of no consequence, provided he had the intent to delay or hinder his creditors. The language of the 39th section is, "with intent to delay, defraud, or hinder his creditors." The testimony of the bankrupt that he did not make the assignment "in contemplation of becoming a bankrupt," is entitled to no weight. What he means by that expression is not defined by him. If he means that he did not make the assignment "in contemplation of becoming bankrupt," in the sense of that expression as used in the clause of the 29th section which is under consideration, and as hereinbefore interpreted, his own testimony, as already shown, proves that he did make the assignment in contemplation of becoming bankrupt. His general negation of the language of the statute is outweighed by his testimony as to facts. If the words used by him, namely, "in contemplation of becoming a bankrupt," are intended to mean something different from the words, "in contemplation of becoming bankrupt," and to imply that what he means is, that, when he made the assignment, he did not contemplate being actually adjudged to be a bankrupt, the answer is, that it was not necessary he should have contemplated the institution of proceedings in bankruptcy against him, provided he contemplated, as he did, the commission of an act which is declared by section 39 to be an act of bankruptcy, and for which he could, under that section, be adjudged a bankrupt, at the option of a creditor, subject to the conditions prescribed in that section.

As, therefore, the bankrupt made the assignment in question with intent to delay and hinder his creditors, and thus committed an act of bankruptcy, he made it in contemplation of becoming bankrupt. The next question is, whether he made it for the purpose of preventing the assigned property from being distributed under the act in satisfaction of his debts. He avows that he knew he was not able to pay his creditors in full; that he made the assignment of his own accord under the advice of counsel, to the effect that he had a right to clothe an assignee with the power of distributing his property in satisfaction of his debts; that he thereby did the best he could with his property for his creditors; and that he had to make the assignment in order to save the property for the creditors generally. This shows an intent and a purpose on the part of the bankrupt to assume, when he was insolvent, and when he contemplated committing an act of bankruptcy, and becoming bankrupt, the distribution of his property, in satisfaction of his debts, through the agency of an assignee selected by himself. This necessarily involves the existence of a purpose to prevent the same property from being distributed under the bankruptcy act in satisfaction of the same debts. There could be no other purpose. Such purpose is not disavowed by the bankrupt in his testimony. On the contrary, his testimony, that he was advised by counsel, before he made the assignment, that he had a right to make it, can only mean that he was advised that, as against the bankruptcy act and its provisions, he had a right to make such assignment, and to provide for the distribution of his property in satisfaction of his debts by an assignee, selected by himself, and subject to regulations prescribed by himself in the assignment, and thus prevent, if the assignment should be carried out, the distribution of the same property under the bankruptcy act. All this he did in contemplation of becoming bankrupt, that is, of committing an act of bankruptcy, because of which a creditor could, subject to the conditions prescribed in the 39th section, put such property, but for such assignment, in the way of being distributed under the act, against the will of the bankrupt, in satisfaction of his debts.

The fact that the assignment in this case was one of all the bankrupt's property, and created no preferences among his creditors, makes no difference. It was as repugnant to the act as if it had assigned only a part of his property, or had created preferences. The language of the clause in the 39th section is, "any assignment" of his property, with the forbidden intent. It makes no difference what the terms or trusts of the assignment are, or how much or how little of the property of the assignor it conveys. So, the language of the clause in the 29th section is, "any * * * assignment of any part of his property," for the purpose defined. The whole includes all the parts, and any one and every one of the parts, and the terms, conditions and trusts of the assignment are of no consequence provided the forbidden purpose exists. It follows that the specification is sustained, and that a discharge must be refused.

GOLDSMITH v. The BAY STATE. See Case No. 1,148.

Case No. 5,521.

GOLDSMITH et al. v. GREVE et al.

[Syllabi, 182.]

Circuit Court, D. Minnesota. Dec. Term, 1876.

RES ADJUDICATA.

[In a suit to quiet title brought against one under whose title plaintiff's grantee was evicted, a prior judgment in favor of the evicted grantee, in an action by him upon his covenants of warranty against one of such plaintiffs, in which he relied upon the title under which he was evicted, is conclusive upon plaintiff and the other grantors, who appeared as witnesses for him, as to the validity of the titles relied upon in such suits.]

[This was a suit in equity by E. Sarah Goldsmith and John Nininger against Mary Greve, Herman Greve, Nathan Schwarzenberg, and Moses Lowenstein to settle title to real estate.]

The complainants bring suit, and ask that their title set forth to certain real estate described in the bill of complaint be declared good, and superior to the claim of title urged by defendant Mary Greve, and that a decree be granted ordering and requiring Mary Greve and her husband, Herman Greve, to release and convey to them all the title and interest which they or either of them acquired and hold under and by virtue of a deed made to Mary Greve by Levi Greve, July 5, 1855, or by virtue of any subsequent deed from him. They also ask for an accounting. Mary Greve and her husband answer the bill of complaint, and, among other things, charge, in substance, that neither of the complainants ever had any right, title, or interest at law, or in equity, in or to any of the real property described therein.

Complainants' case is as follows: Levi Greve was the owner of the property June 26, 1855, and sold and conveyed the same on that day to Nathan Schwarzenberg by deed executed for him by his attorney, Moses H. Schwarzenberg, which deed was properly recorded in Ramsey county, Minnesota, June 27th of that year. Previous to July 5, 1855, at Milwaukee in the state of Wisconsin, where Levi Greve at that time resided, Moses H. Schwarzenberg paid him the proceeds of the sale, which he received, and expressed himself satisfied, and ratified the action of his attorney. The complainants' title to the property was derived through Moses Lowenstein, the grantee of Nathan Schwarzenberg, by deed recorded April 17, 1857, and they have conveyed to several persons, to whom they became liable upon the covenant of seizure and general warranty.

The case of defendants Mary Greve and Herman Greve is as follows: Mary Greve purchased the same property and received a deed from Levi Greve, July 5, 1855, which was duly recorded on the 14th of the same month. After the lapse of 14 years, in February, 1869, and later, she commenced actions in the state courts, to recover from Coffin and others, the grantees of the complainants, the property in controversy, and judgment was obtained in her favor, and her title thereto sustained. Coffin immediately after his eviction commenced a suit against Goldsmith's estate upon the covenants in his deed, and succeeded in the state court of final resort, and in that suit Nininger was a witness on behalf of Goldsmith's estate. The records of all the suits are introduced under stipulations made and filed in this suit, and it appears upon the face of the record in the suit of Coffin, Adm'r, vs. Goldsmith, Executrix, that the title of Mary Greve by deed from Levi Greve dated July 5, 1855, and the title of Nathan Schwarzenberg, claimed by virtue of the ratification of the sale and conveyance by Levi Greve, attorney, and upon which the complainants in this suit rely, were directly in issue, and necessarily adjudicated, and the judgment was in favor of Mary Greve's title. The only question in this suit, which when settled determines all the issues, is whether Mary Greve or Nathan Schwarzenberg had the better title by virtue of the conveyances and the ratification by Levi Greve as above stated.

Gilman, Clough & Lane, for complainants.

J. B. Brisbin and W. P. Warner, for defendants.

NELSON, District Judge. The subject in my opinion is in rem judicatam. In the suit upon the covenants of warranty, Coffin, having been evicted by Mary Greve, relied upon her title to defeat E. Sarah Goldsmith, then executrix, who urged the Schwarzenberg title, which is pressed here. Goldsmith, executrix, under the Code of Minnesota, could set up any equitable defense to defeat Coffin in that action, as she might have done in the ejectment suit against him had she been called upon to defend. Mary Greve, under her answer, can take advantage of the fact of res judicata as it appears by the record in the suit of Coffin, Adm'r, vs. Goldsmith, Executrix. John Nininger, the other complainant, being a witness in that suit, must be regarded as having notice, and an opportunity, if he desired, to become a party and contest Mary Greve's title. All the conditions then exist of res judicata,—the same subject-matter in controversy between the same parties, or privies, and a previous determination of the litigation in a court of competent jurisdiction. I have arrived at this conclusion reluctantly, for the "Schwarzenberg title," in my opinion, should have prevailed in the previous litigation. Decree will be entered dismissing the bill.

Case No. 5,522.

GOLDSMITH v. HAPGOOD.

[Holmes, 454.] [1]

Circuit Court, D. Massachusetts. Jan.. 1875.

BANKRUPTCY—SUIT BY ASSIGNEE TO RECOVER PROPERTY SOLD FOR NOMINAL CONSIDERATION.

An assignee in bankruptcy cannot maintain a suit in equity to recover real estate purchased in good faith by the defendant for a nominal consideration (it then having no market value), within a month before the proceedings in bankruptcy, from the bankrupt's assignees in insolvency appointed several years before under the insolvency law of Massachusetts, although the property has since increased considerably in value.

Appeal from a decree of the district court [of the United States for the district of Massachusetts] ordering a conveyance of certain real estate by the appellant [Nathaniel Goldsmith], made in a suit in equity brought for that purpose by the appellee [Charles M. Hapgood], as assignee in bankruptcy of one Henry Hyde. In the year 1867, Hyde's estate, including the real estate here in controversy, became vested in his assignees in insolvency duly appointed under the insolvency law of Massachusetts. There were several incumbrances on this real estate, which was occupied by Hyde as a homestead; and the assignees were unable to sell it, or even obtain an offer for it, although it was generally known that they were willing to sell for a nominal price merely. The appellant (Hyde's nephew), hearing that the property was for sale at a nominal price, authorized his attorney to purchase it for him; and on Dec. 16, 1870, the assignees in insolvency conveyed all their interest in the real estate to the appellant for a nominal consideration. Dec. 29, 1870, Hyde filed a petition in bankruptcy; and on Jan. 21, 1871, the appellee was appointed his assignee in bankruptcy. After the purchase by the appellant, it was discovered that one of the mortgages on the property was invalid. That incumbrance being removed, the equity of redemption became of some considerable value. Thereupon the assignee in bankruptcy brought this suit in equity to compel conveyance of the appellant's right and interest in the property. The question in the case was, whether the appellant was in fact, as he claimed to be, a bona fide purchaser; or whether as was contended by the appellee, the conveyance was made to the appellant as security for money to be advanced by him to pay Hyde's debts, which he had failed to do, or for the purpose of keeping the property from the possession of the assignee, for the bankrupt's use.

C. R. Train and J. O. Teele, for appellant.

D. Thaxter and Melville Stacy, for appellee.

SHEPLEY, Circuit Judge. This bill cannot be maintained unless at the time of the proceedings in bankruptcy Hyde had a legal or equitable estate in the premises in controversy, which, by the provisions of the bankrupt act [of 1867 (14 Stat. 517)], would pass to his assignee, on the ground that the conveyance to Goldsmith was a fraud at common law or under the provisions of the bankrupt act.

In April, 1867, the interest in the real estate in question vested, under the insolvent laws of Massachusetts, in Fowler Bragg and Henry W. Bragg, Hyde's assignees under the insolvent law. The Braggs, as assignees, held the property from April, 1867, to Dec. 16, 1870, three years and eight months. During this time, it appears from the evidence in the case that they made frequent attempts to sell the property, but "could receive no offers." One of the assignees testifies that he offered it to Hyde, but Hyde would make no offer; that the assignees did not feel justified in advertising it, for they did not think they could get enough to pay the expense of advertising; that it was generally known for several years that the place was for sale; and that the assignees were ready to sell it to any one upon the same terms upon which they afterwards sold to Goldsmith, which was a nominal consideration. They informed Miller, who, as counsel for Goldsmith, negotiated the purchase, that they were willing to sell for a nominal consideration. Miller informed Goldsmith, who authorized Miller to purchase for him; and the conveyance was made to Goldsmith for a consideration which was merely nominal.

The debts of Hyde owing to creditors who had proved their debts under the insolvency proceedings were so much greater than any assets of his estate would pay, that he could not possibly have any valuable resulting interest in the property. There is no evidence that the market value of the interest in the property conveyed to Goldsmith was, at the date of the conveyance, greater than the nominal consideration Goldsmith paid; the assignees in insolvency are not made parties to the bill; and there is no allegation that they made the conveyance fraudulently, or without legal authority to make it. Hyde had no interest in the property to convey. He parted with no title, and did not undertake to convey, and did not convey, any interest to Goldsmith. He paid nothing directly or indirectly as a consideration of the conveyance to Goldsmith. It is claimed that Goldsmith verbally agreed, as part of the consideration, to pay the debts of Hyde. The testimony fails to prove a proposition so incredible in itself as that Goldsmith should have agreed to pay eight thousand dollars (the amount of Hyde's debts) for an interest in property which was not considered of sufficient value to pay the cost of advertising it. Goldsmith appears to have been willing to pay something as an act of charity, to aid an aged and poor relative. Because the purchase afterwards turned out to have been a more advantageous one than the assignees or Goldsmith supposed at the time,

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

does not tend to prove it to have been fraudulent. If there was any ground for a rescission of the sale to Goldsmith, it was an interest which belonged to the assignees representing the creditors under the insolvent proceedings. No fraud is proved on the part of Goldsmith, and nothing passed to the assignees under the bankrupt act; and they cannot maintain this suit. Decree reversed and bill dismissed.

GOLDSMITH (KNAGG v.). See Case No. 7,872.

GOLDSMITH, The L. B. See Case No. 8,152.

Case No. 5,523.

In re GOLDSTEIN et al.

[52 How. Pr. 426.]

District Court, S. D. New York. March, 5, 1877.

BANKRUPTCY—ENJOINING PROCEEDINGS IN STATE COURT.

[Certain creditors, who had joined in a petition in involuntary proceedings, after adjudication therein brought an action on their claim in a state court, in which proceedings were taken under Act N. Y. April 26, 1831 (Laws 1831, p. 396), for the arrest of the debtors on the allegation that they had fraudulently contracted said indebtedness, and had disposed of a large part of their property with intent to defraud their creditors. *Held*, that the bankruptcy court, on motion, would enjoin further proceedings in the state court pending the question of the discharge.]

[In bankruptcy. Motion by the bankrupts, Isidor Goldstein and Abraham Goldstein, for a perpetual injunction restraining prosecution of an action in the state court, or any further proceedings therein.

[The petition in bankruptcy was filed December 27, 1876, in which Haines, Bacon & Co. joined, alleging a claim of $1,056.10 for goods sold and delivered between January 1 and November 1, 1876, for which a note was given maturing January 12, 1877. An adjudication in bankruptcy was duly made and entered January 13, 1877. Subsequently, and on February 2, 1877, Haines, Bacon & Co. commenced an action on their said claim, in which proceedings were taken under Act N. Y. April 26, 1831, and the acts amendatory thereof, for the arrest of the debtors, founded on averments that such debtors had fraudulently contracted said indebtedness, and had disposed of a large part of their property with intent to defraud their creditors; and the debtors were arrested therein. They entered into a recognizance and bond for an adjournment, as required by the act, and the proceedings were again adjourned to permit the making of the aforesaid motion in this court.]

BLATCHFORD, District Judge, after hearing arguments, issued the following order, no opinion being written:

A motion having been made by David Leventritt, counsel for the above named bankrupts, for a perpetual injunction enjoining and restraining Richard R. Haines, Francis M. Bacon, Benjamin R. Haines and William Harrington, composing and comprising the firm of Haines, Bacon & Co., from prosecuting and attempting to prosecute a certain action and proceeding instituted by them against the above named bankrupts in the supreme court of the state of New York, county of New York, and upon reading and filing notice of motion thereof, the petition of said bankrupts and copies of the papers in said action and proceeding, and after hearing David Leventritt, counsel for said bankrupts, in support of said motion, and Richard S. Newcombe, Esq., counsel for said creditors, in opposition thereto, it is ordered that the said Richard R. Haines, Francis M. Bacon, Benjamin R. Haines and William Harrington, composing the firm of Haines, Bacon & Co., they and each of them, their and each of their agents, servants and attorneys, are hereby restrained, prohibited and enjoined from further prosecuting a certain action instituted by them in the supreme court of the state of New York, on February 2, 1877, for the recovery of the sum of $1,050.10 against the above named bankrupts; and they and each of them, their and each of their agents, servants and attorneys are hereby restrained, prohibited and enjoined from further prosecuting a certain proceeding heretofore adopted by them against said bankrupts, under an act, known as "An act to abolish imprisonment for debt, and to punish fraudulent debtors," passed April 26, 1831, and the acts amending the same, and under which proceeding said bankrupts were arrested on the 2d day of February, 1877. Said action and proceeding, and each of them, are hereby stayed until the final determination of this court upon the question of the discharge of said bankrupts, but this order is not to operate to discharge said bankrupts from said arrest, or to affect the order of arrest.

GOLDSTEIN'S SURETIES (UNITED STATES v.). See Case No. 15,226.

GOLIAH, The (NELSON v.). See Case No. 10,106.

Case No. 5,524.

GOLSON v. NIEHOFF.

[2 Biss. 434;[1] 5 N. B. R. 56.]

District Court, N. D. Illinois. Jan., 1871.

NOTICE OF INSOLVENCY — WHAT CONSTITUTES—PREFERENCE—JUDGMENT BY CONFESSION—WHEN A PREFERENCE.

1. The simple fact that a man doing a large business obtains renewals of his commercial paper or pays under special circumstances a large discount, is not notice of insolvency to a

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

creditor, it being shown that at that time similar commercial paper was selling at equal rates in the market.

2. Preference upon a judgment note is obtained when the judgment is entered, not when the warrant of attorney is given.

[Approved in Hood v. Kasper, Case No. 6,664.]

3. If at the time of the entry of judgment the creditor had knowledge of his debtor's insolvency, or of such facts as to make it reasonable to believe him insolvent, the collection of a debt or entry of judgment and issue of execution is a preference under the act.

4. The fact that the note and warrant of attorney were given for a bona fide debt, and that the creditor at that time had no knowledge of the debtor's insolvency, does not sustain such subsequent judgment.

5. Circumstances stated which are sufficient notice to a creditor of his debtor's insolvency.

This was a summary proceeding by petition by the trustees of the estate of Adam Baierle, bankrupt, against Conrad L. Niehoff and Gustavus Troost to recover money received by them on an execution sale of property of the bankrupt. The petition sets forth in substance, that in January, 1869, said bankrupt borrowed of the respondents, Niehoff & Co., five thousand dollars, for which he gave his promissory note, with one Hoffman as surety, payable to said Niehoff & Co. in four months; that said indebtedness was extended by agreement from time to time between the parties until the 12th of November, 1869, when Baierle paid respondents one thousand dollars, and obtained a further extension of sixty days on the remaining $4,000; and on the 12th of January, 1870, the further sum of one thousand dollars was paid to respondents, and an extension for sixty days given for the remaining three thousand dollars; that on the 9th of October, 1869, Baierle borrowed of respondents the further sum of $1,000, for which he gave his note, with one Grater as surety, payable to respondents in thirty days, to which said note was attached a warrant to confess judgment, and which note was, on the 12th of November, 1869, extended for the term of sixty days; and on the 12th of January, 1870, a further extension of sixty days was obtained; that for all these loans and extensions large discounts were paid by the bankrupt, amounting to at least two and a half per cent. per month; that at the time said extensions were obtained said bankrupt was insolvent, and that the fact of his not paying said notes at maturity, and his paying such extortionate and usurious rates of discounts or interest, were sufficient to put said respondents on inquiry, and give reasonable cause to believe him insolvent; that on the 12th day of February, 1870, said Baierle was guilty of an act of bankruptcy, and on the 15th day of February, 1870, a petition was filed in this court to have him adjudged a bankrupt, and that in pursuance of said petition he afterwards was duly adjudicated a bankrupt; that on said 15th day of February, respondents caused a judgment to be entered in the superior court of Chicago by virtue of the warrant of attorney attached to said one thousand dollar note, upon which judgment execution was issued and levied on the same day upon certain personal property of said bankrupt, and the property so levied upon was subsequently sold on said execution, and said judgment, and costs, amounting in all to $1,068.72 was fully satisfied thereby. The petition also charges that at the time of the entry of said judgment and the issue of execution, levy and satisfaction thereof, said respondents knew of Baierle's insolvency, and that by said judgment and levy said respondents obtained a preference over the other creditors of said bankrupt contrary to the tenor and intent of the bankrupt act [of 1867 (14 Stat. 517)]. The petitioners then pray that said Niehoff & Co. may be ordered and adjudged to pay to them as such trustees, all said sums of money so wrongfully received and collected by them from said Baierle.

The respondents by their answer admit the making of said loan to said Baierle, and the receipt of said notes therefor, and the subsequent payment of said sums of $1,000 in November and January to apply on the first mentioned note, and the several extensions of said indebtedness, but they deny the extension of said $1,000 on the 12th of January, 1870, for sixty days, but aver that the same was only extended for the term of thirty days; they also denied all knowledge of Baierle's insolvency, and of any facts tending to apprise them of such insolvency at the time said payments were made and extensions granted. They also admit the entry of said judgment, issue of execution, levy and satisfaction thereof, but deny all knowledge of Baierle's insolvency and acts of bankruptcy at the time said judgment was entered. It was also set forth in the answer, and proved on the trial, that after the entry of said judgment said Baierle made his motion in the superior court to set aside said judgment, on the ground that said note had been extended sixty days from the 12th of January, 1870, and consequently was not due at the time said judgment was entered thereon, and that said motion was, after due consideration, overruled by said court. The only question, except as to the time for which said $1,000 note was extended on the 12th of January, upon which proof was offered at the trial, was in regard to the knowledge or notice which Niehoff & Co. had of Baierle's insolvency during the progress of the transactions detailed. The petitioners relied mainly upon the facts of the extensions obtained by Baierle, and the high rate of interest or discount paid to establish or raise a presumption of knowledge of said insolvency, and the preference by the receipt of the discount, and the two sums of $1,000 each, which were paid in November and January on the $5,000 note; while on the part of the respondents it was proved by several business men who had transactions with Baierle up to a few days before the commission of the act of bank-

ruptcy, that he was engaged in extensive operations in this city as a distiller, rectifier and saloon keeper, and was in unquestioned credit with bankers and merchants; that he had a large amount of property in his hands, and was apparently in prosperous circumstances. It was also proved that at the time Baierle paid the $1,000 and obtained the extension on the $5,000 note in November, he explained to respondents that one Golson had agreed to go into partnership with him and furnish money for the business on which he depended, but that Golson changed his mind, and at the time of the payment of $1,000 in January Baierle stated that the market for highwines was dull, and he preferred to hold them awhile for better prices, and that he was feeding cattle at his distillery which would be better ready for market and more in demand in sixty days.

Adolph Moses, for petitioners.
Hoyne, Horton & Hoyne, for respondents.

BLODGETT, District Judge. In the light of this evidence I do not think respondents chargeable with knowledge of Baierle's insolvency at the time of these extensions, nor with such notice of facts touching his probable insolvency, as should be held sufficient to put a cautious man on inquiry. Baierle's credit was good among those with whom he dealt during all these transactions; that a man engaged in extensive commercial transactions should need extensions or renewals of his commercial paper is no unusual circumstance, and the fact that two responsible citizens were willing to answer as sureties for him shows the estimate in which he was held by them in regard to solvency.

The reasons, too, which he assigned for asking the two last extensions were natural, and there is no dispute as to the existence of those reasons; in fact, a failure in an arrangement for partnership in so complicated a business as Baierle was then carrying on might make an extension necessary for the most solvent man, while the condition of the market for the product of his manufacturing business was certainly an adequate reason for continuing his loan in January, rather than to have sold the highwines and beef at a sacrifice, to pay them.

Again, our examination of the proofs of debt against the estate of the bankrupt shows that considerable more than half of those debts were contracted between the time these extensions were obtained and the acts of bankruptcy. This fact proves conclusively that Baierle was, at this time, in the full enjoyment of unlimited credit in the community with whom he dealt and where he resided. The proof shows that the rate of discount paid was not unusual at the time, but that, on the contrary, the best commercial paper in this city was then in the market at those rates, thus rebutting any presumption or inference of insolvency from the payment of the discount alleged. I think, therefore, that the petitioners' proof fails in a most essential particular, as to the claim to recover back the $2,000, and sums paid by way of discount or interest.

In regard to the preference obtained by the entry and collection of the judgment on the $1,000 note, the proof is that on or about the 12th day of February, 1870, Baierle was missing, and various rumors were afloat in the community in regard to him—by some he was supposed to have been murdered, while others supposed he had absconded with a large sum of money for the purpose of defrauding his creditors—and these rumors were to some extent the subject of articles and notices in the newspapers published in this city. Niehoff, one of the respondents, testifies that he heard something of these rumors, but did not hear that Baierle was insolvent; that Hoffman, who was surety on one of the notes, talked with him as to what steps he, Niehoff, would take to protect the sureties on the paper he held, and it was finally concluded that judgment could be entered on the one thousand dollar note, which was accordingly done on the morning of the 15th of February, about 10 o'clock, and the levy made on the execution the same morning, and before the petition in bankruptcy was filed. It is true Niehoff denies all actual knowledge or information, at the time the judgment was entered, of Baierle's insolvency, but it is clear, from the evidence, that he knew something of the extraordinary rumors afloat in regard to Baierle's being missing, or having absconded; and so much discussion of his affairs seems to have transpired as to lead to the conclusion that the safety of the surety on the note, if not the interest of Niehoff & Co., required that the power to enter judgment on the warrant of attorney should be called into execution. Niehoff says himself, in his evidence, that at the time of the entry of the judgment he "thought something was wrong with Baierle." He evidently did not suppose him dead, as one rumor had it, for he would not have entered judgment against a dead man, and the "something wrong" evidently referred to Baierle's pecuniary affairs, or there would not have been this consultation with sureties, and final conclusion of counsel to enter up a judgment on this note. The proof also shows that Troost, who is a member of the firm of Niehoff & Co., participated in these discussions in regard to Baierle's absence, and the course to be pursued in order to secure the debts the firm held against him, and it would seem from the proof that this judgment was entered after consultation between Troost and Grater, the surety.

Within a few hours of the entry of this judgment, the records of this court, of which all persons in the district are bound to take notice, contained ample evidence of Baierle's insolvency and acts of bankruptcy, and from the time of the filing of the petition in bank-

ruptcy the respondents are chargeable with full knowledge of Baierle's insolvency. At the time when the satisfaction of this judgment was actually obtained by the sale of the property levied upon, Niehoff & Co. were certainly informed of all the facts necessary to advise them of Baierle's insolvent condition. The 35th and 39th sections of the bankrupt act make void all transactions by which one creditor, with the knowledge of the debtor's insolvency, and with the assent of the debtor, obtains a preference as against the other creditors, and the question arises as to whether this is such a preference as is prohibited by these sections.

In considering these questions the first inquiry is as to when the preference by means of a judgment note is obtained—is it when the note, with a warrant of attorney to confess judgment, is executed and delivered? Clearly not, because the power lies dormant, and in mose cases secret, until it is executed by the entry of the judgment. Up to this time the warrant to confess judgment is only an evidence of the debt, and gives the creditor no lien, and, consequently, no preference. It may be of itself an act of bankruptcy, under the law, to give a warrant of attorney to confess judgment, but not necessarily a preference. The warrant of attorney, in fact, is only a means placed in the hands of a creditor by which he may, more promptly than other creditors, seize the property of the debtor on legal process, and only becomes dangerous when used to the detriment of other creditors. It would seem to follow, then, that if a creditor holding a warrant to confess a judgment against a debtor, causes the power thus entrusted to him to be exercised after he has notice of the debtor's insolvency, or has notice of such facts as make it reasonable to believe the debtor is insolvent, and takes his judgment and levies upon the property of the debtor with such knowledge or notice, he is guilty of intending a fraud upon the bankrupt act.

The consequences of his acts are to secure a preference over other creditors, and if he obtains such preference with notice of the debtor's insolvency, he is liable to an action by the assignee for the recovery of the property thus obtained, or its value. The warrant of attorney is a continuing consent on the part of the debtor to the entry of the judgment by the creditor, and if when the creditor executes the power thus delegated, he knows the debtor to be insolvent, the judgment and execution under it is manifestly an act of bankruptcy, participated in by the creditor to such an extent as to make void all advantages obtained thereunder. It will not do to say that because the creditor had no knowledge of the debtor's insolvency at the time he obtained the warrant of attorney, and that the same was given to secure a bona fide debt, therefore all he does under the warrant of attorney must be sustained. As I said before, the warrant to confess judgment lies dormant until the creditor sees fit to act upon it, and whether his action shall result in such an unlawful preference as will make the creditor liable to the assignee depends upon the knowledge or information the creditor had in regard to the debtor's insolvency at the time he made his warrant of attorney operative. Applying these principles to the case before me, I think the proof shows Niehoff & Co., at the time they entered their judgment against Baierle, had knowledge of such facts as gave them reasonable cause to doubt Baierle's solvency, which is equivalent to having cause to believe him insolvent. They thought "something was wrong with him," and this, evidently, had reference to his pecuniary affairs, for the action in question was taken to save the surety, Grater, and perhaps partly in his interest. Baierle, it will be remembered, was missing on the 12th of February, 1870, which was Friday, and it can hardly be possible that, with the large number of creditors, and other persons who were more or less affected by the occurrence, there should not have been a comparison and discussion by those most interested, in regard to his financial embarrassment, which must have reached the ears of the respondents, and contributed to hasten their action upon this warrant of attorney.

I therefore conclude that the judgment entered in this case was entered at a time when the respondents had reasonable cause to believe the bankrupt insolvent, and therefore with intent to evade that provision of the bankrupt act which prohibits and makes void all preferences. Let there be a decree entered for the amount of the execution collected, with six per cent. interest.

Motion for new trial by respondent overruled by court.

NOTE. Consult In re Weeks [Case No. 17,350]; In re Eldridge [Id. 4,330]; Campbell v. Traders' Nat. Bank [Id. 2,370]; and numerous authorities there cited.

Case No. 5,525.

The GOMEZ DE CASTRO.

[10 Ben. 540.] [1]

(District Court, E. D. New York. July, 1879.)

CARGO—NON-DELIVERY—DRAINAGE OF SUGAR—COSTS.

1. A cargo of sugar was shipped from Bahia to New York in bags. The sugar was green, and the drainage from it on the voyage excessive; the vessel also met with heavy weather. On discharging, many bags were found broken, and new ones were furnished and refilled. A quantity of sugar was also swept up from the hold, and sold by the crew with the master's knowledge. The consignee libelled, claiming $1,850 damage for non-delivery of cargo: *Held*,

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

that he could only recover for the value of the sweepings sold.

2. A libellant who fails as to the most part of his claim, cannot recover costs.

In admiralty.

Owen & Gray, for libellant.
James K. Hill, for claimant.

BENEDICT, District Judge. Upon the evidence the libellant can recover no greater sum than the value of the sweepings which the evidence shows were sold by the crew of the vessel. The libellant having failed as to the most part of the considerable claim made by him against this vessel, is not entitled to recover costs. There may be a decree for twenty-five dollars, being the amount for which the sweepings were sold by the junk man; or either party may at his own expense have a reference to ascertain the value of the sweepings sold by the crew.

Case No. 5,526.

The GONDAR.

[Blatchf. Pr. Cas. 266.] [1]

District Court, S. D. New York. Dec., 1862.[2]

PRIZE—OBJECTION TO CONDEMNATION—BLOCKADE—FALSE PAPERS.

1. An objection that this vessel, seized by naval forces in the harbor of Beaufort, N. C., after its capture, and while that place was in custody of the army of the United States, was not subject to capture solely by the naval forces, overruled. If the vessel and cargo are subject to condemnation, the claimants cannot contest in a prize court the competency of the libellants alone to control the proceeds of the forfeiture.

2. Vessel and cargo condemned (1) for having violated the blockade in entering Beaufort; (2) for shipping there a new cargo, with intent to violate the blockade in coming out; (3) for taking an export license and clearance from the enemy at Beaufort; (4) for a false representation on the vessel's papers as to who was master of the vessel.

In admiralty.

BETTS, District Judge. This case, in most of its main features, coincides with that of The Alliance [Case No. 245], decided in this court a few days since. Parts of the testimony in each case have been invoked by the libellants into the other. Both vessels were of American build, were the property of the same owners in this country, and were transferred at one time to the same English claimants, by proceedings exactly similar; and the two vessels went into the port of Beaufort, one on the 22d and the other on the 28th of August, 1861, both having knowledge of the blockade existing at the time, and were there loaded with cargoes and documented for departure in substantially the same manner. Many other circumstances detailed in the proofs in the two cases are omitted in this concise notice of the grounds of decision, which may be more specially spread out in an opinion in extenso, should the cases be removed on appeal. The shipping articles in this case, dated at Liverpool, July 5, 1861, contract for a voyage from Liverpool to Nassau, and any ports and places in the United States, and back to a port of discharge in England. No sea-log was found on board at the capture. The official log-book, signed by the master, enters the commencement of the voyage as being July 5, 1861, "to Nassau, N. P., and one port in the United States, and back to Liverpool." It states that the vessel arrived at Beaufort August 28, and was ready for sea September 14, 1861. The master, mate and one seaman were examined on interrogatories. The vessel was captured at anchor in Beaufort harbor, May 2, 1862, by the United States vessel-of-war Gemsbok, various other war vessels being present. The vessel was laden at Liverpool with 4,300 sacks of salt and 112 tons of iron, which were discharged in Beaufort harbor, and she was there reladen with a cargo of spirits of turpentine, resin and cotton, all of which was taken on board prior to September 14, 1861. She was ready for sea on that day. The cargo was shipped by Dill, a resident of that port, for the owners of the vessel. The master, Jennings, knew that the port was blockaded, but he asserts that the first time he saw a blockading vessel there was on the 6th or 7th of September, 1861, and that he saw none off the port when the ship entered it. Most of the return cargo was taken on board after the blockading vessel appeared off the harbor. The present master, Jennings, was put in command of the ship at Beaufort, after her former master, Gooding, left her. Whilst she lay at that port, the Confederate steamship Nashville came in and went out; and a day or two before that vessel went out, the former master, Gooding, put the former mate, Jennings, in command of the Gondar. Jennings says it was rumored that Gooding was transferred to the command of the Nashville and went to sea on her, and that he had not seen him since. The same witness says that the Gondar was in Charleston harbor at the time of the bombardment of Fort Sumter, and returned thence to Liverpool, from which port she proceeded on the voyage on which she was arrested, and entered the port of Beaufort in August, 1861, and was arrested there.

The presumption, from the facts, is exceedingly cogent, that the voyage was set on foot and prosecuted to its termination with full knowledge, by the master and owners of the vessel and cargo, that the port of Beaufort was at the time in a state of blockade, and with intent to evade such blockade. No proof is found in the ship's papers, or in the preparatory examinations, repelling or displacing such presumptions. The defence is placed essentially upon the legal immunity of neutral ships from liability to capture be-

[1] [Reported by Samuel Blatchford, Esq.]
[2] [Reversed in Case No. 5,528.]

cause of acts done in a prior voyage; and upon the further fact, that, at the time of the seizure of this vessel, the enemy port of Beaufort and its appendant station, Morehead City, were held in the military custody of the army of the United States, and, for that cause, she, as a neutral vessel, was not subject to capture solely by the naval forces of the government. It is not shown that there was any co-operation between the land and the naval forces in the arrest of the vessel and cargo on this occasion, nor any concert even in the proceedings leading to that end, nor does the army make claim to any interest in the capture. Wheat. Capt. 288; The Dordrecht, 2 C. Rob. Adm. 55. If the vessel and cargo were in delicto and are subject to condemnation, the claimants have no power to contest in the prize court the competency of the libellants alone to control the proceeds of the forfeiture. Beaufort or Morehead City was, undoubtedly, a neutral port as to the vessel and cargo, when they entered it. It was, however, an enemy port to the United States, and the acts of the vessel and cargo in going to the port, and whilst in it, were hostile to the United States, and impressed upon them the character of enemy property, because the voyage was undertaken with intent to evade the blockade of the port in entering it, and the vessel obtained therein the cargo arrested on board, with the intention of running the blockade in exporting such cargo, which would render that, also, a hostile act. Under the uniform course of decisions in the courts of the United States during the present war, both of these acts of the vessel were violations of the law of nations, and subject the vessel and cargo seized to forfeiture, she having sought and entered the port of Beaufort knowing it to be blockaded, and having there acquired a new cargo, intending to violate the blockade in exporting it. Upton, Mar. Warf. & Pr. (2d Ed.) 309 et seq. The ship's papers are also found to contain that official recognition of, and affinity with, the enemy, which imports a hostile association with it, adopting and submitting to its authority as an independent and lawful power. As in the previous case of The Alliance, the vessel shielded herself by a Confederate clearance and export license. It has frequently been adverted to, in the course of decisions by this court, that it is legal cause of forfeiture for a neutral vessel to clothe herself in time of war with protective documents obtained from the enemy. In the present instance the Gondar had on board a Confederate export license and clearance, which are evidence of a criminal adhesion to the rebel government. The Julia, 8 Cranch [12 U. S.] 181; The Ariadne, 2 Wheat. [15 U. S.] 143, and notes in Appendix. There was, moreover, a false representation on the ship's papers, Gooding having signed and sworn to the manifest of the cargo September 14, as master of the vessel, and having taken out a certificate of the clearance of the vessel as master thereof, dated the same day, duly executed by J. F. Bell, as collector of that port, when it is proved that he surrendered the command of the vessel to Jennings, the first mate, and appointed him master, and went off in the Confederate steamer Nashville early in March previous. I find in these various particulars ample cause for the condemnation of the vessel and cargo captured, and direct a decree to be entered accordingly.

This decree was, on appeal, and on further proof, reversed by the circuit court, January 8, 1864. [See Cases Nos. 5,527 and 5,528.]

Case No. 5,527.

The GONDAR.

[Blatchf. Pr. Cas. 649.] [1]

Circuit Court, S. D. New York. July 17, 1863.

PRIZE — VIOLATION OF BLOCKADE — ADDITIONAL PROOF.

1. Vessel and cargo acquitted of a violation of, or of an attempt to violate, the blockade.

2. Further proof ordered as to the neutral ownership of the vessel and cargo at the time of capture.

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

[In admiralty. Libel by the United States against the ship Gondar and cargo for an alleged violation of the blockade. The vessel and her cargo were condemned in the district court (Case No. 5,526), and the claimant appeals.]

NELSON, Circuit Justice. This vessel was captured at Beaufort, North Carolina, May 2, 1862, at the same time with the ship Alliance, already considered, and the decision turns very much on the principles involved in that case. [Case No. 246.] The vessel commenced her voyage in July, 1861, at Liverpool, with a cargo of salt and pig-iron, for the port of Nassau, or any port of the United States, and back to Liverpool. She arrived at Beaufort on the 27th of August following, and discharged her cargo. There was no actual blockade of that port at the time, nor until several days afterward. She commenced taking in her homeward cargo on the 1st of September, and completed her lading on the 14th. It consisted of resin and spirits of turpentine. In the meantime a blockade of the port had been established, and the vessel remained in port awaiting its removal, until she was captured. There is no evidence of any intention to break the blockade by the master, or of any act done by him with such intent. The vessel is claimed by J. R. Armstrong and H. Gerard, residents and merchants of Liverpool, and British subjects. The claim is put in by the master in behalf of the owners. The cargo is claimed by one of these

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

parties, J. R. Armstrong. The British register of February 11, 1861, is in the names of the above parties. The documentary proofs as to the property in the cargo shows it to be in J. R. Armstrong. I shall give the same direction to this case that I did to the case of The Alliance [supra], and make an order for further proofs as to the property in the vessel and cargo at the time of capture.

[Both cases were heard upon the proofs as ordered, the decrees of the district court in each case being reversed, and the property restored to its owners. Case No. 5,528.]

Case No. 5,528.

The GONDAR.
The ALLIANCE.

[Blatchf. Pr. Cas. 669.] [1]

Circuit Court, S. D. New York. Jan. 8, 1864.[2]

PRIZE—RESTORATION TO CLAIMANTS.

On further proof, the vessels and cargoes were *held* to be neutral property, and ordered to be restored to the claimants. Decree of the district court, condemning them, reversed.

[These vessels and their cargoes were seized by the United States in the harbor of Beaufort, N. C., and libeled for alleged violations of the blockade. Decrees of condemnation and forfeiture of both vessels and their cargoes were entered in the district court (Cases Nos. 5,526 and 245), from which decrees the claimants appealed. When the cases came up for hearing in the circuit court (Cases Nos. 5,527 and 246), the vessel and her cargo in each case was acquitted of the alleged violation, and an order made for further proofs as to the ownership of the property.]

NELSON, Circuit Justice. The further proofs in the above cases having been submitted to me for their final disposition, I have looked into them, and they appear to be full in supplying the deficiency upon the question whether Armstrong and Gerard, British subjects, were the owners of the Gondar at the time of her seizure; and also upon the question whether Armstrong was, at the time, the owner of her cargo. They are also full to show that the same persons were the owners of the Alliance at the time of her seizure, and that Armstrong was, at the time, the owner of her cargo. These being the only questions in the cases upon which any doubt existed, in the judgment of the court, at the former hearing, and which led to the commission for further proofs upon them, let a decree be entered, in each case, in favor of the claimants.

Case No. 5,529.

GONG BELL CO. v. CLARK.

[See Case No. 5.]

[1] [Reported by Samuel Blatchford, Esq.]
[2] [Reversing Cases Nos. 5,526 and 245.]

Case No. 5,530.

GONZALES v. MINOR.

[2 Wall. Jr. 348.] [1]

Circuit Court, E. D. Pennsylvania. Oct. 30, 1852.

INTERNATIONAL COMITY—ADMIRALTY INTERVENTION—COSTS.

1. The exercise of admiralty jurisdiction in suits by foreign seamen for wages, is matter of comity rather than of duty; and generally speaking, is exercised only under such circumstances as might infer the presumption of a request from the foreign state: as, for example, where a voyage is ended or broken up, and the seamen discharged; or where there is strong reason to believe that there would be a failure of remedy, in case the mariners were compelled to await an oportunity of obtaining redress in their own courts.

[Cited in The Becherdass Ambaidass, Case No. 1,203; The Carolina, 14 Fed. 426; The Topsy, 44 Fed. 635.]

[Cited in Roberts v. Knights, 89 Mass. 450.]

2. In a case of "transparent contrivance," proved by an intervenor upon evidence in this court, which was not before the court below, the libel was dismissed with costs to the intervenors and consignees, against the libellants and the contriving defendant, contrary to the rule established in Carrigan v. The Charles Pitman [Case No. 2,444], which does not allow costs on a judgment of reversal in this court, obtained upon new evidence, not had in the court below.

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

This was a libel for wages by ten Spanish sailors, mariners of a Spanish schooner, the Vencejo, against Antonio Minor, its master, and Figuera and others, consignees in whole or in part of the cargo or vessel. The libel set forth that the schooner having been at Barcelona, and "destined on a voyage thence by way of Cette to Philadelphia," the said master hired the libellants to serve as mariners "for and during said voyage;" but it stated afterwards, that the vessel having arrived at Philadelphia and delivered her cargo, and made freight, "that the libellants still continue on board and in the service of the said schooner." There was no allegation, therefore, that the voyage was ended. The libel sought process against the respondents, but asked none against the vessel. It claimed wages to the amount of $660; it being sworn that one mariner had shipped at $40 a month, another at $25, and another at $18. No copy of the shipping articles was annexed. The return of the process was "Non est inventus" as to Minor, the master; and an attachment of the credits and effects of the owners of the vessel in the hands of the consignee, to the value of $660. A few days previously to this libel being filed, on the 11th of September, 1851, Messrs. H. & W. P. Hall, of South Carolina, had brought a suit against one Manuel Roger, a foreign attachment, in a state court at Phil-

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

adelphia, attaching his estate in the hands of this Minor & Figuera & Co.; and under this process the ship—alleged to be his, in part—was taken possession of by the sheriff, and the freight in the hands of Figuera & Co. claimed, as belonging to him. The answer of the master, Minor, admitted "that all the allegations in the said libel were true:" that Figuera and others were consignees, and had received between $640 and $650, which they declined to pay over, "upon the allegation of some foreign attachment having issued, under which the said schooner had been seized;" and asserted that the respondent had "no funds to pay said demands of libellants, as well as other expenses incident to said attachment;" and that his own wages were also unpaid. And it concluded with the admission and request, "that all and singular the premises are true and within the admiralty and marine jurisdiction of this honourable court, in verification whereof, if denied, the respondent craved leave to refer to the depositions and proofs to be by him exhibited in this cause." Figuera and others, the consignees, stated in their answer, that they had no knowledge of their own respecting the amounts stated in the libel to be due the libellants; that a foreign attachment, of which they annexed a copy, (the attachment by Messrs. H. & W. P. Hall,) had been served on them, in which Roger, the defendant in it, was alleged to be owner, or part owner, of the vessel; and that as consignees of part of the cargo and vessel, they had received of the freight of her last voyage, of which there remained in their hands, $648.18, which they were ready to pay to whomsoever might be entitled to it.

The mariners were represented by John Fallon; the master, Figuera and others, by Christopher Fallon. The libel of the mariners was filed on the 19th of September, 1851. The answer of Minor was prepared and sworn to on the 17th, two days before any application for any process was made. In this state of the pleadings, the Messrs. Hall, already named as the persons by whom the foreign attachment, referred to in the answer of Figuera & Co., had been laid, intervened, setting forth that the allegations of the libel were not the whole truth; praying that the libellants might be obliged to produce the shipping articles, by which, they were informed, it it was contracted that no wages should be paid till the termination of the voyage, which did not terminate at Philadelphia; praying that Minor might be held to proof of his allegations, about having no money; stating that they were informed that the filing of the libel was a contrivance between the libellants, Minor & Figuera & Co., to defeat the attachment of the intervenors, the Messrs. Hall: that Minor was part owner of the schooner, and had received from Figuera & Co. large sums of money, and that he had moneys to defray wages, if due. And praying security from the libellants and respondents for costs; the said libellants having sailed with the said Minor in the Vencejo. This last fact was one which was not denied in any part of the pleadings. The district court dismissed the answer of the intervenors, and decreed in favour of the wages. [Case unreported.] The case being now here on appeal from this decree, Mr. Waln, in behalf of the intervenors, the Messrs. Hall, produced, under objection of Mr. John Fallon, (not sustained by the court,) as to their competency and relevancy, three several letters, dated the 13th and 16th of September, 1851, to the sheriff of Philadelphia county, who had served the process of foreign attachment in the suit of Hall v. Roger, from Messrs. C. and J. Fallon, the respective counsel in this suit of the complainant, the sailors, and the defendant, Minor; but on that suit jointly representing Minor, the defendant, and complaining to the sheriff in his behalf, of the detention of the vessel by that officer, under the foreign attachment in the suit of Hall v. Roger. In one of them, of September 13th, that is to say, six days before this libel was filed, Messrs. "C. and J. Fallon, for Capt. Minor," (the facts stated in the letter being sworn to, as true, by Minor,) write to the sheriff, as follows: "Hall v. Roger, Supreme Court, December Term, 1851.—We are informed by Captain Antonio Minor, that under the writ in the above case, you have attached the schooner Vencejo, and on sending to your office, we were informed by your deputy, that the whole vessel is attached. Capt. Minor is part owner of the schooner, and at the time of the attachment was in possession of her, sailing her as captain, under agreement with the other owners. The right of defendant, if any, is subject therefore to the right of Capt. Minor's possession, and you cannot rightfully dispossess him of it. We are directed, therefore, by Capt. Minor, to notify you that the schooner cannot be rightfully taken out of his possession by you under the above attachment, and you are required forthwith to remove your officer from on board, and permit the vessel to sail, otherwise you will be held liable to damages, costs and expenses of every kind. You will further take notice, that the schooner is now ready to sail with a cargo on board, and that having taken charge and possession of the vessel, you will be held accountable for the cargo on board, and for the loss of freight, as well as for other damages, if the same shall be removed, and you are warned on no account to permit the same to be removed by any person on any pretext whatever." In another letter of the same day, Messrs. C. and J. Fallon write "for Minor:" —"We understand your note to be, that the sheriff don't mean to interfere with the captain's sailing with the vessel referred to. And we have accordingly instructed him to leave with the vessel, holding you responsible for the damages already sustained. If we

have misunderstood you, please say so at once, and instruct the officer you have placed on board."

GRIER, Circuit Justice. The district court decreed in favour of the libellants, on the state of pleadings and proofs, as the case stood before them. But I am of opinion that the bill should have been dismissed, on grounds not taken in the argument of the case in the district court, and for reasons which, if they had been urged in the argument before that court, would have produced a different result. We do not think it worth while to inquire whether the intervenors have taken the proper steps to compel the production of the shipping articles, in order to show whether the mariners contracted for a voyage to Philadelphia and back again to Spain, because we think that no sufficient allegations appear on the face of the pleadings or in the evidence, to justify the interference of the court in favour of the libellants; and moreover, because we are satisfied from facts either admitted or apparent on the record, that the proceedings as between the libellants and master, are collusive, and instituted for the purpose of evading the attachment laid by an American creditor, in a suit against one of the owners of the vessel.

A court of admiralty has jurisdiction in suits for wages, promoted by foreign seamen against foreign vessels, as questions of general maritime law. But the exercise of such jurisdiction is discretionary with the court, and to be permitted or withheld according to circumstances. The express consent of the foreign minister or consul, is not essentially necessary to found such jurisdiction. Nevertheless, the exercise of it, is rather a matter of comity than of duty. Whether it ought ever to be exercised against the remonstrance of the representatives of such foreign nation, we need not inquire; as we cannot foresee all possible cases, and that question is not before us. But when the court does entertain such cases without the request of the representative of the government, they will require the libellants to exhibit such a case of peculiar hardship, injustice or injury, likely to be suffered without such interference, as would raise the presumption of a request, because it is in fact conferring a favour on such foreign state. If the contract with the mariners has been dissolved; if the voyage has been terminated, and there is a dissolution of the relation of the seamen with the ship; or if such dissolution has been caused by some wrongful act of the master; or if a bottomry bond has become due at the end of the voyage, and the remedy might be endangered by delay, in such and like cases as a matter of comity, not of right, courts of admiralty will interfere to protect the rights of foreigners in our ports. I do not think it necessary to examine specially each of the numerous cases to be found on this subject. They are sufficiently collected in the books. Pritch. Dig. p. 477, tit. "Wages"; Abb. Shipp. Bost. p. 786. It will appear from them that courts of admiralty have expressed extreme unwillingness to interfere in suits for wages, by a foreign mariner against a foreign ship; and have done so only where there was strong reason to believe that there would be a failure of remedy, in case the mariners were compelled to await an opportunity of obtaining redress in their own tribunals. In such cases it may well be presumed that the nation over whose vessels we assume this jurisdiction, will consider it as an act of comity, and not of unwarranted interference.

If, in this case, the voyage had been ended and the mariners discharged by the master, it would undoubtedly have presented a proper case for the interference of our court, to assist them in recovering their wages. But it is averred in the pleadings, and not denied as a fact, that the mariners returned on the home voyage to Spain in the same vessel, in company with the master, who was personally liable, and himself an owner. The mariners have in the vessel an ample security for their wages. Although the libel states, that they shipped on a voyage from Barcelona to Philadelphia, it does not state the voyage ended here, or that they could not, on their return, have ample remedy or redress in their own courts. On the contrary, it is abundantly evident from the face of these records, that this libel has been by agreement and collusion with the master, for the purpose of wresting the money in the hands of the garnishees from the foreign attachment. In order to trump up a bill equal to the balance of freight, charges of $18, $25, and even $40 a month, are set down as mariners' wages. The answer of the captain (admitting every thing alleged in the libel) is drawn out and sworn to before the libel was filed or process was issued. The vessel is rescued from the attachment by the claim of the captain, as part owner in possession, and carried away. The captain, mariners and vessel, have returned together to Spain, after having schemed and executed this transparent contrivance to rescue the freight from the attachment. It would be an excess of comity for an American court to interfere in a case of this kind, in order to enable the master of a foreign vessel to elude the process of our courts in favour of one of our own citizens. The libel is dismissed with costs, adjudged to be paid to the intervenors and consignees by the libellants and Antonio Minor, the master, jointly and severally. Decree reversed.

Case No. 5,530a.

GOOD v. DAVIS.

[Hempst. 16.] [1]

Superior Court, Territory of Arkansas. April, 1822.

ACCORD AND SATISFACTION—AFTER ISSUE FORMED—PLEADING.

1. Accord and satisfaction occurring after issue formed in a suit, must be pleaded puis darrein continuance, if the party would avail himself of it.

2. Pleading puis darrein continuance waives all previous defences.

[This was a suit by Edward Good against Samuel Davis.]

PER CURIAM. After the commencement of a suit and issue formed, a party to avail himself of accord and satisfaction occurring afterwards, must specially plead puis darrein continuance, and establish it by evidence, if disputed, and pleading puis darrein continuance waives all previous defences. 1 Salk. 168; 2 Strange, 1105; 1 Chit. Pl. 697; 5 Taunt. 333.

Reversed.

Case No. 5,531.

GOOD v. DODGE.

[16 Pittsb. Leg. J. 84; 3 Pittsb. Rep. 557.]

Circuit Court, W. D. Pennsylvania. 1869.

COURTS—WATER POWER.

1. Federal courts are designed by the constitution as fora free and unembarrassed by local prejudices.

2. The difference of level between the surface where a stream first touches land and the surface where it leaves it is the property of a riparian proprietor. It must be so used and enjoyed as not to encroach upon the rights of adjoining or proximate owners.

3. The owner below the line of a riparian proprietor cannot subtract from the proprietor above by swelling or backing the water upon him.

At law.

Youngman & Comley, for plaintiff.
Loun & Armstrong, for defendant.

McCANDLESS, District Judge (charging jury). This case, which has occupied your attention for some days, was originally instituted in the court of common pleas of Lycoming county, and has been brought within the jurisdiction of the circuit court of the United States by virtue of an act of congress authorizing the removal where one of the parties is a citizen of another state. You must not forget that you are trying a case in a federal court, which was created by the constitution and laws of the United States to give citizens of other states a forum, free and unembarrassed by the local prejudices which are incident to the trial of causes in the neighborhood where they originated, and where the subject matter in controversy exists. You are selected, as gentlemen of position and intelligence, from the body of a large judicial district, and it is right to presume that you know nothing except that which has been given in evidence. You have viewed the ground in person, and much that would otherwise be unintelligible by oral testimony must have become manifested by your own observation. The cause has been tried with great ability by able and distinguished counsel, and it is purely a question of fact for your consideration. Both parties are riparian owners; that is, of something pertaining to the bank of a river or stream of water. The contest here is for the water power to which such riparian owner may be entitled, and which consists of the fall in the stream, when in its natural state, where it passes through his land, or along the boundary of it; or, in other words, it consists of the difference of level between the surface where the stream first touches his land and the surface where it leaves it. This natural power is as much the subject of property as is the land of which it is the accident. It must be used and enjoyed so as not to encroach upon the rights of the adjoining or proximate owner. The owner below cannot subtract from the proprietor above, by swelling or backing the water upon him, and thus lessening his power. When the owner above claims such to be the case he must satisfy you by clear and undisputed testimony.

You must be convinced, by the evidence, that there has been an unwarrantable invasion of his legal rights. This is the trespass for which the action is brought, and he must prove it, and if proven to your satisfaction, you will allow him to the extent of the damage he has sustained, up to the date of the institution of the suit. You will take care to discriminate, in the measurements of levels and distances, between those witnesses who have made casual observations with the naked eye, and those who have made them with mathematical instruments that cannot deceive. Where the elevation and depression of the water is to be ascertained by inches, the latter are the safest and surest guides by which to be governed in making up your verdict. The rights of property must not be impaired by guess or supposition.

The simple fact for you to ascertain and find by your verdict is, has the defendant, by any act of his, backed up the water of the creek upon the plaintiff, and thus impaired the power of his mill; or if it has been so backed up, has it been the result of natural causes, by the bar in his tail race, by the eddy at the mouth of it, by leakage, or by the sinking of the foundations of this ancient structure? These are matters wholly for the consideration of the jury, and about which it is not the province of the court to

[1] [Reported by Samuel H. Hempstead, Esq.]

express an opinion. The case is with you, and you will return such verdict as the evidence will justify.

GOOD (GOLDING v.). See Case No. 5,514.

Case No. 5,532.

GOOD v. SPRIGG.

[2 Cranch, C. C. 172.] [1]

Circuit Court, District of Columbia. June Term, 1819.

BILLS AND NOTES—DISCHARGE OF INDORSER.

An indorser, who has been discharged by the laches of the plaintiff, is not bound by a promise to pay, unless he knew, at the time of his promise, the fact of laches.

Assumpsit against the indorser.

Mr. Jones, for defendant, contended that the defendant was not bound by his promise to pay, not knowing that demand of payment had not been made of the maker, and that it was incumbent on the plaintiff to show that the promise was made by the defendant with a knowledge of that fact.

And so THE COURT decided. CRANCH, Chief Judge, doubting whether the burden of proof, as to that fact, was not on the defendant.

GOODALE (BARCLAY v.). See Case No. 972.

GOODALL (DUANE v.). See Case No. 4,105.

Case No. 5,533.

GOODALL v. TUTTLE.

[3 Biss. 219; 5 Am. Law T. Rep. U. S. Cts. 240; 7 N. B. R. 193; 7 West Jur. 32; 4 Chi. Leg. News, 473, 485.] [2]

District Court, W. D. Wisconsin. June, 1872.

BANKRUPTCY — RIGHT OF ASSIGNEE TO SUE IN ANY DISTRICT COURT.

1. A suit may be maintained by an assignee in bankruptcy to collect the assets of the bankrupt in any other district court than that where the proceedings in bankruptcy are pending.

[Cited in Bachman v. Packard, Case No. 709; Re Brinkman, Id. 1,884; Lamb v. Damron, Id. 8,014.]

[Cited in Brown v. Wygant, 6 D. C. (Mackey) 448.]

2. The right of the assignee to sue in the other district courts is not expressly conferred, but it may be *held* to be included in and implied from the grant "to collect the assets," as that power could not be otherwise made effectual.

3. Jurisdiction over debtors of the bankrupt not being obtained by the bankruptcy proceedings, such power must, in order to give full effect thereto, necessarily be *held* to extend to any district where a suit to collect the assets is necessary.

4. It must be *held* that congress intended to provide for the complete administration of the bankruptcy system in the federal courts, and as authority to entertain such suits is not given to the circuit courts, it must exist in the district courts, or the jurisdiction be radically defective.

[Cited in Sherman v. Bingham, Case No. 12,762; Bachman v. Packard, Id. 709; Johnson v. Price, Id. 7,407.]

5. The second section relates exclusively to the jurisdiction of the circuit courts under the act, and its provisions cannot, therefore, properly be referred to, to limit the jurisdiction of the district courts conferred by the first section.

[Cited in Smith v. Crawford, Case No. 13,030; Bachman v. Packard, Id. 709.]

6. The rule that a legislature, by adopting a statute of another state, or re-enacting an old statute, is presumed to have adopted the judicial construction given thereto, considered and authorities referred to. Cases under the bankrupt act of 1841 [5 Stat. 440] cited and approved.

7. Congress not possessing the power to require or compel the state tribunals to entertain suits in favor of an assignee for the collection of the assets of the bankrupt, the courts should not construe the bankrupt act in such a manner as to necessitate in its execution assistance beyond the constitutional power of congress to provide.

8. Numerous recent cases cited and examined.

In bankruptcy. This was a suit by Ira E. Goodall, assignee of the Rock River Insurance Company, bankrupt, appointed by the district court of the Eastern district of Wisconsin, where the bankruptcy proceedings were pending against L. S. Tuttle, a resident of this district, to collect a debt claimed in favor of the bankrupt's estate, being a premium note given by the defendant for insurance issued to him. The defendant filed a plea to the jurisdiction of the court. This was one of a large number of similar suits, and was made a test case.

S. J. Todd and Finches, Lynde & Miller, for assignee.

S. U. Pinney and M. M. Cothren, for defendant.

HOPKINS, District Judge. The defendant claims that an assignee in bankruptcy cannot sue to collect the assets of the bankrupt, in any other district court than where the bankruptcy proceedings are pending. It presents a question upon which there exists some diversity of opinion among the district judges. I have therefore held it some time for examination. As far as I have seen, all the cases reported under the bankrupt act of 1841, sustain the jurisdiction, while nearly all made or published under the present act, are against its existence; but what is very strange, reference is in only one of the decisions under the present act, made to the cases decided under the act of 1841, directly upon the question.

It may be regarded, therefore, as a kind

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

[2] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 7 West. Jur. 32, contains only a partial report.]

of choice between old and new cases, but I do not propose to rest upon either without an examination of the reasons and principles upon which they are respectively based, and a careful examination of the provisions of the statute upon the subject of jurisdiction of the federal courts in bankruptcy proceedings, and in proceedings growing out of and in virtue of the bankruptcy proceedings. The district courts have no jurisdiction as between party and party of suits at law or in equity for the collection of the assets of the bankrupt, except what is conferred by the bankrupt act, so if such jurisdiction is not conferred by that act, this court is unquestionably without jurisdiction in this and kindred cases.

The question of residence of the parties, which is material in civil cases under the general grant of jurisdiction to the federal courts, is not important here, for this court does not derive any power to act in this case under such authority or statutes. Congress is authorized by the constitution "to establish uniform laws on the subject of bankruptcy throughout the United States." Article 1, § 8, subd. 5.

Whatever authority the district courts have in the premises is derived from the acts of congress passed under that clause of the constitution. The power under that clause is sufficiently comprehensive to enable congress to adopt a uniform system of bankruptcy, commit its administration to such of the courts of the United States as it might choose, and to provide the modes of procedure, special or otherwise, as they might, in their discretion, deem best adapted to secure and accomplish the objects of the act; and if such proceedings should differ from those in ordinary cases and suits, they would, notwithstanding, be obligatory upon the courts, as congress has, by the constitution, plenary authority over that subject.

By the bankrupt act of 1867 [14 Stat. 517], the jurisdiction and all the original jurisdiction created thereby, was conferred upon the several district courts of the United States, which, I think, and as is generally conceded, confers upon the district court where the proceedings are pending, the power to entertain suits of this kind. So that the question is not whether the act authorizes the assignee to sue in the ordinary mode as between party and party in any district court, but whether such right is confined to the district court where the bankruptcy proceedings are pending. Hence it becomes necessary to inquire by what provision the district court of the same district gets such jurisdiction, and, if it is found to exist, then to see by what clause it is restricted to that district.

I do not understand it to be claimed that the act expressly grants such jurisdiction, but only that it results from the authority given to the courts to adjudicate upon, collect the assets of, and to administer and distribute the estate of the bankrupt. The grant of jurisdiction to collect the assets, it is assumed, impliedly confers upon the courts, in the absence of any provision prescribing the manner of carrying into effect such jurisdiction, the right to adopt such form of proceeding as may be necessary and appropriate to give practical efficiency to such grant. This is a universal rule of construction, and without such a rule many rights would go unredressed, for it is not unusual for legislative bodies to leave with the courts the power to devise and adopt a remedy commensurate with the exigencies of the case in the execution of the authority conferred, the restrictions being that they must not be such as are in violation of the provisions of the fundamental law, or in derogation of the constitutional rights of the citizen.

As I have before said, the right to proceed in the district court by the ordinary and plenary modes of actions at law or in equity, as between party and party, is not expressly conferred in the act, but as stated by Chase, C. J., in Re Alexander [Case No. 160], "This jurisdiction may be well enough held to be included in the general grant of the first section." It is important to bear this in mind, as it may assist in a settlement of the difficulties that have been encountered on this question of jurisdiction of the district courts.

The second section does not profess or attempt to confer or regulate the jurisdiction of the district courts. That relates exclusively to the circuit court. But it may with propriety be said to assume the existence of this jurisdiction in the district courts. That section clothes the circuit court with concurrent jurisdiction with the district court in certain (not all) cases arising under the act, but not of the character of this case, so it is not necessary to define or discuss its extent or meaning. I say by that section, congress assumed the jurisdiction of the district court in all cases, and that it was conferred by section 1, for if it is not found in that it does not exist. And in that assumption there is a very clear legislative construction of the extent and meaning of section 1.

To be more specific than Chief Justice Chase, I think it may well be held to be included in the express and general power "to the collection of all the assets of the bankrupt." And as no special mode is provided for carrying out or exercising that power, it is to be presumed, as before stated, that congress intended the courts would, according to their usual practice in such cases, adopt the customary and common mode of practice provided for the collection of debts or the recovery of property in other cases—that is to bring an action either at law or in equity, according to the nature of the case.

But, as before stated, the right to maintain suits of this kind in the district where the proceedings are pending, is not questioned—

only the right to sue in any other district. In the solution of that question, it may be profitable to examine and see, if possible, why the right was given the assignee to sue for the collection of the debts only in such district. The debts and assets of every nature, situated in all districts, pass to and vest in the assignee, as much as those situated in the district of his appointment. It is his duty to collect the debts from parties out of his district, and to take possession of property out of his district and convert it into money, as much as that within it. Why restrict his right to sue in the district court to the district where he was appointed? If the interests of the estate might be promoted by allowing the assignee to sue in the district court appointing him, is that consideration any less potent as applied to his right to sue in other district courts? Do not the same reasons that exist for authorizing him to sue in one district court exist and apply equally to the right to sue in any and all districts? I suggest these questions to see if any reason can be assigned for the distinction attempted to be sustained.

It is said by one learned judge that the assignee is not remediless; that he can sue in the state courts. Suppose that to be so, can he not sue also in the state courts within the district of his appointment? That being so, it furnishes no reason for any such distinction.

I assume, therefore, that no satisfactory or plausible reason can be assigned for allowing the assignee to sue for the collection of the assets in the district court appointing him, that does not apply, with equal force, in favor of his right to sue in any other district; and if no reason for such distinction can be assigned, why impute to congress an intention to create one? But it is said that the first section so limits it. I think I have shown that it does not; that in terms it does not give the right to maintain a suit in any district court, but that such right only exists by implication, as being fairly within the intention of congress, and as necessarily attaching to the district courts to collect the assets. Is it to be inferred as extending to that district as a necessity to the due administration of the laws? That cannot be upheld, for I have shown that if the assignee can sue in the state courts to collect the assets in one district he can in another, and thus through the agency of those courts collect all the assets—those authorized by the second section of the act to be sued for in the circuit court, as well as the common debts that cannot be sued for in the circuit court. So I say again there is no necessity for holding that the assignee may sue for assets in the district court appointing him, and not in any other.

There is nothing in the act that requires it, and as there is no reason for making such distinction, I do not think courts should establish such an one. The act provides "that the jurisdiction hereby conferred shall extend to the collection of all the assets." If any portion of the assets were out of the district, how were they to be collected? In one of two ways; either by process issuing from that district court, to the defendants residing in any district, or by allowing suit to be brought in the district court where the defendant might reside. To collect all the assets, one of those modes would have to be adopted. It is very plain, I think, that the general rule which prohibits the suing a party out of the district where he resides, was not changed. So it must have been supposed by congress that suits could, under that general power, be brought in any district court. But it is said that the first section confers jurisdiction "on the district courts in their respective districts," that that is the extent also of the "original jurisdiction" conferred. I think too much importance is given that expression. There are certain proceedings that the bankrupt courts can only do in the district where the proceedings are pending—such as the adjudication of bankruptcy; that could only be done by the court where the proceedings were pending if those words were omitted; so also of all that class of cases and proceedings relating to the regularity of the bankrupt proceedings proper, including controversies between the bankrupt and his creditors, the ascertainment of liens on bankrupts' property, and the priority thereof, down to the distribution of the assets and the discharge of the bankrupt. These and like questions must all necessarily be heard by the court before which the bankruptcy proceedings are pending. None of those matters could be tried or heard in the state courts or any other court, so that limitation in the act as to such matters does not appear to possess much significance, as the same construction would have to be given to the act if it had been left out.

But the act provides for things and acts to be done that affect and relate to third persons; acts which do not in any sense require the presence of the records of the case or proceedings; acts and proceedings which it is contended can be transacted and taken in the state courts, to-wit: suits for the collection of the assets against delinquent debtors. Should the limitation be held as applicable to such cases? As before stated, the right to collect all the assets is one of the express grants conferred by the act upon the district court, and if congress had intended to confine the right of the assignee to prosecute suits to the district court of the district appointing him, it seems to me they would have expressed such limitation in unequivocal language, and made some other provisions for the collection of debts from parties living outside of that district.

But the act contains this further general

authority, "to do all acts, matters and things" to be done under and in virtue of the bankrupt proceedings," without any words of limitation or restriction as to courts. Did not congress intend by that, that all proceedings necessary to be done in virtue of the bankruptcy should be done in the federal courts? Suits against third parties to collect the debts and to collect the assets generally, are not such suits included in the general terms as proceedings in virtue of the bankruptcy. Can it be maintained from any thing in the act, that congress intended to leave the collection of the debts or any part of the assets to the agency of the state courts, or that they intended to rely upon the instrumentality of any other courts than those of federal origin for a complete administration of the laws? If not, then why construe it so as to necessitate the employment of such agencies? Why give a construction that defeats the manifest intention of congress in that respect? Courts are not authorized to create a limitation by construction; that is in contravention of the intention of the law makers. Dresser v. Brooks, 3 Barb. 429.

The system adopted and established by congress should be administered by the courts charged with that responsibility, according to its true spirit, intent and meaning, instead of their attempting to escape therefrom by a narrow and technical interpretation of the language, without regard to the obvious purport of the whole act. My conclusions, therefore, are, that congress, under the power contained in the constitution, by the act of 1867 established a uniform system of bankruptcy; and in it they attempted and intended to confide its administration to the federal courts, and for that purpose they conferred original jurisdiction upon the several district courts of the United States within their respective districts, to adjudicate upon the question of the bankruptcy, to hear all matters relating to the bankruptcy, and all questions arising between the bankrupt and his creditors, authorizing this jurisdiction to be exercised in vacation as well as in term time, and authorized a review of all such proceedings in the circuit court of the district where the proceedings were pending, by petition or otherwise, and empowered the circuit court to hear those matters in vacation or term time; that the exercise of the jurisdiction thus far was meet and proper to be had in the district court where the papers were filed and not in any other district.

The act further confers the power upon the district courts to collect all the assets of the bankrupt, and to do all other acts necessary to be done in virtue of the bankruptcy. This by implication confers the authority upon the district courts to entertain jurisdiction of suits in the name of the assignee against third persons, either at law or in equity, for the collection of the debts and property of the bankrupt, and as such jurisdiction is not expressly limited to the district courts where the proceedings are pending, and as no reason exists for such limitation, the courts are not warranted in restricting its exercise to such district.

I have not undertaken to define with accuracy the character or extent of the jurisdiction of the circuit courts under the second section, as I do not see that that section sheds any light upon the jurisdiction of the district courts as conferred by section one.

The eighth section, by allowing appeals from decrees and writs of error from judgments of the district courts to the circuit courts, assumes that the district courts have jurisdiction of suits at law and in equity, and there is nothing in that section that indicates, or from which it may be inferred, that it is restricted to any particular district or class of cases. It may be applicable to and include all cases without exception, and the language is as consistent with its existence in each district as in the district where the proceedings are pending.

The judges holding that an assignee cannot sue in any district court other than where he was appointed, also hold, (and correctly, too, I think,) that a party cannot be sued outside of the district where he resides or is found, or in other words that jurisdiction in that respect is not enlarged; so that by their own construction they convict congress of the folly of establishing a system of bankruptcy without providing the means for its execution within their own jurisdiction. Such a construction is as destructive of the uniformity of the system they are empowered to establish as it is subversive of their intentions.

The jurisdiction that may be exercised in vacation is entirely different from that for the collection of debts or assets. By the proceedings and adjudication, jurisdiction is obtained of the bankrupt and his creditors, and the court making the adjudication is the only one, according to the well settled rules of all courts, that can deal with the bankrupt and his creditors, and settle all conflicting claims, equities and controversies arising between them. All such matters are exclusively within the jurisdiction of the court where the proceedings are pending, and such parties may proceed summarily to have their rights heard and determined by such court.

It has been held that persons or creditors holding claims upon the property of the bankrupt, in the possession of the assignee, may proceed summarily by petition as against the assignee,—Ferguson v. Peckham [Case No. 4,741],—while the assignee, to collect the debts or to recover property claimed adversely, must proceed by action at law or in equity. The reason for such distinc-

tion is obvious. As I have already attempted to show, jurisdiction over the debtors and adverse claimants is not obtained by the bankruptcy proceedings, they cannot be treated as parties to the proceeding like creditors. That being so, the power to collect the assets was necessarily additional—an independent authority given to the district courts, not to be exercised at chambers, like their other powers, but in the usual and formal manner that courts proceed in common law and equity cases. This is the jurisdiction that I have endeavored to show may be held as impliedly conferred by the first section, and which is recognized by the second and eighth sections, and which, according to my understanding of the act, pertains to each district court, and authorizes an assignee in bankruptcy to sue for the collection of the assets in any district court where it may be necessary to effect such collections. This conclusion is at variance with the decisions of some of the district courts, but I think I am sustained in it by the weight of authority as well as by sound reason.

I cannot but be impressed with the idea that due consideration has not been given to the authority of decisions made under the act of 1841, sections 6 and 8 of which correspond in substance with sections 1 and 2 of the present act, except that some additional powers are expressly conferred by the present. They are the sections which confer jurisdiction, and it becomes, therefore, of the first importance to ascertain what construction had been given and placed upon those sections concerning the question of jurisdiction, before the passage of the present act, for as congress subsequently re-enacted the law, it is to be presumed that they did so in view of the construction given to it and in affirmation thereof.

This rule is universally applied in the construction of re-enacted statutes. Sedg. St. & Const. Law, 428–431. If, therefore, the courts had interpreted the corresponding sections in the act of 1841, as giving the authority for the assignee to sue in other district courts than where the proceedings were pending, under the rule above stated, such interpretation is absolutely binding upon the courts. Such decisions have not only the weight that the eminent legal attainments and ability of the judges pronouncing them gave to them, but in addition thereto is the presumption that congress approved and sanctioned them, which, it seems to me, the courts should regard as of about the same effect as if such construction had been incorporated into the act.

The bankrupt act of 1841 expressly allowed certain jurisdiction to be exercised summarily, which, under the present act, the supreme court, in Smith v. Mason, 14 Wall. [81 U. S.] 419,[2] has decided is not the case. It is there settled that when the party sued is a stranger to the proceedings, he must be proceeded against in the formal mode as used in common law or equity cases. In Ex parte Christy, 3 How. [44 U. S.] p. 312, Judge Story, from whose opinion a part of the special grants of jurisdiction in the present act are copied, says: "The obvious design of the bankrupt act of 1841, c. 9, was to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period. For this purpose it was indispensable that an entire system adequate to that end should be provided by congress, capable of being worked out through the instrumentality of its own courts independently of all aid and assistance from any other tribunals over which it could exercise no effectual control."

Again, at page 320 he says: "The judicial power of the United States is, by the constitution, competent to all such purposes; and congress by the act intended to secure the complete administration of the whole system in its own courts, as it constitutionally might do." And further, at page 321, he says: "The truth is (as has been already asserted) that in no other way could the bankrupt system be put into operation without interminable doubts, controversies, embarrassments and difficulties, or in such a manner as to achieve the true end and design thereof."

From these general views of the reasons and principles involved in and underlying the act and the objects to be attained by it, and the modes and tribunals for its administration, no intelligent party, I think I may safely assert, will dissent, but it is true that the precise point involved in this case was not before the court, but there were others relating to the general powers of the district courts under the act which called for an examination and ascertainment of the jurisdiction conferred by the act, and made the remarks above quoted pertinent to that case and to the question now before this court.

The same learned judge, in Mitchell v. Great Works Milling Co. [Case No. 9,662], the case of a bill in equity filed in the circuit court by an assignee in bankruptcy, which was demurred to on the ground that the circuit court had no jurisdiction under the act of 1841, again examines and explains the law, and its various provisions relative to the jurisdiction conferred on the federal courts. He overruled the demurrer and sustained the jurisdiction. He there showed, by a very able and exhaustive argument, that congress contemplated by the provisions conferring jurisdiction, to give the entire administration of the law to the federal courts, and did not contemplate the aid of the state courts, and said: "It is clear that congress has no rights to require that the state courts shall entertain suits for such objects and purposes. The states, in providing their own judicial tribunals, have a right to limit, control and restrict their ju-

[2] Consult, also, Marshall v. Knox [16 Wall. (83 U. S.) 551].

dicial functions and jurisdiction according to their own mere pleasure. They may refuse to allow suits to be brought there 'arising under the laws of the United States,' for many just reasons: First, because congress is bound to provide such tribunals for themselves; second, state courts are not subject to the legislation of congress, as to their jurisdiction," continuing the argument to show that the law, if it depended upon state tribunals for its execution, could not be administered. A bankrupt law, to be constitutional, must be uniform throughout the whole United States. That includes uniformity in administration, which it would be impossible to attain if it were entrusted to the state courts. Some might hold one provision unconstitutional, and some another, in a way to render the administration of it impossible. In no way, therefore, except by committing the administration of it to the federal courts, could it be made "uniform."

Justice McLean, in McLean v. La Fayette Bank [Case No. 8,885], says: "This power (bankruptcy jurisdiction) cannot be exercised by the state courts. Their powers are derived from different sovereignties, to which they are amenable. Congress had not the power to impose this jurisdiction on the state courts." Judge Story, in Ex parte Martin [Id. 9,149], had the question before him as to whether the federal courts in districts other than where the proceedings were pending had jurisdiction to restrain the proceedings by creditors, or to prevent parties from interfering with the bankrupt's property in such districts. After quoting the following language of the act as to the extent of the jurisdiction "to all acts, matters and things to be done under and in virtue of the bankruptcy until the final distribution and settlement," which is the same language used in the present act, he says:

"Now, this language is exceedingly broad and general, and it is not, in terms or by fair implication, necessarily confined to cases of bankruptcy originally instituted and pending in the particular district court where the relief is sought. On the contrary, it is not unnatural to presume that as cases originally instituted and pending in one district may apply to and reach persons and property situate in other districts, and require auxiliary proceedings there to perfect and accomplish the objects of the act, the intention of congress was that the district courts in every district should be mutually auxiliary to each other for such purposes and proceedings. The language of the act is sufficiently comprehensive to cover such cases." He further says: "No state court could entertain the suit, for the act confers no power or jurisdiction on any state court."

In Moore v. Jones, in district court of Vermont, reported in 23 Vt. 739, which was a proceeding by an assignee to collect a sum of money received by a party contrary to the provisions of the bankrupt act, Judge Prentiss says: "Jones was decreed a bankrupt, not in this court, but in the district court of the Northern district of New York, and the question is, whether, that being the case, this court can take jurisdiction of the matter in controversy, or, indeed, of any matter arising under or growing out of the bankruptcy." It will be seen that that case presents the identical question involved in this, and Judge Prentiss, on the authority of Ex parte Martin, supra, sustained the jurisdiction. The only question presented in that case was as to the jurisdiction of the district court of Vermont, and the decision sustaining it in that case is a direct authority in favor of the jurisdiction of this court in this case.

These are all the cases I have been able to find upon this question, reported under the act of 1841, and I have taken the liberty to quote freely from them, to elucidate and establish my own views by the reasons and opinions of those enlightened courts, and for the further purpose of showing the direct bearing and application of the well settled rule before referred to, that a legislature, by reënacting a statute which has received a construction from the courts, is presumed to have adopted the construction as well as the act itself—as stated in Pennock v. Dialogue, 2 Pet. [27 U. S.] 1: "The known and settled construction of these statutes by courts of law has been considered as silently incorporated into the acts, (on their reënactment), or has been received with all the weight of authority." The same rule has been applied to constitutional provisions copied from other states. Their judicial construction is held to have been also adopted. Attorney General v. Brunst, 3 Wis. 791.

Now the courts having construed the act of 1841, which contained similar, though not as extensive, grants of jurisdiction as the present act, as not restricting the proceedings for the collection of the assets of the bankrupt to the district court where the proceedings were pending, and having so uniformly and emphatically held that the intention of congress was that the act should be administered in the federal courts, and that they could not constitutionally impose the execution of the act upon the state courts, and congress having, with full knowledge of such uniform interpretation, re-enacted the law, how can the courts escape from the application and obligation of the above rule? Is not that construction to be regarded as "incorporated into the act," and as binding upon the courts as the act itself? It seems to me it must be so, and that there is no way of escape from it. But without regarding that as absolutely controlling, I think the general and universal rules for the construction of statutes sustain such interpretation.

In U. S. v. Freeman, 3 How. [44 U. S.] 565, the court, after citing various cases as different illustrations of the rule, say: "The mean-

ing of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed, the limitation of the rule being, that to extend the meaning to any case not included in the words, the case must be shown to come within the same reason upon which the law-maker proceeded." Does not the "same reason" exist for allowing an assignee to sue for the recovery of the bankrupt's estate in the district court of every district where the estate is situated, as exists for allowing him to sue in the district where the proceedings are pending? If so, is it not manifestly the duty of the courts under that rule to place such a construction upon the act as to effectually carry out the intention of the law-makers? In People v. Utica Ins. Co., 15 Johns. 381, the court say: "Such construction ought to be put upon a statute as may best answer the intention which the makers had in view, and this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances; and whenever such intention can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute; where any words are obscure or doubtful, the intention of the legislature is to be resorted to, in order to find the meaning of the words. A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers, and such construction ought to be put upon it as does not suffer it to be eluded." 6 Bac. Abr. 1, 5, 10, and authorities there cited; 1 Kent, Comm. 462; Dresser v. Brooks, 3 Barb. 429; Jackson v. Collins, 3 Cow. 89; The King v. Younger, 5 Term R. 449; Margate Pier Co. v. Hannam, 3 Barn. & Ald. 266; Wilkinson v. Leland, 2 Pet. [27 U. S.] 627.

Again in Dwar. St. 690, it is said, "The intention is to govern, though such construction may not in all respects agree with the letter." "That the meaning of words is best ascertained from the subject of the act." Id. 696. "That the reason and object are a clue to the true meaning." Of course these rules are to be considered applicable only in cases where there is some ambiguity in the language, or the language is such as to leave some doubt as to the limitations of the act. When the words of an act are perfectly clear it needs no interpretation. But I think after the amount of discussion these jurisdictional clauses have occasioned, both under the old and the present act, that it will not be claimed or alleged that they are not sufficiently ambiguous to require interpretation.

I will now briefly examine the cases decided under the present act, and will endeavor to show that those which conflict with the interpretation sought to be maintained by me are in reality but two. The first case in which the question was raised or is noticed was In re Richardson [Case No. 11,774]. That was a bill brought by a bankrupt (residing in New Orleans) in the Southern district of New York, to enjoin his creditors from prosecuting their claims against him in New York, which was dismissed for want of jurisdiction. It may be very reasonably claimed that the district court of Louisiana had exclusive jurisdiction of the matter involved therein, and that the court in the Southern district of New York could not grant the relief asked. A state court for that reason could not grant the relief sought in that case, any more than the district court. The court in Louisiana acquired jurisdiction, as I have heretofore shown, of the bankrupt and of all his creditors, and might, perhaps, be said to be exclusively the tribunal to adjust all matters between them, and upon that ground it might properly have been dismissed. But the Louisiana court did not, as hereinbefore stated, get jurisdiction, by the proceedings in bankruptcy there, either of the bankrupt's debtors, or of persons holding his property by adverse claims. A new proceeding in favor of the assignee would be necessary even in that court, in order to get jurisdiction of them—i. e., by the service of process as in ordinary suits at law or equity; so the question as to whether such a suit might not have been maintained in New York was not before the court. I regard what was said, therefore, as not said in reference to the question now under consideration, and as not binding, nor entitled to the consideration of a decision made upon the point presented in this case. I am not prepared to say that that case was not properly dismissed, but upon other grounds and for other reasons than exist in this case. The next case in order of time was the case of Markson v. Heaney [Id. 9,098], in the United States circuit court of Minnesota. That was the case of a bill filed by an assignee, appointed in Kansas, against a party in Minnesota to restrain the foreclosure of a mortgage given by the bankrupt upon property situated in Indiana. The opinion is delivered by Dillon, J. The question, he says, was not raised by either party in the argument, and he says at its conclusion, "I therefore express my first impressions concerning it." I do not consider that as the final and deliberate opinion of the learned judge on the question, and think he would not feel bound by it himself as such. The question there, however, was only as to the jurisdiction of the circuit court under the second section of the act, and he did not attempt to define the extent of the jurisdiction of district courts as conferred by the first section, nor does he refer to the opinions under the former act upon the question that I have

cited, nor to any case except that of In re Richardson, supra; so I am satisfied that it should be received as only the "first impression" of the learned judge, formed without argument or deliberate consideration.

The next case is Shearman v. Bingham [Case No. 12,733]. That presents the identical point involved in this case, and it was ruled that the court had not the jurisdiction. Judge Lowell referred to, but declined to follow, the opinion of Judge Story in Ex parte Martin [supra], as well as that of Judge Prentiss, in Moore v. Jones [supra], though he says the difference between the two acts is hardly to be distinguished. In Dwight v. Ames [Case No. 4,965], the same judge says that section 1 of the present act is identical with section 6 of act of 1841, except the present goes further and adds some new powers, which he enumerates, and among which is the express power to collect assets. He adopts the views of the judges in Re Richardson and Markson v. Heaney, above cited. He does not seem to recognize any difference between the jurisdiction conferred upon the circuit courts and the district courts, and treated the question upon the theory that the jurisdiction granted by the first section did not relate to suits at law or in equity between the assignee and third persons; "that," as he says, "being regulated by section two."

This is the point of difference, and if he is correct, a suit cannot be brought in any district court, not even the one where proceedings are pending for the recovery of a debt due the bankrupt, for the jurisdiction conferred by the second section relates only "to suits at law or in equity, which may or shall be brought by the assignee against any person claiming an adverse interest, or by such person against such assignee touching any property or rights of property of said bankrupt transferred to or vested in such assignee." That jurisdiction is limited to the subject-matter stated, and to persons setting up adverse claims thereto. Morgan v. Thornhill [11 Wall. (78 U. S.) 65]. That does not authorize either the circuit or district courts of any district to entertain suits by the assignee to collect debts due to the bankrupt's estate. Such suits cannot be maintained in the circuit courts, as held in Woods v. Forsythe [Case No. 17,992]; and if suits for the collection of debts cannot be maintained in the circuit courts under the jurisdiction thereby conferred, they cannot be in the district courts, if they derive their power to entertain such suits at law only under that section, for the jurisdiction conferred by that is only concurrent; so, according to the construction of the learned judge, a suit to collect a debt is not maintainable in any district court, and there is, therefore, no need of distinguishing between districts. But he evidently does not mean that, for he says, "The true meaning of the law is that I have jurisdiction of such actions as this only when the bankruptcy is here." But where does he get such jurisdiction from, if section 1 does not relate to suits at law or in equity between the assignee and third persons? If the jurisdiction exists it is by virtue of the powers granted by section 1. It is provided in that section that the "jurisdiction hereby conferred shall extend to the collection of all the assets of the bankrupt." I do not think that congress intended by that, that debts were to be collected only by moral suasion. If not, what other way is there to collect them than by action commenced by due process of law, where debtors do not voluntarily pay, and when the law makers confer the power to collect they necessarily include the right to do it by due process of law. The learned judge has failed to satisfy me, notwithstanding his opinion is carefully prepared, and ably sustains his theory that he has arrived at the true meaning of the act. Nor do I think he answers or explains away the positions and argument of Judge Story, on the same point. I think he was not entirely satisfied with its soundness himself, for he says he should not regret to see the decision overruled, because of the inconvenience that might result from it in the administration of the act. His theory about using the state tribunals in aid of the administration of the act I have shown to be questionable under the constitutional power of congress, and practically very uncertain, as the state might at any time deny the right to the use of their tribunals in such cases, and neither congress or the federal courts could prevent it. But as to whether suits to collect the assets can be maintained in the state courts, I am not called upon now to express an opinion. All I have meant to say is that congress cannot impose that duty upon them. He refers, in support of his position, to the eleventh section, which provides that proceedings in bankruptcy must be commenced in the district where the bankrupt resides. That fixes the venue for commencing the proceedings in bankruptcy, and prescribes the contents of the process for acquiring jurisdiction of the proper parties to the bankruptcy proceedings, but it does not require all the acts and proceedings, necessary to be done or taken "in virtue of the bankruptcy," such as suits at law or in equity, to be prosecuted in that district. If it had been so intended, it would doubtless have authorized the issuing of process from that district to the marshal of any and every district where a necessary defendant in such suits might reside, so as to bring him into that court. Section 7 of the act of 1841 provided "that all proceedings in the case to the close thereof" should be had in the district where the bankrupt resides. Yet Judges Story and Prentiss made the decisions I have before mentioned without referring to it at all. That was not, however, re-enacted. But it is evident that section 11 relates to the proceedings against the bankrupt, the action, orders and directions of the court in the bankruptcy proceedings proper, and not to suits

against third persons growing out of the proceedings; so that it ought not to have any influence in determining the questions involved in this case. I have shown, I think, that the reasoning of the learned judge goes too far—does not stop when he does. It goes to show that congress has failed to confer jurisdiction upon any federal court to entertain a suit for the collection of the debts due the bankrupt's estate, so that the question of distinction attempted to be sustained between the authority of the different districts is wholly immaterial.

Judge Nixon, of the New Jersey district court, has adopted Judge Lowell's views, and held in Jobbins v. Montague [Case No. 7,330] that a suit in equity cannot be maintained in a district court other than where the bankruptcy proceedings are pending. That was a suit of the class of which a circuit court has concurrent jurisdiction under section 2. The learned judge, in stating his own reasons, confines himself principally to two phrases in the first section: First, that the original jurisdiction conferred is "given to the district courts in their respective districts in bankruptcy proceedings;" and, second, that such courts "are authorized to adjudicate, etc., according to the provisions of the bankrupt act." It occurs to me that he attaches undue weight to those phrases. It seems to me if they were both omitted the sense of the section would not be materially changed; for the district courts cannot, by any law that I know of, exercise jurisdiction out of their respective districts. Their jurisdiction is and always has been restricted to the territorial limits of the district. And if the second phrase was omitted, could the courts exercise the jurisdiction in any other way than "according to the provisions of the act?" Are not the provisions of the act as binding upon the courts without that clause as with it?

My understanding is that the courts are bound by the provisions of all acts of congress, and that a declaration in the act that they are to be governed by them, would not in the least change the obligation or action of the court in respect to the law. As an instance of the obligatory operation of that clause he also cites the eleventh section, which provides where proceedings shall be commenced. If that phrase was omitted altogether, could the proceedings be commenced in any other district than that provided in section 11? He also suggests as warranting the strict construction that he seems to understand he is giving to the act, that "the bankruptcy courts are mere creatures of the statute." It seems to me that his views in that respect do not accord with the general principles, purposes, and theory of the system.

Congress is authorized by the constitution to adopt a uniform system of bankruptcy, which it has done, and clothed the several district courts with original jurisdiction to administer it. Now to hold that the powers of such courts are to receive a strict construction is not, it seems to me, according to the generally received doctrine of courts in such cases. Such an act is properly denominated "remedial," and should therefore receive a generous and liberal interpretation, which embraces and extends to the provisions conferring upon the courts jurisdiction to execute it, as well as to the other parts. Would the learned judge apply that construction to the district court when sitting in admiralty? If not, why? It is constituted a court of admiralty by statute, and is a creature of the statute in the same sense that it is when sitting in bankruptcy. He also undertakes to draw support for his restricted meaning from the language of the second section. I have hereinbefore attempted to show that no such use could be made of section 2; that that section relates to the proceedings in, and the jurisdiction to be exercised by, the circuit courts, and does not profess to regulate or interfere with the jurisdiction of the district courts, and like Judge Lowell, he also deplores the construction that he feels constrained to place upon the act, as he anticipates that embarrassments may result therefrom in its administration.

I avoid all such regrets and doubtful apprehensions by simply following the construction placed upon the act of 1841 by Justice Story, and which, I am more and more convinced, was approved by congress, as in preparing the present act they copied into it from his opinions several of the clauses in reference to the extent of the jurisdiction of the district courts, and particularly the one "to the collection of all the assets of the bankrupt;" so that congress must, as a question of fact, not merely presumption, have been familiar with his opinions upon that subject, and also with the opinions that congress did not possess the power to cast upon the state courts the duty or authority to execute any part of the act.

Judge Miller, of the Eastern district of this state, has repeatedly decided that the district courts have jurisdiction in cases exactly like this; that the general clause or grant of authority to collect the assets does not refer alone to the court where the bankruptcy proceedings are pending, but to the district courts generally, and authorizes the assignee to sue in any district court; that such cases may be said to be cases arising under the laws of the United States and within the judicial power as declared by the constitution of the United States.

It was suggested by the counsel for the defendant on the argument, that as the bankruptcy proceedings, out of which this case arises, were by the act dividing this state into two districts and organizing this district, declared to remain in the eastern district, and that as by that act jurisdiction, in all unfinished cases, was retained in that district, the assignee might commence suits

in that court against parties residing in this district.

I do not think that position can be sustained, for according to my theory of the act, which I have hereinbefore attempted to maintain, a suit against a third person for the collection of the assets, is not a proceeding in the bankruptcy case proper. That, although it may be said that such suits grow out of it, or are "acts done in virtue of the bankruptcy," yet they are not a part of the proceedings, so as to authorize the prosecution of such suits in that district.

The bankrupt and his creditors are required to attend to the case in that court, as they are regarded as parties to those proceedings, and all orders touching their rights and the administration of the estate can alone be made there, but that cannot include suits at law or in equity against third parties that are required subsequently to be brought for the collection of the assets.

Such a course would be contradictory of and antagonistic to the theory and general purposes of the law, as I have heretofore explained it, and would be very unjust to the defendant in this suit, and other defendants in various other cases now pending herein, as it would subject them to largely increased costs without any corresponding benefit. This being an action by the assignee of a bankrupt mutual insurance company to collect the premium note given by the defendant, a member of the company, it was not of such a character, or for such an amount as predisposed my mind to a favorable disposition of the case for the plaintiff, and I woud gladly have turned the plaintiff over to proceed in some of the inferior tribunals of the state to collect this class of debts, but I could not see that I had any right to do so under the law. Such matters cannot be taken into consideration legitimately, however, in construing an act or as changing an otherwise correct construction.

I think the interpretation I have adopted is in harmony with the general spirit of the act, and gives to it its proper scope and efficiency, and it certainly has the support and concurrence of many of the most learned and distinguished judges of the federal courts, from whose opinions on the subject I have hereinbefore liberally quoted.

In the result finally reached, I have designed giving to the act its most natural and obvious meaning, and have only drawn such inferences therefrom as are sanctioned by the known and accepted rules governing the interpretation of statutes in like cases. I therefore direct a judgment for the plaintiff.

GOODALL, ETC., STEAMSHIP CO. (LORD v.). See Case No. 8,506.

GOODELL (CLUTE v.). See Case No. 2,911.

GOODELL (SPAFFORD v.). See Case No. 13,197.

Case No. 5,534.

GOODENOUGH et al. v. WARREN et al.

[5 Sawy. 494; 11 Chi. Leg. News, 289; 7 Reporter, 772; 25 Int. Rev. Rec. 279; 7 Am. Law Rec. 751.] [1]

Circuit Court, D. Oregon. May 12, 1879.

REMOVAL OF CAUSES—DEED—RECORD OF DEED—AGENT—KNOWLEDGE OF.

1. A suit against tenants in common or persons claiming to be such, concerning the title to or possession of land, is divisible and removable into the national court under section 639 of the Revised Statutes, by either of said tenants so far as he is concerned.

2. The complainants brought suit in the state court against W., a citizen of California, to quiet title to certain lands, and joined with him as defendants certain citizens of Oregon, from whom W. derived whatever right or title to the premises he has: *Held*, that the substantial controversy in the suit was wholly between citizens of different states—the complainants and W.—and might, therefore, under section 2 of the act of March 3, 1875 (18 Stat. 470), be wholly removed by the latter into the national court.

[Cited in The Debris Case, 16 Fed. 34.]

3. At common law a deed is valid between the parties thereto and their privies, although not witnessed, acknowledged or recorded, and it is so in this state without acknowledgment or record: Semble, that under the Oregon statute the attestation of a deed is no part of its execution, but only the appointed means of preserving the evidence thereof; and quere, is acknowledgment equivalent to attestation; but the deed of a married woman is not operative until acknowledged upon a privy examination, as provided by statute.

4. A record of a junior deed does not avoid an unrecorded elder deed to the same premises, when the junior deed was taken with knowledge of the existence of the elder one; the grantee in the junior deed, under such circumstances, is not considered a bona fide purchaser.

[Approved in Manandas v. Mann (Or.) 13 Pac. 449.]

5. The grantee in a conveyance obtained through the agency of a third person is bound by the knowledge of such agent as to the existence of a prior unrecorded deed to the same premises.

[Cited in Fitzgerald v. Wynne, 1 D. C. 115.]

Suit to quiet title.

E. C. Bronaugh, for complainant.

W. S. Beebee and H. T. Bingham, for defendants.

DEADY, District Judge. This suit was brought by Ira Goodenough, George Woodward and Thomas Connell, against five of the seven children of the late Jonathan Keeney and Marcena Moore, George Warren, A. J. and Levi Knott, in the state circuit court for Linn county, to quiet the title to the undivided west half of the donation claim of Jonathan Keeney and Mary, his wife, it being claim number forty-two, and containing three hundred and twenty acres, and also the donation claim of Isaac McGinnis, it being

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 7 Reporter, 772, contains only a condensed report.]

claim five thousand five hundred and fifty-seven, and containing one hundred and sixty acres, the said claims being adjoining one another and situate in the county aforesaid.

It appears from the complaint that on August 13, 1867, said Keeney and wife, then residing in the territory of Idaho, sold the premises to Anthony, Amasa and Albert Moore, and executed a deed to them for the same, with a covenant to warrant and defend against all persons claiming under them, which deed was duly acknowledged by the wife, but not the husband, before the clerk of a probate court in said territory, and on July 9, 1868, was copied on the record of deeds in Linn county, but was not entitled to record, because there was no certificate upon such deed as to the official character of the person taking such acknowledgment and the genuineness of his signature thereto, etc., as required by section 12 of the Oregon act upon conveyances (Laws Or. 516) in the case of deeds executed elsewhere in the United States to lands within the state; that on February 4, 1873, said Anthony, Amasa and Albert for a valuable consideration conveyed said premises to A. J. Moore and Alexander Moore, which deed was duly recorded on the following day; that on October 21, 1874, said A. J. Moore conveyed his interest in the premises to said Alexander, and on September 30, 1876, said Alexander conveyed the premises to Marcena Moore; that on April 23, 1877, said Marcena and Alexander mortgaged the premises to D. Brenner, to secure the payment of a promissory note of the same date made by said Anthony and Alexander Moore for the sum of nine hundred and eighty dollars and fifty-nine cents, which mortgage was duly recorded on April 26, thereafter; that afterwards, by means of sundry conveyances, made in pursuance of a judgment obtained against said A. J. Moore by Charles Goodenough, on December 3, 1876, and a decree of March 13, 1878, foreclosing said mortgage and executions issued thereon and sales upon the same, and other conveyances by the grantees in said last mentioned ones, the complainants became and were the owners of whatever interest, right or title in and to the premises passed to said Anthony, Amasa and Albert by the deed to them of Keeney and wife, of August 13, 1867; that after the execution of said last mentioned deed and prior to November 21, 1878, said Jonathan Keeney died, intestate, leaving the defendants James Keeney, Peter L. Keeney, Nancy Glen, Betsy Keeney, Mary C. Hockensmith, Eli Keeney and Elias Keeney as his children and heirs at law, and Mary Keeney as his widow; that on November 21, 1878, said widow and said Betsy and Peter sold and quitclaimed their interest in the premises to said Marcena Moore —the former for the consideration of two hundred dollars, and the latter of one hundred dollars, and said Nancy on the following day did the same for the consideration of one hundred dollars; that on December 11, 1878, said Marcena for the consideration of two thousand dollars, conveyed her interest in the premises to the defendant George Warren, which deeds to said Marcena and said George were duly recorded on December 12, 1878; that said Marcena at the time of taking said conveyances from the children and widow of Jonathan Keeney, had actual knowledge of the sale and conveyance aforesaid from Keeney and wife to said Anthony, Amasa and Albert Moore, and the said defendant Warren, at the time of taking the said conveyance from said Marcena, had such knowledge also; and that neither said Marcena Moore nor Warren took such conveyance in good faith, but with the intent to defraud the complainants.

The defendant, Warren, removed the cause to this court under the act of July 27, 1866 (section 639, Rev. St.), upon the ground that he was a citizen of California, and that the suit is one "in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties in the case."

The transcript of the pleadings, process and proceedings was filed in this court on March 25, 1879. The complainants moved to remand the case upon a number of grounds, all of which were abandoned on the argument except the one—"that the defendant had no right to remove the cause under any statute of the United States."

The district judge, with the concurrence of the circuit judge, who was consulted, denied the motion, upon the ground that if the defendant Warren had any interest in the premises, he was simply a tenant in common with the complainants, and that therefore the controversy, so far as he was concerned, could be determined without the presence of the other defendants as parties, citing Field v. Lownsdale [Case No. 4,769]; Fields v. Lamb [Id. 4,775]; McGinnity v. White [Id. 8,802]; and also, that under section 2 of the act of March 3, 1875 (18 Stat. 470), the defendant, Warren, had a right to remove the whole cause into this court, because this is a suit in which there is a controversy wholly between citizens of different states—the complainants and said Warren—a controversy as to the nature and effect of the deed from Keeney and wife to the three Moores, and the effect of the subsequent conveyances, under the circumstances, from the widow and three children of Keeney to Marcena Moore, and the latter to the defendant, Warren, which can be fully determined as between them, citing Donahoe v. Mariposa L. & M. Co. [Case No. 3,989]; and further, that this is a suit in which there is no controversy, except the one between the complainants and Warren, and that the other parties made defendants are neither necessary nor proper parties to the suit, because they have no interest in the subject-matter or the controversy concerning it.

The defendant Warren now demurs to the

bill, and for cause of demurrer alleges that there is a misjoinder of parties defendant and that the bill is without equity. Warren being the only defendant in this court, the first cause of demurrer was abandoned on the argument. Under the second one it was maintained that the purchaser at the foreclosure sale took nothing but the interest that was vested in the mortgagors at the date of the mortgage, citing Goodenow v. Ewer, 16 Cal. 469; Boggs v. Hargrave, Id. 562; Jackson v. Littell, 56 N. Y. 111; and Osterberg v. Trust Co., 93 U. S. 428, which point was admitted by counsel for complainant; and also that the instrument signed by Keeney and wife was not their deed and therefore did not pass the legal estate in the premises; and that if it was such deed, it was so far avoided by the conveyances from the widow and children of Keeney, which were first duly recorded.

Excepting in the case of a married woman, a deed, at common law, is valid between the parties thereto and their privies, although not witnessed, acknowledged or recorded. It is only necessary that the writing should be signed, sealed and delivered to make it the deed of the party. 2 Bl. Comm. 307; 4 Kent, Comm. 450, 456; 2 Washb. Real Prop. 572; Dole v. Thurlow, 12 Metc. (Mass.) 164; Hepburn v. Dubois, 12 Pet. [37 U. S.] 375; Elliott v. Peirsol, 1 Pet. [26 U. S.] 333; Moore v. Thomas, 1 Or. 211; Musgrove v. Bonser, 5 Or. 314.

Does the statute of Oregon change this rule? Section 1 of the act relating to conveyances (Laws Or. 515) declares that "conveyances of lands or of any estate or interest therein may be made by deed signed and sealed;" and although in the same section and sentence it is further provided that such deeds may be "acknowledged or proved and recorded" as therein directed, yet it is not declared and evidently was not intended to make either such acknowledgment, proof or record any part of the execution of such instrument. These acts are all subsequent to the execution of the deed, and are the appointed means by which constructive notice of its execution and contents may be given to all the world. But section 10 of the act aforesaid does declare, that "deeds, executed within this state, of lands or any interest in lands therein, shall be executed in the presence of two witnesses who shall subscribe their names to the same as such;" and while this provision may not make such attestation an essential part of the execution of the deed, yet it is probable that where the execution is controverted it cannot be shown, if not so attested. It is not a part of the execution, but the means by which it must be proven, if necessary. 2 Bl. Comm. 307. And it may be also, that as an acknowledgment before a proper officer of the execution of a deed has the same effect as proof of the same by the attesting witnesses, to authorize the deed to be admitted to record, that it should have the same effect as an attestation generally. A formal acknowledgment before a proper officer by a grantor in a deed, that he executed it, is as safe and satisfactory evidence of the fact as the testimony of any subscribing witnesses.

Nor does it appear that under the statute the deed of a married woman is fully executed or effectual to pass an interest in land until it is duly acknowledged. Elwood v. Block, 13 Barb. 50. At common law the deed of a feme-covert was void, and she could only convey her lands by levying a fine, as it was called, a proceeding which involved a privy examination of the wife, as in the case of an acknowledgment. 2 Bl. Comm. 348; 4 Kent, Comm. 497; 2 Washb. Real Prop. 559.

These questions—is attestation necessary under the statute to the validity of a deed between the parties? and is acknowledgment a necessary part of the execution of the deed of a married woman?—do not appear to have been passed upon by the supreme court of the state, and therefore they should not be here if it can be avoided.

The deed of Keeney and wife was not executed within this state, but in Idaho; and while it is not shown what is the law of that territory upon the subject of conveyances, until the contrary appears it will be presumed to be the same as that of Oregon. The deed is attested by three witnesses—one of them being Anthony Moore himself, and is duly acknowledged by the wife. The fact that the official character of the officer taking the acknowledgment and the genuineness of his signature is not certified to by a clerk of a court of record or other proper certifying officer does not in my judgment, affect the validity of the acknowledgment, although such certificate was necessary to authorize the deed to be admitted of record.

The case then stands thus: Keeney and wife by their deed duly executed on August 13, 1867, conveyed the premises, including, as I suppose one half of the wife's share of the donation to the three Moores, and the complainants before November, 1878, succeeded to their interests in the same, while in November, 1878, the widow and three of the seven children of said Keeney executed conveyances of the premises to Marcena Moore, the grantor of the defendant. The deed from Keeney and wife, not being acknowledged by Keeney nor the acknowledgment of the wife certified to as required by section 12 of the act on conveyances, was not entitled to record; and although actually copied upon the record on July 9, 1868, is to be taken and considered as an unrecorded deed. While this deed was unrecorded the deeds to Marcena Moore and the defendant Warren were duly executed and recorded.

Apart from the effect of the non-registration of the Keeney deed and the registration of the deeds to said Marcena and the defendant, the complainants have the legal title to the premises and the defendant has no interest in them. But by section 20 of the act

on conveyances (Laws Or. p. 518), it is provided that a conveyance which is not recorded within five days from the making of it "shall be void as against any subsequent purchaser in good faith, and for a valuable consideration of the same real property * * * whose conveyance shall be first duly recorded." The object of this provision is plain. It is to protect innocent purchasers from the operation of secret or unknown prior conveyances. To do this, in case of conflicting conveyances, it declares the deed of the party in default, by not recording the same, to be void, but only so in favor of a bona fide purchaser for a valuable consideration. The statute works a forfeiture of a prior estate, and is not to have effect except within the reason of it.

From the time of Jackson v. Burgott, 10 Johns. 459, decided by Chief Justice Kent in 1813, it has been held that notice of a prior deed takes the case out of the statutes and supersedes the prior registry, because a person purchasing with knowledge of such conveyance cannot be considered as acting in good faith. In this case, the court speaking of a purchase with notice of a prior unrecorded deed, say; "It may be assumed as a settled principle in the English law" that "the prior deed shall have the preference. * * * It is considered as done mala fide, by assisting the original vendor to defraud the prior vendee; and the courts will not suffer a statute made to prevent fraud to be a protection to fraud." The same ruling has been made by the supreme court of the state in Bohlman v. Coffin, 4 Or. 317, and Musgrove v. Bonser, 5 Or. 316.

What amounts to notice of a prior deed is a question that must be determined largely by the circumstances of each case. And it cannot be denied that, in some instances, the question has been decided in favor of the party holding the prior deed under circumstances well calculated to seriously impair, if not destroy, the efficacy of this wholesome provision in favor of prompt and proper registration of deeds.

But in this case, according to the allegations of the bill, and I think the strong probability of the case also, Marcena Moore at the time of taking the conveyances to herself had actual knowledge of this unrecorded deed, and the defendant at the time of the conveyance to him had such knowledge also, if not personally, then by his agent Anthony Moore, who acted for him in making the purchase and obtaining the conveyance. Whatever knowledge the agent had or acquired in this case of the prior deed before completing the purchase for Warren, the law imputes to the latter and he is chargeable with it, whether actually communicated to him or not. Story, Eq. Jur. § 408; Bowman v. Nathan [Case No. 1,740]; Varnum v. Milford [Id. 16,891]; Bank of U. S. v. Davis, 2 Hill. 460; Hough v. Richardson [Case No. 6,722]; Bierce v. Hotel Co., 31 Cal. 160; May v. Le-Claire, 11 Wall. [78 U. S.] 232; The Distilled Spirits, Id. 356.

The demurrer is overruled.

Case No. 5,535.

GOODENOW v. MILLIKEN et al.

[1 Hask. 348.] [1]

District Court, D. Maine. July, 1871.

EQUITY—FRAUDULENT PREFERENCE—SUIT BY ASSIGNEE IN BANKRUPTCY TO RECOVER ASSETS.

In equity, money paid by a debtor to his creditor as a fraudulent preference under the bankrupt act of 1867 [14 Stat. 517] may be recovered by the assignee, although the same might also be recovered in an action at law.

In equity. Bill by an assignee [Henry C. Goodenow], charging that the bankrupt, within four months of his bankruptcy proceedings, being insolvent and in contemplation of insolvency or bankruptcy, with intent to give a preference to the respondents [Seth M. Milliken and others], who were his creditors, paid to them $175.00 in money and delivered to them a horse in full payment of their debt in fraud of the bankrupt act, they at the time having reasonable cause to believe their debtor to be insolvent, both of which they refused to surrender to the complainant upon demand. The bill sought discovery from the respondents of the circumstances and their intent touching the matter alleged, and prayed that they be decreed to pay to the complainant the money so received by them, as stated, and to deliver to him the horse mentioned or be charged with its value. To so much of the bill as sought a recovery of the money received by them, the respondents demurred for want of equity; and to that portion of the bill praying for a return of the horse or its value, the respondents pleaded that they had sold the horse and received its value in money before the bill was filed, and that the court had not jurisdiction in equity to give relief, as the complainant had a plain and adequate remedy at law. The cause was set for hearing and heard upon the sufficiency of the demurrer and plea.

Thomas H. Haskell, for orator.

William L. Putnam, for respondents.

FOX, District Judge. The allegations in complainant's bill clearly present a fraudulent preference under the 35th section of the bankrupt act. It is conceded that the district court has conferred upon it by the provisions of the bankrupt act, the most extensive and complete powers of a court of equity in the adjustment and settlement of the bankrupt's estate, and in all acts, matters and things to be done under and in virtue of the bankruptcy, and that its authority in this behalf is co-extensive with that of the courts of equity in England. It has been repeated-

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

ly held by the supreme court of the United States, that the equity jurisdiction of the courts of the United States is not regulated by or dependent upon the equity powers of the respective state courts, but depends upon what is a proper subject of relief in the courts of equity in England. It is claimed however, that this bill presents a case, under the judiciary act of 1789 [1 Stat. 73], which declares "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." That from an inspection of the bill, it appears that a suit at common law could be maintained by the complainant for the recovery of the money paid by the bankrupt in fraud of the act, and also for the amount realized from the sale of the horse, or his actual value as the complainant might elect. The supreme court of the United States, has repeatedly said "that the above provision in the judiciary act is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law, it must be plain and adequate, or in other words, as practical and efficient to the end of justice and its prompt administration as the remedy in equity." I have no doubt that an action at law could be maintained by this complainant, but I feel equally confident that under the circumstances he had an election and can sustain the present bill.

The bill is founded on fraud. The charge is, that the respondents in fraud of the provisions of the bankrupt act, received the money and horse from the bankrupt in payment of their claim against him; and the purpose and scope of the bill is to invalidate and set aside this fraudulent proceeding, and to obtain such relief therefrom in money or by return of the property as the court may hold the assignee is entitled to.

In Bean v. Smith [Case No. 1,174], Judge Story says, "There are many cases in which courts of law and equity exercise a concurrent jurisdiction, and the judiciary act never intended to disturb that jurisdiction. In such cases, it is supposed that the remedy at law is not adequate and complete for all the purposes for which the plaintiff may claim relief. There cannot be a doubt that this bill states a case which is entirely fit and proper, if it be proved, for the interference of a court of equity. Nothing is more common than for courts of equity, upon bills filed for the purpose, to set aside conveyances made to defraud judgment creditors. It is a case peculiarly belonging to its jurisprudence, and adequate and complete relief cannot be obtained at law."

In Gould v. Gould [Case No. 5,637], the same learned judge in 1844 said, "That this court is competent in point of jurisdiction to grant relief in this case, if fully made out in proof, notwithstanding similar relief may be attainable in the state court is a matter upon which I entertained no doubt. This court possesses full jurisdiction in equity in all cases of fraud, including fraud in obtaining judgments and decrees in other courts, and is not limited in its exercise to cases where by the state laws no relief can be granted by the state courts. The jurisdiction is concurrent with the state courts in all such cases. I know of but a single exception which has been allowed, and that is, fraud in obtaining a will of real or personal estate. Even this exception has been thought to stand more upon authority than principle. In the case of Gaines v. Chew, 2 How. [43 U. S.] 645, the supreme court of the United States said, 'In cases of fraud, equity has a concurrent jurisdiction with a court of law, but in regard to a will charged to have been obtained through fraud this rule does not hold. It may be difficult to assign any very satisfactory reason for the exception.'"

Washington, J., in Harrison v. Rowan [Case No. 6,143], says, "Proceeding then upon the ground of the established jurisdiction of the court of chancery, we know there are a number of cases in which a concurrent jurisdiction is exercised by the two courts, and in many of them the ground of the equity jurisdiction is not that the common law courts are incompetent to afford a remedy, but that such a remedy is less complete than the court of equity from the nature of its organization is capable of affording. Cases, for example, of fraud * * * are clearly cognizable in the common law courts, and yet the court of chancery has always exercised a concurrent jurisdiction over them upon the ground above mentioned.. We hold it therefore to be perfectly clear that when a case is otherwise proper for the jurisdiction of a court of equity, it is no objection to its exercise that the party may have a remedy at law. The inquiry must always be, whether the case is within any of the general branches of equity jurisdiction as claimed and exercised by that court."

In Smith v. McIver, 9 Wheat. [22 U. S.] 532, Chief Justice Marshall recognizes the principle "that courts of equity have concurrent jurisdiction with courts of law in all matters of fraud."

The objection, that this bill is to recover merely a claim for so much money, is disposed of by Shawhan v. Wherrett, 7 How. [48 U. S.] 641, which was a bill in equity brought by an assignee in bankruptcy under act of 1841, charging, that the respondents being creditors of the bankrupt had filed their bill prior to the commencement of proceedings in bankruptcy before the state court in Kentucky, claiming that a certain conveyance of the bankrupt was fraudulent and void as to his creditors; that the court had decided the same to be void, and ordered the property to be sold for the benefit of creditors, and had since proceeded to sell the real and personal estate of the bankrupts and that the

defendants claimed a lien upon the proceeds of the sales by virtue of their proceedings in the state court. The assignee by his bill prayed as to the movable property, which was of the bankrupt, and which the defendant had caused to be sold under the decree of the state court, that the defendant be adjudged to pay to him the amount of said sales. Such was the decree of the district court, and it was affirmed by the supreme court of the United States. The whole controversy in this suit in equity was respecting the proceeds from sales of the personal estate, which had passed to the assignee unincumbered by any lien as was claimed by the respondents. It could have been determined in a suit at law whether the lien existed or not in favor of the respondents upon these proceeds, and if the lien did not exist, the value of the property or the amount realized from its sale could in such a suit have been recovered as damages, but the court sustained the bill, as it was proper to determine as to the existence of the alleged lien, just as in the present case it is proper for the court to determine whether the transactions of the parties vested a good title to the money and horse in these respondents, or whether it was void for fraud, and thereby the respondents rendered accountable for the property or its value to the complainant.

In Chemung Canal Bank v. Judson, 8 N. Y. 263, the validity of a decree of the district court of the United States in equity proceedings under the former bankrupt act came before the court of appeals in New York for decision. By this decree a voluntary preference given by the bankrupt to the bank was adjudged fraudulent and void and set aside, and damages to the amount of $6,796, decreed to the assignee, that being the sum which had been received by the bank under the preference. The court of appeals (page 263) declared "That the proceeding before the district court was one clearly of equity jurisdiction. The object of it was to set aside the voluntary assignment made previous to the petition in bankruptcy, and to call the voluntary assignee and the plaintiff to account for what they had received in fraud of the bankruptcy."

In 1 Daniell, Ch. Pr. 576, it is laid down, that amongst other cases in which courts of equity and courts of law entertain concurrent jurisdiction are those arising from frauds; therefore when fraud is made the ground for the interference of the court a demurrer will not hold.

Judge Story says (Story, Eq. Jur. § 440), "We may conclude this head by calling the attention of the reader to the remark, which has been necessarily introduced in another place, that courts of equity will exercise a concurrent jurisdiction with courts of law in all matters of fraud, excepting only of fraud in obtaining a will, which if of real estate is constantly referred to a court of law to decide it, in the shape of an issue of devisavit vel non; and which if of personal estate, is in England cognizable in the spiritual or ecclesiastical courts. * * * No other excepted case is known to exist, and it is not easy to discern the grounds upon which this exception stands in point of reason or principle, although it is clearly settled by authority." In Jones v. Bolles, 9 Wall. [76 U. S.] 349, Mr. Justice Bradley says, "Equity has always had jurisdiction of frauds, * * * and it does not depend on discovery."

Applying the principle of these authorities to the present cause, the bill must be sustained because of its very foundation and ground, which is an alleged fraudulent preference received by the respondents from the bankrupt, contrary to the provisions of the bankrupt act. Whether this transaction was fraudulent or not is the primary matter of investigation, and this the court is to pass upon, and determine whether the respondents are or not chargeable therewith, and so affected by the fraud that the contract must be vacated and wholly set aside by the court, and it be decreed that they have no right to retain in their hands the avails of the fraud as against the assignee in bankruptcy. In the present case, the fraud may be easily established, may be much more susceptible of proof than in cases of a more intricate character; but in all these cases, jurisdiction does not depend on the facility of proof in establishing the fraudulent preference, but on the question of the validity of the respondent's title to the property, and whether or not they hold certain estate, real or personal, by a title fraudulent and void as against the assignee. The alleged fraud gives the court in equity jurisdiction to institute the investigation, and proceed to inquire whether the transaction was in fraud of the provisions of the act, and if it so appears, then by its decree to vacate and annul the entire transaction, and afford such other relief by a decree for damages, or restoration of the property itself as it may think most expedient. As Mr. Justice Washington has remarked, "The inquiry must be whether the case is within the general branches of equity jurisdiction as claimed and exercised by courts of equity." The allegations in the present bill being, that the rights as set up to the fund or property by the respondents were acquired by them in fraud of the bankrupt act, and the court being called upon by the assignee to so determine, and thereupon to declare them null and void, the case, as I think, is brought within that comprehensive branch of equity jurisdiction of setting aside and vacating conveyances made by a debtor in fraud of his creditors. In such cases, courts of equity grant relief upon the ground of fraud established by presumptive evidence, which evidence courts of law would not always deem sufficient proof to justify a verdict at law. Story, Eq. Jur. § 190. So far as I am advised, the practice of the district courts of the United

States in matters of this nature arising under the present bankrupt act has been in conformity with these views.

In Ahl v. Thorner [Case No. 103], Leavitt, J., sustained a petition in equity by an assignee for the recovery of $4,990, alleged to have been paid by the bankrupt to Thorner in fraud of the provisions of the bankrupt act, the amount having been paid to him to protect him against his liability as an endorser of the notes of the bankrupt. A decree was rendered in favor of the assignee for the amount thus received. This case is in all respects similar to the present on the questions now before the court for its adjudication, being nothing but a bill for invalidating the preference and for restoration of the amounts paid by the bankrupt.

In Campbell v. Traders' Bank [Id. 2,370],—Drummond, J.,—it was decided that an assignee might recover, by a bill in equity, of the respondents, the proceeds of a stock of goods which had been sold by them on an execution against the bankrupt, he having suffered his property to be taken on the execution, and thereby given the bank a fraudulent preference. The learned judge says, "The bank has obtained an unwarrantable preference, the property has been sold and the money paid over to them, and I hold the bank is responsible for the proceeds of the sale. There was besides, a payment of over $300 made on the debt from money in the hands of the Traders' Bank on the 29th of May for which a check was given, and there was $900 of money which was levied on in the hands of the bank by the sheriff at its instance. I think these incidents will have to follow the principal; that the result of the reasoning which has been stated leads necessarily to the conclusion that the same consequences flow from the payment and levy of these sums, and therefore that they would be included as a part of the amount of damages for which the Traders' Bank would be responsible, and also for the interest from the time of the receipt of the money."

Graham v. Stark [Case No. 5,676] was a proceeding in equity by an assignee to have certain chattel mortgages given by the bankrupt set aside as fraudulent preferences under the bankrupt law. The property mortgaged had been disposed of by the respondents. The assignee prevailed in the suit.

Driggs v. Moore [Case No. 4,083] was a bill in chancery brought by an assignee to have certain mortgages given by the bankrupt set aside, and that the mortgagees should be held accountable for the proceeds of the mortgaged property as fraudulent preferences. The decision of the court was, having found that the mortgage was made with a view to giving a preference, "It follows that there must be a decree in favor of complainant for the value of the property taken by defendants. I shall adopt the amount brought on sale, as the fair value * * with interest." In that case the sale was by defendants before any proceedings in bankruptcy had been instituted, so that it was as clearly a money demand, i. e., for the value of the property mortgaged, as the present claim is for the money received by respondents, defendants, however, in the court first adjudicating that the transaction was fraudulent and vacating by its decree the whole contract.

Scammon v. Cole [Id. 12,433], decided in this district, was in all its essential particulars like the present, being a bill in equity by an assignee to recover certain personal property which had been conveyed to the respondents by the bankrupt as a fraudulent preference, and also for compensation for the value of some of the mortgaged property which had been sold by the mortgagees. The bill was sustained upon both branches.

Wilson v. Brinkman [Id. 17,794] was a case similar to that of Campbell v. Traders' Bank [supra], and with a like result. The assignee by bill in equity recovered the proceeds of the sale.

These decisions are sustained by the opinion of Swayne, J., in Bill v. Beckwith [Case No. 1,406], and although Nelson, J., in Re Bonesteel [Id. 1,627], held that a summary petition in equity was not the proper remedy for the assignee to recover the assets of the estate, yet he granted the assignee leave to amend and file his bill in the usual way for the recovery of the assets.

It is further claimed by the complainant that his bill may be maintained as a bill of discovery. It certainly contains some pointed interrogatories, calling upon the respondents to disclose their knowledge of the standing of the bankrupt at the time of the payment, and of their purpose and object in receiving it from him; but as the bill is framed it cannot be sustained as a simple bill of discovery, as it nowhere, that I have found, contains the necessary allegations that the complainant is unable to prove these facts by other testimony, and that the discovery of them by the respondent is indispensable. Demurrer overruled. Plea adjudged bad.

Case No. 5,536.

In re GOODFELLOW.

[1 Lowell, 510;[1] 3 N. B. R. 452 (Quarto, 114); 3 Am. Law T. Rep. Bankr. 69; 1 Am. Law T. Rep. Bankr. 179.]

District Court, D. Massachusetts. 1870.

BANKRUPTCY—PETITION BY ALIEN RESIDENT—EFFECT OF ADJUDICATION—FRAUDULENT CONVEYANCE IN FOREIGN JURISDICTION.

1. An alien residing in the United States may be adjudged a bankrupt on his own petition.

[Cited in Re Burton, Case No. 2,214; Re Ives, Id. 7,115; Allen v. Thompson, 10 Fed. 124.]

2. Such an alien, owing debts here, may petition as soon as his residence is acquired.

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

3. An adjudication of bankruptcy upon a voluntary petition is a conclusive finding that the petitioner is insolvent and owes more than three hundred dollars, but not that he is within the jurisdiction of the court in other respects.

[Cited in Re Dunkle, Case No. 4,160; Re Thomas, Id. 13,891.]

4. It seems, that an alien debtor who, when residing abroad, has made conveyances which would be preferences under our bankrupt law [of 1867 (14 Stat. 517)], and then within six months comes to the United States and goes into bankruptcy, is not entitled to his discharge.

[Cited in Re Marter, Case No. 9,143; Re Seeley, Id. 12,628.]

5. If such a debtor has made conveyances at his home, in New Brunswick, which are fraudulent at common law, and on a secret trust for himself, he cannot have his discharge in bankruptcy here.

In bankruptcy.

I. Knowles, Jr., for creditor.

C. A. F. Swan, for bankrupt.

LOWELL, District Judge. Joseph Goodfellow, the bankrupt, was born in the province of New Brunswick, and he resided there until last December. In 1868, he became a partner with one Stone, whose domicile was in New Hampshire, in a trade between the British provinces and Boston, and the firm owe debts here. In December, the bankrupt was arrested in Boston, and gave a recognizance, according to the law of the state, to appear before a magistrate within a certain time, and take the oath for the relief of poor debtors. He afterwards applied to take the oath, and pending the hearing thereon petitioned this court, on the 5th of January, to be adjudged a bankrupt, alleging that he resided in Boston, and had carried on business there for fourteen months next preceding the date of his petition. He was duly adjudged a bankrupt accordingly, but the first meeting has not been called, nor has an assignee been appointed. The creditor at whose suit he was arrested now petitions that the proceedings may be vacated for want of jurisdiction, alleging the debtor to be a non-resident alien.

The point is taken on behalf of the bankrupt that the adjudication itself is a conclusive finding of all the facts necessary to support it. No doubt the petition is conclusive evidence that the debtor is insolvent and desires to take the benefit of the act, and perhaps the fact that he owes $300 may be conclusively found by the adjudication; but upon a fact which goes to defeat the jurisdiction of the court over the supposed bankrupt, it cannot be so. Such a fact as that may be shown by plea and proof in any court by a person not estopped to show it, and it cannot be that the only exception is of the court in which the void proceedings themselves are pending. Nor is the adjudication binding as a judicial decree, which must be impeached, if at all, in a higher court. It is made ex parte, without notice to creditors, and is entirely under the control of this court, upon due proof that it ought to be annulled, at least in this stage of the cause.

The decision, then, depends upon the soundness in fact and in law of the petitioner's objections to the bankrupt's right to apply to this court, which are, that he is not a resident of Boston, and if he is, that he has not been so for six months, and in either case is not within the statute.

Section eleven makes every person residing within the jurisdiction of the United States who owes a certain amount of debts subject to the act, and it is not denied that resident aliens are here included. Judd v. Lawrence, 1 Cush. 531. If confirmation were needed, it is found in the latter part of the same section, which prescribes a special form of oath for citizens of the United States; clearly showing that some others than citizens are capable of being petitioners. But it is said that an alien must have resided for six months within the district before he can apply to the court. If the requirement were unqualified that the application must be in the district wherein the debtor has resided for the six months next before the filing of his petition, it might be a necessary inference, though one which would lead to most unfortunate consequences, that a debtor who had changed his residence within six months could not apply at all, notwithstanding the previous words, which include all persons residing within the jurisdiction of the United States. But the qualification is not absolute, it is for the six months, "or for the longest period during such six months," and the meaning is plain that, if the debtor has changed his residence within the United States during the six months, he must apply in that district in which his residence has during that time been the longest. And if he has had but one residence within the United States of less than six months, his application in the district where he resides is made in the district in which he has resided the longest, though it be made on the day after his residence was established. As if a citizen of the United States residing abroad, but trading here, returns to his native domicile and files his petition immediately. Or in the case before Judge Blatchford, where a firm had carried on business in New York for only two months out of the six. In re Foster [Case No. 4,962]. If, then, a person resides within the United States, and no district can be shown in which he has had a longer residence (within six months) than that in which he petitions, he has chosen the proper district.

I assume, for the purposes of this case, as the construction least favorable to the jurisdiction I am upholding, that the residence mentioned in the first part of section twelve is equivalent to domicile, which was its meaning under the insolvent law of Massachusetts (McDaniel v. King, 5 Cush. 469);

and that an alien who has never lived here at all, though he may have traded here through agents, could not be made bankrupt here even if he might happen to be temporarily within the jurisdiction. The law is otherwise in England, because strangers or aliens have been included in terms, in all their statutes of bankruptcy since that of James I. But our statute has followed that of Massachusetts in this respect, though in the matter of this six months, or longest period, it is based on that of England. But it is not necessary to pass upon this point, nor to inquire whether any residence short of the acquisition of a domicile would under any circumstances, fall within the act, because, upon the evidence, which comes wholly from the debtor himself, who was examined orally before me, and which I have carefully considered, but need not recapitulate, I feel bound to hold that he was domiciled here on the 5th of January. The creditor's petition is dismissed, and the cause will proceed before the register.

The case was afterwards brought on again in 1870 upon specifications, filed by the same creditor, in opposition to the bankrupt's discharge; and there was evidence tending to show that he gave preferences to certain creditors in New Brunswick while he lived there, within six months of his petition to the court here, and that he had made a deed of a farm to his brother-in-law to delay, hinder, and defraud creditors generally.

I. Knowles, Jr., for opposing creditor.
C. P. Hinds, for bankrupt.

LOWELL, District Judge. It has been argued in behalf of the bankrupt, that, granting the preferences to have been made, and to be within the period contemplated by the statute, still they were made while he was a resident of the province, not subject to our law and not contemplating bankruptcy under it, and that in such a case the law cannot affect him; and as it is not shown that the acts were illegal when and where they were done, they must be presumed to have been legal, and if so, they are good wherever they may be sought to be impeached. There is much force in this argument, and, indeed, it would be irresistible if the question were of the title to the goods or money conveyed in preference, or of any criminal responsibility; but the question here is, whether a person who applies to be discharged from his debts must not show that he has complied with the conditions imposed by law, even although he was not aware of them and was not subject to the law when he did the acts. Congress has an undoubted right to annex such conditions as it chooses to the grant of a discharge. It might enact, for instance, that certain things done before the passage of the act should be ground for refusing it. And this seems to me an analogous case. The statute says: "You shall not be released if you have given certain preferences." Now, preferences are not necessarily illegal; they are the payment of just debts. It depends altogether upon the fact of subsequent bankruptcy within a certain time whether they turn out to be legal or not. The fact that the transaction is legitimate between the parties and even against all the world is not important, if the intent existed in the mind of the debtor. The act requires an equal distribution of the estate, and if this fails through the act of the debtor, as, for instance, if he have lost a part of it in gaming, the discharge is not granted. It is not a punishment; it is not retroactive. It is simply a condition precedent. Were this otherwise, creditors might be treated very unequally and unjustly, and yet lose all remedy. Let us suppose a non-resident alien trading with this country. If there is any bankrupt law in his own country, he must divide all his estate equally among his foreign as well as his domestic creditors; for that is the main feature of all bankrupt laws throughout the civilized world. If he does this he obtains a discharge, which is good throughout the world, according to the better opinion. I am not now speaking of a discharge by the authority of one state of this Union, which is limited by the federal constitution. Speaking generally, the discharge is good everywhere, and all creditors are treated alike. But suppose there is no bankrupt law. By the common law, a debtor may prefer any one or more creditors, and he naturally favors those at home, but he gets no binding discharge from all his debts. Then he comes here, and says, "I have divided my property as I chose, in the absence of a bankrupt law at my former residence, and now I will obtain the advantages of your bankrupt law without its disadvantages, and thus obtain the benefit of both jurisdictions." I have referred to such a case, which appears to be much like the present one, in order to show my view of the intent of congress, and the reasons for it. If the estate of the debtor has been disposed of in accordance with the statute, a discharge shall be granted; otherwise, not. It may be said to be a great hardship that a foreign merchant should be required to conform to laws that he knows nothing of, as, for instance, to keep books of account, which the laws of his own country do not require him to keep. The answer is, that in coming here for the benefits of a discharge from his debts he adopts the law, and must take it as he finds it. Indeed, it is not easy to see any distinction between citizens and aliens in this respect. A citizen who owns property and carries on business in other countries, cannot do acts which are perfectly lawful there, and still obtain the benefits of our statute, if the acts are such as will be a bar to the discharge.

I do not, however, find it necessary to pass conclusively upon this question of preference,

because the evidence shows a conveyance of a farm by the bankrupt to his brother-in-law under very suspicious circumstances; not as a preference, but for purposes of concealment. It is testified that the deed was made at a time and under circumstances when it is most probable it was intended to save it from being taken on execution. The explanation of the debtor is not satisfactory. He says he gave the deed merely as security for certain liabilities; but it is proved that they had already been secured. Taking all the facts and circumstances it seems to be made out by the weight of the testimony that this conveyance was in fraud of creditors generally. I cannot assume that such an act is lawful anywhere. And if it were, still the petitioner could not be discharged, because the presumption is that he has still a subsisting interest in the farm which he has not procured to be surrendered to his assignee. Discharge refused.

Case No. 5,537.

GOODFELLOW v. MUCKEY et al.

[1 McCrary (1881) 238.] [1]

Circuit Court, D. Kansas.

INDIAN TREATY—CONSTRUCTION OF GRANT MADE THEREBY—INDIAN TITLE POSSESSORY IN GENERAL—POTTAWATOMIE TREATY, NOT A GRANT IN PRESENTI.

1. Grants and reservations claimed under Indian treaties are strictly construed against the grantee or beneficiary.

2. It has been uniformly held by the supreme court of the United States that, in the absence of express legislation by congress to the contrary, the Indian title is but a right of occupancy, the fee remaining in the United States.

3. The treaty between the United States and the Pottawatomie tribe of Indians, of November 15, 1861 (12 Stat. 1192), is not an exception to this general rule, and does not amount to a grant in presenti.

[At law. Action by William Goodfellow against Joseph Muckey, Mary Muckey, and L. H. Ogee.]

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

FOSTER, District Judge. This is an action of ejectment brought by the plaintiff to recover the south half of section thirty, town ten, range fifteen, in Shawnee county, Kansas. The plaintiff claims title by a master's deed, made under judicial sale, of land on decree of a foreclosure of a mortgage executed by Joseph Muckey. The land in controversy was allotted to Mary Muckey, a minor, under the treaty between the United States and the Pottawatomie tribe of Indians, concluded on the fifteenth day of November, 1861 (12 Stat. 1192), and afterwards, on the sixteenth day of May, 1870, patented to Joseph Muckey, the head of a family, under the provisions of article six of the treaty between the United States and the Pottawatomie tribe, concluded February 27, 1867 (15 Stat. 533).

So much of the treaty of 1861 as is pertinent in this case is as follows:

"Article 1. The Pottawatomie tribe of Indians, believing that it will contribute to the civilization of their people to dispose of a portion of their present reservation in Kansas, consisting of five hundred and seventy-six thousand acres, which was acquired by them for the sum of $87,000, by the fourth article of the treaty between the United States and the said Pottawatomies, proclaimed by the president of the United States on the twenty-third day of July, 1846, and to allot lands in severalty to those of said tribe who have adopted the customs of the whites and desire to have separate tracts assigned to them, and to assign a portion of said reserve to those of the tribe who prefer to hold their lands in common; it is therefore agreed by the parties hereto that the commissioner of Indian affairs shall cause the whole of said reservation to be surveyed in the same manner as the public lands are surveyed; the expense thereof shall be paid out of the sales of land hereinafter provided for, and the quantity of land hereinafter provided, to be set apart to those of the tribe who desire to take their lands in severalty, and the quantity hereinafter provided to be set apart for the rest of the tribe in common, and the remainder of the land, after the special reservation hereinafter provided for shall have been made, to be sold for the benefit of said tribe.

"Article 2. It shall be the duty of the agent of the United States for said tribe to take an accurate census of all the members of the tribe, and to classify them in separate lists, showing the names, ages and number of those desiring lands in severalty and of those desiring lands in common, designating chiefs and head men respectively, each adult choosing for himself or herself, and each head of the family for the minor children of such family, and the agent for orphans and persons of an unsound mind; and thereupon there shall be assigned, under the direction of the commissioner of Indian affairs, to each chief, at the signing of the treaty, one section; to each head man, one-half section; to each other head of a family, one-quarter section; and to each other person, eighty acres of land, to include in every case, as far as practicable, to each family, their improvements, and a reasonable portion of timber, to be selected according to the legal subdivision of survey. When such assignment shall have been completed, certificates shall be issued by the commissioner of Indian affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law, such tracts shall be exempt from levy, taxa-

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

tion or sale, and shall be alienable in fee, or leased or otherwise disposed of, only to the United States or to persons then being members of the Pottawatomie tribe, and of Indian blood, with the permission of the president, and under such regulations as the secretary of the interior shall provide, except as may be hereinafter provided; and on receipt of such certificates the person to whom they are issued shall be deemed to have relinquished all right to any portion of the land assigned to others, in severalty, or to a portion of the tribe in common, and to the proceeds of the sale of the same whensoever made.

"Article 3. At any time hereafter when the president of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provisions of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause the lands severally held by them to be conveyed to them by patent in fee simple, with power of alienation; and may, at the same time, cause to be paid to them, in cash or in the bonds of the United States, their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty; and on such patents being issued and such payments ordered to be made by the president, such competent persons shall cease to be members of said tribe, and shall be become citizens of the United States, and thereafter the land so patented to them shall be subject to levy, taxation and sale, in like manner with the property of other citizens; provided, that before making any such application to the president, they shall appear in open court in the district court of the United States for the district of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and shall also make proof to the satisfaction of said court that they are sufficiently intelligent and prudent to control their affairs and interests, and that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families.

"Article 4. To those members of said tribe who desire to hold their lands in common, there shall be set apart an undivided quantity sufficient to allow one section to each chief, one-half section to each head-man, and one hundred and sixty acres to each other head of a family, and eighty acres of land to each other person, and said land shall be held by that portion of the tribe for whom it is set apart, by the same tenure as the whole reserve has been held by all of said tribe, under the treaty of one thousand eight hundred and forty-six. And upon such land being assigned in common, the persons to whom it is assigned shall be held to have relinquished all title to the land assigned in severalty, and in the proceeds of sales thereof whenever made."

Under the third article of this treaty a certificate of allotment for this land was issued to Mary Muckey, numbered 1,285, said allottee being a child perhaps a year old.

The sixth article of the treaty of 1867 reads as follows:

"Article 6. The provision of article third of the treaty of April nineteenth, eighteen hundred and sixty-two, relative to Pottawatomies who desire to become citizens, shall continue in force, with the additional provision that, before patents shall issue and full payments be made to such persons, a certificate shall be necessary from the agent and business committee that the applicant is competent to manage his own affairs; and when computation is made to ascertain the amount of the funds to which such applicants are entitled, the amounts invested in the new reservation provided for in the treaty shall not be taken into account; and where any member of the tribe shall become a citizen under the provisions of the said treaty of eighteen hundred and sixty-two, the families of said parties shall also be considered as citizens, and the head of the family shall be entitled to patents and the proportional share of funds belonging to his family; and women who are also heads of families, and single women of adult age, may become citizens in the same manner as males."

Under this article a patent for said land was issued to Joseph Muckey as the head of the family. The patent recites the issuing of the certificate of allotment, but purports to convey the absolute title in fee to the patentee. Joseph Muckey mortgaged the land, and the mortgage was foreclosed, the land sold, and this plaintiff became the purchaser thereof.

The question arises, did Joseph Muckey have such a title that he could make a valid conveyance? The plaintiff maintains that the patentee held the absolute fee simple title free from all equities or trusts in favor of the allottee. On the other hand it is claimed by defendants, that by the treaty of 1861, and the certificate of allotment issued in pursuance thereof to Mary Muckey, the whole title of the government to the land passed to the allottee as by absolute, irrevocable grant, and that the patent subsequently issued to Joseph Muckey as the head of the family, under article six of the treaty of 1867, was absolutely null and void.

As a rule, legislative grants must be interpreted, if practicable, so as to effect the intention of the grantor, but if the words are ambiguous, the true rule is to construe them most strongly against the grantee. Rice v. Railroad Co., 1 Black [66 U. S.] 360. All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language. Railroad Co. v. Litchfield, 23 How. [64 U. S.] 66. This rule of construction may

very aptly be applied to grants and reservations claimed under Indian treaties. It has been the traditionary policy of the government in treating with the Indian tribes, to reserve from the public domain tracts of land for the use and occupation of the Indian tribes, and to limit them to such reservations. The right of the Indians to have and occupy these lands for themselves and their families, has been granted in language more or less comprehensive, but always evincing a purpose on the part of the general government to limit the Indian title to the use and occupation of the land. In some instances their lands have been patented to them in fee simple so long as they should exist as a nation and remain on the land. Such were the provisions of the treaties with the Senecas and the Shawnees, made in 1861. 7 Stat. 349, 352. In most treaties the words "set apart" and "reserved" are used in appropriating portions of the public lands for the homes of the Indian tribes. In the treaty with the Menomonies of Wisconsin, in 1831 (7 Stat. 342), the following language was used: "The following described tract of land, at present owned and occupied by the Menomonie Indians, shall be set apart and designated for their future homes." The supreme court in construing this treaty use the following language: "The land thus recognized as belonging to the Menomonie tribe, embraced the section in controversy in this case. * * * But the right that the Indians held was only that of occupancy. The fee was in the United States subject to that right, and could be transferred by them whenever they chose." Beecher v. Wetherby, 95 U. S. 525. It has been uniformly held by the supreme court that the Indian title was but a right of occupancy, the fee remaining in the United States. U. S. v. Cook, 19 Wall. [86 U. S.] 592; Johnson v. McIntosh, 8 Wheat. [21 U. S.] 574; Worcester v. Georgia, 6 Pet. [31 U. S.] 580; Cherokee Nation v. Georgia, 5 Pet. [30 U. S.] 48; Fletcher v. Peck, 6 Cranch [10 U. S.] 142; 1 Kent, Comm. 259. And unless there is a clear and explicit provision in the treaty, showing that the government intended to make a grant in fee simple, the court will not presume a new departure has been made, or that a different policy from that pursued in the past was intended. Now, there is but little in this treaty to justify the court in finding a grant made or intended to be made to the allottees.

It was undoubtedly the desire of the government to induce the Indians to adopt the modes and habits of civilized life whenever it could be accomplished, and as a step in that direction, the plan of allotment in severalty to those of the tribe who had adopted the customs of the whites, and were willing to abandon all claims to the common lands and funds, was adopted. It was optional with the adult Indian to have his land in common with the tribe, or to have it allotted to him in severalty; the head of the family choosing for the minor children, and the agent for orphans and those of unsound mind. It further provides that certificates shall issue to the allottees for the tracts assigned in severalty, specifying the individuals to whom they had been assigned respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of said assignees and their heirs. The allotted lands were exempt from taxation and sale, and were not alienable by the allottee. That the contracting parties to this treaty did not regard the fee as becoming invested in the allottee by virtue of article two, and the certificate issued in pursuance thereof, is demonstrated by the next article, for it is therein provided how the adult allottees may obtain that title. It provides in substance that when he should make it appear to the United States district court that he had adopted the habits of civilized life, and that he was sufficiently intelligent and prudent to control his own affairs, and take the oath of allegiance, etc., he could then apply to the president of the United States for a patent, and the president, on being satisfied that he was competent to control his own affairs, might cause the lands to be conveyed to him by patent in fee simple with power of alienation; and when the patent was made and the fund distributed, the patentee became a citizen of the United States and ceased to be a member of the tribe, and the lands were subject to taxation, sale, etc. That the contracting parties anticipated that these allotments would ultimately ripen into perfect titles through the proceedings specified in article three, is altogether probable; but that event might or might not happen. If the intention of the grantor is the controlling consideration in construing this treaty, as decided in Rice v. Railroad Co., supra, what better evidence is needed of that intention than the treaty of 1867, which was assented to and approved by the Pottawatomies themselves? The fourth and sixth articles of that treaty are quite inconsistent with the idea of a grant in presenti under the former treaty.

The principal object of the treaty of 1867 was clearly to cause the removal to the Indian Territory of such of the tribe as had not and would not become citizens. Article four required a registry to be made under the control of the agent, showing the names of all members of the tribe who desired to remove to the new reservation, and of all who desired to remain and become citizens. Now under the former treaty, the head of the family may have become a citizen and received a patent for his land, and was no longer a member of the tribe, while his minor children, and perhaps his wife, were still members of the tribe, without provision for severing that relation. So it resulted that he could not elect to go to the new reservation, while his family might. Here was a capital opportunity for this unnaturalized female, the mother of this unregenerated brood,

to assert the doctrine of woman's rights, and lead them all off to the Indian country, leaving the newly fledged male citizen the victim to his vaulting ambition to taste the fruits of civilization and become a white man. This peculiar situation called for some relief, and hence the provision in the sixth article making the whole family citizens in cases where the head had or should become a citizen. Why the patent should be issued to him for all the land allotted to his family is not so apparent. But they were then all citizens of the United States and no longer Indians. They had passed from the tutelage and control of the government, and become invested with all the privileges of other citizens. What was to be done with the title to their lands? Should the government hold it until they became of age or make conveyance directly to the minor allottees; or place it in the head of the family? The head of the family had established his ability to manage his own affairs and had become a citizen, and who was more suitable to take this title than the natural guardian of the allottees? I can see no reason why the United States and the Pottawatomie Indians, having the undoubted right to make provisions in the treaty of 1861, allotting these lands in severalty and for patenting the same as provided therein, had not the same right and power to amend that treaty, and provide for transferring the legal title to the parent or guardian of the allottee. This being an action in ejectment, the paramount legal title must control, and it is not necessary at this time to decide whether the patentee took the title in trust for the allottee, or in what manner the trust, if any, could be properly executed, or whether notice thereof should be imputed to the purchaser of the legal title. Judgment must go for the plaintiff.

GOOD FRIENDS, The (UNITED STATES v.). See Case No. 15,227.

Case No. 5,538.

GOODHUE et al. v. BARTLETT.

[5 McLean, 186.] [1]

Circuit Court, D. Ohio. Oct. Term, 1850.

EVIDENCE AS TO HANDWRITING—SOURCE OF WITNESS' KNOWLEDGE — DEPOSITION — TESTIMONY BEYOND PERSONAL KNOWLEDGE OF WITNESS.

1. Where a witness swears positively to the handwriting of an individual, it is sufficient. The question as to the source of his knowledge must come from the other party.

2. If a deposition be taken under the act of congress, in the absence of the party, he should take the deposition again, if not satisfied with the examination.

3. Where a witness swore to certain items charged, of which he had no personal knowledge, his statement was overruled.

At law.

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

Mr. Stanbery, for plaintiffs.

Ewing & Thurman, for defendant.

OPINION OF THE COURT. This is an action of assumpsit. The plaintiffs being commission merchants in New York, the defendant, having consigned to them a large amount of pork, drew several drafts upon them, all of which were accepted and paid. On the final adjustment of the account, there appeared to be a balance due to the plaintiffs of twenty-eight hundred dollars. To recover this balance this action was brought. A great number of drafts were produced in evidence, purporting to have been drawn by [Moses R.] Bartlett and paid by plaintiffs, which were charged in the accounts. Robert Hewett, a witness, was sworn, who stated he was book-keeper of the firm, and he swears that the accounts of sales of provisions shipped by Bartlett to the plaintiffs, to be sold on commission, is an accurate account as recorded in the books of the company; and also of the charges and disbursements which were all actually paid; and also that the charges of interest and commissions were the customary charges, &c. The drafts referred to were drawn by M. R. Bartlett, one by Joseph Neville in favor of said Bartlett; and are produced by witness, and are stated in the accounts from the letter H. to W. The handwriting of Bartlett was admitted on all the drafts, except the one drawn by Neville. To prove the signature of Bartlett on that draft, the deposition of Hewett was taken, who swore that the draft was indorsed by Bartlett.

The defendant objected to this deposition, because the witness does not say that he was acquainted with the handwriting of Bartlett, or had ever seen him write. But THE COURT overruled the objection, observing, that the source of the knowledge is proper to be inquired into, but when he swears to the fact, it must be received as competent. The other side may examine whether he has ever seen the party write, or has corresponded with him, &c., but this is not necessary to be inquired into by the person taking the deposition. In Slaymaker v. Wilson, 1 Pen. & W. 216, "the deposition of a witness who swore positively to her father's hand, was rejected, because she did not say how she knew it to be his hand." But in Moody v. Powall, 17 Pick. 490, such evidence was (Mr. Greenleaf, in his Evidence, vol. 1, p. 612, note 1) "very properly held sufficient, on the ground that it was for the other party to explore the sources of the deponent's knowledge, if he was not satisfied that it was sufficient." It is no answer to this, that the party who objects to the deposition was not present when it was taken. If the deposition were taken under the act of congress, without notice, the defendant might have taken it again. That part of the statement of the witness which relates to charges in the books, of which he had no personal knowledge, is overruled.

The property was shipped by the way of New Orleans, and the commission merchants, at that place, drew on the plaintiffs for warehouse charges, which drafts were paid. These charges were the same in amount as usual in such cases. This evidence was objected to, unless the drafts were produced, the charges were examined and entered in the book. THE COURT overruled the objection and admitted the evidence. The jury found the balance for the plaintiffs. Judgment.

Case No. 5,539.

GOODING v. VARN.

[Chase, 286.] [1]

Circuit Court, D. South Carolina. June Term, 1869.

LIMITATIONS—EFFECT OF THE CIVIL WAR—COMMENCEMENT AND TERMINATION OF THE WAR IN SOUTH CAROLINA.

1. The statute of limitations was suspended as between citizens of the Confederate States and citizens of those states which adhered to the national government during the whole period of the war.

2. As far as South Carolina is concerned, the war began April 19, 1861, and ended April 1, 1866.

This was an action of assumpsit on two promissory notes. The defendant pleaded the general issue and the statute of limitations. General replication to first plea. Demurrer to second.

Ed. McCrady, Jr., for plaintiff.

Campbell & Seabrook, for defendant.

CHASE, Circuit Justice. The plea of the statute of limitations is good. Without entering upon the questions discussed by counsel it is sufficient to say that the state of war existing between the state of South Carolina and the government of the United States rendered unlawful all intercourse between citizens of that state and citizens of those which adhered to the national government. The latter could not sue in the courts of South Carolina; all legal remedies therefore were denied them during the war, by the war.

The period of the beginning and termination of the war varies in different states. It began with the president's proclamation of blockade, being the first exercise of belligerent rights, April 19, 1861. It was then that the existence of civil war was first formally recognized by the national government. The end of the status of war as to South Carolina, is to be considered as being April 1, 1866, the proclamation of the president of that date having declared it terminated thenceforward.

The demurrer to the plea of limitations must therefore be overruled.

GOODLOE (PINTARD v.). See Case No. 11,171.

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

Case No. 5,540.

In re GOODMAN.

[5 Biss. 401; [1] 8 N. B. R. 380.]

District Court, D. Indiana. Sept., 1873.

BANKRUPTCY—MARRIED WOMEN.

1. In Indiana a petition in bankruptcy will not lie against a married woman where it is not shown that she has a separate estate.

2. The statute not having removed her common law disabilities, she is still incompetent to contract.

3. The district court will consider the state statutes and decisions, in applying the bankrupt law [of 1867 (14 Stat. 517)] to married women.

This was a proceeding in bankruptcy, instituted by Hays, Gibbons & Co., of St. Louis, against Rachel Goodman, a married woman. The petition is in the usual form, and charges that Mrs. Goodman is the wife of Morris Goodman; that for several years last past she has been a resident of the city of Evansville, Ind., where she has been engaged in business in her own name, buying and selling goods, wares and merchandise; that she is indebted to petitioners in the sum of $487.27, for goods sold and delivered, which sum is due and unpaid, and within six calendar months next preceding the filing of said petition, she committed an act of bankruptcy, describing it. The respondent moved to dismiss the petition for want of jurisdiction.

Judge Warren, for petitioning creditor.

Shackelford & Richardson, for respondent.

GRESHAM, District Judge. By the common law, married women are disabled generally from contracting or engaging in trade. There are exceptions to this rule, having their foundation in special local custom, or upon the principle that the marriage is for the time suspended. Of the latter character is the statute of this state, which authorizes a married woman, whose husband has left the state, or has abandoned her without providing for her maintenance, or who is confined in state's prison, to sue and be sued as a feme sole, to sell and convey her real estate, and to receive payment for her own labor and that of her minor children.

Whether this proceeding can be maintained, depends upon how far the legislature of Indiana has gone in changing the common law concerning the rights of married women. The following statutes upon the subject are all that need be referred to:

A married woman's lands, and the profits thereof, are not liable for her husband's debts, but shall remain her separate property, as if she was unmarried, except that she shall not incumber or convey such lands, otherwise than by deed, in which her husband shall join. 1 Gavin & H. p. 374, § 5.

Personal property of the wife, held by her at the time of her marriage, or acquired dur-

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

ing coverture by descent, devise, or gift, remains her property to the same extent and under the same rules as her real estate so remains. 1 Gavin & H. p. 295, note.

When a married woman is a party, her husband must be joined with her, except when the action concerns her separate property, she may sue alone; and, when the action is between herself and her husband, she may sue and be sued alone. 2 Gavin & H. p. 41, § 8.

The decisions of the supreme court of Indiana, interpreting these and other statutory changes on the same subject, are involved in much confusion and doubt; but the following rulings are sufficient to dispose of the question presented in this case:

The statute extends only to such personal property of the wife as she had at the time of her marriage, or acquired during coverture by descent, devise, or gift, leaving the common law, with respect to the wife's earnings, unchanged; and if the wife engage in any trade or business without means of her own, that is, without means acquired in some one of the ways mentioned in the statute, the profits of such trade or business belong to the husband, for they are as much the earnings of the wife as any other income produced by her labor or skill. Baxter v. Prickett's Adm'rs, 27 Ind. 490; Jenkins v. Flinn, 37 Ind. 349.

If a married woman, having no separate estate or means of her own, carry on business with the knowledge and consent of her husband, it is regarded as the business of the husband, and the husband is liable for the contracts of the wife thus entered into, on the theory that the husband is the principal and the wife the agent. Jenkins v. Flinn, supra.

The separate personal estate of the wife, including the issue and profits of her real estate, she may dispose of as a feme sole, and when she has indicated her purpose to deal with such personal estate, a court will give effect to her contracts if they be of a character to result in benefit to her; and the wife may, without the consent of her husband, contract for the repair and betterment of her real estate, and such contracts will be enforced in equity. Kantrowitz v. Prather, 31 Ind. 92.

The separate estate of a married woman is not liable for her general engagements. Her capacity to enter into binding contracts exists only when she has a separate property, and when her contracts relate to that property. Kantrowitz v. Prather, 31 Ind. 92.

A married woman may carry on trade with her separate money, and may employ her husband to manage her trade. Copeland v. Cunningham, 31 Ind. 116. But she cannot enter into a contract of co-partnership with her husband. Montgomery v. Sprankle, Id. 113. I am not able to see any reason for this distinction. If a married woman may engage in trade with her own means as a feme sole, why may she not become a partner in trade? If she may embark with her own separate means in general trade and merchandise, why say that she shall not have the same advantage that others derive from uniting their capital and skill as partners? If she may contract with her husband for his service as an agent in superintending and carrying on her business, of course she may contract with any other person for the same purpose; and if she may do this, it would seem more rational to say that she may also do what experience has shown is generally more profitable and satisfactory in trade, and that is to make a contract with some person who has either skill or capital or both to share in the profits and losses of her business.

It would seem from these and other decisions (and they must be followed by the federal courts, for they are interpretations given by the highest court in the state to the statutes of the state):

1. That a married woman cannot engage in any kind of trade or business on her own account, unless she have separate property.

2. That if a married woman, not having separate property or means of her own, engage in and carry on business, the profits, if any there be, belong to the husband as the earnings of the wife.

3. That a married woman in Indiana possessed of no separate estate, is relieved of none of the disabilities imposed upon her by the common law.

The rule then still being that a married woman cannot contract, and the power to do so being an exception to this rule, and the petition failing to show that Mrs. Goodman was possessed of any separate property or means with which she was carrying on her business, it follows that she cannot be adjudged a bankrupt. The petition is therefore dismissed.

NOTE [from original report in 8 N. B. R. 380]. Although the federal courts, on this question of bankruptcy of married women, seem to regard the state laws and the decisions of the state courts in establishing the status of a married woman and her powers and liability, it is difficult to reconcile the decisions. In the above case, Judge Gresham dismisses the petition, because, under the state law, a married woman has no power to contract, and the petition fails to set forth any separate estate, and contains no special words to charge it. But in Illinois, where she is also incompetent to contract, except as to her separate estate, the United States district court has sustained a petition in bankruptcy against a married woman, where the allegation of the petition simply was that she and her husband were co-partners in business. In re Kinkead [Case No. 7,824]. The statutory provisions in Indiana are nearly the same as in Illinois, except as to married woman's earnings, and although in both states it is held that she may engage in trade, and even employ her husband as her agent, in one state it is held that she may be a co-partner with her husband, and in the other that she cannot. The Illinois statute of 1861 [Laws 1861, p. 143] gives a married woman the right to property which she owns at the time of marriage, or which she receives during coverture, from persons other than her husband. The act of 1869 [Laws 1869, p. 255] gives her the right to her personal earnings. In New York state, where a married woman can be sued at law

upon her contracts, it has been held in the United States district court that a feme covert, a trader, is within the meaning of the bankrupt act, and may be declared a bankrupt. In re O'Brien [Case No. 10,397]; Graham v. Starks [Id. 5,676]. In Minnesota, where the statute allows a married woman, under certain circumstances, to engage in trade in her own name, by obtaining a license from a probate justice, in which case the business, and its profits become her separate property, and she is bound by her contracts, Judge Nelson held that where a married woman who had been engaged in business, as a member of a partnership, but without complying with the requirements of the statute, could avail herself of the plea of coverture to defeat bankruptcy proceedings against her. In re Slichter [Id. 12,943].

GOODMAN (KAMPSHALL v.). See Case No. 7,605.

GOODMAN (McFARLAND v.). See Case No. 8,789.

GOODMAN v. NEW YORK GUARANTY, ETC., CO. See Case No. 18,125.

GOODNOUGH v. WARREN. See Case No. 5,534.

Case No. 5,541.

In re GOODRICH.

[4 Dill. 230.] [1]

Circuit Court, E. D. Arkansas. 1878.

REV. ST. § 828, IN RESPECT OF COMMISSION TO CLERK ON MONEYS PAID INTO COURT, CONSTRUED —WHEN CLERK ENTITLED TO COMMISSION—WHO LIABLE TO PAY THE SAME.

1. The one per cent. commission allowed to the clerk, "for receiving, keeping, and paying out money, in pursuance of any statute or order of court" (Rev. St. § 828), implies that the money shall be actually received, kept, and paid out by him, and is his compensation for such services.

[Cited in Leach v. Kay, 4 Fed. 74; Blake v. Hawkins, 19 Fed. 205; Fagan v. Cullen, 28 Fed. 844; The Vernon, 36 Fed. 114; The Serapis, 37 Fed. 443; Smith v. The Morgan City, 39 Fed. 573; Easton v. Houston & T. C. Ry. Co., 44 Fed. 721.]

2. The clerk is not, at least in general, entitled to such commission on moneys which, although ordered to be, are not, in fact, paid into his hands.

[Cited in Leach v. Kay, 4 Fed. 74; Thomas v. Chicago & C. S. Ry. Co., 37 Fed. 550.]

3. A party adjudged to pay money, may pay it to the party entitled, or his attorney of record, and the clerk or registrar will not, in such case, be entitled to commission or poundage; but if he pays to the clerk, he does the act which entitles the clerk to his commissions, and must, as a rule, pay the same, and the amount cannot be taxed against the other party. See Upton v. Tribilcock, note at end of case.

Certain questions as to the right of the clerk to commissions on money ordered to be paid into court, and as to the party liable to pay such commissions, were submitted on the following agreed case: "Several writs of mandamus have issued from this court against the city of Little Rock, in favor of different parties, commanding the city to levy a certain tax for the purpose of paying off the judgments upon which the writs of mandamus were issued, and ordering that, when the tax so levied shall have been collected, the same shall be paid into the registry of this court, for the purpose of satisfying the judgments and costs. It is the practice here, in conformity to the mode adopted in the district court, that when said money is paid into the registry the clerk shall execute to the proper city or county officers receipts for the same, showing how the same has been applied and apportioned among the creditors, with separate statements of credits and costs. In the cases against the city of Little Rock, the attorneys for the plaintiffs have refused to allow the taxes so collected in obedience to the writs of mandamus to be paid into the registry, and have caused the city officers holding the same to pay the amounts to them as attorneys for plaintiffs, and refuse to pay or allow the clerk's poundage, or commission of one per cent., which he claims under section 828 of the Revised Statutes of the United States. We agree to submit the following propositions to the circuit judge, the district judge declining to act: First. Whether, when the writ of mandamus commands that the money collected under it shall be paid into the registry of the court, the city or county officer holding the same can pay it to the attorneys for the plaintiffs, instead of into the registry of the court. Second. Whether, when money is paid to the plaintiffs' attorneys, collected on mandamus which commands said money to be paid into the registry, the clerk is entitled to his poundage or commission. Third. Whether the plaintiffs or defendants are liable for clerk's poundage, where money is paid into the registry. B. S. Johnson, City Attorney. U. M. Rose, for Creditors. Ralph L. Goodrich, Clerk, pro se."

U. M. Rose, Gallagher & Newton, and Geo. L. Basham, for creditors.

We submit that the plaintiff cannot have any costs to pay in collecting a judgment. The commissions of the clerk are like the commissions of the marshal when he collects the money, and they should be taxed as part of the costs in the case.

DILLON, Circuit Judge. "For receiving, keeping, and paying out money, in pursuance of any statute or order of court," the clerk is entitled to "one per centum on the amount so received, kept, and paid." Rev. St. § 828. The one per cent. thus allowed is for compensation to the clerk for the trouble and responsibility of actually receiving, keeping, and paying out money.

On the facts submitted, I am of opinion that the clerk is not entitled to a commission on moneys which, although ordered to be, were not, in fact, paid to him under the writs of mandamus.

If a party adjudged to pay money, instead

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

of paying it to the party entitled, or his attorney of record, elects to pay the same to the clerk, he does the act which entitles the clerk to his commission for receiving, keeping, and paying out the money, and he must pay the commission allowed to the clerk therefor, and the same cannot be taxed against the other party, as was held by Mr. Justice Miller, in Upton v. Tribilcock. (See note.) That case, in principle, covers the case submitted to me. The claim of the clerk is disallowed. There are no equitable circumstances presented in this case to vary the general rule. Ordered accordingly.

NOTE. Upton v. Tribilcock.—The case was thus: Judgments were rendered against defendants, and by stipulation of parties, all the judgments were to be satisfied upon the payment of $18,000, in three equal installments, "to the clerk of the circuit court of the United States, at Des Moines." Under this stipulation defendants paid to the clerk $6,000, the first installment, from which the clerk deducted one per cent., his commission for receiving, keeping, and paying out the money. Plaintiff only gave credit for the amount received by him from the clerk, to-wit: the sum of $5,940. The other installments were paid, as they became due, to the plaintiff's attorneys of record, and upon final payment plaintiff claimed that defendants should pay the $60 deducted by the clerk. The defendants denied their liability to pay the same.

The question was submitted to Mr. Justice Miller, who decided that defendants, notwithstanding the stipulation to pay to the clerk, were at liberty to pay to the plaintiff, or the plaintiff's attorneys of record, and take their receipt therefor, and that in the event of such payment the clerk would not be entitled to the commission of one per cent., but the defendants, having of their own election paid the $6,000 to the clerk, were liable for the clerk's commission of one per cent. on the $6,000; and he held that the defendants must pay the clerk's poundage ($60) on the sum which they actually paid in to the clerk, but were not liable for poundage on any other part of the amount of the judgment. [See 91 U. S. 45.]

GOODRICH (BAILEY v.). See Case No. 735.

GOODRICH (BARNUM v.). See Case No. 1,036.

Case No. 5,542.

GOODRICH v. CHICAGO.

[4 Biss. 18.] [1]

Circuit Court, N. D. Illinois. July Term, 1864.[2]

LIABILITY OF CITY FOR OBSTRUCTIONS IN RIVER.

1. In the construction of the charter of a city the federal courts are bound by the decision of the supreme court of the state.

2. If a city undertakes to remove obstructions from a river, which it is under no legal obligation to remove, and abandons the work without having changed the status of the obstruction, it does not become liable for subsequent damages caused by such obstruction. The city by assuming such a work does not assume any new liability.

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

In admiralty. This was a libel filed by Albert E. Goodrich to recover damages sustained by reason of an obstruction in the Chicago river. The libellant alleges that he is the owner of a line of propellers regularly navigating the Lakes, and that one of them, leaving the port of Chicago, ran against a sunken rock in the river and was seriously injured. The ground-work of the proceeding was that the city of Chicago, by its charter, had been vested with exclusive jurisdiction and control over the river, and that the duty was imposed on it to remove obstructions, and that this duty was binding on it. It is provided in the city charter of Chicago that the city may remove and prevent all obstructions in the waters which are public highways in said city, and widen, straighten, and deepen the same; may preserve the harbor, prevent any use of the same, or any act in relation thereto, inconsistent with or detrimental to the public health, or calculated to render the waters of the same, or any part thereof, impure or offensive, or tending in any degree to fill up or obstruct the same; prevent and punish the casting or depositing therein any earth, ashes, or other substance, filth, logs, or floating matter; prevent and remove all obstructions therein, and punish the authors thereof; and shall have power to regulate and prescribe the mode and speed of entering and leaving the harbor, and of coming to and departing from the wharves and streets of the city, by steamboats, canal-boats, and other craft and vessels, and the disposition of the sails, yards, anchors, and appurtenances thereof, while entering, leaving, or abiding in the harbor; and to regulate and prescribe, by such ordinances, or through their harbor-master or other authorized officer, such a location of every canal-boat, steamboat, or other craft or vessel, or float, and such changes of station in and use of the harbor as may be necessary to promote order therein, and the safety and equal convenience, as near as may be, of all such boats, vessels, crafts, and floats; and may impose penalties not exceeding one hundred dollars for any offense against any such ordinance; and by such ordinance charge such penalties, together with such expenses as may be incurred by the city in enforcing this section, upon the steamboat, canal-boat, or other vessel, craft, or float. The harbor of the city shall include the piers and so much of Lake Michigan as lies within the distance of one mile into the lake, and the Chicago river and its branches to their respective sources.—Laws and Ordinances of Chicago, 1873, pp. 403, 407. Further facts are stated in the opinion.

Goodwin, Larned & Goodwin, for libellant.
Robert Rae and B. F. Ayer, for the city.

DAVIS, Circuit Justice. The question depends upon the proper construction to be

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

[2] [Affirmed in 5 Wall. (72 U. S.) 566.]

given to the provision in the charter of the city of Chicago. The defendant contends that the language is that of permission and not of command, while libellant insists that it must be considered as creating an imperative duty. If this question was an open one I should have no hesitation in holding that the legal obligation does so rest, and that the city is bound to make full redress to a party who is injured by neglect of that duty. I think that the true interests of commerce and the best interests of the city would be promoted by such a construction, and that it is sanctioned by principle and authority.

But the supreme court of the United States has always held that the federal judiciary will adopt the adjudications of the judicial department of the several states as the appropriate organ for construing the legislative enactments of that government. Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 152.

Goodrich sued at law in one of the courts of the state for the same matter for which this libel is brought. The declaration sets forth the cause of action fully; it asserted the legal obligation of the city and its liabilities because the city had wrongfully let the obstruction remain to the danger of navigation. All the provisions of the charter, which could be supposed to confer authority on the city, were cited, and it was averred that the city had assumed the liability, and for that purpose had levied taxes, had controlled the waters, and had passed ordinances relating to them. In one of the counts of the declaration the ordinance of the common council was set forth. In short, every averment was made that was necessary to raise the question. A demurrer was interposed to this declaration which was sustained, and the case was taken to the supreme court for adjudication. The case is reported in 20 Illinois, 445, and the judgment of the court below was affirmed. The supreme court say, "To maintain this action we must hold, that the city is bound to exercise all the authority here conferred and to do all the acts here authorized. Such, we are satisfied, was not the intention of the legislature."

This is an authoritative adjudication denying the exclusive obligation and duty on the part of the city. In order to escape the effect of this decision, the libellant avers that the city undertook to remove the rock, and left it in a more dangerous position than at first. This averment was doubtless made because the supreme court said if the authorities of the city undertook to remove this rock, and in so doing had carelessly left it in an exposed position, by reason whereof the plaintiff's steamer had run against it, and was injured, the city would be liable. There can be no clearer principle of law than this: that a municipal corporation, when it undertakes to do an act, must do it carefully, and if not an action will lie. I think the proof, however, fails to establish the fact that what was done by the city tended to the injury of the harbor. The harbor-master did attempt to get the rock out, but abandoned the enterprise. He swears the rock was so imbedded in sand that he did not succeed in loosening it. The master of the tug corroborates the testimony of the harbor-master, and swears that the sunken stone or rock did not change position at all. But it is said the city assumed to remove it. In what way? By passing an ordinance requiring the harbor-master to give notice to masters of vessels to remove. It may be said that this ordinance imposed no legal obligation as is averred in the libel. But it is said also that the city assumed the responsibility when the harbor-master tried and failed. I cannot see how that fact of itself could impose a legal obligation. The attempt was made to remove the obstruction and abandoned. It injured no one. The act was not wrongful and was not the cause of the accident. It was proper enough to try to remove the obstruction, but it was not imposed on the city as an imperative duty, and on no legal principle can the libel be maintained. The city has done nothing in this case to injure the harbor, and if the supreme court decision is binding on me there is an end to this litigation.

I have not discussed the question of res adjudicata. The judgment, although on demurrer, is a judgment on the merits, and it decides that the action will not lie. The libel is dismissed.

[NOTE. Upon an appeal by the libelant to the supreme court, the decree of the circuit court was affirmed in a brief opinion by Mr. Justice Swayne (5 Wall. [72 U. S.] 566) upon the ground that there was no such difference between the above case and that decided in the supreme court of Illinois as could take the case before it out of the operation of the principles of res adjudicata.]

Case No. 5,543.

GOODRICH et al. v. The DOMINGO, et al.

[1 Sawy. 182.] [1]

District Court, D. California. June 7, 1870.[2]

FISHING VESSELS—RIGHTS OF SEAMEN.

Where by the articles the crew of a fishing vessel were bound to make the fish, and on the arrival of the vessel the owners declined to allow them to do so, and the men remained by the vessel for nearly two months, at all times ready and willing to make the fish, and then left her and sued for their shares of the catch, *held*, that their readiness and willingness to make the fish were equivalent to an actual performance of their contract; and that they were entitled to be paid their shares. Various charges made by the owners disallowed.

[This was a libel by Foster C. Goodrich and others against the owners of the bark Domingo.]

Milton Andros, for libellants.

W. H. L. Barnes, for claimants.

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

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

HOFFMAN, District Judge. This suit is brought to recover the shares due the libellants of the proceeds of the catch of fish, on a fishing voyage in the above vessel. The contract, as stated in the articles, which were signed at Honolulu, is as follows:

"The crew shall receive instead of monthly wages two fifths of the sales of the fish taken on said voyage. It is intended and agreed to hire as many men as it is deemed advisable to fish on said voyage, the crew or sharesmen to pay the wages of said hired men, and they are to draw two fifths of the sales of said fish caught by them. They, the sharesmen, are also to pay two fifths of all expenses, viz.: clearing and entering the vessel, pilotage, wharfage, storage, flake hire, duties, commissions, and other expenses which may be incurred in the sales of the proceeds of said voyage. The crew to dry the fish and deliver them on the wharf in San Francisco. They, the sharesmen, are to pay two fifths of the cook's wages on said voyage."

Under this agreement, the vessel on May 12, 1869, proceeded on her voyage, having on board some eight or ten Kanakas, hired in accordance with its terms. She arrived at this port on the twenty-seventh October, with about eighty tons of fish. The men at once applied to the master and owners to proceed to dry, or as the technical phrase is, "make" the fish, offering their services for the purpose. But, though frequently solicited, the master and owners declined to allow the fish to be made. The men were unable to obtain any settlement or compensation, and fearful of impairing their rights by leaving the vessel, remained on board until the eighteenth December, but they did no work, and paid their own expenses for subsistence.

The reason assigned by the owners for their delay in making the fish is the following: At the time of the arrival of the vessel the market for fish was greatly overstocked. The nominal price was twelve cents per pound, but this could only be obtained for small quantities, and was due to the fact that all the holders of the article had entered into a combination by which all the fish in the market were put into a common stock, and held at a fixed price. All sales made by the common agent of all the parties, were credited to each in the proportion which his contribution to the common stock bore to the whole.

As the stock of made fish was more than sufficient to supply the demand, it was for the interest of the owners of the Domingo's cargo to postpone the making of the fish; for when made they are liable to deteriorate in quality; and the cargo, though not made, was credited to them as a contribution to the common fund, and entitling them to receive its proportional share of any sales which might be made.

The making of the Domingo's fish was, therefore, not commenced until February, 1870, and a considerable portion of the cargo still remains unsold, or to speak more accurately, the owners have not received on account of that cargo, shares of the proceeds of sales amounting to more than about twenty or twenty-five per cent. of its entire value. But they have received on account of sales credited to other cargoes owned by them and put into the common stock, sums exceeding in amount the value of the Domingo's cargo, had all the sales been credited to that cargo alone.

It is contended on the part of the respondents, that, inasmuch as the articles are silent as to the time within which the fish were to be made—that the law will imply that it was to be done within a reasonable time—and that the time taken, was not, under the circumstances, unreasonable. To this latter proposition I cannot assent. The owners were entitled to a reasonable time—but it was a reasonable time to make the fish with all convenient and usual despatch. The nature of the agreement and the fact that the sharesmen were seamen, who looked to their share of the proceeds as their only compensation for their services, forbid the idea that it could have been intended that they should wait an indefinite period at their own charges, in port, until the state of the market might make it for the interest of the owners to dry the fish, or until the proceeds of the cargo might be realized by the slow process which the owners, in view of their interest in other cargoes, saw fit to adopt.

I consider, therefore, the readiness and willingness on the part of the men to make the fish, as equivalent to a performance by them of their agreement, and that the refusal of the master and owners to allow them to do so for so long a period, amounted to a waiver by the latter of that part of the sharesmen's contract. The men, therefore, have the same rights as if they had actually made the fish, nor can any charge be allowed against them for the wages and provisions of the substitutes who were subsequently hired to do the work.

These charges must, therefore, be struck out of the account rendered by the owners. In this account are embraced two sets of charges. The first claimed to be payable in full by the sharesmen. The second are those for only two fifths of which they are charged. Amongst the first are several items of expenses incidental to the shipment of the Kanakas.

The chief items are for expense of drawing a bond for the return of the Hawaiian seamen; for tax to Hawaiian government for passage money of Kanakas from this port to Honolulu, after their discharge; for fees to Hawaiian consul at this port. All these expenses were no doubt necessarily incidental to the employment of the Hawaiian seamen. But I am at loss to perceive how they can be charged to the sharesmen. By the articles, the latter agreed to pay the wages of the men

hired at Honolulu, but nothing more. Nor does it seem unreasonable to restrict their liability to the payment of wages; for the expense of supplying provisions, which fell upon the ship, bore but a small proportion to the wages, which were to be paid by the sharesmen, while the ship received three-fifths of the fish caught by the Kanakas, and the sharesmen only two-fifths.

Even if the terms of the contract were doubtful or ambiguous, the court, by a well settled rule, would be bound to give to it a construction most favorable to the seamen. Wope v. Hemenway [Case No. 18,042]; Jansen v. The Theodor Heinrich [Id. 7,215]. But there is no ambiguity; and to charge the sharesmen, under an agreement to pay "wages," with the other incidental and consequential expenses attendant upon the hiring of the men, would be, not to construe the contract, but to introduce into it an entirely new stipulation. The charge for wages paid to the Kanakas must, therefore, be confined to the payments made to them for wages earned during the voyage and up to its termination.

Among the expenses, two fifths of which are charged to the sharesmen, are two items for pilotage into and wharfage at Honolulu. These charges are defended on the ground, that although the shipping articles for the fishing voyage were signed at Honolulu, yet the men had originally joined the ship at this port, with the understanding that she was to proceed to Sydney and thence to Honolulu, where the Kanakas were to be hired and the fishing voyage was to commence. It is therefore claimed, that the charge for pilotage in going into Honolulu and of wharfage while there, should be borne by the men. This claim is wholly inadmissible.

The men did not sail from Honolulu under any contract made at this port. Not only was a new agreement made at the former place, but it appears in proof that they had been previously discharged and their connection with the ship completely severed. The new engagement was entered into at the master's solicitation, and after some little hesitation on the part of the men. It referred to the voyage then to be commenced, and the charges for pilotage, wharfage, etc., to be borne by the men, were charges to be incurred in the course of the voyage to which the articles referred.

To charge them with an expense incurred and paid by the ship before the agreement was entered into, would be absurd. It may be, however, that some part of the wharfage expense was incurred on account of the fishing voyage, while the vessel was taking in salt or other supplies. I shall, therefore, allow one half of this item. There are also charged to the men two fifths of the fees paid to the custom house inspector on duty while the vessel remained undischarged at this port. They amount in all to $272.01.

In respect to these, it is to be observed that they must in great part have been incurred in consequence of the owners' determination to postpone for several months the discharge of the ship. It would be manifestly unjust to charge the whole expense of this to the men, even if they were liable for any part of it. But, in fact, they are not liable for any part. Their agreement was to pay two fifths of the duties, other than for entering and clearing the vessel; custom house charges are not mentioned. The articles were drawn by the owners. Had it been intended to include inspector's fees, it should have been so stated.

The remaining item objected to on the part of the libellants is a charge of two fifths of a certain allowance, or, as it is called, "commission," paid to the master. It amounts to one half a cent per pound on the whole catch. This appears to be the usual allowance to the master of a fishing vessel, and in this case constituted his only compensation. The articles provide that the sharesmen are to pay two fifths of "all expenses, viz.: clearing and entering the vessel, pilotage, wharfage, storage, flake hire, duties, commissions and other expenses which may be incurred in the sales of the proceeds of the said voyage." The commissions here referred to are evidently commissions on the sales of the proceeds of the voyage. The compensation or allowance to the master in lieu of wages, can hardly be called a "commission," and if the men, in addition to paying the wages of the Kanakas, and two fifths of the wages of the cook were also to pay two fifths of the master's wages or compensation, it should have been so stated in clear and unequivocal terms. The charge must, therefore, be disallowed.

In the account rendered by the owners the value of the fish is stated at eight cents per pound. This is quite as much, perhaps more, than could have been justly claimed, had the owners, on the arrival of the vessel and when they determined to enter into the combination and postpone indefinitely the drying of the fish, made a prompt settlement with the men.

But I regard this valuation of the cargo by the owners in their account rendered to the men as an admission, and in view of the long and unjust delay (more than seven months) to which the seamen have been subjected, I think they should be bound by it. The account must, therefore, be referred to the clerk to be restated in accordance with the foregoing, all items not herein rejected to be allowed, and a decree entered in favor of the libellants for the amounts found due to them respectively.

[Decree affirmed on appeal, at the October term, 1870, of the circuit court, by Sawyer, Circuit Judge. Case unreported.]

GOODRICH (GILMORE v.). See Case No. 5,447.

GOODRICH (GOSSLER v.). See Case No. 5,631.

GOODRICH (GREENLEAF v.). See Case No. 5,778.

Case No. 5,544.

GOODRICH v. HUNTON.

[2 Woods, 137.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1875.[2]

INJUNCTION TO RESTRAIN EXECUTION — ILLEGAL JUDGMENT—PARTNERSHIP—PLEA OF DISCHARGE IN BANKRUPTCY.

1. Generally, under the jurisprudence of Louisiana, a judgment rendered against a party whose domicile is not in the parish where the court is held is void; and,

2. Generally, after the dissolution of a partnership, the partners must be sued in the parish of their domicile.

[See note at end of case.]

3. But notwithstanding the dissolution of a partnership, it still continues for the purpose of liquidation and partition of its assets, and all the partners can be legally sued in the domicile of the firm for such purposes.

4. A discharge in bankruptcy must be pleaded. It cannot be set up after judgment as a reason why the judgment should not be enforced.

In equity. The case was as follows: [Logan] Hunton, the defendant, brought an action at law in the Fourth district court for the parish of Orleans, against the commercial firm of Pilcher & Goodrich, the Goodrich of said firm being the complainant in this case. In said action Hunton, on the 23d day of January, 1874, recovered a judgment against said firm for $2,500, with interest at eight per cent. from May 1, 1861. Thereupon the complainant, Ferdinand M. Goodrich, filed his petition in the same state court which had rendered the judgment against Pilcher & Goodrich, in which he represented that the judgment was null and void, and that Hunton was about to enforce it, and prayed for the writ of injunction to restrain him from so doing. The state court allowed the injunction to go as prayed for. Afterwards Hunton filed his petition and bond for the removal of the case made by the petition to this court, Hunton being a citizen of Missouri and Goodrich of Louisiana, and the case was removed to this court, where it came on for final hearing and decree.

Geo. L. Bright, for complainant.

Thomas Hunton and J. Ad. Rosier, for defendant.

WOODS, Circuit Judge. The grounds upon which complainant asks that there be decreed in his favor a perpetual injunction against the execution of said judgment are two:

1. He says that the court which rendered the judgment had no jurisdiction over his person, and so far as he is concerned, the judgment is null and void. The claim is that the firm of Pilcher & Goodrich, which, during its continuance, had been domiciled in New Orleans, was dissolved before the action of Hunton was commenced in the state court; that at the commencement of the suit, the complainant Goodrich had his domicile, not in New Orleans, but in the parish of Carroll, and could not, therefore, be sued in a court of the parish of Orleans; that the service of the citation issued against him from a court of the parish of Orleans was null and void, and the judgment rendered on such service was therefore null and void. To support this claim, the complainant relies on article 162 of the Code of Practice, which declares: "It is a general rule in civil matters that one must be sued before his own judge; that is to say, before the judge having jurisdiction over the place where he has his domicile or residence, and shall not be permitted to elect any other domicile or residence for the purpose of being sued; but this rule is subject to those exceptions expressly provided for by law." Among the exceptions to this rule is the following, as expressed in article 165: "In matters relative to partnership, as long as the partnership continues, in all suits concerning it, the parties must be cited to appear before the tribunal of the place where it is established." The complainant says that the partnership having been dissolved before the suit against the firm of Pilcher & Goodrich was commenced, the case would not fall within the above exception to article 162, and he could not be sued out of the parish of his domicile, to-wit, the parish of Carroll. That a judgment rendered against a party whose domicile and residence is not in the parish where the court is held, is null and void, is sustained by the following decisions: State v. Judge, 21 La. Ann. 258; State v. Head, Id. 550; Richardson v. Hunter, 23 La. Ann. 255. It has also been held that after dissolution of partnership, the partners must be sued in the parish of their domicile. Marsh v. Marsh, 9 Rob. (La.) 45; Hobson v. Whittemore, 13 La. 423; Black v. Savory, 17 La. 85. The reply of the defendant to these authorities seems to me to be clear and conclusive.

The evidence in this case establishes beyond controversy that the partnership of Pilcher & Goodrich was in the course of liquidation when the suit of Hunton was brought in the Fourth district court for the parish of Orleans; and the authorities are clear that while the partnership is in liquidation, it continues, and the case must therefore fall within the exception to article 162, made by article 165 of the Code of Practice above cited. Article 165 was taken verbatim from article 159 of the French Code of Procedure, and the French authorities, in construing that article, have declared that notwithstanding dissolution, the partnership still continues for the purpose of liquidation and partition, and that all the partners could be legally cited to appear before the tribunal of the domicile of the firm for the above purpose. 2 Troplong de la Société, 472; No. 1004; 11 Réportoire du Journal du Palais, verbo "Société," 827; Cour d'Appel de Liége, 1842, p. 321. The supreme court of Louisiana, fol-

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

[2] [Reversed in 99 U. S. 80.]

lowing the French authorities, has held that the partnership, although dissolved, still continues for the purposes of liquidation and partition of gains, and that the partners might be sued at the domicile of the partnership for such purposes. Lobdell v. Bushnéll, 24 La. Ann. 296. Following the construction of the supreme court of this state of articles 162 and 165 of the Code of Practice, as I am constrained to do, I am of opinion that the partnership of Pilcher & Goodrich was in existence when the suit of Hunton against the firm was brought; that by service of citation issued from the Fourth district court of the parish of Orleans, the court acquired jurisdiction over the person of the defendant Goodrich, and that the judgment against him is valid and binding.

2. But the complainant says that before the rendition of the judgment against him at the suit of Hunton, he had been discharged in bankruptcy. This is no reason for restraining the execution of the judgment. The discharge in bankruptcy was a defense which should have been pleaded to the action. As Goodrich failed to set it up against the suit of Hunton, he cannot now aver it as a reason why the judgment should not be enforced. There is no ground shown for maintaining the injunction issued by the state court. It must be dissolved and the bill dismissed at the complainant's costs.

[NOTE. From the decree dissolving the injunction issued by the state court and dismissing the bill the complainant appealed to the supreme court, which, in an opinion by Mr. Justice Bradley, reversed the circuit court on the ground that the case was one of which that court could not take cognizance. 99 U. S. 80. The proceeding was held to be tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, and not a separate suit. An action of nullity can only be brought in the court which rendered the judgment, unless a bill in equity charges fraud in obtaining it. The Code of Louisiana classifies the causes of nullity into causes relative to form and those relative to the merits, which is coincident with cases cognizable and not cognizable in the courts of the United States.]

Case No. 5,545.

GOODRICH et al. v. NORRIS.

[Abb. Adm. 196.] [1]

District Court, S. D. New York. March, 1848.

BILL OF LADING — INTENTION OF THE PARTIES— EFFECT AS A RECEIPT—QUANTITY OF GOODS—MISTAKE.

1. A bill of lading is to be regarded in a double aspect,—as a contract for the transportation and safe delivery of the goods covered by it, at the stipulated freight, and also as a receipt for the goods for the purposes of the contract.

2. In so far as a bill of lading operates as a contract, it is conclusive as to the intentions of the parties, and may not be varied by parol evidence.

[Cited in Dixon v. Columbus, etc., R. Co., Case No. 3,929.]

3. In so far as a bill of lading operates as a receipt merely, it is open to explanation or rectification by parol evidence, as in any other receipt.

[Cited in The Wellington, Case No. 17,384.]

4. The statement of the quantity of goods received, contained in a bill of lading, may be rectified in an action by the original shipper, by proof that through mistake the bill was signed for a greater quantity than was actually delivered.

[Cited in Crenshawe v. Pearce, 37 Fed. 435.]

5. But the proof of mistake in such case must be clear and unquestionable, to rebut the evidence afforded by the bill.

This was a libel in personam, by James E. Goodrich and others, against John Norris, master of the schooner John I. Adams, to recover damages for the breach of a contract of affreightment. The libel showed that the libellants had shipped on board the respondent's schooner a number of barrels of tripe, to be delivered to consignees at Boston, and that the respondent failed to deliver five of the barrels,—to recover the value of which this action was brought. The other facts appear in the opinion.

George S. Stitt, for libellants.

I. The respondent cannot contradict his bill of lading. Creery v. Holly, 14 Wend. 26; Barrett v. Rogers, 7 Mass. 297. A bill of lading is a contract, and is conclusive, especially as against the master; it may not be in all cases conclusive as against the ship-owners.

II. Admitting, however, for the purpose of the argument, that respondent may show a mistake in fact, he has not shown such mistake: (1) His witness merely swears that when the vessel was on her voyage they compared the cargo with the bills, and found but twelve barrels of tripe on board. This is all the testimony produced to prove the pretended mistake. But it does not prove that the eleven barrels mentioned in our bill of lading were not received by the schooner or delivered by the libellants. (2) In this case the respondent had the means of ascertaining the truth, as he undoubtedly did, and there is no pretence of fraud. This is not a "mistake of fact," within any proper sense of that phrase. See Saltus v. Everett, 2 Hall, 252.

III. The proofs indicate that in fact seventeen barrels were delivered to the vessel.

IV. The libellants claim a judgment for the highest price proved, twelve dollars per barrel, and interest on that amount from the latter part of December, 1846, allowing the ordinary time for a voyage to Boston.

Burr & Benedict, for respondent.

I. The objection taken by libellants' counsel, that no evidence can be received to vary the bill of lading, cannot be sustained, because (1) the libellants were the original shippers of the goods, and as between the shipper and the ship-owner, the bill of lad-

[1] [Reported by Abbott Brothers.]

ing may be contradicted (Abb. Shipp. 334); and (2) if the goods were never on board, the libellants cannot be injured by having the truth established, though it should contradict, vary, or explain a written instrument signed through fraud or mistake.

II. Upon the question of fact, whether the goods were in fact delivered on board, the evidence is satisfactory that they were not.

BETTS, District Judge. This case rests wholly upon one fact, and turns upon the force and effect of the evidence relative to that fact, offered upon both sides.

On December 3, 1846, the respondent signed a bill of lading, in the usual form, for eleven barrels of tripe, shipped by the libellants on board the respondent's schooner, to be delivered at Boston, to the firm of Davis & Whittemore. The bill described the barrels as being "marked and numbered as in the margin," but it contained no marginal marks or numbers.

The vessel arrived at Boston, having on board twelve barrels of tripe, but six only were marked for Davis & Whittemore, and that number were delivered to them. The other six were delivered to other consignees, conformably to their marks. No bill of lading was shown for them, although the mate testifies that he believes one was signed; and he also proves that freight was received for twelve barrels only. He also testifies that no more than twelve barrels were on board the vessel, and that after the vessel got out of port, it was ascertained, by the amount of cargo and by the freight list, that bills of lading had been signed for five barrels more than were in the vessel.

The libellants contend that evidence to contradict or explain the bill of lading is incompetent, and maintain that the respondent is concluded by his signature to the one produced. This is not the rule as between the original parties of the bill of lading, and where no rights of third persons are in question. In that case evidence may be received to show a mistake in the statement of the quantity of goods received, contained in the bill of lading.

In an action by the original shipper of the goods, the master or owner will be allowed to show that he was induced by fraud to sign a bill of lading containing an exaggerated statement of the quantity of goods received; and that such evidence will defeat an action for the recovery of an alleged deficiency in the delivery made, is well settled by the case of Bates v. Todd, 1 Moody & R. 106. That was an action against the owners of the ship Thames, on a bill of lading, signed by the master at Singapore, for eight hundred and ninety bags of pepper. The declaration alleged that eight hundred and ninety bags were shipped, and that some of them had been lost. The defence was, that only seven hundred and ninety bags were in fact shipped, and that the captain had been induced to sign the bill of lading for eight hundred and ninety by the fraud of the plaintiffs' agent at Singapore. It was contended for the plaintiffs, that the bill of lading was conclusive, and estopped the defendant who was owner of the ship. But Chief Justice Tindal held, that as between the original parties, the bill of lading was merely a receipt, liable to be opened by the evidence of the real facts, and he left the question to the jury, whether in fact eight hundred and ninety bags or only seven hundred and ninety were shipped.

The case of Berkely v. Watling, 7 Adol. & E. 29, is somewhat broader. The plaintiff there declared, in assumpsit, that the defendants, Watling and Nave, were owners of a ship called the Search, and that in consideration that the plaintiff, at their request, shipped goods on board, to be delivered to him or his assigns, the defendants promised to deliver them and had failed to do so. Nave pleaded separately, that the plaintiff did not cause the goods to be shipped in the vessel. On the trial the plaintiff produced a bill of lading, signed by the captain of the ship, transmitted to the plaintiff by Watling, which stated the goods to be shipped by Watling, to be delivered to the plaintiff or his assigns. It was also proved that the plaintiff held the bill of lading for value. Evidence was offered at the trial, on the part of the defendant, Nave, to show, that although the master signed the bill of lading for the goods, yet they were never shipped on board the vessel, as therein expressed; and the question was, whether Nave was estopped by the bill of lading from showing that fact. "The statement in the declaration," said Mr. Justice Littledale, "is that the plaintiff caused the goods to be shipped, which is put in issue by the second plea. How does the plaintiff prove his allegation? He puts in a bill of lading, which certainly appears to be signed by the master, but, on the face of it, the goods are shipped by Watling.. Then the plaintiff must prove Watling to be his agent; by so doing he supports the allegation. It turns out that in fact the goods were not shipped on board the Search at all. But the plaintiff says that the defendant, Nave, is estopped from showing this by the bill of lading signed by his own agent. How is he estopped? Watling knew the fact, and his knowledge is the plaintiff's knowledge. The plaintiff, knowing the fact by Watling, his agent, how is the defendant, Nave, estopped by what Watling does as his agent? Since, therefore, the plaintiff, as shipper, is cognizant of the facts, we need not say how far, on the general question, there is an estoppel, but, in my opinion, the bill of lading is not conclusive."

In the case now presented, no suggestion of fraud is made, but the respondent relies upon proof of the mere fact that the goods receipted for by the bill were never actually delivered to the vessel. That fact, if clearly

proved, will exonerate the master from responsibility to the original shipper, though it might not release him in an action by an assignee. The bill of lading has, in legal effect, a double aspect. It is a contract for the transportation and safe delivery of the property shipped, and it also embodies, as a matter collateral to that contract, a receipt for the goods so shipped. In so far as the bill operates as a contract, it is, undoubtedly, the exclusive evidence of the obligation of the parties; but in respect to those clauses which operate merely as a receipt for the goods, it has no higher obligation than an ordinary receipt, and is open to explanation and rectification by parol proof. 3 Phil. Ev. (Cow. & H. notes) 1439. The fact that both a contract and a receipt are embodied in one instrument, forms no reason why they should be regarded as differing in effect from similar instruments executed in an independent form.

The clauses in the bill of lading which relate to the quantity and condition of the goods received, do not enter into the contract between the parties; they are parts of the receipt. The contract is for the transportation of the goods, for their delivery, for the stipulated freight, &c. But the statements that the goods embraced within this contract have been received on board the vessel, and that they are of such and such description in point of quantity, quality, condition, marks and numbers, &c., are in the nature of a receipt, not an agreement. They are therefore explainable, not alone by evidence of fraud, but by such proof of mistake as is by well-settled rules of law permitted to control the operation of ordinary receipts. It is proper, therefore, to receive the evidence offered on the part of the defence in this case, and if it clearly shows that the goods for which this suit is brought were never, in point of fact, delivered to the respondent, it will constitute a good defence to this action.

On the part of the libellant, the testimony, if not direct and complete, to the fact that the seventeen barrels were delivered on board the vessel, at least strongly corroborated the bills of lading, and may furthermore account for the difference between the quantity receipted and that found on board; as one witness states that he took down five barrels, and another person in the libellant's employment carted down twelve barrels. The latter saw barrels already on the dock, and was told in answer to his inquiry on board the vessel, that they belonged to the libellant's parcel. He left his five barrels on the dock near the vessel, by direction of those on board. He does not remember that he had a receipt given him, but thinks the other man brought back a receipt for his loads. He assisted the other man (who is now at sea) in loading twelve barrels, eleven of which were marked Whittemore & Davis, and one to O. Robinson. One of those he carted down had the same mark, and the other four were Russel & Squires.

The mate's impression is, that six of the barrels were addressed to Russel & Squires, and were delivered to them out of the twelve on board. He further says he found four barrels on the dock when the vessel came into her berth, and had them rolled on board. They were marked for Whittemore & Davis; and he further testifies that the twelve barrels were all brought to the vessel by one person. If the evidence of the other cartman is credited, there are then five more barrels which were delivered by him, of which the mate took no account.

Under these circumstances, the testimony of the mate does not destroy the effect of the bills of lading. The written evidence must prevail, and the respondent must be held to account for the five barrels deficient in the delivery. The proof is they were worth here from $10 to $12 per barrel; and the lowest valuation of the goods will be taken in such case, when the evidence carrying them higher is not precise and clear. The libellant is entitled to a decree for $50, with interest from December 3, 1846, to this day, and his costs to be taxed.

GOODRICH v. PACKARD. See Case No. 5,546.

Case No. 5,546.

GOODRICH et al. v. REMINGTON.

SAME v. PACKARD.

[6 Blatchf. 515.] [1]

Circuit Court, N. D. New York. July 14, 1869.

BANKS AND BANKING — BANKRUPTCY OF REAL OWNER OF INCORPORATED BANK — SUIT BY ASSIGNEE TO RECOVER ASSETS FROM BANK'S RECEIVER—COSTS.

1. M., a private banker under the general banking law of New York, not being allowed by law to establish another private bank, established a joint stock bank under that law, under an agreement that the stockholders other than himself were to have no real interest in the bank, and they had none, and the bank was carried on under that arrangement. M. failed in business, and the bank failed, and a receiver of the bank was appointed by a state court of New York. M. having been subsequently adjudged a bankrupt, his assignee in bankruptcy brought a suit in equity, in this court, against the receiver, to compel a delivery of the assets of the bank to the assignee, for distribution in bankruptcy, as assets of M.: *Held*, that the relief could not be granted, and that the bill must be dismissed.

2. As the question was one on which it was proper to ask the opinion of the court, and as the assignee, in filing the bill, acted under the advice of eminent counsel, no costs were allowed to the defendants.

In equity. The plaintiffs in these cases [Horace P. Goodrich and others] were the assignees in bankruptcy of Hiram J. Messen-

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

ger. The defendants [Emery B. Remington and Milton D. Packard] were, respectively, receivers, appointed by the supreme court of the state of New York, in separate proceedings, instituted against the Bank of Ontario, and against the Bank of Canton, severally and respectively, as insolvent banking associations, organized under the general banking law of the state of New York. The plaintiffs, by their bills, asked decrees from this court, declaring the property in the hands of such receivers, and claimed by them as property and assets of such insolvent banking associations, to be the property and assets of the bankrupt.

HALL, District Judge. The facts upon which the rights of the parties, in these suits, depend, are substantially the same in the two cases, and they may, therefore, be properly disposed of upon the same grounds.

The bankrupt, being already a private banker, under the general banking law, at Cortland, determined, some years since, to establish a bank at Canandaigua, and, at a subsequent period, determined to establish another bank at Canton; but he could not establish such banks as a private banker, under the general banking law, because he already had such private bank at Cortland. Therefore, for the purpose of establishing the bank at Canandaigua, he executed, in connection with William Richardson, Merrick Munger, John C. Draper, and James H. Tripp, a certificate of the organization of the Bank of Ontario, in due and proper form. The execution of this certificate was duly acknowledged, and it was then recorded in the clerk's office of Ontario county; and the other formal acts necessary to the organization of a banking association, as contemplated by such certificate of organization, were done, as required by the general banking law of New York. By this certificate of organization and the subscriptions thereto, it appears, that the capital stock of the association was fixed at $100,000, and divided into one thousand shares of $100 each; and that, of these, the bankrupt subscribed for 920 shares, and the other four associates for 20 shares each.

The Bank of Canton was organized in the same way, the capital stock and number of shares being the same, and the associates being the bankrupt, who subscribed for 950 shares, and C. W. Heaton and Charles H. Stevens, who subscribed for the additional 50 shares, Heaton subscribing for 20 shares, and Stevens for 30 shares.

It is claimed, and may be considered as proved, that these banks were, in fact, established for the sole benefit of the bankrupt; that, as between him and the other associates, it was agreed that the other associates were not to be called upon to pay up their subscriptions, and were to have no real interest in the bank; that, in fact, they never paid any thing on such subscriptions; and that, from first to last, the bankrupt managed and controlled all the operations of these banks, without any interference from the other associates, without any board of directors, and, as between himself and the other persons who had signed the certificates of organization, in all respects, in substance, as though they had been his individual banking establishments. The required returns to the banking department of the state were, however, duly made, and the other forms of keeping up the organization and operations of these banks, as banking associations, as contradistinguished from a private banking establishment, were observed and maintained; and the transactions and business of such banks, with their depositors and dealers, were carried on in the name, form, and manner of similar transactions and business of actual legal banking associations, organized and carried on in good faith, and without fraud, either against the state, in its corporate character, or against its citizens, as individuals. Under these circumstances, the Bank of Ontario, either without ever having had a dollar of capital, or without having had any capital paid in that was not very soon thereafter withdrawn by the bankrupt, carried on business for several years, and its deposits, at one time, amounted to more than $340,000. The operations of the Bank of Canton were more limited, and its deposits were much less. The failure of the bankrupt, at his banking house in New York City, at once caused the failure of these two banks, and of his private bank at Cortland. At the time of these failures, the bankrupt was indebted to the Bank of Ontario, to an amount exceeding $160,000, and to the Bank of Canton, to an amount exceeding $29,000, in addition to his possible liability for the whole amount of stock subscribed by him in those banks respectively. It is probable that his assets were not then sufficient to pay more than 30 or 35 cents on the dollar of the claims of his general creditors.

The plaintiffs, as assignees in bankruptcy, insist, that the acts of the bankrupt and his associates, in perfecting a formal organization of the Banks of Ontario and Canton, as banking associations, and in carrying them on as such for years, for his individual profit, making verified, but false, returns to the banking department, in the forms of those required by law to be made by banking associations, and holding out these banks to the public as banking associations duly organized, and recognized by the laws of the state as corporations having a legal existence, with legal franchises, corporate property, and clearly defined rights and liabilities, entirely separate and distinct from the individual existence, property, rights, and liabilities of the bankrupt, was a gross fraud on the banking department and the state, as well as against those dealing with the banks; that these banks were, and, in respect to this controversy, must be regarded as the banks of the bankrupt, as a private banker; that

the assets and property of these banks, now in the hands of their receivers, must be decreed to belong to the plaintiffs, as assignees in bankruptcy; and that the depositors in and creditors of these banks must come in and share pro rata with all the other general creditors of the bankrupt. This is resisted by the receivers, who insist that the assets in their hands belong to them, as such receivers, and must be disposed of by them, for the benefit of the creditors of such banks, as required by the statutes of the state under which such receivers were appointed. No proceedings, under the bankrupt law of the United States, to obtain an adjudication of bankruptcy, have been taken by or against the Bank of Ontario, or the Bank of Canton, as banking associations.

The making, recording, and filing of the certificates of the organization of the Bank of Ontario, and of the Bank of Canton, and the acts of user under them, must, under the laws of this state, and the decisions of our state courts, be held to be sufficient to establish the existence of these banks, as corporations, as against the associates and third persons, whatever might be the right of the state, by a direct proceeding, by quo warranto, founded upon the frauds alleged, to put an end to their corporate existence. Act April 18, 1838, §§ 15–18 (Sess. Laws N. Y. 1838, c. 260); Buffalo & A. Val. R. Co. v. Carey, 26 N. Y. 75; Eaton v. Aspinwall, 19 N. Y. 119; Dayton v. Borst, 7 Bosw. 115, affirmed 31 N. Y. 435; Palmer v. Lawrence, 3 Sandf. 161, affirmed 5 N. Y. 389; Leonardsville Bank v. Willard, 25 N. Y. 574; Robinson v. Bank of Attica, 21 N. Y. 406; Stover v. Flack, 30 N. Y. 64. Whatever might be the rights of the creditors of these banks, as against the bankrupt, in consequence of the fraud practiced by the bankrupt, there is no ground of equity upon which the assignees of the bankrupt, (either as his representatives, or as the representatives of his general creditors,) can reach the assets of these banks now in the hands of their receivers.

It was urged by the plaintiffs, that the object of the bankruptcy act [of 1867 (14 Stat. 517)] is, to secure an equal, or, rather, pro rata, distribution of all the property of the bankrupt, to and among all his creditors; but the act itself (section 36) recognizes a different rule, as respects the joint and individual property, and joint and individual debts, of members of a copartnership; and, if there were no legal corporations in existence, and the associates who signed the certificates of organization before referred to were simply copartners, and liable as such, their copartnership property would be distributed among their copartnership creditors, to the exclusion of the separate creditors of an individual member of the copartnership. In short, it is believed that there is no ground upon which the plaintiffs can maintain either a legal or an equitable title to the property sought to be reached by these suits. The fraud imputed to the bankrupt should not give his general creditors any right to the deposits in these banks, as against the persons who made such deposits upon the faith of the legal existence of the corporations, and of their right to look to the assets and property of the corporation as their security; and it would seem to be inequitable and unjust to enforce the claim made by the assignees in this case.

The view taken of the actual legal and equitable rights of the parties renders it unnecessary to inquire whether the bills in these cases should not be dismissed upon the ground that the rights insisted upon by the plaintiffs, if any such rights exist, are legal rights, in respect to which they have an entirely adequate remedy at law. Nor has it been deemed necessary to discuss the question, whether the laws under which the receivers were appointed are insolvent laws, and, therefore, superseded by the bankruptcy act; for, the plaintiffs, in order to succeed in these suits, must show title in themselves to the property in controversy. The receivers, being in possession of the property, are entitled to hold it until it is claimed under a paramount title.

As the decision is against the alleged right of the plaintiffs to the subjects of controversy, it is, also, unnecessary to consider the question raised by the defendants, in regard to the right of the state courts to decide the questions of property involved, by reason of their having, as it was insisted, obtained jurisdiction, and placed the property in controversy in the possession of their receivers, by proceedings commenced anterior to the commencement of the proceedings in bankruptcy under which the plaintiffs claim.

Upon the whole case, the plaintiffs' bills must be dismissed; but, as the question presented was one upon which it was proper to ask the opinion of the court, and as the assignees, in filing their bills, acted under the advice of eminent counsel, the bills must be dismissed without costs.

GOODRICH TRANSP. CO. (UNITED STATES v.). See Case No. 15,228.

Case No. 5,547.

In re GOODRIDGE.

[2 N. B. R. 324 (Quarto, 105).] [1]

District Court, S. D. New York. Dec. 15, 1868.

BANKRUPTCY — SPECIFICATIONS IN OPPOSITION TO DISCHARGE.

Where specifications in opposition to the discharge of the bankrupt set forth that he had concealed property in the hands of his brother, and the only evidence in support thereof being the testimony of the bankrupt and his brother, from which badges and indicia of fraud were

[1] [Reprinted by permission.]

deduced, and not overborne by the positive testimony, *held*, that the specifications were sustained and discharge refused.

[Cited in Re Rainsford, Case No. 11,537; Re Antisdel, Id. 490.]

In bankruptcy.

H. P. Herdman, for creditors.

Charles Mott, for bankrupt.

BLATCHFORD, District Judge. The substance and effect of the five specifications filed in opposition to the discharge of the bankrupt in this case are, that the bankrupt has wilfully sworn falsely in his examination before the register, in swearing that he had no property when his petition was filed, except the exempt property named therein, and no property concealed in the hands of his brother, John R. Goodridge, and that his said brother was not indebted to him; that the bankrupt has concealed property in the hands of his said brother, and has not delivered it to the assignee; and that, for the purpose of preventing the sum of from four to five thousand dollars from being distributed among his creditors in bankruptcy, he has resorted to the device of keeping that sum in the hands of his said brother, claiming that it was paid to him in discharge of a debt.

A fraud of the kind here alleged is one that can seldom be proved by other than circumstantial evidence. The parties to the transaction are generally, as in this case, the only witnesses, and if their stories are to be believed as told, no fraud can be established. External evidence is not to be had, and the truth must be reached by examining the evidence of the alleged parties to the fraud, and weighing its probabilities and scrutinizing its general tenor and manner. In the present case, the story of the bankrupt and his brother, as they tell it, is as consistent with a fraud as with an honest transaction, and if the alleged fraud was to be perpetrated, a natural way to consummate it, with the hope of escaping detection, would have been the way employed in this case. The determination of the question of fraud or no fraud, must, under such circumstances, depend upon the impression made by the evidence of the parties concerned. Of course, those who would commit such a fraud, would swear falsely to carry it through. If their positive testimony to the honesty of the transaction is overborne by badges and indicia of fraud, deduced from their own testimony, the conclusion must be that there was fraud. If their positive testimony to the honesty of the transaction is true, and there was no fraud, there will not be found in their testimony any badges and indicia of fraud, sufficient to overbear such positive testimony. Applying these principles to the evidence of the bankrupt and his brother in this case, I cannot resist the conclusion that the four or five thousand dollars which the bankrupt alleges he made for his brother at the West, was not made for his brother, and was not his brother's property, but was the bankrupt's property. It was used by the bankrupt for his own purposes, and calling it a debt due to his brother, he claims that he paid it up by installments, the last of which was paid somewhere in the first half of the year 1867. The impression made by the whole testimony of the bankrupt is very unfavorable. When any test is sought to be applied, by close questions, to a positive statement of his, his recollection always fails. He says he purchased lands at the West for his brother, but cannot recollect how much his brother paid him for his services, or anything about it, except that they settled. His general statement is that when he left the Western country he had made for his brother some four to five thousand dollars, which was paid over to his brother at different times afterwards in New York. When asked how long it was since he finished paying that money, he says: "A little over a year, I think." Again, he says: Q. "When, and as near as you can tell, was it, that you and your brother settled, and what was the basis of that settlement in relation to the matters connected with the Western lands?" A. "There was no final settlement of all matters until I paid him the balance due him, a little over a year ago." Q. "How much was the balance then due him?" A. "I don't recollect; but I paid him at different times, from time to time, since I came to New York." Q. "In that final settlement was any allowance made by your brother for your services in purchasing said land?" A. "Yes." Q. "How much?" A. "I don't recollect the amount." The purchase of the lands at the West was evidenced by land certificates, all of which the bankrupt, and not his brother, received; and his brother was never at the West, but was in New York, while the bankrupt then lived in Wisconsin. On his examination by his own counsel, the bankrupt is called on to explain and does it in this way: Q. "You testified that you could not tell exactly how much or what amount you received; that it was a good while ago. Explain what you mean by that." A. "We had an understanding at that time, about the time I came to New York, how much I was to receive up to that time. There was no money paid at the final settlement, about a year and a half ago." On his further examination on the part of the creditors, he says: Q. "How does it happen that you remember that you footed up and paid your brother four or five thousand dollars so definitely, and can't remember at all the amount or anything like the amount you received as commissions?" A. "I don't think it exceeds five hundred dollars that I received from him." Q. "Did you take or give a receipt on said last-mentioned settlement?" A. "I don't remember of passing receipts." The recollection of the brother is equally at

fault when any test is sought to be applied, and his testimony is equally vague and general with that of the bankrupt. Thus: Q. "When did he pay it to you?" A. "He was paying me all the time from the time when he came back to New York from Wisconsin up to about a year and a half ago, when we settled in full for all except what is on the schedules." The items on the schedules all accrued before he went West. The bankrupt went West in 1854. The item on the schedules due to his brother is a debt of three hundred dollars, contracted in 1853. The transactions in the Western lands were between 1854 and 1858 or 1859. In 1858 or 1859, the bankrupt removed to New York. It is a strange circumstance that the bankrupt should pay his brother this alleged debt of four or five thousand dollars, and still leave standing a prior one of three hundred dollars, but not at all strange that if he were putting four or five thousand dollars into his brother's hands as a cover, he should leave the old debt of three hundred dollars standing. Still further, the brother says: Q. "How much money did he pay you in all?" A. "I couldn't state exactly, but somewhere from four to five thousand dollars." Q. "How did that indebtedness accrue, or how did he come to owe you that sum?" A. "From investing the money I sent him at Chicago in a lot there, selling the contract for the purchase of the lot, whereby a sum of money was made, and continuing to invest that money in school and swamp lands in Wisconsin for me, and in selling said lands and investing in others, etc." Q. "How much money was made on the Chicago lot?" A. "It would be impossible for me to tell." Q. "Do you know how many acres, or about how many acres of school and swamp lands your brother purchased for you while in Wisconsin?" A. "I cannot tell you now, but it was some thousands of acres." Q. "Do you know in any other way except by the account rendered by your brother, how many acres was purchased or sold, or what profit was made on them?" A. "I do not. I never went to Wisconsin. I relied wholly on my brother, and our business was transacted wholly by letter, except the time when he came to New York, and I saw him in person." Q. "Did you instruct him to continue investing this money, or did he do it of his own volition, without consulting you?" A. "The acts of my brother were according to my directions, but he was left to use his judgment and discretion. My instructions to him were general." Q. "Have you any of those land certificates now?" A. "I have." Q. "How many acres?" A. "I think there are eighty acres." Q. "Was there ever any understanding or agreement between you and your brother as to what he should receive for his services in transacting the business you have stated for you?" A. "There was not, until after the transaction of the business; until he came back to New York. The understanding was, that he should be paid, but the amount was not fixed till he came back to New York." Q. "When was this understanding had between you, and how?" A. "I can't say whether it was by letter or when he came on to New York, and when I saw him personally." Q. "When did you first ascertain that he was owing you the four or five thousand dollars you have testified he paid you?" A. "When he came to New York, but I was being constantly advised by him while West, as the sum was accruing." Q. "On your settlement with him what was allowed for his services for you, in all the matters you have stated?" A. "I couldn't tell exactly, but somewhere in the neighborhood of four hundred dollars." Q. "During the time your brother was transacting this business for you in the West, did you keep any book account or memorandum of the amounts of lands he advised you from time to time he had purchased and sold on your account?" A. "I did not." In a subsequent examination the brother says: Q. "During the time your brother, the bankrupt, was in the West, did he send or pay you any money?" A. "I have no recollection of his paying me a cent; I am certain that he did not." Q. "How long after he returned from the West was it before he paid you anything?" A. "I could not say positively. It might have been about a year." Q. "What did he then pay you?" A. "He paid me at different times all along, in different sums, from that time till we settled, about a year and a half ago, when he paid me the entire balance." Q. "How much was that balance then paid you?" A. "I don't remember."

This story of the debt of four or five thousand dollars, paid in this way, is not credible, on all the evidence. It might, perhaps, be as impossible to believe the fact, that the bankrupt paid over to his brother the four or five thousand dollars, as to believe that it was paid in discharge of a debt, were it not that the bankrupt is driven by a statement of his receipts and expenditures since he removed to New York, in 1859, to account for about four thousand five hundred dollars in some way, and he does it by stating that it was paid to his brother, and for the indebtedness referred to. The specifications are sustained and the discharge refused.

GOODRIDGE (DRAKE v.). See Cases Nos. 4,062 and 4,063.

Case No. 5,548.

GOODSELL et al. v. BRIGGS et al.

[Holmes, 299.] [1]

Circuit Court, D. Massachusetts. March, 1873.

CUSTOMS DUTIES—APPRAISEMENT—INJUNCTION AGAINST APPRAISERS.

1. In appraising the value of an importation, the appraisers are not bound by prior appraisals of the value of goods of the same kind imported by the same party.

2. The circuit court has no authority to enjoin the appraisers from taking evidence anywhere as to the value of an importation.

3. The court refused to enjoin the appraisers of the value of an importation of gloves, from carrying out of the district into which the importation was made, samples of the gloves, for the purpose of obtaining evidence as to the value of the importation.

Motion for injunction [by T. B. Goodsell and others against H. S. Briggs and others]. The original bill was against the appraisers of certain importations of the complainants. It alleged that the complainants, as a firm, were manufacturers at Naples, Italy, of a peculiar kind of glove, and imported the same to Boston, Mass.; that several controversies had arisen between the complainants and the customs officers of the United States as to the true market value of the gloves at Naples; that in 1872, according to an arrangement with the secretary of the treasury, one of the complainants went to Naples and obtained evidence of the market value of the gloves there; that upon his return a hearing was had before the general appraiser as to said value, which hearing was understood by the United States authorities and the complainants to be final, and end all controversy as to the value of the gloves; that the decision upon the hearing was that the gloves imported were invoiced at the proper value, and accordingly the duties on all such importations up to Jan. 1, 1872, were paid, and the bonds therefor cancelled; that in March, 1873, and at sundry times afterwards, the local appraiser had marked up the value of importations of gloves by the complainants, notwithstanding the former final decision of the value of such importations, and although the gloves were of the same quality as those previously imported by the complainants, and the value thereof in Naples had not changed; that the appraisers had appointed a hearing to be held in New York, at which evidence was to be taken by the appraisers as to the value of the importations since Jan. 1, 1872; that the complainants had protested against any hearing in New York. The bill prayed that the appraisers be enjoined from removing the goods to New York; and from holding any hearing there as to the value of the complainants' said importations, except by interrogatories and cross-interrogatories under a commission; and that the general and merchant appraisers be enjoined from holding further hearings as to such value; and that the local appraiser be enjoined from marking up the value of said importations. By supplemental bill, the complainants charged that the collector of Boston had authorized the removal of some of the complainants' goods to New York, and that they had been removed by the general appraiser; and prayed that the collector be made a party defendant, and that the general appraiser be ordered forthwith to return the goods to the storehouse in Boston; otherwise the prayer of the supplemental bill was as in the original bill. The collector, by his answer, denied that he had ordered, or intended to order, removal of the complainants' goods. The local appraiser made affidavit averring that all acts done or proposed to be done in the premises were authorized by instructions of the secretary of the treasury; and denying that any of the complainants' goods had been removed to New York, except samples, removed before the original bill was filed; which samples were necessary for use in taking evidence in New York as to the value of the importations.

B. F. Butler and John A. Loring, for complainants.

F. W. Hurd, for defendants.

LOWELL, District Judge. It is a very useful function of courts of equity to restrain vexatious litigation by enjoining a renewal of a contest which has been fully settled between the same parties. The bill makes out a case which might well call for such interference, if the complainants' rights have been definitely and forever adjudicated, as they allege, and if the appraisement of different goods heretofore imported by them were analogous to a suit between them and the United States. But it must be admitted that each importation is a new case, on which the appraisers are to pass judgment, and on which they may take new evidence; and no court has ever undertaken to say that one, two, or any number of former appraisements made the matter rem judicatam, and estopped further inquiry. If this analogy could be made out, there could never be more than one appraisement of the same class of goods of the same importer, however mistaken the first might have been. This rule would work as harshly for the merchant as for the government, for it is the right of both to have every invoice appraised on its own merits. Besides, it would be necessary to show that the goods were in fact precisely alike, and that the market value in the country of exportation had not changed; which are among the very facts which the appraisers are appointed the sole tribunal to decide, with no appeal to this or any other court. If oppression is exercised by vexatious and unfounded examination and reexamination of questions really the same, though nominally different, I know of no judicial remedy, though there may be others. It is clear that in appraising these goods the

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

officers are acting within the scope of their authority, and that I have no power to enjoin them from using their judgment in the premises.

It seems to be within the scope of the appraisers' powers to obtain evidence wherever it is to be found. The statute says they are to ascertain, estimate, and appraise the value by all reasonable ways and means in their power, and it gives them power to summon witnesses and take depositions. The bill says they cannot take evidence out of this judicial district; which may be true in one sense, that is, they may not be able to oblige witnesses to attend out of the district. But they have the right to inform themselves; and if witnesses will attend and testify in New York, they may take their testimony, ex parte, if they choose; and the notice to the complainants is a matter of courtesy and fairness, upon which they may take such action as they think best. It is a commendable practice, and one which, I understand, is always followed, as it should be, to give the importer an opportunity to see and examine the witnesses; but I know of no law which requires it, or which obliges or would justify the appraisers to overlook any evidence which they can reasonably obtain, though it may put the government and the importer to some trouble and expense, if the evidence is important enough to warrant it. It is all a question of judgment and discretion. If the complainants have procured evidence in Naples, I know of no reason why the appraisers may not seek it in New York. Nor do I know of any law which requires it to be taken on written interrogatories filed in this district, or indeed that it can be so taken.

On the only remaining subject-matter of the prayer I remain of the opinion expressed to both parties at or just after the argument. If the case were made out that the defendants were about to remove a large and valuable part of the complainants' goods to New York, they would be acting beyond their jurisdiction, and I do not know that I should not feel bound to restrain them. If they can remove one package in every ten, they can remove the other nine, and the complainants would have no adequate remedy. On the question whether the action against the officer would be adequate, I expressed some doubt; but it would not be so, I am satisfied, in many cases. But there are some circumstances which make it improper, in my judgment, to issue the writ at this time. I see no legal objection to the appraisers taking so much of the goods as would serve for samples, unless in some very unusual and extraordinary case, where the mere specimens would be of great value. If they cannot do this, they cannot take the testimony to any purpose. Now the local appraiser makes oath that only samples have been taken; and though this is denied by the complainants on oath, yet their statement is made, as it almost necessarily must be, on information and belief only, while the appraiser ought to know whereof he affirms.

I have not had time to make a thorough examination of the law of the case, though I have read many important cases. I assume that the circuit courts will never interfere with the ordinary action of the administration of the customs laws by the proper officers, and have no jurisdiction to do so. I assume, further, that if the officers do an act which is beyond their jurisdiction, and is a mere usurpation, the court may interfere by injunction, if the case seems to require it.

By one of the statutes concerning internal revenue the courts are prohibited from restraining the assessment or collection of any tax,—meaning, I suppose, a tax under those laws; and I do not understand that the circuit courts have ever exercised a power of restraining collectors of customs from assessing or collecting duties. The remedy by action is not only plain and adequate, but exclusive, in most cases. I have seen no case in which such a writ has been issued, except by consent, though there may be such. But to take away the property of the tax-payer, not in assessing or collecting a tax, but for some incidental purpose, or to destroy it, or to give it away, is not either assessing or collecting a tax. And I am at present inclined to think that there is jurisdiction in such a case, whether the officer be acting in the internal or the customs service. Motion denied.

Case No. 5,549.

In re GOODWIN.

[5 Dill. 140; [1] 17 N. B. R. 257.]

Circuit Court, E. D. Missouri. 1879.

ACCOMMODATION MAKER ENTITLED TO RIGHTS OF A SURETY AS AGAINST A HOLDER WITH KNOWLEDGE OF THE TRUE RELATION OF SUCH MAKER.

1. An accommodation maker of a note is not, as respects a holder with notice, the principal debtor; and where the holder, with knowledge that the maker is an accommodation maker, without his knowledge or consent gives time, by a valid contract, to the party who is in fact the principal debtor, the accommodation debtor is entitled to the rights of a surety, and is discharged, although the holder did not know, when he took the note, that the maker was not the party primarily liable thereon.

[Cited in Vary v. Norton, 6 Fed. 810; Union Bank v. Crine, 33 Fed. 811.]

2. Such is the modern English doctrine, and it was followed in the case in judgment.

In bankruptcy. The district court, on the motion of the assignee, expunged the claim of the Valley National Bank on the note for $6,000 held by it, made by Goodwin, Behr, & Co., bankrupts, to the order of Gustavus Hoeber, and by him endorsed to the bank for value. The bank appeals from this order. The further facts appear in the following opinion of the district court:

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

TREAT, District Judge. A motion was made by the assignee to expunge the claim of the bank. Issues have been framed, and the cause heard. Goodwin, Behr, & Co. were the makers, and Hoeber the endorser, of a note for $6,000, which the bank discounted. Before the same became due the bank knew that the makers were such solely for the accommodation for the endorser. The bank then discounted a note of said endorser at ninety days for $5,000, passed the proceeds of the discount to his private account which he kept with said bank, and he gave his check for $6,000, which was charged against said private account. As the endorser's note for $5,000 was not secured by an endorser thereon, the bank retained the original note for $6,000, and seek to have the same allowed against Goodwin, Behr, & Co.'s estate in bankruptcy. There are two propositions, either of which is fatal to the claim: 1st. Hoeber, the endorser, paid the note by his check for the $6,000, which extinguished the bank's demand thereon. 2d. If that be not so, the bank, knowing that Hoeber was primarily liable (Goodwin, Behr, & Co. being mere accommodation makers), received payment of at least $1,000 thereon from Hoeber, and extended to him the time of payment for the balance for ninety days without the assent of the accommodation makers.

The legal rule in such cases is that if the holder of the note is informed that the maker is only nominally such, but actually an accommodation maker for the endorser, he must deal with the paper and the parties with reference to their true relationships to the obligation. The makers were sureties, and an extension of time to Hoeber, the actual principal, without the assent of the surety, was a discharge of the surety if the bank precluded itself from enforcing at once the original obligation. It is true that matters have been called to the attention of the court which show peculiar equities as between Goodwin, Behr, & Co. and Hoeber, but the bank does not represent said equities. [The decision is against the claim of the bank and judgment must be for the defendant.][2] The authorities are not seemingly in accord. If, however, the bank is held, by information given subsequent to the discount of the $6,000 note, to be dealing with the transaction as if Hoeber were the maker, and Goodwin, Behr, & Co. the endorsers, then the receipt of part payment from Hoeber, and an extension of time to him for a consideration as to the balance due, discharged the sureties. The English courts, while insisting on the strict rule as to the extension of time to the principal without assent of the surety, criticise the reasons given in some cases in support of the rule. May it not be that the true reason is found in the maxim, "in haec foedera non veni" (I have not entered into this agreement)? A surety enters into an obligation, the elements of which are time, etc. If the obligation is to be prolonged beyond the prescribed time, whereby there can be no legal remedy in his behalf until the end of the new period, is there not virtually an effort to hold him bound to a changed or new contract as to time, when the financial and other conditions of the parties may have undergone an entire change in the interval? The conclusion is, that the bank is not entitled to prove the $6,000 note, or any part thereof, against the estate of Goodwin, Behr, & Co., and judgment will be entered accordingly.

H. A. Haeussler and Finklenburg & Rassieur, for the bank.

Nathaniel Myers, for the assignee in bankruptcy.

DILLON, Circuit Judge. In England an accommodation maker is, in courts of law, regarded as the principal debtor, although the creditor or holder knew, at the time of taking the note, that it was given by the maker to the payee without consideration (Byles, Bills, 4th Ed., 191, where the cases are cited; 1 Pars. Notes & B. 325, and notes; 3 Kent, Comm. 104; Story, Bills, §§ 291, 368, 432, 434); and, therefore, the extension of time by the holder to the acceptor without the consent of the payee and endorser will not discharge the acceptor—nothing will discharge the maker but payment or release. The leading case is Fentum v. Pocock, 5 Taunt. 192, 1 Marsh. 14, which has been frequently approved in England and in this country. The cases are referred to by Mr. Parsons (1 Notes & B. 325), and in White & Tudor's Leading Cases in Equity (volume 2, 4th Am. Ed., p. 1917). There is no decision of the exact point by the supreme court of the United States. The nearest approach to it is in Sprigg v. Bank of Mt. Pleasant, 12 Pet. [37 U. S.] 257; Lenox v. Prout, 3 Wheat. [16 U. S.] 520; and Creath v. Sims, 5 How. [46 U. S.] 192, 206. The American cases rest on the authority of the English cases—particularly Fentum v. Pocock, and those which follow it.

But in equity it is otherwise, and the real relation of the parties to the note, bill, or bond determines their rights in all cases where the holder has knowledge of that relation. And it has recently been expressly decided by the queen's bench, the court of chancery, and by the house of lords, that the rule of law that if the creditor contracts with the principal debtor to give him time, the surety is discharged, applies to bills of exchange and promissory notes; and that it makes no difference, in the application of the rule, that at the time of contracting the debt the surety was believed by the creditor to be the principal debtor. Oriental Financial Corp. v. Overend, Gurney & Co. (A. D. 1871) L. R. 7 Ch. 142, 41 Law J. Eq. 332,

[2] [From 17 N. B. R. 257.]

affirmed in the house of lords (1874) L. R. 7 H. L. 348; Ewin v. Lancaster, 6 Best & S. 571; Bailey v. Edwards, 4 Best & S. 761; Pooley v. Harradine, 7 El. & Bl. 431; Taylor v. Burgess, 5 Hurl. & N. 1; Greenough v. McClelland, 2 El. & El. 424.

The facts in the English case first cited are, in all essential respects, similar to the case now under consideration, and the principle involved is precisely identical. The accommodation acceptors were held to be sureties as against a holder who did not know that they were accommodation acceptors at the time he discounted the bills, but who, after knowledge of that fact, gave time, by valid contract, to the party who was in fact the principal debtor, without the knowledge or consent of the accommodation acceptors; and the holder's action at law against the acceptors was restrained.

I will not enter upon a lengthened discussion of the subject. These cases settle the law of England, and overrule the cases on which the American decisions to the contrary rest. I am inclined to think the doctrine of the court of chancery, and of the house of lords, rests upon sound principles, and that a creditor who actually knows that a given party is a surety on the contract ought not to be permitted to change that contract, or vary the surety's rights by a new contract, without his consent—unless, indeed, the surety has, by express stipulation, as in Sprigg v. Bank, supra, declared in the contract that he is a principal, and thereby estopped himself to plead and show that he was such, and entitled to the privileges and rights of a surety.

I affirm the decision of the district court on the strength of the recent English cases referred to, and regret that the case is such that my judgment cannot be reviewed by the supreme court. Affirmed.

NOTE. The following is extracted from the printed argument of Mr. Myers:

1. While mere indulgence to a principal debtor does not release a surety, yet the surety is released if, without his consent, time is given to the principal by any contract binding on the creditor. This proposition is affirmed in all the authorities bearing on any phase of the question.

2. And where, on the maturity of the original obligation, a portion thereof is paid and a new note of the principal debtor taken for the balance, the original obligation being left as collateral security to the new one, that is an extension of time to the principal, which would preclude the creditor from pursuing the principal till the maturity of the new note, and so would release the surety. Gould v. Robson, 8 East, 576; Andrews v. Marrett, 58 Me. 540; Fellows v. Prentiss, 3 Denio, 512; Stedman v. Gooch, 1 Esp. 3; Putnam v. Lewis, 8 Johns. 389; 1 Pars. Notes & B. p. 239.

3. And it is immaterial that the surety is the maker of the note. If the maker is in fact an accommodation maker, then, as between him and the principal, he is only surety for the principal; and if this relation between the parties is known to the creditor when he first acquires the claim, the foregoing doctrines apply with full force. Grafton Bank v. Woodward, 4 N. H. 301; Horne v. Bodwell, 5 Gray, 457; Wilson v. Green, 25 Vt. 456; Mariner's Bank v. Abbott, 28 Me. 285; Fowler v. Brooks, 13 N. H. 245; Claremont Bank v. Wood, 10 Vt. 582; Peake v. Dorwin's Estate, 25 Vt. 31; Davis v. Barrington, 30 N. H. 524; Bank of Steubenville v. Hoge, 6 Ohio, 18; Garrett v. Ferguson, 9 Mo. 125; Jones v. Jeffries, 17 Mo. 577; Burk v. Cruger, 8 Tex. 66; Smith v. Tunno, 1 McCord, 451; Lime Rock Bank v. Mallett, 42 Me. 349; Riley v. Gregg, 16 Wis. 671; Harris v. Brooks, 21 Pick. 195; Carpenter v. King, 9 Metc. (Mass.) 511; Branch Bank v. Darrington, 9 Ala. 949; Grafton Bank v. Kent, 4 N. H. 221; Flynn v. Mudd, 27 Ill. 323; Kennedy v. Evans, 31 Ill. 269; Kelly v. Gillaspie, 12 Iowa, 57; Miller v. McCan, 7 Paige, 451; Manchester Iron Manuf'g Co. v. Sweeting, 10 Wend. 163; and authorities cited in the principal case. There are a few cases to the contrary: Walker v. Bank of Montgomery, 12 Serg. & R. 382; Bull v. Allen, 19 Conn. 105; Yates v. Donaldson, 5 Md. 401; Lewis v. Hanchman, 2 Barr. [2 Pa. St.] 418. These four cases are squarely in conflict with the principal case. So far as they consider the question at all, they proceed on the theory that one who signs as maker is estopped from showing he is only a surety, because that, it is said, would be to contradict the note. But the fact is, a maker of a note is not necessarily a principal. There are thousands of accommodation notes; and for a maker to show he is only an accommodation maker is not to contradict the note, but to show a fact entirely consistent with his being a maker, and, hence, the principle of estoppel does not apply. If, however, the surety, besides being a maker of the note, contracts expressly as principal, then, of course, he has waived his rights and privileges as surety; and this is all that was held in Sprigg v. Bank of Mt. Pleasant, 10 Pet. [35 U. S.] 257; McMillan v. Parkell, 64 Mo. 286, and Claremont Bank v. Wood, 10 Vt. 585. In the last-mentioned case the note read, "We, each as principal," etc. The court said: "The plaintiff would have been bound to respect the rights of Judd (the maker) as a surety, had these words been omitted." In Sprigg v. Bank of Mt. Pleasant, supra, the bond described all the obligors as "principals." In McMillan v. Parkell, supra, the note read, "We, each as principal," etc., and also had this clause: "Nor shall any delay or extension of time of demand of payment affect our liability hereon." The history of the question in England is as follows: The earliest case is Laxton v. Peat, 2 Camp. 185, decided by Ellenborough in 1809. That decision supports the principal case. In 1813, Fentum v. Pocock, 5 Taunt. 192, came before Mansfield, and he overruled Laxton v. Peat. In 1831, Tenterden, in Hall v. Wilcox, 1 Moody & R. 58, overruled Fentum v. Pocock, and reaffirmed Laxton v. Peat. In 1836, Oakeley v. Pasheller, 10 Bligh (N. S.) 548, arose in the house of lords. The decision supports the principal case. In 1853, Manley v. Boycot, 2 El. & Bl. 46, reaffirmed Fentum v. Pocock, but the decision of the house of lords in Oakeley v. Pasheller was overlooked. Since then the following English decisions support the principal case: Davies v. Stainbank, 6 De Gex, M. & G. 679, decided in 1854; Pooley v. Harradine, 7 El. & Bl. 431, decided in 1857; Greenough v. McClelland, 2 El. & El. 424, decided in 1860; and, lastly, Oriental Financial Corp. v. Overend, Gurney & Co., L. R. 7 Ch. 142, decided in 1871.

4. Nor is the rule altered by the fact that the creditor, at the time he acquired the note, did not know that the maker was only a surety, provided he learned that fact before he granted the extension of time to the principal. Oriental Financial Corp. v. Overend, Gurney & Co., supra; Oakeley v. Pasheller, supra; Wheat v. Kendall, 6 N. H. 504; Branch Bank v. Darrington, 9 Ala. 949; Millerd v. Thorn,

56 N. Y. 402; Smith v. Shelden, 35 Mich. 42. Oakeley v. Pasheller is about the strongest case in England. In that case, a certain banking firm was indebted to Oakeley in a very large sum. One of the firm died, and his executors gave Oakeley a bond for the payment of the debt. Subsequently an arrangement was made between the surviving partners and the executors, whereby the surviving partners assumed all the firm debts, including that to Oakeley. From that moment, and only from then, the executors became, as between them and the surviving partners, mere sureties for the debt due Oakeley. Oakeley learned of this arrangement, and then granted an extension to the surviving partners. This was held to release the executors. Lord Lyndhurst said: "The question appears to me to be very clear and distinct, and unembarrassed." In Oriental Financial Corp. v. Overend, Gurney & Co., Lord Chancellor Cairns says that, after Oakeley v. Pasheller, "it is impossible to contend if, after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under these circumstances the rule as to the discharge of the surety does not apply." The doctrine of Oakeley v. Pasheller is approved in Millerd v. Thorn and Smith v. Shelden, the latter of which is a well-considered opinion by Cooley, C. J.

Case No. 5,550.

In re GOODWIN.

[3 N. B. R. 417 (Quarto, 106).] [1]

District Court, S. D. New York. Nov. 27, 1869.

BANKRUPTCY — FAILURE OF ASSIGNEE TO COMPLY WITH GENERAL ORDER NO. 28.

Before the court can take action on the failure of an assignee in bankruptcy to comply with the requirements of general order No. 28, the same must be shown to it by at least prima facie evidence.

[In bankruptcy. In the matter of William F. Goodwin.]

By the Register:

I, Isaiah T. Williams, the register of this court in bankruptcy, to whom has been referred the above-entitled matter, do hereby certify to this honorable court, that George V. House, of 683 Broadway, in the city of New York, was on the 9th day of July, A. D. 1869, duly elected assignee of the estate of the above-named bankrupt, and duly executed the bond required by the 13th section of the act, and received from me the assignment of the estate of the said bankrupt, on the 17th of August, 1869. And I do further certify that, in pursuance of the rule of this court in bankruptcy, adopted November 13th, 1869, I have called the attention of said assignee to the provisions of the general order No. 28, and I hereby bring the case to the notice of the court, although I have no means of knowing whether or not the said assignee has failed to make a report to the court of the funds received by him, as required by said general order.

BLATCHFORD, District Judge. When an assignee fails to make a report to the court, of funds received by him, it must be assumed that no funds have been received by him, and that no deposits have been made by him. In order to warrant proceedings against an assignee for not complying with general order No. 28, it must be shown at least by prima facie evidence that he has received funds, or has made deposits in respect to which he ought to have made a report to the court under said general order. No such thing is shown in this case, and therefore there is nothing on which the court can base any action in the premises. The clerk will certify this decision to the register, Isaiah T. Williams, Esq.

[1] [Reprinted by permission.]

GOODWIN (BETTS v.). See Case No. 1,374.

Case No. 5,551.

GOODWIN v. CARTWRIGHT et al.

[2 Hask. 340.] [1]

District Court, D. Maine. April, 1879.

JUDGMENT—SATISFACTION—EQUITABLE RELIEF.

1. A defendant in a suit at law, having allowed a judgment to be rendered against himself upon the plaintiffs' stipulation to satisfy and discharge the same upon the performance of certain acts by the defendant, has no relief in equity from that judgment but by the terms of the stipulation.

2. If such stipulation is to become operative only upon the performance by the obligee of certain conditions precedent, which are impossible, in the absence of fraud, it is his fault, and he must abide the condition of the bond.

3. If the condition is, to satisfy a judgment against the obligee when he shall assign to the obligor two claims of his own against the United States then pending in the court of claims, and the obligee did not have such claims pending in that court, he cannot enforce the obligation, because he voluntarily inserted a condition precedent impossible for him to perform.

4. In such case, the obligee can have no remedy in equity.

In equity. Bill asking specific performance of the terms of a stipulation given by the respondents [David G. Cartwright and others] to the orator [Asahel Goodwin] that the former would satisfy and discharge a judgment against the latter, which they have refused to do. Answer, that respondents did not stipulate to satisfy and discharge the judgment until the orator had first assigned to them two claims of his own then pending in the court of claims against the United States, which he had not done. The cause was heard upon bill, answer and proof.

George F. Holmes and Almon A. Strout, for orator.

Henry B. Cleaves and Nathan Cleaves, for respondents.

FOX, District Judge. On the twenty-sixth day of August, 1876, Cartwright & Harrison

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

of New York, two of the respondents, recovered in this court a judgment against Goodwin &Maxwell, for the sum of $26,395.24 damages and cost, said action being founded on a prior judgment recovered before the circuit court of the United States, holden at Brooklyn, within and for the eastern district of New York, May 13, 1868, by said plaintiffs, against said Goodwin & Maxwell, as stipulators for the value of schooner Othello, which had been seized upon a libel instituted by Cartwright & Harrison on a bond of bottomry and respondentia given by Maxwell as her master in the port of St. Thomas, Goodwin being the owner of the schooner. [See Case No. 2,483.]

It appears that the Othello had been chartered by the United States at the rate of $50 per day, and while on a voyage from Wilmington, N. C., to New York, with a cargo of munitions of war, the property of the United States, was, by perils of the sea, compelled to make the port of St. Thomas in distress, where on the twenty-fifth day of January, 1866, a bond was executed by the master, pledging vessel, freight and cargo for the payment of $15,535.46 with twelve per cent. interest, in ten days after her arrival at New York. At the time the stipulation was filed in the district court, the Othello had been in the custody of the marshal about one hundred and fifty days, and when she was released, she was again employed by the government under the charter. Goodwin claimed of the United States to be paid under the charter at the rate of $50 per day during the whole time the Othello was in the marshal's custody, and also claimed that the United States should pay its fair proportion in general average, of the expenses at St. Thomas, Mr. Justice Nelson having decided that the cargo, being the property of the United States, was not subject to seizure and attachment, and that a suit could not be instituted against the Government in respect to it. [Case No. 10,611.]

On the same day that the judgment was entered in this court, viz., August 26, 1871, Jos. S. Ridgway, in behalf of Cartwright & Harrison, executed a stipulation as follows: "United States Circuit Court, Maine Circuit. David G. Cartwright and Frederick H. Harrison vs. Asahel Goodwin and Daniel Maxwell. Judgment having this 26th day of August, 1871, been, upon due proof, recovered, entered and perfected in favor of the above named plaintiffs, against the defendants above named, jointly and severally, for the sum of $26,395.24 damages, it is hereby stipulated and agreed that in consideration of the assignment by said Goodwin (the principal debtor upon said judgment) to the plaintiffs, and the execution by said Goodwin to the plaintiffs of any and all instruments in writing requisite and sufficient for that purpose and required by the plaintiffs, and that said Goodwin shall and will whenever requested by the plaintiffs produce any and all proofs in his possession, in support of two certain claims now pending, prosecuted by and in the name of said Goodwin in the court of claims against the United States, to recover balance of money payable under and pursuant to charter party, and balance of money payable under and pursuant to general average upon bottomry and hypothecation bond of, or upon schooner Othello, and in good faith exercise all reasonable effort and diligence, in concert with the plaintiffs, to establish and to obtain and secure the collection of said claims in said court of claims and any appellate court, the enforcement of and proceedings upon the judgment herein, shall and will be stayed; and further, that, upon the collection of the said claims in full, and the payment therefrom of all reasonable expenses of such collection, and payment of amount then due and owing, upon the judgment herein, to account and pay over to said Goodwin, or his assignees, any surplus that may remain thereof, and execute satisfaction of said judgment herein; and that provided said Goodwin acts in good faith with the plaintiffs, and attends as a witness or otherwise whenever and wherever required by them, (unless necessarily prevented, his necessary traveling expenses being paid,) and produces all papers and other proof in his possession or under his control bearing upon or relating to said claims, and exerts himself faithfully and with reasonable diligence, and to the best of his knowledge, information and ability to secure the collection of said claims, then, upon the termination of said proceedings now pending in said court of claims, the plaintiff shall and will, upon demand by said defendants, satisfy the judgment herein of record, and execute proper release and discharge of the same. Cartwright & Harrison, by Joseph S. Ridgway, N. Y. Dated Portland, August 26, 1871."

The present suit is instituted by Goodwin, to compel a specific performance of this stipulation, to stay proceedings upon and an enforcement of said judgment, and to obtain a release and discharge of the same, and a perpetual injunction against taking out or levying any execution thereon; and the bill avers a performance of all matters incumbent upon him under the stipulation. Ridgway and Maxwell are made respondents. Cartwright and Harrison, in their answer, admit the recovery of the judgment in this court, and that the stipulation was on the same day executed by them by Ridgway as their attorney; but they aver that Ridgway expressly refused to enter into any stipulation whatever, prior to entry of judgment in the action, or in any way to impair or affect said judgment or the validity thereof, or to make the same conditional or dependent on said stipulation, and that they never authorized Ridgway so to do; that as they are informed and believe, Goodwin represented to Ridgway that these two claims were pending

in the court of claims at the time said stipulation was entered into, and at all times theretofore referred to said claims as pending in said court of claims, and wilfully and fraudulently concealed from said Ridgway and these defendants, the fact that said claims were not then pending in said court of claims, but, so far as the same had ever been pending in said court, had already been adjudicated by said court adversely to said Goodwin, as he then well knew that Ridgway had no knowledge of this, but believed the representations of Goodwin to be true, and, relying upon them, entered into said stipulation.

The answer charges fraudulent concealment and misrepresentation by Goodwin as to the pendency of these claims, with the intent to defraud Ridgway and these defendants; they deny that Goodwin has ever been ready and willing to execute to them all or any instruments in writing requisite or sufficient for the purpose of assigning to them said claims referred to in said stipulation, or has ever at any time executed and tendered to them any such instrument, or to furnish proof in support of said claims; but charge him as being in default in all these particulars; and they further charge that the stipulation was entered into upon the complainant's representations and the belief of Ridgway and these defendants, that the two claims in said stipulation referred to were then pending in the court of claims, and predicated upon the assumption that a trial upon the merits thereof was to be thereafter had in said court, but that, by reason of said claims having, prior to said stipulation, been adjudicated adversely to said complainant, there were no such claims as are referred to in said stipulation, pending in said court or in existence, which could be assigned, or in relation to which complainant could do or perform any of the acts, matters and things provided for in said stipulation.

The answer of Ridgway is substantially the same as that of Cartwright and Harrison. The record discloses that August 25, 1871, was assigned for the hearing of the action then pending in this court, the defendants having pleaded the general issue and also certain special pleas, the nature of which is not disclosed at this hearing; that on that day, the parties appeared, and a compromise was proposed by complainant, by his transfer of his claims on the government. After some negotiations, it was the next day agreed with the approval of counsel, that all the special pleas should be stricken from the files, and that judgment should be rendered for the plaintiffs for the balance remaining unpaid upon the judgment, and that this judgment should be released and discharged, and satisfaction entered upon the record upon the performance by Goodwin of certain matters as set forth in the stipulation the same day executed by Ridgway in behalf of the judgment creditors, and upon termination of said proceedings, then pending in said court of claims.

It is strenuously claimed by the counsel of Goodwin and Maxwell and by the complainant, in their depositions in this cause, that although the stipulation recites that the judgment on that day had been upon due proof recovered, entered and perfected in favor of plaintiffs, yet that the whole was but a single transaction, it having been verbally agreed before entry of the judgment, that such stipulation should be given; and in argument it is now contended that the party cannot insist on returning and enforcing the judgment, and at the same time avoid all liability under the stipulation, which it is said was the consideration upon which the debtors assented that judgment should be rendered against them.

Conceding that all that transpired were but parts of one transaction, the only matter of a conditional nature about the whole proceeding was, that Ridgway should execute such a stipulation, which he at once did. The debtors assented to a valid, unconditional judgment, provided that the creditors would obligate themselves to satisfy and discharge the same upon the performance by one of them of certain things, which he had agreed to do. He was satisfied to waive any defense he might have had in the suit, and allow the judgment to go against him, if he could receive such an obligation. The respondents, having executed such an instrument, have performed all that devolved upon them under the parol contract. The stipulation, as executed, was satisfactory to the complainant and his counsel, and all right to any relief from said judgment, therefore, arises from, and is wholly by force of such stipulation; and this certainly must have been the opinion of his counsel at the time of drafting the present bill, as the prayer is, not to vacate and annul the judgment, but that the creditors may be required to perform and fulfill their stipulation, and stay proceedings upon and enforcement of said judgment, and to satisfy the same. Not an intimation is to be found throughout the entire bill, that the judgment was in any way dependent or conditional.

All the redress, therefore, which this complainant can acquire, is by the enforcement of the stipulation thus made in his behalf. It became a valid legal obligation, and his creditors and the court must determine the rights of complainant under this stipulation; by it, the creditors were bound to enter a discharge and satisfaction of their judgment, only upon the performance by Goodwin of certain acts; when these acts were accomplished by him and the cases then pending in the court of claims determined, he could demand of his creditors to do what, by their stipulation, they had contracted to do; but until he had so done, his creditors were under no liability to him by virtue of such stipulation.

What was then incumbent on the complainant, if he would require of his creditors a performance by them of their part under this agreement? Prior to its execution, he had represented to Ridgway that he held two claims against the government; one for the recovery of a balance of money, payable under and pursuant to charter party; the other for a balance of money payable under and pursuant to general average, upon bottomry and hypothecation bond of and upon schooner Othello, which claims were then being prosecuted by and in the name of Goodwin, in the court of claims, against the United States; these claims, he agreed to assign to these creditors, and to execute all instruments requisite to assign the same to them, whenever required so to do by the creditors.

Has Goodwin performed all that was incumbent on him to do, to entitle him to demand of the creditors a release and satisfaction of the judgment? He now admits that, on the twenty-sixth day of August, 1871, there were no proceedings in his behalf pending before said court of claims; and the evidence is conclusive that, prior thereto, he had never instituted but one suit in that court against the United States, which was for the recovery, under the charter party, for the detention of the Othello at New York for one hundred fifty days by the marshal under process from the district court. In that suit, a hearing was had May 4th, and the case was dismissed May 26, 1871, an opinion having been prepared by Drake, C. J., reported in 6 Ct. Cl. 150. An application for an appeal was filed June 1, 1871, by the attorney of the complainant, to whom the record of appeal was delivered December 6, 1871; but it does not appear that the appeal was prosecuted. The complainant admits he was informed of the decision of this suit by the court of claims before August 21, 1871, and that he directed the appeal to be taken.

Soon after the decision of Judge Nelson, an application was made in the name of the complainant, by Ridgway, for the benefit of Cartwright and Harrison, to the proper department at Washington, for payment by the government of its proportion of the general average charges incurred at St. Thomas. The claim exceeded $20,000; an allowance of $6,000 or $7,000 was made on account of this claim, and was received by Goodwin in 1868, and no further steps are shown to have been afterwards adopted to procure the payment of any thing further upon general average; but the suit for detention under the charter party was commenced before the court of claims May 11, 1869.

There never having been but one case in behalf of the complainant at any time pending before the court of claims, and the cause of action therein being restricted to claims under the charter party, and this having been dismissed prior to August twenty-sixth, so that, instead of there then being two claims of the complainant pending before that court, there were none in fact. The complainant, by the terms of the stipulation, had bound himself, if he would enforce the stipulation against the creditor, to perform that which was impossible as he well knew. This he undertook and promised to do, and until he has complied with his undertakings, he has no right to call upon the judgment creditors to grant him a discharge, which they had stipulated to do only upon the assignment of the pending claims against the government. He, by his own voluntary contract, has created this duty a charge upon himself; and he must first make it good, before any liability attaches to the stipulators, who are not to be called upon to perform this part of the obligation, until complainant has himself complied with all conditions precedent on his part to be performed.

The fact that his contract required of him an impossibility does not relieve him from its performance if he would enforce the contract against the other party; there being nothing illegal in what he had thus agreed to do, and no fraud having been practiced upon him, he thus voluntarily and expressly agreed that he would not demand a release from the judgment until he performed the duty he had assumed, viz., to transfer to the creditors two claims specifically described, and then pending before the court of claims. Such was the contract on his part, and no right of action can accrue to him by force of it, until he first performs that which he agreed to do. Acting deliberately under advice of learned counsel, he thus entered into this agreement, and he has no just cause of complaint, if the judgment recovered against him is thus to continue in full force, as it is very manifest the claims, which the complainant once had against the government, could in no way prove beneficial to the creditors.

The assignment which was tendered by the complainant, executed in February, 1872, was clearly not in accordance with the terms of the stipulation, as it is demonstrated that he was not the owner of any claims such as are provided for by the stipulation.

It is claimed that, prior to the execution of the stipulation, Ridgway well knew that there were no proceedings pending before the court of claims in complainant's behalf; and the complainant, in his testimony, states that he had before that informed Ridgway that his petition had been dismissed by that tribunal. This Ridgway, in his deposition, denies, and while the court entertains no doubt that Ridgway then knew the disposition made by the third auditor of the claim for general average, it does not appear that he was informed that no steps had been taken to prosecute the matter before the court of claims. The stipulation distinctly states that both of these claims were then pending before that court, and Ridgway swears that he then believed such was their condition, and acted upon this belief; and his statement is strongly corroborated by his conduct imme-

diately afterwards in advising complainant's counsel that, upon examination, he had ascertained these claims were not pending in the court, and, therefore, the creditors would not stand by the stipulation. He could hardly have entered into such a stipulation with such a recital therein, and at once proceed to act upon it and investigate as to the alleged claims, if he at the time was well aware that no such claims existed.

The complainant, having failed to perform the condition of the stipulation which he was bound to do if he would avail himself of it, is not entitled to the relief prayed for by his bill. Bill dismissed with costs.

[See Goodwin v. U. S., 17 Wall. (84 U. S.) 515.]

Case No. 5,552.

GOODWIN et al. v. The C. DURANT.

[43 Hunt, Mer. Mag. 70.]

District Court S. D. New York. July, 1860.

TOWAGE—LIABILITY FOR NEGLIGENCE.

[1. An action to recover damages arising out of the negligent performance of a towing contract rests in contract and not in tort.]

[2. Where the tug acts pursuant to the direction of the owners of the tow and a pilot employed by them it is not liable for resulting damages.]

[This was a libel in rem by Ebenezer Goodwin and others against the tug C. Durant for damages for negligence.]

Before BETTS, District Judge.

The libelants, owners of the bark Elizabeth, sue to recover $212.50 damages, alleging that in October, 1856, they employed the tug to tow the bark to sea, and that in doing so she carelessly towed the bark against a schooner, injuring the bark to the amount of $100, and the schooner to the amount of $112.50, which the libelants had to pay. The evidence showed that the libelants first employed the tug to tow the bark from a dock in Brooklyn to anchorage ground in the North river, on which voyage the injury spoken of took place, and then made a subsequent agreement that the tug should tow the bark to sea for $30. One of the libelants brought with him a pilot to superintend the removal of the bark to the North river, and the manner of hauling her from the dock and conducting the voyage was conducted by them, and the pilot in charge of the tug followed their orders.

HELD BY THE COURT: That the gist of the action rests in contract and not in tort. That if the bark received injuries by negligence in the management of the tug, that fault was attributable to the libelants and their agent, the pilot, and not to the owners of the tug, who acted pursuant to the directions of the libelant and the pilot. Libel dismissed, with costs.

GOODWIN (FRIEDMAN v.). See Case No. 5,119.

GOODWIN (LEEF v.). See Case No. 8,207.

GOODWIN (LYELL v.). See Cases Nos. 8,616 and 8,617.

Case No. 5,553.

GOODWIN v. LYNN et al.

[4 Wash. C. C. 714.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1827.

CONTRACTS — DEPENDENT OR CONCURRENT COVENANTS—AVERMENT OF PERFORMANCE.

When the covenants in an agreement are dependent or concurrent, the plaintiff must aver and prove performance, or an offer to perform the covenants on his part; and to ascertain what covenants are of this description, the intention of the parties is to be sought for rather in the order of time in which the acts are to be done, than from the structure of the instrument.

[Cited in Dunn v. Moore, 16 Ill. 152; Pittsburgh & S. R. Co. v. Biggar, 34 Pa. St. 457; Hite v. Kier, 38 Pa. 75.]

This was an action of covenant for nonpayment of a certain sum of money, the consideration for a tract of land lying in the state of New York. The declaration set forth the agreement under seal, bearing date the 23d of June, 1823, by which the plaintiff covenanted to convey to the defendants [Lynn and Butts] a certain tract of land in the state of New York, on the first day of April following, and, on the same day, to assign to the defendants a certain lease of a blacksmith's shop, and also to deliver possession of the premises to be conveyed, on which day the defendant covenanted to pay the sum of $2500, the sum sued for in this action. The plaintiff further covenanted to plough and to sow on the land, during the fall of 1823, twenty acres in wheat, and twenty in rye. The declaration averred that the plaintiff was on the land during the whole of the 1st of April, with a deed of conveyance fully executed, ready to deliver the same to the defendants, and also to deliver possession according to his agreement, but that the defendants did not come to receive the same. The plaintiff proved that he was on the land on the 1st of April 1824, with a deed duly executed, ready to deliver the same, as also the possession, but that the defendants did not come to receive either. Plea, non infregerunt, &c.

Mr. Tilghman, for defendants, objected, that the plaintiff cannot recover without averring in his declaration, and proving on the trial, that he had ploughed and sown the stipulated quantity of land in wheat and rye, and also delivered, or offered to deliver, an assignment of the blacksmith's shop; these

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

being, the one, a precedent, and the other, a concurrent covenant. 2 Selw. N. P. 443, 444.

C. J. Ingersoll, for plaintiff, replied that the performance of those acts should have been specially pleaded.

WASHINGTON, Circuit Justice (charging jury). The general rule is, that where the covenants in an agreement are dependent, or concurrent, the plaintiff must aver in his declaration, and prove on the trial, performance of, or an offer to perform, the covenants on his part. And in the construction of the instrument, for the purpose of understanding whether the covenants are dependent or not, the intention of the parties is to be discovered, rather from the order of time in which the acts are to be done, than from the structure of the instrument, or the arrangement of the covenants. Willis, 157; 7 Term R. 130; 8 Term R. 366; 5 Bos. & P. 233; 2 Johns. 145; 1 Saund. 320, note 4; Doug. 690; 1 Saund. 320, note 4; 2 Doug. 108, note 3; Id. 352, note 1. In this case, for example, the contract was to be completed on the 1st of April 1824, but previous to that, a certain quantity of the land was to be ploughed and sown by the plaintiff in wheat and rye; in which condition it was to be conveyed, and possession delivered to the defendants. Performance, by the plaintiff of this part of the covenant, and of that which bound the plaintiff to assign the lease, or an offer to do so, is not alleged in the declarations; and if those acts have not been proved to your satisfaction, your verdict ought to be for the defendants. The burthen of proof is on the plaintiff.

Verdict for defendant.

GOODWIN (RYAN v.). See Case No. 12,186.

Case No. 5,554.

GOODWIN v. UNITED STATES.

[2 Wash. C. C. 493.] [1]

Circuit Court, D. Pennsylvania. Jan., 1811.

CUSTOMS DUTIES—FRAUDULENT ENTRY — IMPUTATION OF FRAUD TO CONSIGNEE.

1. Action of debt, in the district court, for the value of goods stated to have been fraudulently entered. The declaration states the goods to have been imported into Philadelphia, of which entry was made, and that the goods were not invoiced according to their actual cost at Liverpool, the place of their exportation, with a design to avoid the payment of the duties, or part of them; that the goods were of greater value than the amount of the invoice; and that the defendant was the person making the entry, contrary to the form of the act of congress, &c. The offence, under the act of congress, consists in the making of an entry upon an invoice, below the actual cost of the goods, with design to evade the duties. No matter how fraudulent the invoice may be, still, if the entry is made according to the actual cost, the person making it is guilty of no offence. The law requires that the goods shall be entered at the market value at the place of exportation, deducting charges.

[Cited in U. S. v. Twenty-Eight Packages of Pins, Case No. 16,561; U. S. v. Batchelder, Id. 14,540.]

[Cited in State v. Eddy, 10 Mont. 311, 25 Pac. 1032.]

2. The declaration imputes to the consignee the offence of the exporter, and makes him liable for it, although the fraudulent intention is imputed by the declaration to the person making the invoice, and not to him who made the entry, and is prosecuted for the fraud.

This was a writ of error from the judgment of the district court, in an action of debt, brought by the United States against [John] Goodwin, under the 66th section of the "Act to regulate the collection of duties on imports and tonnage," March 2, 1799 [1 Stat. 677], for the value of certain goods alleged to have been fraudulently entered. The declaration stated, that after the passing of the act of congress, &c. certain goods, &c. were imported into the port of Philadelphia, &c. of which entry was made in the office of the collector of the port of Philadelphia, &c. to wit, five bales of blankets, &c. and that the goods, &c. so entered as aforesaid, were not invoiced according to the actual cost thereof at the place of exportation, to wit, at Liverpool, &c. with design unlawfully to evade the duties, or a part of the duties, upon the said goods, &c. and the said United States in fact say, that the said goods were of the value of 1500 dollars, &c. and that the said John Goodwin was the person making entry of the said goods, &c. as aforesaid, in the office of the said collector, &c. contrary to the form and effect of the said act of congress, &c. whereby, and by force of the said act, &c. an action hath accrued, &c. The goods belonged to persons in England, who were manufacturers, and who had shipped them on their own account. Goodwin, who made the entry, was their agent, and consignee of the goods. The goods were invoiced and entered according to what they had actually cost the manufacturers, but at less than the general market price or value at the place of exportation. The only question agitated in the court below, was, whether such entry was conformable to the act of congress? The district judge charged the jury, "that if the goods were entered according to invoices below the market price, as generally prevailing at the place of exportation, although according to the real cost and value thereof to the exporter at the place of exportation, the same were liable to forfeiture, and the defendant liable for the value thereof, &c.; that the law means the general value of goods, including all costs, charges, &c. making the total in general paid by the importers, and not merely the value to a manufacturer, or casual fortunate purchaser." The jury having found for the United States, judgment was rendered accord-

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

ingly [case unreported], upon which this writ of error was brought. It was assigned for error, that the district judge had misdirected the jury, as above stated; and also, "that in the declaration of the plaintiffs below, no offence against the act of congress is charged to have been committed by the defendant." Several other errors were assigned, which it is not material to notice.

For the plaintiff in error, it was contended, that upon a view of the different sections of the act of congress, goods should be invoiced and entered according to what they actually cost the exporter at the place of exportation, and not according to their market value there. The different sections speak of the entry being made according to the cost, prime cost, actual cost, actual and real cost, sections 36, 52, 66. In case there is no invoice, by which to ascertain the cost, then only is the value, ascertained by appraisement, to be the rule. The entry is to be made upon oath. The owner can tell what the goods cost him, but how can he safely swear to their general market value? The cost is fixed and ascertained—the market price fluctuating and varying—one thing to-day, another to-morrow. Upon the exception to the declaration—All circumstances necessary to constitute the offence must be laid in the declaration, and contra formam statuti will not aid the omission. Chit. Pl. 357; 1 Salk. 212; Cro. Eliz. 231; 5 Com. Dig. 358, 360. Every word stated in this declaration may be true, and yet no offence committed. To constitute the offence, the goods must be entered—entered on an invoice—the invoice produced to the collector—the invoice not according to the actual cost; and it must be with intent to evade the duties, or a part thereof. Under this declaration, the entry might have been made without an invoice; or the cost stated in the invoice may have been above the actual cost, or the market price; or the entry may have been made by an agent; in either of which cases, no offence would have been committed.

For the United States, it was argued, that the entry must be made according to the general market value or price, at the place of exportation. The policy of the law requires this, in order to have a uniform standard. Were it otherwise, it would be impossible to detect frauds upon the revenue; for who can tell what an article cost the particular importer, if it differ from the general value? It is true, the words of the law are, cost, and actual cost; but they are, cost at the place of exportation—not the cost to the manufacturer, or particular exporter—nor at the place of manufacture, or elsewhere—but at the place of exportation. If mere cost to the party were intended, there would be no need to say any thing about place. Accordingly, by the 66th section, if the collector suspects that the goods are not invoiced at a sum equal to that at which they have been usually sold at the place from which they are imported, he is to take them into custody, &c. until their value at the time and place of exportation, be ascertained, &c. Why so, if the special cost to the particular importer, be the rule to enter by? By that construction, he may be entering his goods legally and truly, and yet the collector be bound to take them into custody, under this 66th section. As to the declaration, it follows the words of the act of congress. In laying an offence under a statute, there can be no better rule than to follow the terms of it. Here the very words used in the act of congress, are used in the narrative. If, then, that act creates an offence, this declaration must properly charge it. It states the entry to have been made with intent unlawfully to evade the duties, &c. This excludes the possibility of being innocently entered. It is said that under this declaration they may have been entered without an invoice. But that is not so; for it says, "the said goods, so entered, &c. were not invoiced according to their actual cost," &c. This imports an invoice. They could not have been invoiced above their cost or value; for the declaration says, it was "with intent to evade," &c.

Meredith, Chauncey, and Rawle, for appellant.

Mr. Dallas, Dist. Atty., for the United States.

WASHINGTON, Circuit Justice. This is one of those cases which too frequently occur, in which the court is called upon to interpret legislative expressions of doubtful import, without a clue to ascertain, with precision, what was the real intention of the framers of the law. After the closest examination of the point on which the controversy hangs, we can truly say, that our mind rather inclines to the opinion which we shall deliver, than that we feel a full confidence in its correctness.

The point of law to be decided in this case, arises out of the 36th and 66th sections of the act imposing duties; the former of which prescribes the rules by which goods imported into the United States are to be entered, with a view to the ascertainment of the duties to be paid thereon; and the latter imposes the penalty to be incurred by a violation of those rules. But, to arrive at any thing like a correct understanding of the subject, we must turn to some other sections of this law, and from the whole, obtain, if we can, a view of the system by which this branch of the public revenue was intended to be secured. In the first place, the owner, consignee, or factor, is required to make an entry in writing, and in the entry to specify the marks of the packages, and the prime cost, including charges, in the money in which the invoices are made out; and is also to produce the original invoices, or other documents received in lieu of them. The prescribed form of the entry specifies the value of the different articles subject to specific duties, as also the value of such as are subject to ad valorem duties. The entry is to be verified by an oath of the party making the entry,

that it contains a true account of all the goods so imported, and of the cost thereof, including all charges; that the invoice produced is genuine, and the only one received by him, by which he is charged, or is to account, and that he knows of no other, and that if he should thereafter receive any other, he will communicate it to the office. If, for want of an invoice, or for any other cause, an imperfect entry is made, so that the particulars of the goods are unknown, the goods are to pass to and remain in the possession of the collector, until the particular cost or value, as the case may be, shall be ascertained, either by the exhibition of the original invoices, or by appraisement, at the option of the importer; for which purpose two merchants are to be chosen, one by the collector and the other by the party, who are to value the goods; and their valuation is to be verified by the oath of the appraisers, that the prices affixed to each article are, to the best of their skill and judgment, the true and actual value or cost thereof at the place of exportation. The mode of ascertaining the ad valorem rates of duty at the place of importation, is to be, by adding a certain per centage to the actual cost of the article, including all charges; commissions, outside packages, and insurance only excepted. If the goods so entered, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereon, the goods themselves, or the value are declared to be forfeited. If the collector suspects that the goods are not invoiced as high as they have been usually sold for at the place from whence they were imported, he is to take and keep possession of them, until their value at the time and place of importation, is ascertained, in the manner prescribed in relation to imperfect entries, and until the duties so ascertained, are paid or secured; but in case of a prosecution to enforce the forfeiture, such an appraisement is not to exclude other proof of the actual and real cost of the goods at the place of exportation.

The whole cause turns upon the legislative meaning of the word cost. The district attorney contends, that it is synonymous with value, or market price; and the importer, that it means the price they cost the individual at the place of exportation. The term is certainly of equivocal meaning, and is sometimes used to express the value of a thing, and sometimes the price paid for it. If possible we must endeavour to find out from the law itself, the meaning attached to the terms, by the legislature who passed it. The actual cost at the place of exportation, and the prime cost and all charges, are clearly used synonymously by the legislature; for the importer is required, by the thirty-sixth section, to make his entry according to the prime cost, (not saying at the place of exportation,) and charges; and the sixty-sixth section, which imposes the penalty, drops the expression of prime cost and charges, and substitutes the other, actual cost at the place of exportation. What then constitutes the actual cost of an article at any particular place, which is purchased there for the purpose of being exported, and which is actually exported? The answer is, the price given, and every charge which attended the purchase and the exportation, paid or supposed to be paid, at the place whence the article is exported. The actual cost of a bale of goods purchased at Liverpool, is composed of the price paid for it, or, in other words, the prime cost and charges, including commissions on the purchase, the packages, if any, and if the goods were purchased at the manufactory, then it includes not only the prime cost, and all charges attending them to the place of exportation, but also the charges before mentioned, and perhaps many others. What is the meaning of the market price, or value of an article, at the place of exportation? The answer is, the price at which such articles are sold and purchased, clear of every charge but such as is laid upon it at the time of sale. This is not only the general meaning of the expression, but we conceive the legislature so understood it, because the collector is directed to have the articles appraised, in cases where he suspects that the invoice price is below that at which the same kind of goods has usually been sold in the place whence they were imported, and the invoice price, we know, must be the actual cost of the articles at the place of exportation. Now, if these general definitions be correct, we are inclined to think, that the section of the law which relates to the mode of estimating the ad valorem rate of duties, will assist us, in no small degree, in expounding the terms on which all the difficulty hangs. These duties are to be estimated by adding a certain per centage to the actual cost, including all charges, commissions, &c. excepted. Now, if the actual cost of the article at the place of exportation, essentially includes all subsequent charges incurred at that place, including commissions, &c., and if the market price of the article at that place does not include them then it would seem that it was unnecessary to declare, that to the real cost there should be added all charges, if the real cost, as opposed to the market price, was intended. We are aware that it may be said in answer to this, that the charges were specified for the purpose of the exception, and perhaps this may have been the case; but certainly, if the actual cost necessarily includes all charges, the exception of commissions, &c. might, with strict propriety, have been made to the actual value, without specifying any particular part, of which the actual value was composed.

Having advanced thus far in our search after the legislative meaning of these expressions, let us inquire whether the other provisions of the law consist with the construction which the above course of reasoning seems to countenance: and how far it is practically conducive to the security of the revenue, the ultimate object of the whole system, and also to the convenience of the individuals from whom that revenue is to be

derived. For, if other parts of the law are at variance with this construction, or if its adoption shall be found in practice to subject the parties to be charged with the duties, to hardships which are unreasonable and unjust, these considerations may be sufficient to induce us to embrace the other construction which has been contended for. In the first place, then, it is natural to expect that the legislature, when it imposes upon the collector the delicate duties of detecting and prosecuting every attempt to defraud the revenue by an under valuation of the goods subject to duty, and for this purpose clothes him with very extraordinary powers; would, at the same time be inclined to furnish him with a standard, to which he might at all times appeal, without depending upon the integrity of the individual, whose conduct he is at liberty to suspect, and without an excuse for suspicion, where his conduct has been fair. If, then, the officer suspects that the goods are invoiced, not below their real cost, but below the price for which they have been usually sold in the place whence they were imported, he is directed to take and retain possession of them until their value, at the time and place of importation, is ascertained by appraisers, and the duties paid or secured. This step must always be inconvenient and injurious to the importer, and, therefore, we cannot suppose that the power was intended to be arbitrarily exercised, however slight the ground of suspicion might be. But who could say that the suspicion was obviously unfounded, if the price paid for the goods, and the charges, were the sum on which the duties were to be estimated? The invoice is the evidence of the party against whom the suspicion may be entertained; and whether that, or any other evidence of a fact with which the collector must be totally unacquainted, ought safely to be relied upon, may frequently be a mere pretext for suspicion, sometimes a justifiable ground of suspicion, but scarcely in any instance can the conduct of the officer, in this respect, be certainly condemned. But if the market price of the goods at the place of exportation, be that, including charges, upon which the duties are to be charged, then not only the fact to be ascertained, will correspond with the standard by which it is to be ascertained, but the standard itself is so far uniform and apparent, that the officer may, from other entries in his office, and from disinterested witnesses, at any moment test the fairness of any particular entry. It would seem strange, and in some measure absurd, to test the verity of a particular act by a standard totally unlike the act, and bearing no relation to it; and it must be admitted, that this incongruity would frequently happen, if the market price of any article were made the standard for fixing the price which that article actually cost.

Again; in the form of the entry, as prescribed by law, the importer is required to state, not the actual cost of the articles at the place of exportation, but the value of those, subject to the different rates of ad valorem duties. The change of expression in the very section, and upon the very subject where the cost is spoken of, seems to indicate that those expressions were considered by the legislature as synonymous; and this conclusion is strongly corroborated by the oath, which the appraisers are to take in the case of an incomplete entry; for they are to swear that the prices affixed to each article, are, to the best of their judgment, the true value or cost thereof at the place of exportation. The expressions are, not value or cost, as the case may be, in which case either might have been taken, but they are to swear in the alternative, although the value might have been much higher, or much lower than the price paid by the importer, and the charges; which proves that the legislature either used these words as synonymous, or have been guilty of a great absurdity, if not of something worse, in requiring such an oath to be taken. Against this construction various objections have been made; the principal of which is founded upon the oath of the person making the entry. If the market price is to govern, it is asked how can the oath be safely taken in any case, where the market price is different from the actual cost to the party? Now, if the difficulty which this question presents, will not be removed in every possible case, if the contrary construction be admitted, then the argument drawn from it loses a great deal, if not the whole of the weight attached to it; for it will not do to embrace a construction on the ground of convenience only, if the relief which it is to afford, is partial and inadequate to its object. And, although the owner himself may safely swear that the goods cost him the sum at which they are invoiced, how can the consignee, and still less the agent, swear what the cost is, with greater safety to his conscience than what the market price was? In both cases, he must depend upon the invoices, letters of advice, and other documents; and if he can pin his faith upon the correctness of one, he may with equal confidence upon that of the other. The fact is, that the oath is deemed in relation to the invoices, or other evidences of value, accompanying the goods, and ought not to be considered as affirming any thing upon the knowledge of the party. If this be not the case, we can only say, that construe the words actual cost as you please, and the oath, to say the least of it, is a very rash one. Another objection, somewhat similar to the one just disposed of, is the danger which a consignee would be exposed to, in relation to forfeiture, if he were compelled to enter according to the market price, which at no given time can be precisely stated or known. The answer to this is, that though he should make his entry below the market price, still he has been guilty of no breach of

the law, unless he acted fraudulently, and with design to evade the duties imposed. If he act wrong from such a motive, he has no right to complain.

Upon the whole, then, I think there are stronger reasons for embracing the construction given to this law by the district judge, and fewer inconveniences attending it, than that contended for by the appellant. The decree is, I think, correct upon the merits. That the defects pointed out in the declaration, do in fact exist in it, is not to be questioned; and the only inquiry is, whether they are cured by the statute of jeofails, enacted by congress. Many of them most certainly are, because they partake entirely of form. But the objection to the proper averment of the offence, is, we think, a substantial one, and goes to the heart of the declaration. It is admitted, that an omission to state the offence on which the prosecution is founded, is fatal; because, as no evidence need be given at the trial, but such as goes to support the allegations in the declaration, nothing can be intended, from the finding of the jury, to supply the omissions of the declaration, in this respect, or to satisfy the court that the party was convicted of any offence. Now, what is the offence, not under the sixty-sixth section, but under that and the preceding sections relative thereto? Most certainly, it is the making of an entry upon an invoice below the actual cost of the goods, with design to evade the duties. No matter how fraudulent the invoice may be, still, if the entry be made according to the actual cost, the person making the entry is guilty of no offence. Neither is he guilty of any offence, if he make the entry upon an invoice above the actual cost of the goods; because, in that case, the revenue is not defrauded, but is benefited. But this declaration makes the offence to consist in the existence of an invoice which did not agree with the actual cost, and upon this declaration, the United States were not bound, at the trial, to show that the entry did not correspond with the actual cost; for, if the fact had been, that the entry did correspond with it, or was even higher, still, the United States were entitled to a verdict, if the invoice was shown to be lower than the actual cost, no matter at what prices the entry was made. Besides, the invoice is generally the act of the exporter, and the entry always that of the importer, consignee, or agent. The declaration, therefore, imputes to the consignee the offence of the exporter, and makes him liable for it; and this too, although the fraudulent intention is imputed by the declaration to the person making the invoice, and not to him who made the entry, and is prosecuted for the fraud. Upon this ground, therefore, the judgment of the district court must be reversed.

[NOTE. The United States took the case to the supreme court on writ of error, and, a rule having been obtained by the defendant in error to show cause why the said writ should not be dismissed (the ground of the rule being that, as the cause was not removed from the district into the circuit court by appeal, but by writ of error, there was no provision, in any law of the United States, giving jurisdiction to the supreme court to re-examine the judgment of the circuit court), the court, in an opinion by Mr. Justice Washington, made the rule absolute. 7 Cranch (11 U. S.) 108.]

GOODWIN (UNITED STATES v.). See Case No. 15,229.

Case No. 5,555.

GOODYEAR v. ALLYN et al.

[6 Blatchf. 33; 3 Fish. Pat. Cas. 374; 1 Am. Law T. Rep. U. S. Cts. 94.] [1]

Circuit Court, S. D. New York. Jan. 11, 1868.

PATENTS—MARKING ARTICLES—ACT OF MARCH 2, 1861—DAMAGES—BURDEN OF PROOF—PENALTY—PARTIES TO SUIT IN EQUITY—VERIFICATION BY EQUITABLE OWNER OF PATENT.

1. Section 13 of the act of March 2, 1861 [12 Stat. 249], does not require that the bill should aver that the patentee had marked the articles made or vended under the patent as required by the statute.

2. To prevent the recovery of damages under that statute it must appear, either from the bill or in the proofs, that the patentee has made or vended the articles under the patent.

3. The burden of proof is upon the defendant to show a failure on the part of the patentee to mark, as required by the statute, articles made or vended under the patent. If this be shown, the burden of proof is upon the patentee, to show that before suit was brought, the defendant was notified that he was infringing the patent, and that he continued, after such notice, to make and vend the patented article.

[Cited in Schofield v. Dunlop, 42 Fed. 325.]

4. The penalty imposed by the statute for a failure to mark patented articles is only the taking away of the right to recover damages in the suit. It does not affect the right to an injunction, either perpetual or provisional.

[Cited in Putman v. Sudhoff, Case No. 11,483; New York Pharmical Ass'n v. Tilden, 14 Fed. 741; Anderson v. Monroe, 55 Fed. 404; Dunlap v. Schofield, 152 U. S. 244, 14 Sup. Ct. 578.]

5. Whether the statute applies to a suit in equity, or any other suit, except an action brought under section 14 of the act of July 4, 1836 [5 Stat. 123], quaere.

6. The plaintiff in a suit in equity does not recover damages.

7. The practice is well settled that it is proper, in a suit in equity on a patent, to join as plaintiff with the owner of a legal title to the patent, the party who is immediately injured by the infringement, and who is equitably entitled to the fruits of the recovery in the suit.

[Cited in Black v. Allen, 42 Fed. 621.]

8. The bill may be verified by the equitable owner of the patent, and a verification by the holder of the legal title is not necessary.

In equity. This was a motion for a provisional injunction [against Richard J. Allyn and Samuel F. Phelps] to restrain the in-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus is from 3 Fish. Pat. Cas. 374, and the statement and opinion are from 6 Blatchf. 33.]

fringement of two reissued letters patent, granted to Henry B. Goodyear, administrator of Nelson Goodyear, May 18th, 1858, for an "improvement in the manufacture of India rubber," and numbered 556 and 557. They were reissues of an original patent [No. 8,075], granted to Nelson Goodyear, May 6th, 1851. The patent, as reissued, was extended May 5th, 1865, for seven years from May 6th, 1865. The reissues related to what is commonly known as "hard India rubber," or "vulcanite," No. 556 being for the process, and No. 557 for the product. Henry B. Goodyear, administrator, was the owner of the legal title to the reissues. The Vulcanite Jewelry Company was the owner of an exclusive license, under the reissues, in and for the whole of the United States, to make, use, and vend bracelets, earrings, brooches, beads, chains, charms, pins, and necklaces, designed to be worn about the person, for ornament, and, also, watch cases and watch keys. The bill averred that the Vulcanite Jewelry Company was in the full enjoyment of the rights and interests acquired by it, and that this suit was brought for its benefit, but it did not aver that the company had ever made or vended any article under the patent. The bill was verified by the president of the company, and the jurat contained an averment that the deponent verily believed Nelson Goodyear to have been the first and original inventor of the improvements claimed in the reissued letters patent.

William J. A. Fuller, for plaintiffs.
Peter Van Antwerp, for defendants.

BLATCHFORD, District Judge (after stating the facts as above). These reissued patents were fully sustained, on a final hearing, in a suit in equity, in this court,—Goodyear v. New York Gutta Percha, etc., Co. [Case No. 5,580],—in 1862, against all defences of invalidity and want of novelty. On the present application, the defendants do not deny the infringement alleged, but they take three objections to the plaintiffs' bill.

By section 13 of the act of March 2, 1861 (12 Stat. 249), it is provided, that, "in all cases where an article is made or vended by any person, under the protection of letters patent, it shall be the duty of such person to give sufficient notice to the public that said article is so patented, either by fixing thereon the word 'patented,' together with the day and year the patent was granted, or when, from the character of the article patented, that may be impracticable, by enveloping one or more of the said articles, and affixing a label to the package, or otherwise attaching thereto a label, on which the notice, with the date, is printed; on failure of which, in any suit for the infringement of letters patent, by the party failing so to mark the article, the right to which is infringed upon, no damage shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make or vend the article patented." The objection taken is, that the bill does not aver that the plaintiffs, or either of them, marked, as required by the statute, the articles made or vended under the patent. There are several answers to this objection: (1) It does not appear, by the bill, that the plaintiffs, or either of them, have ever made or vended any articles under the patent, and that fact is not shown by the defendants. (2) If that fact did appear, either by the bill or otherwise, it would be for the defendants to show a failure by the plaintiffs to mark, as required, the articles made or vended, and then the burden of proof would be on the plaintiffs to show that, before suit was brought, the defendants were duly notified that they were infringing the patent, and that they continued, after such notice, to make or vend the article patented. (3) The penalty imposed by the statute, for a failure to mark patented articles, is only the taking away of the right to recover damages in the suit. It does not affect the right to an injunction, either perpetual or provisional, as a remedy. (4) It is questionable, whether the statute applies to a suit in equity, or to any other suit, except an action on the case for damages, brought under section 14 of the act of July 4, 1836 (5 Stat. 123), that being the only species of suit in which the plaintiff can recover damages for the infringement of a patent. The plaintiff in a suit in equity on a patent does not recover damages. Livingston v. Woodworth, 15 How. [56 U. S.] 546. 559.

It is objected, also, that the plaintiffs are improperly joined, and that it is not proper, in a suit in equity on a patent, to join as plaintiff, with the owner of the legal title to the patent, a party who is a mere licensee. The practice is well settled, that it is proper, in a suit in equity on a patent, to join as plaintiff, with the owner of the legal title to the patent, the party who is immediately injured by the infringement, and who is equitably entitled to the fruits of the recovery in the suit. Goodyear v. Central R. Co. [Case No. 5,563], before Mr. Justice Grier; Stimpson v. Rogers [Id. 13,457], before Judge Ingersoll. It is averred, in the bill, that the Vulcanite Jewelry Company is entitled to sue for, and receive to its own use, in the name of Goodyear, administrator, and itself, all the damages occasioned by infringements of the reissues, by the manufacture, sale, or use of articles covered by the license to it, made in violation of the reissues, and that this suit is brought for its benefit. This suit is, therefore, properly brought in the name of those who are joined as plaintiffs in it.

The objection is taken, also, that the bill is not verified by Goodyear. The president of the company is, on the facts, the proper party to verify it, and he has done so, and the verification contains the proper averments.

The infringement is made out by the affidavits on the part of the plaintiffs, and is undefended, and a provisional injunction must issue, according to the prayer of the bill.

[For other cases involving this patent, see note to Goodyear v. Mullee, Case No. 5,577.]

GOODYEAR (ATLANTIC GIANT POWDER CO. v.). See Case No. 623.

Case No. 5,556.

GOODYEAR et al. v. BERRY.

[2 Bond, 189; 3 Fish. Pat. Cas. 439.] [1]

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

PATENTS—EFFECT OF COMMISSIONER'S DECISION—DECISIONS IN THE CIRCUITS — CONSTRUCTION OF SPECIFICATION AND CLAIMS — CHEMICAL COMBINATIONS—"OTHER ALLIED GUMS"—INFRINGEMENT—HARD RUBBER.

1. So far as principles affecting the validity of letters patent have been settled by prior decisions in the circuits, they will be regarded as authoritative and final.

2. It is in accordance with the late decision of the courts, that the decision of the commissioner is not conclusive upon the substantial identity of the inventions claimed in the original and reissued patents.

3. It is well settled that in the effort to ascertain the intention and meaning of the specifications and claims, they are to be viewed in a liberal spirit, so that, if possible, the object of the inventor or patentee may be carried out. Mere rigid technicalities are to be set aside, unless there is a clear legal necessity for sustaining them.

[Cited in Goodyear Dental Vulcanite Co. v. Willis, Case No. 5,603.]

4. The words, "other allied gums," and "other vulcanizable gums," used in the specifications and claims of the reissues of Nelson Goodyear, are not intended to cover any gum, though then unknown, which may be capable of vulcanization. They include only caoutchouc and other gums then known to be vulcanizable.

5. In the case of patented chemical combinations, the exclusive right to the invention imports nothing but protection against the use of the same, or substantially the same elements, compounded and treated on principles substantially the same as those of the patented article.

6. Although the words, "other vulcanizable gums," were not found in the original patent, the interpolation of them into the reissues does not make the latter void.

7. The case of Goodyear v. Providence Rubber Co. [Case No. 5,583] examined but not followed.

8. When the denial of infringement in the answer, under oath, is not positive and unequivocal, the testimony of a single witness, with corroborating facts, is a sufficient proof of infringement.

9. When an infringement is proven, a cessation to use the infringing article is no bar to an injunction and account. The party whose rights have been invaded may claim protection against future infringements.

10. Hard rubber manufactured under the patent of Edwin L. Simpson, dated October 16, 1866, is an infringement of the Nelson Goodyear reissues.

[Cited in Goodyear v. Blake, Case No. 5,560; Hamilton v. Ives. Id. 5,982.]

[Cited in Burke v. Partridge, 58 N. H. 352.]

This was a bill in equity, filed [by Henry B. Goodyear, administrator, and Samuel A. Duncan] to restrain the defendant [Archibald Berry] from infringing letters patent [No. 8,075] for an "improvement in the manufacture of India rubber," granted to Henry B. Goodyear, administrator of Nelson Goodyear, deceased, May 6, 1851, and surrendered and reissued May 18, 1858, in two divisions, numbered 556 and 557, respectively. The claim of the original patent was as follows: "What I do claim, etc., is the combining of India rubber and sulphur, either with or without shellac, for making a hard and inflexible substance hitherto unknown, substantially as herein set forth. And I also claim the combining of India rubber, sulphur, and magnesia or lime, or a carbonate or a sulphate of magnesia or of lime, either with or without shellac, for making a hard and inflexible substance hitherto unknown, substantially as herein set forth."

The disclaimer and claim of reissue 556 was as follows: "It is well known that it has been proposed to produce a hard substance from caoutchouc by passing it through highly-heated liquid sulphur; but this has not been attended with practical success. I do not wish to be understood, however, as making claim broadly to the union of caoutchouc and sulphur in the proportions named, however these substances may be united and treated. But what I do claim as the invention of the said Nelson Goodyear, and desire to secure by letters patent, is the combining of sulphur and India rubber or other vulcanizable gum, in proportions substantially as specified, when the same is subjected to a high degree of heat, substantially as specified, according to the vulcanizing process of Charles Goodyear, for the purpose of producing a substance or manufacture possessing the properties or qualities substantially described; and this I claim, whether the said compound of sulphur and gum be or be not mixed with other ingredients, as set forth."

The disclaimer and claim of reissue 557 was as follows: "I do not wish to be understood as making claim broadly to a manufacture or substance produced by the admixture of caoutchouc and sulphur; nor as making claim broadly to a manufacture or substance by subjecting the compound of caoutchouc and sulphur, whether with or without other substances, to a high degree of heat, as, prior to the invention of Nelson Goodyear, caoutchouc and sulphur had been compounded, and such compound alone, as well as other ingredients, had been subjected to a high degree of heat, but not to produce the manufacture or substance having the character peculiar to the said manufacture or substance invented by the said Nelson Goodyear.

[1] [Reported by Lewis H. Bond, Esq., reprinted in 3 Fish. Pat. Cas. 439, and here republished by permission.]

What is claimed, etc., is the new manufacture or substance herein above described, and possessing the substantial properties herein described, and composed of India rubber, or other vulcanizable gum, and sulphur, in the proportions substantially as described, and when incorporated, subjected to a high degree of heat, as set forth, and this I claim, whether other ingredients be or be not used in the preparation of the said manufacture, as herein described."

The defendant was a dentist in the city of Cincinnati, who had used hard rubber or "vulcanite" in the preparation of plate or plates for artificial teeth. Since the bringing of the suit he had begun to use the compound described in the letters patent for "an improvement in dental rubber," granted to Edwin L. Simpson, October 16, 1866, the specification whereof was as follows: "Be it known that I, Edwin L. Simpson, of Bridgeport, in the county of Fairfield and state of Connecticut, have invented a new improvement in dental rubber, and I do hereby declare the following to be a full, clear, and exact description of the same: The rubber now used for dental purposes has incorporated with it large proportions of free sulphur, for the purpose of vulcanizing the rubber after it is formed. The odor and taste occasioned by the presence of this sulphur is extremely obnoxious to many persons, and occasions the principal, if not the only, objection to the use of rubber for dental purposes. To overcome this objection, and produce vulcanized rubber for dental purposes without the actual or apparent presence of sulphur, is the object of my invention, and consists in preparing the rubber for vulcanizing by the introduction of a peculiar vulcanizing compound, for which I have applied for letters patent of even date herewith; and that others skilled in the art may be enabled to prepare and use my improved rubber, I will proceed to describe my manner of so doing. I will first describe the vulcanizing compound, as set forth in the specification accompanying my application for patent, as aforesaid. I first boil linseed or other vegetable oil to the consistency of honey (this I do to facilitate the preparation), thoroughly mix two ounces of benzoin gum with one pound of pulverized sulphur; then to each quart of the boiled oil add one pound of the prepared sulphur, carefully subjecting this mixture to a moderate heat sufficient only to cause the two substances to react upon each other until they pass from a semi-fluid to a semi-hard state, having a honeycomb or spongy appearance. This forms my vulcanizing compound, and differs from that patented to me February 28, 1865, in that the benzoin gum is added, which, by its vaporizing qualities, more perfectly expels the fumes of the sulphur, as well as the odor from the oil, and renders the compound nearly, if not perfectly, odorless, and when combined with the India rubber, or similar gums, and subjected to a regulated heat, will cause the same to undergo the change known as vulcanizing. To produce my rubber for dental purposes, to one pound of India rubber or gutta percha, add ten to fourteen ounces of my above described compound; the greater the quantity of the compound the harder will be the rubber. After curing, twelve ounces I believe to be the proper quantity for general purposes. Thoroughly mix the compound and rubber by grinding between warm rolls. To produce the requisite color, I add chrome red, or lake pink, in quantities to produce the requisite color, and when thoroughly mixed the substance will be in a plastic state, and in this state rolled into thin sheets and ready for the dentist's use. The dentist forms the plate in the ordinary manner for other rubber, and when so formed, it should be subjected to a heat of 320 degrees Fahrenheit, for about four hours—proportionately less time as the degree of heat is greater; otherwise treat as ordinary rubber; and the plate thus prepared will be as tasteless and odorless as metal plate, and will not tarnish the fillings or other gold in the mouth of the wearer. Having, therefore, thus fully described my invention, what I claim as new and useful, and desire to secure by letters patent, is: Combining the within described vulcanizing compound with the India rubber in the proportions herein named, and substantially in the manner and for the purposes specified. Edwin L. Simpson."

A. Pollok, T. D. Lincoln, and J. H. B. Latrobe, for complainants.

S. S. Fisher, for defendant.

OPINION OF THE COURT. The bill alleges an infringement, by the defendant, of two reissued patents to Henry B. Goodyear, as administrator of Nelson Goodyear, dated May 18, 1858, for an improvement in making hard rubber or vulcanite. These reissued patents were extended for seven years from May 6, 1865. The infringement charged consists in the use of hard rubber by the defendant, as plates for the insertion of artificial teeth. The bill prays for an injunction and an account of profits. The history of the invention covered by complainant's patent is briefly this: In June, 1844, Charles Goodyear applied for and obtained a patent for an improvement in the process of preparing India rubber, or caoutchouc. In December, 1849, this patent was surrendered and a reissue granted on an amended specification. And, subsequently, another reissue was obtained. These patents embrace substantially the mode of producing a soft and plastic article known as vulcanized rubber, by subjecting the rubber, in combination with sulphur and other ingredients, to a high degree of artificial heat. The article produced by this process was called vulcanized India rubber, and was used for the various purposes contemplated by the inventor. In

May, 1851, Nelson Goodyear obtained a patent for a new and useful improvement in the preparation of India rubber, by which the article known as hard rubber, now extensively applied to many useful purposes, was produced. The patentee having died, the reissued patents numbered 556 and 557 (one for the process and the other for the product) were granted to the said Henry B. Goodyear, as administrator of Nelson Goodyear, dated May 18, 1858, and subsequently extended for seven years.

Numerous grounds of defense are set up in the defendant's answer, but those relied on in the argument are as follows: 1. That the reissued patents to Henry B. Goodyear are void, as not being for the same invention as the original. 2. That the reissues were improperly granted. 3. That the fact that the dentists in this vicinity openly and notoriously purchased and used the soft rubber for making hard rubber plates for artificial teeth, is a bar to a suit in equity; and that if the complainants have a remedy, it is at law. 4. That no infringement is proved. Before noticing specially these several grounds of defense, it will be proper to remark that the reissued patents, on which this suit is brought, have heretofore been the subjects of litigation, and have been judicially passed upon. And in so far as principles involving the validity of these patents have been settled by these decisions, they will be regarded as final and authoritative on this court. It appears that in the spring of 1861, a suit in equity was brought in the circuit court of the United States for the Southern district of New York, by Goodyear v. New York Gutta Percha & India Rubber Vulcanite Co. [Case No. 5,580], charging an infringement of both the reissued patents of H. B. Goodyear, and praying for an injunction and account. The bill was similar in its frame and averments to that filed in the case before this court. The defendants, in their answer, denied the validity of the reissues, alleging they were obtained by fraud, and insisting that Nelson B. Goodyear was not the first and original inventor of vulcanite, or the process of making it. The case was elaborately argued before the New York court, at October term, 1862; and the court, Judge Nelson presiding, after mature consideration, sustained the validity of the reissues, and awarded a perpetual injunction. In January, 1867, another bill was filed in the same court, in the name of Goodyear v. Waite [Id. 5,587], alleging an infringement of these reissued patents, and praying for an injunction. The answer of the defendants, in that case as in this, denied the validity of the reissues on the grounds of vagueness and insufficiency of the specification; that the reissues were for an invention different from and broader than that claimed in the original patent; and, also, that they were void as being for a process and a product in separate patents for the same invention. The infringement charged was also denied by the answer, and it was also alleged, as a ground of defense, that the complainants, by their long acquiescence in the use of hard rubber by dentists for dental purposes, had abandoned their right to the exclusive use of the article for such purposes, and had dedicated it to the dental profession. This case was strenuously contested. A large mass of testimony was taken by the parties, and it was elaborately argued by distinguished counsel, and finally decided by the learned Judge Nelson, in August last. This decision was made subsequently to the hearing of the motion for a preliminary injunction in the case now pending. The learned judge just named, after taking the case under advisement, decided all the points in controversy in favor of the complainants, granting a perpetual injunction, and a decree against the defendants for profits.

The opinion of Mr. Justice Nelson, in the case just referred to, is before the court, and has been carefully noticed. He decides, in substance, the following points: 1. That the description of the invention of Nelson Goodyear, as contained in the two reissued patents, is sufficiently full, clear, and exact to meet the requirements of the statute. 2. That the invention of Nelson Goodyear, consisting of a process for the production of the article known as hard rubber, was original with him, and properly the subject of a valid patent, both for the process and the product; and that Henry B. Goodyear, as the administrator of Nelson Goodyear, had a right to surrender the original patent for an insufficient description in the specification, and to receive the two reissued patents granted to him. 3. That the evidence did not make out a dedication of the right accruing under such issued patents to the dental profession or the public; and that the use of the hard rubber for dental purposes, by unlicensed persons, might be restrained by the process of injunction, and redress obtained in equity. The issue of infringement does not appear to have been insisted on by the defendants in the New York case, and there is, therefore, no special finding of the court upon it. Indeed, it was not denied by counsel in their argument, and from the fact that a decree was entered for the complainants, the irresistible inference is, that the infringement was made out to the satisfaction of the court.

I have carefully noticed the views and conclusions of Judge Nelson on the points adverted to, and have no hesitancy in adopting them as the views and conclusions of this court, so far as they apply to the questions and issues now before it. To restate at length the grounds on which the learned judge placed his decision would be a useless expenditure of time and labor. They are lucidly set forth in his opinion, and I see no necessity for reproducing them. I shall, therefore, confine myself to the points made in the able argument of the defendant's counsel, not

discussed or settled by Judge Nelson. The first of these points is, that the reissues are void, as being for an invention broader than that claimed in the original patent, and which can not by fair construction be included in it. This presents a question of great interest to the parties, and, perhaps, not wholly free from difficulty in its solution. I will state the conclusion to which I have been led after careful and anxious consideration. Nelson Goodyear, in the specification on which his original patent was based, professes to have invented a new and useful improvement in the preparation and manufacture of caoutchouc, or India rubber. He refers to the patent of Charles Goodyear for the preparation of the plastic compound, and claims to have discovered a new process, by which hard rubber, before unknown, is produced. He describes minutely the ingredients from which and the process by which the article is produced, disclaiming the invention of the heating or curing process claimed and covered by the patent of Charles Goodyear, and he sums up his invention or claim as follows: "What I do claim as my invention, and desire to secure by letters patent, is the combining of India rubber and sulphur, either with or without gum-shellac, for making a hard and inflexible substance, hitherto unknown, substantially as herein set forth. And I also claim the combining India rubber, sulphur, magnesia, or lime, or a carbonate or sulphate of magnesia or lime, and either with or without shellac, for making a hard substance, hitherto unknown, substantially as herein set forth."

For the purposes of the opinion under consideration, it will not be necessary to refer specially to the description of the process, claimed in the reissue No. 556, or of the product, as claimed in reissue No. 557. The claim of the first-named patent is as follows: "What I do claim as the invention of the said Nelson Goodyear, and desire to secure by letters patent, is the combining of the sulphur and the India rubber, or other vulcanizable gum, in proportions substantially as specified, according to the vulcanizing process of Charles Goodyear, for the purpose of producing a substance or manufacture possessing the properties or qualities substantially such as described; and this I claim, whether the said compound of sulphur and gum be or be not mixed with other ingredients, as set forth." The claim of the patent, No. 557, is in the following words: "What is claimed as the invention of the said Nelson Goodyear, deceased, and desired to be secured by letters patent, is the new manufacture or substance herein above described, and possessing the substantial properties herein described, and composed of India rubber, or other vulcanizable gum and sulphur, in the proportions substantially such as described, and when incorporated, subjected to a high degree of heat, as set forth; and this I claim, whether the other ingredients be or be not used in the preparation of said manufacture, as herein described." In both these claims the words "other vulcanizable gums" occur, which are not found in the original patent to Nelson Goodyear. In the body of the specifications of each of the reissues, the words "allied gums" follow after the words "India rubber." The answer of the defendant sets up these variances between the original patent and the reissues, and insists that the reissues are for a different invention from that covered by the original patent and therefore void. And this view is strenuously urged in the argument of the counsel for the defendant. It may be proper to remark, on this point, that the commissioner of patents has passed upon this question, and by the grant of the reissued patents has given his official sanction to their validity. It is, in effect, his deliberate judgment that the claims of the reissues are not broader than those of the original, and cover substantially the same invention. It is in accordance with the later decisions of the courts, that the decision of the commissioner is not conclusive upon the substantial identity of the invention claimed in the original and that claimed in a reissue. Yet, for reasons not necessary to be stated, his action may well be regarded as affording a presumption in favor of the validity of the reissue. This presumption, of course, is overcome by evidence of fraud in obtaining the reissue, or a clear repugnancy between the original and the reissued patents.

Another remark seems proper in this connection. In the case of Goodyear v. Waite, before referred to, as having been heard before Judge Nelson, and decided by him, although this point as understood by this court, was distinctly made in the defendant's answer as an objection to the reissued patents, it was not urged in the argument by his counsel, and was not noticed in the opinion of the judge. The plain reference from this is, that the counsel did not regard it as a sustainable defense, and that such also was the view of the learned judge who decided it. The argument of counsel on this point is, that the words "other allied gums," used in the specification, and the words "other vulcanizable gums," in the claims of the reissues, are mere interpolations, and import a claim, not only broader than the original, but which, if they had been inserted in the original, would have invalidated the patent. It is insisted that in the reissues the patentee claims the application of his process to other vulcanizable or allied gums which had not been known, and of which he could, therefore, have no knowledge; and in doing so describes an invention broader than, and differing from, the original. The doctrine is a familiar one, and well settled, that the invention described and claimed in a reissue must be the same as originally patented. And if, by a fair construction, the specification and claim are for something substantially different from those of the original, the patent is void. Do these reissues fall within the scope of this

principle? This is a question of construction, in the consideration of which the entire specifications, including the claims, are to be looked at. And it is well settled by the courts that in the effort to ascertain the intention and meaning of the specifications and claims, they are to be viewed in a liberal spirit, that, if possible, the object of the inventor or patentee may be carried out. Mere rigid technicalities are to be set aside, unless there is a clear legal necessity for sustaining them. Now, in reference to these reissues, there is no pretense that there is any substantial variance from the original, as to the process by which hard rubber is produced, or the character or quality of the article when made. The proportions of rubber and sulphur, and other ingredients, where named, are the same, and the degree of heat is the same. In that which is the very gist of the invention there is no discrepancy. That consists in the discovery of the fact that the substances named, when compounded as required, and subjected to a certain heat, will produce hard rubber. And now the inquiry is pertinent, whether the suggestion in the claims of the reissues, that other allied gums or other vulcanizable gums may be used to produce the result, can be claimed as changing the character of the invention, or make it broader than in the original. Counsel insist that these words enlarge the claim, so as to cover any gum, though then unknown, which may be susceptible of vulcanization. And it may be, if this were the true construction of the claim, the reissue would be liable to the objection urged. But, clearly, the words referred to are to be taken in a more limited sense. They can be held only to include caoutchouc and other gums then known to be vulcanizable. There would seem to be no impropriety in referring to such; for, under the generic term "caoutchouc," it is well known there are different qualities of gum, though all are susceptible of vulcanization. The trees producing it are indigenous in various countries; and owing to peculiarities of soil and climate, the products of the trees differ in quality. The gums, too, are known in commerce by different names, and are of different degrees of purity and excellence, though all are produced by trees belonging to the same family. The gum called "gutta percha" has a peculiarity not applicable to any other of these gums. In its natural state it is mixed with woody fibers, and requires a certain preparatory process before it is fitted for vulcanization, or can be applied to any of the uses to which India rubber is suited. Now, by a fair and rational interpretation, are not the words used in the claims of the reissues to be limited to these known varieties of the caoutchouc, and not unnecessarily to be extended to all gums thereafter to be discovered? It is a fair presumption that these different qualities of vulcanizable gums were in the mind of the person who framed these specifications, and that there was no intention to anticipate and claim the benefit of future discoveries in that direction. The words used were not, perhaps, necessary to the protection of the rights of the inventor; but in the absence of any proof that they were used for any deceptive purpose, and out of abundant caution, it can hardly be received as such an enlargement of his claim as, in effect, should invalidate his patent. In a word, I can not view the addition of the words quoted as embracing, within their fair scope, a claim for a different invention from that described in the original patent.

The principle is conceded that a patent for a mechanical structure or contrivance, producing a new and useful result, is no protection against the use of an invention producing the same result by appliances and on principles substantially different from the patented invention. The rights of the patentee or proprietor of the patent are only invaded by a result like that of his invention, effected by what are substantially the same means. And so in the case of patented chemical combinations; the exclusive right to the invention imports nothing but protection against the use of the same, or substantially the same elements compounded and treated on principles substantially the same as those of the patented article. In brief, a patent right does not cover every possible mode of accomplishing the result proposed by an inventor. And this, as I understand them, is the extent of the decisions of the supreme court, cited by the learned counsel for the defendant. The soundness of the doctrine established by that court is not doubted, but its application to the present case is not so obvious. If the claims of a reissued patent clearly imply an expansion of the invention beyond the claims of the original patent, there is always ground for a presumption that there was a fraudulent intent to anticipate and cover subsequent inventions, and thus bar the door against patents for all subsequent discoveries. This is clearly against the policy of our patent-right system, and has been wisely condemned by the uniform decisions of the courts of the United States. This is the import of the decision of the supreme court of the United States in Burr v. Duryea, 1 Wall. [68 U. S.] 534, and other cases cited by the defendant's counsel. But I can not see that the claims of these reissues are of the character which will bring them within the scope of these cases.

I have examined attentively the ruling of the court in the case of Goodyear v. Providence Rubber Co. [Case No. 5,583], claimed by counsel to be decisive authority against the validity of these reissues. The case was before Mr. Justice Clifford, holding the circuit court of the United States for the district of Rhode Island, in 1864. The suit was for an infringement of the reissued patents to Charles Goodyear for his process of making soft or plastic rubber by vulcanization. The claim of the original patent and the first reissue was for the process of treating and curing caoutchouc or India rubber; but, in the reissue of 1860, the words, "or other vul-

canizable gums," were added. And this addition was claimed to be an enlargement of the invention, rendering the reissue void. The question was, therefore, substantially the same as in the pending case. The learned judge before named construed the claim of the reissued patent to Charles Goodyear as including "all other vulcanizable gums," whether then known or thereafter to be discovered, capable of vulcanization. Viewing the claims in this light, he held that the reissue was for an invention different from that covered by the previous patents and therefore void. If this construction of the reissue was right, probably the conclusion of the learned judge was correct. But, for reasons already stated, I am unable to give the added words in the claims of the reissued patents the extended meaning of which he held them to be susceptible, and can not, therefore, concur with him in his conclusion. It is certainly with some distrust of my own judgment that I differ from that learned judge; but my convictions are so strong on the question that I do not feel at liberty to yield them, even to his superior learning. If wrong in this, I shall be gratified to have my error corrected by an appeal to a higher court.

On the question of infringement, there seems to be nothing in the case calling for a minute and extended investigation. In the cases referred to in a previous part of this opinion, establishing the validity of these reissued patents, the infringement alleged does not seem to have been controverted, and the decrees entered clearly imply that the fact of infringement was made out. In Waite's Case the infringement charged was the manufacture and use of hard rubber by dentists as the foundation for artificial teeth. The allegations in the bill were substantially, if not literally, identical with those in this bill, and the answer was the same. And the court in that case decreed a perpetual injunction. But the counsel for the defendant in this case takes issue on the question of infringement, insisting that the fact is not technically made out by the evidence. He claims that the defendant denies in his answer, under oath, that he has infringed, and that the complainant has proved the fact only by one witness; and, therefore, the court can not find the fact of infringement. Now, the first remark on this point is, that the defendant's answer does not contain an explicit denial of the infringement. It is evasive in its character. He admits, substantially, the use of hard rubber, made by the process of baking the soft or plastic rubber, for dental purposes, but denies the process is that described and claimed in the reissued patents. But he adduces no proof that the hard rubber has been or can be made by any means or process variant from that covered by the reissues. And, in the absence of such proof, there is at least a fair presumption that the hard rubber used was the article as claimed and described in the reissues. And it may also be remarked, that a denial of the infringement is wholy inconsistent with the theory of the defense set up in the answer, and mainly relied on by counsel. That defense is not that the defendant has not used the hard rubber for dental purposes, but that he had a right to use it by the implied dedication of such right to the dental profession. This ground of defense is, by a clear implication, an admission of the infringement.

But there is the positive testimony of one witness that the defendant, Berry, and all the other defendants against whom suits are pending in this court, distinctly admitted the preparation and the use of the hard rubber for dental purposes. As the denial of the infringement in the answer of the defendant is not positive, and the testimony of the witness referred to is strongly corroborated by other facts and considerations bearing on the question of infringement, the fact is made out to the satisfaction of the court. Upon that issue there is hardly room for a doubt. There is every reason to conclude that hard rubber for dental purposes has been in general use by the profession. It is in evidence that fully three-fifths of the dentists in the United States are licensed under the Goodyear patent; and this fact evinces not only the appreciation of the profession of the article, but its very general use. Those refusing to take licenses evidently intend to place their defense, not on the ground that they did not use the article, but on the ground of the invalidity of the patent and the dedication of its use to the dental profession. But it is insisted in the argument of the defendant's counsel, though not set up in the answer as a defense, that the defendant now uses in his profession a hard rubber or compound, made under a patent to Edwin L. Simpson, granted October 16, 1866. It is claimed that the process and the product under this patent are essentially different from the claims of the Nelson Goodyear patent, and therefore not an infringement of that patent. This defense, it is obvious, applies only to the issue of infringement. But it is not perceived, if sustained by the testimony, that it is an answer to the claim of the complainants as made in their bill. If the defendant has infringed by the use of the Goodyear hard rubber, he is liable to account for such infringement, though he may have discontinued the use of the article charged as an infringement of the Goodyear reissues. If an infringement of the complainants' rights under these reissues is made out, the cessation to use the infringing article is no bar to an injunction and a decree for an account. I understand the law to be well settled, that, under the circumstances stated, the party whose rights have been invaded may claim protection against future infringements, and is not obliged to rest on the fact that the party has ceased

his acts of infringement. But, as the Simpson patent is before the court, and evidence has been offered, without objection, upon the question of the identity of the process and product under it with that of the Goodyear patent, and the point has been discussed by counsel, it may be expected the court will pass upon that issue. In noticing this point, I shall try to be very brief. And the first obvious remark in reference to the Simpson patent is, that it does not claim a new process for the vulcanization of India rubber, or that the product is essentially different from that made under the Goodyear patent. In this specification he says: "The rubber now used for dental purposes has incorporated in it large proportions of free sulphur for the purpose of vulcanizing the rubber after it is formed." And again: "The odor and taste occasioned by the presence of this sulphur is extremely obnoxious to many persons, and occasions the principal, if not the only, objection to the use of rubber for dental purposes. To overcome this objection, and produce vulcanized rubber for dental purposes, without the actual or apparent presence of sulphur, is the object of my invention, and consists in preparing the rubber for vulcanizing by the introduction of a peculiar vulcanizing compound." It is here clearly stated that the object of the patentee was to rid the compound used for dental purposes of the unpleasant taste or odor of the sulphur. He then describes the mode by which he proposes to effect this object, as follows: "I first boil linseed or other vegetable oil to the consistency of honey (this I do to facilitate the preparation); thoroughly mix two ounces of benzoin gum with one pound of pulverized sulphur; then to each quart of the boiled oil add one pound of the prepared sulphur, carefully subjecting this mixture to a moderate heat, sufficient only to cause the two substances to react upon each other, until they pass from a semi-fluid to a semi-hard state, having a honeycomb or spongy appearance." He adds, that benzoin gum, "by its vaporizing qualities, more perfectly expels the fumes of the sulphur, as well as the odor from the oil, and renders the compound nearly, if not perfectly, odorless, and when combined with India rubber or similar gum, and subjected to a regulated heat, will cause the same to undergo the change known as vulcanization." In producing rubber for dental purposes, he requires to one pound of India rubber from ten to fourteen ounces of the vulcanizing compound. These are to be thoroughly mixed by being ground between warm rollers, and coloring matter put in if desired. This mixture is plastic, and being rolled into thin sheets, is prepared for use by the dentists. The form of the gums and roof of the mouth being taken in this plastic material in the ordinary mode, it is vulcanized by subjecting it to a heat of 320 degrees of Fahrenheit for about four hours; or, if the heat is above 320 degrees, for a less time. The patentee claims "that the plate thus prepared will be as tasteless and odorless as a metal plate," etc.

The claim of the patent is: "Combining the within described vulcanizing compound with India rubber, in the proportion herein named, and substantially in the manner and for the purposes herein specified." The claim of the Nelson Goodyear patent, and the reissues under it, have been stated, and need not here be reproduced. Now, Simpson, in his specification and claim, does not pretend that by his process he does not produce the article known as hard rubber, or that it is made without the use of sulphur, as required by the Goodyear patent. The claim is, in substance, an improvement upon the known process for its production by the introduction of gum benzoin, to deprive the hard rubber of its sulphurous taste and odor, and thus render it more acceptable for dental purposes. The process of vulcanization is substantially the same as that described in the Goodyear patent, and the product the same, with the exception that it is tasteless and odorless. As to the identity of the processes under the Goodyear and Simpson patents, the complainant has offered the testimony of four learned chemical experts, who have severally tested the elements of the products of both patents by a rigid analysis. These experiments have been conducted with a view to ascertain the precise ingredients and their proportions in the compound described in the Simpson patent. Without stopping to state the details of these analyses, as set forth in the testimony of these experts, it is sufficient to say that they harmonize more nearly than could be expected in the results attained. They find that the compound described by Simpson, when vulcanized, contains about four ounces of sulphur to sixteen ounces of rubber. Thus it is made clear that the article produced under the Simpson claim is vulcanized by essentially the same process, and has very near the same proportions of sulphur and rubber as claimed in the Goodyear patent. These are the vulcanizing agents named in that patent, when subject to the action of heat. The same ingredients and the same processes are claimed by the Simpson patent, and the product of the two is essentially the same.

I can have no hesitation, therefore, in holding that the use, for dental purposes, of hard rubber plates made under the Simpson patent, is an infringement of the Nelson Goodyear patent; and in no aspect of the case is the defendant relieved from liability as an infringer by asserting the use of the product under the Simpson patent. While it is probably true that Simpson has made a valuable discovery in introducing into his compound an ingredient which, by its vaporizing properties, prevents the unpleasant taste and odor of the vulcanized rubber, when used as plates for artificial teeth, and for this invention may have been well entitled to a

patent, he or his licensees are not protected in the use of the process and the product as claimed by and patented to Nelson Goodyear. I may remark, in closing, that I am fully sustained in this conclusion by the opinion of Judge Blatchford, district judge of the United States for the Southern district of New York, in the case of Goodyear v. Evans [Case No. 5,571], recently before him, on an application for an injunction to restrain the defendant from the use of hard rubber made under Simpson's patent, as an infringement of the Goodyear patent. In a printed opinion of the learned judge, now before me, the question is ably discussed, and the conclusion attained that it was a proper case for an injunction, which was accordingly awarded. After noticing the claims of the two patents, and reviewing the testimony as to the infringement, the learned judge says: "Nothing more is needed to establish clearly that the use of the Simpson vulcanized product is an infringement of reissue No. 557, and that the manufacture of it by the Simpson process is an infringement of reissue No. 556." Concurring, as I do, in this conclusion, a decree for the complainants will be entered.

[For other cases involving this patent, see note to Goodyear v. Mullee, Case No. 5,577.]

Case No. 5,557.

GOODYEAR et al. v. BEVERLY RUBBER CO.

[1 Cliff. 348.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1859.

PATENTS—CONSTRUCTION—VULCANIZED RUBBER—SALE OF PATENTED MACHINE—SALE OF PORTION OF FRANCHISE—MONOPOLY.

1. The patent issued to Charles Goodyear, June 15, 1844, for improvement in India-rubber fabrics, reissued December 25, 1849, and extended for seven years, June 15, 1858, was for the product known as vulcanized rubber, as well as for the process by which it was produced.

2. When the patentee sells the right to make, use, and vend the invention in a particular place, the purchaser buys a portion of the franchise which the patent confers; but the purchase of a patented implement or machine for use in the ordinary pursuits of life stands on a different ground.

[Cited in American Cotton Tie Co. v. Simmons, Case No. 293; Adams v. Burks, Id. 50; Hawley v. Mitchell, Id. 6,250; Holiday v. Mattheson, 24 Fed. 186; Morgan Envelope Co. v. Albany Perforated W. Paper Co., 152 U. S. 425, 14 Sup. Ct. 630.]

3. By virtue of the contract of sale and the unconditional delivery of a patented article, it passes outside of the monopoly, and is no longer under the peculiar protection granted to patented rights.

[Cited in Adams v. Burks, Case No. 49; Hill v. Whitcomb, Id. 6,502; Hawley v. Mitchell, Id. 6,250.]

4. When the patentee of certain processes and the product thereof, for a valuable consideration, sold the patented article, both the manufactured article and the materials of which it was composed passed to the purchaser, discharged of the peculiar privileges secured by the patent; and the purchaser may use the material in the manufacture of other articles not themselves protected by a patent.

5. And this is the case, although the patented article was bought of the patentee's licensee, who was restricted by the license to a use of the patented product different from that to which it was devoted by the purchaser.

[Cited in American Cotton Tie Supply Co. v. Bullard, Case No. 294.]

Bill in equity [by Charles Goodyear and others] to recover damages for the infringement of a patent right. Charles Goodyear was the inventor and patentee of an improved process for the manufacture of India-rubber, and the other complainants were grantees and licensees under him, of the exclusive right of making, using, and vending to others to be used, the said improvement for making clothing. Letters-patent [No. 3,633] were granted to the first-named complainant on the 15th of June, 1844, for a new and useful improvement in rubber fabrics. On the 25th of December, 1849, a reissue [No. 156] was granted him for fourteen years, and on the 15th of June, 1858, a renewal for seven years. The rights of the licensees to make various articles of rubber, and the exclusive right to make clothing under the patent, existed before the extension; and the same were continued to them by subsequent agreements, which were in force at the time of the suit. Articles manufactured from the material prepared according to the patented process were denominated vulcanized rubber goods, and it was alleged that the term applied to the goods was understood by the respondents, and all persons engaged in the business, to mean the goods made of a compound of India-rubber, in the original composition of which sulphur is present in any form or degree, and where the compound in that state has been subjected to the action of artificial heat, so as to produce the chemical or other changes described in their patents. To show the character of the infringement, it was further alleged that the respondents, in making their goods, had used a compound which at some time before the manufacture had been subjected to a treatment substantially similar to that of the complainants, and the same in its effects. The above embraces the substance of the bill, which prayed for an account, damages, and an injunction. In effect the answer denied that the papers annexed to the bill of complaint were, as they purported to be, true copies of Charles Goodyear's original and reissued patents, or that the reissued patent was ever extended as alleged. Objection was also made to the maintenance of the suit by the last-named complainants, as they were not a legally existing corporation; and they were required to prove the existence of the agreements under which they claimed rights in the patent. Concerning the process it was admitted that

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

the term "vulcanized rubber" was known and used as meaning India-rubber, manufactured according to the patent of Charles Goodyear, by subjecting it to a high degree of heat after it has been combined with certain metallic substances; but it was denied that all rubber goods which have sulphur in them, or have been subjected to any degree of heat, are vulcanized rubber. It was insisted that vulcanized rubber could be devulcanized and thus cease to be vulcanized, as iron can be changed to steel, and steel converted back into iron, and cease to be steel. The respondents claimed to manufacture the rubber for the manufacture of rubber goods by a different process from that of the complainants, and described their own method substantially as follows: They bought up the old worn-out shoes made by the first-named complainant and his assignees, and deprived them of those peculiar properties which constitute vulcanized rubber. To accomplish this, they ground up the shoes until they were reduced to a finely pulverized substance, and boiled it in hot water or steamed it for about forty-eight hours, to devulcanize the goods, destroy the sulphur and other metallic substances, and as far as possible expel them from the material. After the boiling process the substance became sticky and soft, so that it could be formed into a sheet or rolled out, like vulcanized rubber; but all the properties of vulcanized rubber were removed by this treatment. Resins, coal-tar, and gum-shellac were then incorporated with the material to give strength and perfection to the fabric; after which, spread upon cloth and made into the various intended articles, it was dried in the sun or in slightly heated rooms. For this process the respondents, as assignees of Hiram L. Hall, had three patents. The answer further set up as a proof that goods manufactured by the respondent's process were not vulcanized rubber goods; that they were not prevented from liability to decompose by the action of the essential oils, or from animal perspiration. As a further defence, the answer set forth that all the rubber used by respondents had once been vulcanized by the license and permission of the first-named complainant, had once been publicly sold by his consent; and that therefore he had once been paid a price satisfactory to him, and that he could not therefore forbid or prevent the use of it by lawful purchasers for a lawful purpose.

B. R. Curtis and E. Merwin, for complainants.

It was shown by the evidence that the goods of the respondents retain more or less of the important qualities of vulcanized rubber, and that their value is due to that. But assuming that the effect of their process is to devulcanize vulcanized India-rubber, and that their goods are no longer vulcanized, then the respondents are still liable, inasmuch as they unlawfully employ in their manufacture vulcanized rubber, the product of Goodyear, and secured to him by his patent. Vulcanized rubber being covered by Goodyear's patent, no one can use it without his license. No express license is pretended. Then, if respondents have any implied license, they must derive it from the persons from whom they procured the rubber. But if the licensees from whom respondents obtained their rubber had no authority to employ the same in the manufacture of clothing, then respondents had no such right. Now the licensees of Goodyear are allowed to use vulcanized rubber for the manufacture of shoes only, and, not being allowed to use the rubber for any other purpose themselves, can confer no other right upon any one else. Goodyear never directly granted a general use of his vulcanized rubber, and nothing passed by implication, except such things as were incident to the subject of the grant and necessary to its enjoyment. Broom, Leg. Max. (3d Ed.) 310; Stevens v. Gladding, 17 How. [58 U. S.] 447–452, 453. See Wilson v. Simpson, 9 How. [50 U. S.] 109. The tariff which Goodyear received on the rubber shoes was adjusted in reference to the use of his product in the manufacture of that article, and he has been paid for nothing more.

Caleb Cushing and H. F. Durant, for respondents.

The substance of the defence is sufficiently indicated in the statement of the facts and pleadings.

CLIFFORD, Circuit Justice. Mere formal objections to the right of the complainants to maintain the suit will not be considered at the present time, for the reason that all those objections, even if well taken, may be obviated by additional proofs; and if it should appear that the complainants have a meritorious cause of action upon the merits, it would still be competent for the court to allow such proofs to be introduced. Two principal questions are presented on the merits, but in the view taken of the case it will only be necessary to examine one of them to determine the controversy. Assuming that the suit is well brought, and that the patent of the first-named complainant is for the product, as well as for the process of manufacturing it, still the respondents insist that they do not infringe the rights of the complainants; because, as they contend, they do not use that process in the manufacture of their goods, and inasmuch as they purchase the product in the market either from the patentee or his licensees, or those rightfully owning and possessing it under them, they have the right to use it as they please for any lawful purpose. In the second place, they insist that the process used by them has the effect to devulcanize the material which they use in the manufacture of their goods, depriving it of all the peculiar qualities

and properties imparted to it by the process of the first-named complainant, and that the goods which they manufacture and sell are not vulcanized India-rubber goods, within the intent and meaning of the complainants' patent. By the pleadings and evidence it conclusively appears, that the respondents purchase the old worn-out shoes made and sold in the market by the first-named complainant, or his assignees, and use that material for the manufacture of their goods. Their process of preparing and using the material is stated by several witnesses of great experience and intelligence substantially as follows. They purchase the shoes made of vulcanized India-rubber, according to the process of the first-named complainant, grind it between steam-heated rollers into a coarse powder, then put the powder into what are called "reclaimers," exposing it to a high degree of steam, say from seventy to one hundred and fifty pounds' pressure to the inch. When the mixture comes from the reclaimers it is pasty and tenacious, and is then passed through steam-heated rollers, adding coal-tar, litharge, and resin with lampblack during the process of rolling. Those substances are incorporated with the material while the steamed rubber is passing the rollers, which effects a combination of the whole, and produces, as the witnesses say, a thick pasty sheet of modified rubber, fit and prepared to be laid on cloth. That sheet of modified rubber is then put into the calenders, where the cloth is passing over a steam-heated roller, thereby receiving a thin coating or sheet of the composition, which is pressed on smooth by the roller of the calender. To complete the process, the cloth is then dried in the sun, or in rooms heated to a low degree of heat, as stated in the answer. Without entering more into particulars, it will be sufficient to say that the evidence, in the judgment of this court, shows conclusively that the respondents do not use the process of the complainants. They do not use sulphur or its equivalent in any form, and their process of drying the goods is essentially different, and is accomplished by a much lower degree of heat. That proposition is sustained as well by the results attained by the process as by the means employed to produce those results. Complainant's process is designed and has the effect to bring the composition or material to the state in which it was when the shoes were made and sold in the market. Respondents purchase the material in that state, and their process is designed and has the effect to destroy the foreign material connected with the rubber, such as cotton or wool, and to partially melt and very much to soften the rubber as manufactured by the complainants, thereby modifying and changing its state; at least temporarily, so that it can be again used for a similar purpose. These considerations lead necessarily to the conclusion that the respondents do not use the process of the complainants; but the whole evidence shows that they do use the product produced by the process, and in point of fact that they cannot use any other. No doubt is entertained that the patent of the first-named complainant is for the product as well as for the process by which it is manufactured. Of itself the patent is sufficient prima facie evidence that the patentee was the original and first inventor of the thing patented, and that the same was new and useful; from which it follows that the burden of proof lies on the respondents to show a prior invention, or to disprove its novelty and usefulness. They have not exhibited any such proof, and consequently cannot prevail on that ground. Assuming that their process does not produce a new product, they are therefore without defence in this suit; unless, under the circumstances of the case, they have a right to use the product manufactured by the complainants. That question is one of considerable importance, and certainly is not unattended with difficulty in its solution. Inventors, as in this case, have not only the exclusive right to manufacture the product according to their process, but they also have the exclusive right to use and sell the manufactured article. Those privileges constitute the rights secured to them by their letters-patent. Another person consequently cannot make vulcanized India-rubber for the purpose of manufacturing shoes and selling the manufactured article without the grant or license of the patentee or his assigns. Patentees may grant an interest in the patent, or they may license another to manufacture the product produced by their process, and authorize him to sell the same in the market. Whether the inventor in any given case has a patent for the article manufactured, or only for the product or the material of which it is composed, the unconditional sale of the manufactured article carries with it the absolute dominion over the material as well as over the manufactured article. Having manufactured the material and sold it for a satisfactory compensation, whether as material or in the form of a manufactured article, the patentee, so far as that quantity of the product of his invention is concerned, has enjoyed all the rights secured to him by his letters-patent; and the manufactured article, and the material of which it is composed, go to the purchaser for a valuable consideration, discharged of all the rights of the patentee previously attached to it, or impressed upon it, by the act of congress under which the patent was granted. Few decided cases are to be found bearing on this question, and none perhaps where it has been directly determined. Those which come nearest to the point in the federal courts are Bloomer v. McQuewan, 14 How. [55 U. S.] 549, and Wilson v. Rosseau, 4 How. [45 U. S.] 646, which very clearly and satisfactorily recognize the true distinction between the grant of the right to make and vend a patented machine, and the grant of the right to use it. In the case first named, Taney, Ch. J., says the franchise which the patent grants consists altogether in the right to exclude every

one from making, using, or vending the thing patented without the permission of the patentee, adding in effect that this right of excluding others from exercising those privileges is all he obtains by the patent. When the patentee sells the exclusive privilege of making and vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a share in the monopoly which is derived from, and exercised under, the protection of the United States. Unless otherwise provided in the contract, the interest which the purchaser thus acquires terminates at the time limited for the continuance of the patent; and if holding merely as an assignee, he has no just claim to share in a further monopoly subsequently acquired by the patentee. But the purchaser of the machine or implement, for the purpose of using it in the ordinary pursuits of life, stands on a different ground. In using it he exercises no rights created by the act of congress, nor does he derive title to it by virtue of the franchise or exclusive privilege granted to the patentee. Whether the inventor had a patent or not, he might lawfully sell it to him, if no other patentee stood in the way. Accordingly, it has been repeatedly held by the supreme court, that a party who had purchased a patented machine, and was in the use of it during the original term of the patent, might continue to use the machine during the extended term. Bloomer v. McQuewan, 14 How. [55 U. S.] 549; Wilson v. Rosseau, 4 How. [45 U. S.] 646. That rule, as was held in Chaffee v. Boston Belting Co. [22 How. (63 U. S.) 217], decided at the last term of the supreme court, rests upon the doctrine as stated in the preceding case, that the purchaser, in using the machine under such circumstances, exercises no rights created by the patent act, nor does he derive title to it by virtue of the franchise or exclusive privileges granted to the patentee. Both of those cases affirm the rule, that when the patented machine rightfully passes to the hands of the purchaser, from the patentee, or from any other person by him authorized to convey it, the machine is no longer within the limits of the monopoly. By virtue of the contract of sale, and the unconditional delivery of the manufactured article, it passes outside of the monopoly, and is no longer under the peculiar protection granted to patented rights. Whenever a valid sale of the patented article is thus made, it then becomes the private property of the purchaser, and is no longer protected by the laws of the United States, but by the laws of the state in which it is situated. From this rule, which is believed to be a sound one, it follows that, if a purchaser acquires an absolute, unconditional title to that which is the subject of a patent, he may continue to use it until it is worn out, or he may repair it or improve upon it as he pleases, in the same manner as if dealing with any other kind of property. Suppose it to be an implement or machine, he may devise it or sell it, and if it be composed of various parts he may break it up and use the materials for any other lawful purpose. Second purchasers acquire the same rights as the seller had, and may do with the article or its materials whatever the first purchaser could have lawfully done if he had not parted with the title. Some attempt was made at the argument to distinguish this case, and take it out of the operation of this general rule, on the ground that the patentee had never granted to any one the right to use his process to manufacture the patented product and sell it in the market, without restricting and specifying the object to which it was to be applied. To one he granted the right to use the process for the purpose of making shoes, and to another the exclusive right to use it for the purpose of making clothing. Neither had the right to use the process for the purpose granted to the other; and the argument proceeds upon the ground that the purchaser of the manufactured article in either case cannot apply the material of which the manufactured article is composed to any object or purpose other than the one to which the manufacturer and original seller was authorized to apply it. Beyond question, the grantee, assignee, or licensee of the right to make and vend the patented product is bound by his contract and cannot exceed it. His contract, however, in the case under consideration, fully authorized him to manufacture the material of which the shoes are composed, and to sell the shoes in the market. When he sold the shoes and received the consideration for the sale, the royalty for that quantity of the manufactured product was paid, and so much of the product went to the purchaser discharged of the peculiar privileges secured by the patent. Absolute dominion over the material of which the shoes are manufactured passes to the purchaser when the sale is made, and he is not obliged to keep them as waste articles, or throw them away when they cease to be of value as shoes, but may use the material for any other lawful purpose to which it can be applied. As bona fide purchasers of the shoes, therefore, the respondents may use the material of which they are composed to make clothing or any other article not itself protected by a patent. Having come to this conclusion, it is unnecessary to consider the remaining proposition assumed by the respondents. The bill of complaint is therefore dismissed with costs.

[For other cases involving this patent, see note to Goodyear v. Central R. Co., Case No. 5,563.]

Case No. 5,558.

GOODYEAR v. BISHOP et al.

[4 Blatchf. 438; 2 Fish. Pat. Cas. 96.] [1]

Circuit Court, S. D. New York. Aug. 17, 1860.

PATENTS—INFRINGEMENT — SUIT FOR BENEFIT OF EXCLUSIVE LICENSEE—INDEMNITY AGAINST COSTS—NOMINAL PLAINTIFF.

1. Where an action at law for the infringement of letters patent is brought in the name of the holder of the legal title to the patent, but for the benefit of a party who is an exclusive licensee, under the patent, of the right to make a particular article, the suit will not be discontinued on the application of the defendant and the consent of the nominal plaintiff.

[Cited in Nelson v. McMann, Case No. 10,109; Brush-Swan Electric Light Co. v. Thomson-Houston Electric Co., 48 Fed. 226; Brush Electric Co. v. Electric Imp. Co. of San José, 49 Fed. 74; Same v. California Electric Light Co., 3 C. C. A. 368, 52 Fed. 961.]

[Cited in Jackson v. Allen, 120 Mass. 77.]

2. The nominal plaintiff may claim indemnity against costs, and the court, on a proper application, will provide for it.

This was a motion by the defendants [James Bishop and others], founded on the consent of the nominal plaintiff [Charles Goodyear], to have an order entered discontinuing this suit, which was an action at law for the infringement of letters patent [No. 3,633] granted to the plaintiff [June 15, 1844, and reissued (No. 156), December 25, 1849], for improvements in the manufacture of India-rubber.

George C. Goddard, Francis B. Cutting, and William Curtis Noyes, for plaintiff.

James T. Brady and George Gifford, for defendants.

NELSON, Circuit Justice. The motion is resisted on the ground that the suit is brought in the plaintiff's name for the benefit of his licensees, the Union India-Rubber Company. This company is the owner of an exclusive right to the patent of Goodyear for making wearing apparel out of vulcanized India-rubber. A suit at law to protect this right, is properly brought in the name of the patentee. See Goodyear v. McBurney [Case No. 5,574]. In that case, the defendants set up a release of Goodyear, and the court permitted the parties in interest to answer the release by showing their interest, and notice of the same to the defendants before the release. The principle there held governs this case.

Whether the interest of the licensees is technically an assignment at common law, or by the patent act [of 1836 (5 Stat. 117)], we hold it not important in the application of the principle. It is sufficient they possess such a right under the patentee as entitles them to the protection sought, and of that there can be no doubt. We agree that the nominal plaintiff may claim indemnity against costs, which, on a proper application, would be provided for by the court.

It is said that Goodyear, or those representing him, has stipulated to sue infringers, and that the remedy of the licensees is on this covenant. But, if so, the stipulation does not necessarily take from the party his remedy which the law has provided for him by proceeding directly against the wrong doer.

The motion is denied, with costs. Let this rule be entered nunc pro tunc, as of November 7, 1859, Goodyear having died since motion.

[Subsequently, on the trial, the jury found a verdict for the plaintiff. Case No. 5,559.

[For other cases involving this patent, see note to Goodyear v. Central R. Co., Case No. 5,563.]

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

Case No. 5,559.

GOODYEAR et al. v. BISHOP et al.

[2 Fish. Pat. Cas. 154.] [1]

Circuit Court, S. D. New York. Jan., 1861.

PATENTS—INFRINGEMENT—DAMAGES—LICENSE RATE.

1. In order to find actual damages, the jury must find, in the evidence, the facts or data from which such actual damages are to be deduced.

2. If the patentee of a machine or other article uniformly sells a license to make or use the thing patented at a given rate, such license fee would constitute the actual damage of the patentee in an action for infringement.

[Cited in Emerson v. Simm, Case No. 4,443; Goodyear Dental Vulcanite Co. v. Van Antwerp, Id. 5,600.]

3. But if there is no such fixed and uniform fee, it is proper for the jury to inquire how many customers were diverted from the plaintiff to the defendant; whether the plaintiff was prepared to supply the market, and was prevented by the defendant; in short, whether, by the competition of the defendant, the plaintiff was limited, hindered, checked, or interfered with in his business, or otherwise actually damaged, in a sum equal to the profits which he could have made if he had made and sold the goods made and sold by the defendant, over and above what he (the plaintiff) did in fact make and sell.

4. In answer to the claim of the defendant, that he has made but a small sum, it is proper to consider that the whole expense of commencing and closing out the business is included in the time covered by the suit, and that such expenses are not properly chargeable to the patent.

This was an action on the case tried before Judge SHIPMAN and a jury, to recover damages for the infringement of letters patent [No. 3,633] granted to Charles Goodyear June 15, 1844, and reissued [No. 156] December 25, 1849, for "improvement in processes for the manufacture of India rubber." So much of this invention as covered the right to manufacture wearing apparel for men and boys, of rubber cloth, was conveyed, by license, to Jonathan Trotter for $10,000,

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

and a royalty of five cents per square yard. Trotter transferred this license to the Union Rubber Company, the parties in interest,—see Goodyear v. Bishop [Case No. 5,558],—for $25,000. In February, 1853, the defendants who had been connected with the Union Rubber Company as stockholders or otherwise, began the manufacture of articles covered by the license, and continued such manufacture for five months. The plaintiffs [Charles Goodyear, executor, and others] insisted that, if they had made the goods manufactured by defendants, they would have made a profit of nearly $30,000, and this was claimed as their measure of damages. The defendants [James Bishop, Galvin F. Spear, Nicholas Williamson, and James B. Laing] insisted that, although the nominal profits appeared to be large, yet that, in fact, they had netted only $473, and could only be liable, at most, for that sum. Infringement was not denied.

G. C. Goddard, F. B. Cutting, and W. Curtis Noyes, for plaintiffs.

J. C. T. Smidt, James T. Brady, and George Gifford, for defendants.

SHIPMAN, District Judge (charging jury). This action is brought to recover damages for the infringement by the defendants of the rights of the plaintiffs, alleged to be secured to them by an exclusive license from Goodyear, the patentee, to manufacture clothing or wearing apparel for men and boys, under what is known as the Goodyear patent.

The commencement of these acts of infringement may be safely assumed, on the evidence, to have been on February 1, 1853, and the manufacture of the articles in some stages was continued until July 1, 1853, a period of five months.

The premises on which this manufacture was carried on were situated in Naugatuck, Connecticut, and were hired by the defendants, who did business under the name and style of the "National Rubber Company." The lessees of the defendants were the Naugatuck Company. On May 22, 1853, the Naugatuck Company, the original lessees of the defendants, conveyed their interest in the premises to the plaintiffs, subject, of course, to the rights of the defendants under their lease. On the last named day the plaintiffs took forcible possession of the premises, and, in the eye of the law, illegally ejected the defendants therefrom. For this forcible dispossession of the defendants the plaintiffs were liable to an action, and the defendants had a right, under the law, to be restored to the peaceable occupancy of the premises.

Although the plaintiffs had thus obtained possession of the factory, the property of the defendants was not removed from it, and, after the interruption of the business of the defendants for some day or two, both parties came to an understanding that the defendants should be permitted to remain until the 1st of July, when the latter were to surrender and vacate the premises.

At this point the defendants make an important claim, and insist to you, as matter of fact, that this understanding or agreement, which was then entered into, had a wider scope than merely to permit the defendants to continue to occupy the factory until the 1st of July—that it, in point of fact, authorized the defendants to do all the acts which they did after the 22d of May, for which the plaintiffs are now seeking to recover damages.

The defendants still further claim that this understanding not only authorized them to continue their manufacture so far as they did continue it from the 22d of May down to the 1st of July, but that it also discharged them from all claims of the plaintiffs for what they had manufactured prior to that time.

It would follow, if this claim of the defendants were sustained by the evidence to your satisfaction, that the plaintiffs could not recover in this action, for, in that case, all the acts complained of in the plaintiffs' declaration, after the 22d of May, must have been done under the license of the plaintiffs, and all those before that time have been legally discharged.

On this point, gentlemen, under the instructions I shall submit to you, you will have no trouble. As I view the case, the only evidence for you to consider as to what this arrangement between the parties was, is to be found in the written memorandum signed by C. F. Spear and Williamson, two of the defendants, and dated the 25th day of May. The duty of construing this paper devolves on the court, and I charge you that it furnishes no discharge for the acts of the defendants prior to the 22d of May, and no excuse for their acts after that time, except what relate to their occupancy of the premises, and which the plaintiffs do not complain of. The whole question of damages, therefore, lies open for the entire time.

There is another question of fact which the counsel for the defendants urged upon your notice, but upon which my instructions will also relieve you from any responsibility.

The plaintiffs, as you will recollect, hold their title to the exclusive right to manufacture the articles in question under a license from Charles Goodyear.

The license came through Mr. Trotter, but that makes no difference. It is claimed that, by the terms of this license, Goodyear was bound to protect the plaintiffs against all infringements, including these wrongful acts of the defendants; that, in consequence of these infringements of the defendants, the plaintiffs withheld from Goodyear a large amount of tariffs which the plaintiffs would otherwise have been bound to pay to him for their right to manufacture under the li-

cense, and that this amount so withheld from Goodyear was ultimately applied in extinguishment or satisfaction of the very damages the plaintiffs are seeking to recover in this action.

On this point, the defendants insist that it appears from the testimony of Henry B. Goodyear that some $75,000 were thus withheld by the plaintiffs, although I do not recollect that he states that it was ever applied in satisfaction of the damages claimed in this suit.

But it appears, from other evidence in this case, that Charles Goodyear, the patentee, assigned all his interest in these tariffs to William Judson, and that, by virtue of that assignment and the powers conferred upon him by Goodyear, he had authority to settle with the Union Rubber Company (the plaintiffs) and adjust the matter in controversy between them and Goodyear.

The plaintiffs aver that Judson did settle with them, and adjust their differences with Goodyear; but that their claim against these defendants for damages for infringing the rights secured to them by their license, and which they are now seeking to recover, formed no part of that settlement. In proof of this they have offered in evidence the written agreement executed by Judson and themselves on February 25, 1858. It is the duty of the court to construe this instrument, and I charge you that it contains no evidence of any release by or payment to the plaintiffs of the damages resulting from the acts of the defendants complained of.

There is no other evidence in this case from which you can find such release or payment, unless it is to be found in the testimony of Mr. Henry B. Goodyear.

It follows, gentlemen, from the remarks I have already made, and from my views of the other legal questions in the case, that the plaintiffs are entitled to recover.

This brings us to a most important question, that of the amount of damages to which the plaintiffs are entitled; and here the duty rests mainly on you, and it is the most important part of the case.

The court can only submit to you the rule which you are to apply to the case, and some suggestions which may possibly aid you in its application. As to the rule, it will be your duty to give the plaintiffs such actual damages as they have proved to your satisfaction they have sustained at the hands of the defendants. And by actual damages I mean damages in fact, and not what is sometimes called in the law vindictive and exemplary damages. Sometimes a wrong or injury is done by a defendant under circumstances of wantonness or malice, and the law in such cases permits the jury to award to the plaintiff a sum over and above the pecuniary injury which he has received, and this additional amount is termed vindictive or exemplary damages. But that rule has no application to the present case.

You are then to give the actual damages which the plaintiffs have proved that they suffered.

Your difficulty in this case will be to determine from the proof what amount of actual damages the plaintiffs have suffered.

If you could adopt the simple theory of the defendants' counsel, which is to give the amount the defendants actually netted, which one witness stated was $473, your task would be easy. That sum, with interest at six per cent. from January 1, 1854, to to-day, would fix the amount of your verdict. So, too, if you could adopt the equally simple theory of the plaintiffs' counsel, which is, to take the sum which the plaintiffs' witnesses say they (the plaintiffs) could have realized in profit if they had made and sold the articles made and sold by the defendants. This sum they claim is about $27,000, which, with the interest at six per cent., would yield about the sum of $40,000. Both these positions show how easy it is to theorize, for they are very easy and simple; but their strikingly diverse results show us also that, in the practical business of doing justice between man and man, mere theories require to be applied, if applied at all, with some degree of caution, and with some scrutiny to see if the facts presented by the evidence support them. Now, gentlemen, I do not say to you that $27,000 was not the actual damages suffered by the plaintiffs. But I do charge you that although the plaintiffs might have made $27,000 profits if they had made and sold these goods which the defendants manufactured and sold, that is by no means conclusive evidence that $27,000 is the actual damages they are entitled to recover.

It is for you to say whether, from the evidence before you, you are satisfied that the plaintiffs would have made these goods and realized these large profits if the defendants had not made them, and that the defendants by their acts deprived them of what they would otherwise have gained. You are to examine the evidence, and say whether there is sufficient proof to satisfy you that any and how many customers were diverted from the plaintiffs to the defendants; whether the plaintiffs were prepared to supply, and were prevented from supplying the articles made by the defendants; in short, whether, by the competition of the defendants, the plaintiffs were limited, hindered, checked, or interfered with in their business, or otherwise actually damaged in this sum, equal to the profits which they could have made if they had made and sold the same goods made and sold by the defendants over and above what they (the plaintiffs) did in fact make and sell.

If you are satisfied that the plaintiffs were thus actually damaged, then you will find your verdict accordingly; but, before you come to such a result, you must find in the evidence the facts or data from which you deduce that result.

If the jury should come to the conclusion that the evidence warrants them in finding the actual damages to be what this theory of the plaintiffs would indicate, they will, of course, from the selling price, $107,520, deduct the costs of manufacture (including the tariff) stated by Trotter to be $54,124, and by Williamson to be $58,658 (and the jury must determine which is the correct sum), and also deduct from the selling price ten, twenty or thirty per cent., accordingly as they shall find from the evidence the rate proved to be, and, after these deductions, interest at the rate of six per cent. should be cast on and added to the balance from January 1, 1854, to today. This will give, as I make it, not very far from $40,000, if the discount is twenty per cent., and a less sum if thirty per cent.

But as I have already remarked, before the jury come to this result, they must be satisfied that the facts proved, warrant them in fixing this sum as the actual damages sustained by the plaintiffs.

And if the jury should not feel satisfied that the actual damage proved amounted to so large a sum, then they will search for the true sum which the evidence proves. This leads me to submit another aspect of the case, and I shall, of course, leave it for them to say whether or not it is on the whole the true one.

Suppose a patentee of a carriage or a machine, which could be easily built by any person who desired to use it, should license a large number of persons to build, each for his own use, a single one, and suppose this was the exclusive mode in which the patentee endeavored or desired to profit by his invention. The price of these licenses of course would be uniform for the same machine or article.

Now, suppose one man should build one without a license, and should be sued for an infringement, what would be the actual damage the patentee must sustain? Clearly, the price at which he uniformly sold his license. The infringer in that case desires the article—he obtains it wrongfully—and, in so doing, actually damages the patentee by depriving him of what rightfully belongs to him.

Now, I agree that the case before us is not exactly parallel to the one supposed—Goodyear was the patentee. This patent, among other rights, secured to him the exclusive privilege of making men's and boy's clothing of vulcanized rubber. The right to this exclusive privilege he sold by license to Trotter, and Trotter sold the same to the plaintiffs. The price of that license to Trotter was $10,000, and five cents on every square yard of rubber cloth made. Trotter sold to the plaintiffs for $25,000, the latter to pay the tariff of course. It would seem that this license was worth that tariff at least, as the defendants were willing, and anxious to manufacture and pay that tariff. The plaintiffs also made it a profitable business at that tariff. It may be fair to presume (and I leave it to the jury whether it is so or not) that these very defendants would have been glad to have bought a license of the plaintiffs at that rate. But the defendants wrongfully availed themselves of the business without payment to the plaintiffs, the exclusive owners of the privileges, and thereby deprived the latter of what was their just due.

It is for the jury to say whether here are not clearly, actual damages sustained by the plaintiffs. If so, the amount can be exactly determined without groping after a result among theories suspended upon "ifs." The number of yards manufactured by the defendants was 82,693½. Multiplying this number by the rate of the tariff per yard the precise result is easily obtained. But if the jury should be satisfied that this tariff furnishes evidence of what the value of this right, appropriated by the defendants, was, it does not follow that they must regard it as conclusive or as the exclusive evidence of that value.

They are at liberty to take into consideration the fact, if they find it proved, that this was a very profitable business. On this point, the evidence of the plaintiffs is explicit; and, although the defendants say they netted only a small sum on what they manufactured, it must be remembered that the whole expense of commencing a new establishment, and the disadvantage of closing the business, all had to come out of five months' production. It is, perhaps, more wonderful that they did not lose than that they made no more; and it is for the jury to say whether the fact that they did make even a small sum, is not evidence, under the circumstances, that the business was a very profitable one.

The jury may also consider, in this connection, the fact that in addition to the tariff of five cents upon the square yard, the bonus of $25,000 was paid by the plaintiffs for this license over and above the tariff, which constituted a part of the price of the license.

The jury can assume seventeen years as the period which the bonus may cover, as that term is the possible life of the license, and then give it such effect in enhancing the rate per cent. as they think it is entitled to.

If the jury should feel satisfied that this was a profitable business, and that a license to carry it on was worth more than the rate of tariff paid to Goodyear, they may add to the rate such per cent. as will, in their judgment, be warranted by the evidence, and will give, when the rate is multiplied by the whole number of yards manufactured, the actual damages sustained by the plaintiffs.

As I have stated to you, gentlemen, the tariff rate is five cents upon the square yard, and the number of square yards is 82,693½. In addition to that, I have also mentioned the fact that the witnesses for the plaintiffs testify that it was a very profitable business (but you are to judge of that evidence), and that the defendants made, under all their disadvantages, some profit.

In addition to that there is the bonus of $25,-

000, paid by the plaintiffs, for the use of this exclusive privilege, over and above the five cents upon the square yard. Of course, that is evidence, and appropriate evidence, for the jury to consider, in saying what the value of the rights of the plaintiffs was, of which the defendants deprived the plaintiffs and appropriated to themselves.

Of course, to whatever sum they find as the damage accrued at the time the manufacture ceased, July 1, 1853, they will add interest at six per cent. for eight years and a half a month. There is no evidence here when the tariffs were payable, and I take that as most favorable to the defendants. They will, in their verdict, distinguish between the principal sum they find and the interest, so that if there is any error, either in the time or computation, it can be corrected without a new trial.

The jury found a verdict for the plaintiffs, with $7,180.47 damages.

[For other cases involving this patent, see note to Goodyear v. Central R. Co., Case No. 5,563.]

Case No. 5,560.

GOODYEAR v. BLAKE.[1]

Circuit Court, D. California. June, 1869.

PATENTS—RENEWAL TO ADMINISTRATOR—PLEADING AND PROOF—CERTIFIED COPY OF ASSIGNMENTS—VALIDITY—DEDICATION.

[1. A renewal to a person as administrator is conclusive on the courts, in the trial of the validity of such renewal, that such person was administrator. Woodworth v. Hall, Case No. 18,016, followed.]

[2. By pleading to the merits, defendant admits the capacity of the corporation plaintiff to sue.]

[3. The accidental omission to make technical proof of an uncontroverted fact, such as corporate capacity to sue, may be supplied, in the discretion of the court.]

[4. The commissioner's certificate that the annexed "is a true copy," annexed to various assignments of a patent, attached so as to constitute one document, applies to all of such assignments.]

[5. Copies of assignments of a patent, duly certified, are prima facie evidence of the genuineness of the originals on file.]

[6. The validity of reissued letters patent, issued to the administrator of Nelson Goodyear for an improved process of preparing India rubber and other vulcanizable gums, reaffirmed, as is also the question of what constitutes an infringement.]

[7. The fact that, for a considerable period, dentists had no difficulty in obtaining the Goodyear rubber base for dental purposes, though having no license to use it, and that no suit was instituted in the state for infringement of the patents for many years, does not prove a dedication of the right to use it, where an agency to sell licenses was established in the state, and notice was given on the wrappers of all gum sold that none but licensed purchasers could use it for dental purposes, and that the owners of the patents were vigorously pressing a test case in the courts.]

This was a bill for an injunction and for an account of profits made by defendant by an alleged infringement of a patent. The original patent [No. 8,075] was granted to Nelson Goodyear, for an improvement in the manufacture of India rubber, on the 6th of May, 1851. On the 18th of May, 1858, this patent was surrendered by Henry B. Goodyear, administrator of Nelson Goodyear, and two reissues obtained, Nos. 556 and 557, one for the process and one for the product. These reissues were extended on the 5th May, 1865, for 7 years, from May 6th, 1865. Various technical objections were raised by the defendant. The validity of the reissues and the fact of infringement were also denied.

BY THE COURT. 1. It is objected that there is no proof of the death of Nelson Goodyear, and that the letters of administration are not produced. The same objection was made in the suit, under this patent, in the district court of the United States for the district of West Virginia, and overruled by the court. In Woodworth v. Hall [Case No. 18,016], the court says: "The next objection is that no letters of administration are now produced. But in the Kentucky case (Woodworth v. Wilson, 4 How. [45 U. S.] 712), this objection, among others, was urged, and the court did not sustain it, because the patent being renewed to the plaintiff, as administrator, was proof that he had satisfied the board at the patent office, of the fact of his being administrator, and it was not competent to go behind their decision in respect to it." This authority is decisive of the point.

2. It is objected that no proof is offered of the corporate existence of the Goodyear Dental Vulcanite Company. (1) The objection should have been taken by plea. "It is to be considered that this was a trial upon the merits, and, by pleading to the merits, the defendants, necessarily, admitted the capacity of the plaintiffs to sue." Conrad v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 450. See, too [Smith v. Kernochen] 7 How. [48 U. S.] 198; [Livingston v. Story] 11 Pet. [36 U. S.] 393; [Louisville, C. & C. R. Co. v. Letson] 2 How. [43 U. S.] 497. (2) The certificate of incorporation has been produced since the hearing, and an application made to reopen the case for the admission of the evidence. The application is addressed to the discretion of the court. I can perceive no reason why an accidental omission to make technical proof of an uncontroverted fact should not, in a case like this, be supplied. (3) Even if the corporation be treated as non-existent, the only effect will be to leave the whole title in the other complainants, whose right to sue is established.

3. It is objected that the certificate attached to the copies of the mesne conveyances is insufficient, and that no proof of the execution of the originals is offered. Section 4 of the act of July 4, 1836 [5 Stat. 117], provides "That copies of any records, books, &c., belonging to said office (the patent of-

[1] [Not previously reported.]

fice), under the signature of the said commissioner, with the said seal affixed, shall be competent evidence in all cases in which the original records, books, &c., could be evidence." Brightly, Dig. 722. The various assignments in this case have been attached together so as to form one document, and to this is annexed a certificate of the acting commissioner of patents, under the seal of his office, that "the annexed is a true copy from the records of this office." It is argued that the use of the singular restricts the application of the certificate to the first agreement contained in the document. I see no reason for such a construction. The commissioner has treated all the papers, when attached together, as constituting one document. If any of the originals of the papers thus bound together is not of record, or is not correctly copied, the certificate is untrue. The certificate imports verity, and is prima facie evidence of the genuineness of the originals, and absolute evidence of the correctness of the copies. The objection that the original assignments were not proved was taken in Parker v. Haworth [Case No. 10,738], and overruled. Copies duly certified were held to be prima facie evidence of the genuineness of the originals on file in the office. The foregoing are all the technical objections presented at the hearing.

The defendant further insists that the reissues are invalid, that there has been no infringement, and that the rights under the patent have been abandoned and dedicated to the public. The invention patented is for an improved process of preparing India rubber and other vulcanizable gums, whereby a new substance is produced, distinct in character, and used for wholly different purposes from that produced by the invention of Charles Goodyear. The reissues were for the process or method, and for the product or result. The validity of these reissues has been before the courts in numerous cases. I do not feel called upon to enter into a detailed examination of the various objections urged to them. It has repeatedly been held that the reissue patents were for substantially the same invention as that covered by the first patent to Nelson Goodyear; that the original patent was properly surrendered in order to amend the claim that the reissue of two patents, one for the process and the other for the product, was unobjectionable; that the specifications were in all respects sufficient, and that the reissues are not for an invention broader than that claimed, or which, by a fair construction, can be included in the original patent. I have carefully perused the numerous decisions, certified copies of which have been furnished to the court, and I yield to their authority, and agree to their conclusions. The question of infringement is equally well settled by the authority of the numerous courts to which cases under these patents have been submitted.

The invention consists in combining a specified quantity of sulphur, from 25 per cent. to 50 per cent., with India rubber, and by subjecting the compounds to a specified heat, obtaining thereby a new product of great and varied utility. The patents, as has been observed, are for the process, and for the product as obtained by the process. It will be observed that the process consists of two parts,—first, the combination of the sulphur and gum in the requisite proportions; and, secondly, the subjecting of the compound to heat. It is the latter part of the process which imparts to the compound its valuable properties. The gum is combined with the sulphur by persons who devote themselves to that branch of the manufacture. It is, at this stage, plastic and soft, and easily moulded into any form. In this condition it is bought by dentists, and when moulded into the required form it is baked, and the hardness, durability, elasticity, and its other valuable qualities, imparted to it. It is admitted in this case that the defendant has purchased the plastic gum combined with sulphur, as specified in the patent, and converted it, by heating, into the vulcanite or product specified in the patent No. 557. This he claims is no infringement of either patent. But, assuming both patents to be valid, the infringement is clear. He has produced the product patented by the use of the process patented. It is true that he has not himself conducted the whole operation; but he has used the most important part of it, and that which, by producing the new substance, alone gives value to the previous parts of the process. If, in a process, consisting of two distinct parts or operations, not necessarily continuous, one person could conduct the first, and, turning over the half-completed article to another, the latter could perform the second part, and produce a result which is also patented, without liability on the part of either to the owner of both the process and the product, the protection of the latter would be gone. But the point, as before observed, is settled by authorities too numerous to be questioned. In Wait's Case, and in several others, the infringement charged was substantially, if not literally, identical with that charged in the bill before this court, viz.: the making and using of the hard rubber in the manufacture of plates for artificial teeth. In all these cases it was held to be an infringement. See opinions of Leavitt, J., in the United States circuit court for the Southern district of Ohio, in Goodyear v. Berry [Case No. 5,556]; of Nelson, J., in Goodyear v. Wait [Id. 5,587]; of Nelson, J., in Goodyear v. New York Gutta-Percha, etc., Co. [Id. 5,580]; of Jackson, J., in Goodyear v. Hullihen [Id. 5,573].

The remaining ground of defence is the alleged abandonment and dedication to the public of their rights by the owners of the patent. It is not alleged on the part of the defendant that by reason of any dealing

with him by the complainants, or sales by them to him of rubber, they have licensed him to use the invention. In such cases, and in analogous ones under the copyright law, the court will refuse to interfere summarily by injunction, and leave the parties to their action at law. Rundell v. Murray, Jac. 311; Saunders v. Smith, 3 Mylne & C. 721. The defendant claims through the public, and he must maintain his case, if at all, through a dedication. In the able argument of Mr. Blake in Goodyear v. Wait [supra], it was strenuously urged, in opposition to the dictum of Mr. Justice Story in Wyeth v. Stone [Case No. 18,107], that there could be no dedication to the public of a patent right; that a patent right is as much the right of the patentee as the furniture of his house, or the stock on his farm; and that there was no such mode of alienating this right known to the law as the dedication of a patent to the public. The court, however, declined to pass upon the question, being of opinion that upon the proofs no dedication could in point of fact be maintained. The doctrine of dedication has been pronounced an odious doctrine, to be proved only by the most conclusive evidence. The evidence offered in this case is to the effect that no suit has until the present one been instituted in this state. That, for a considerable period, dentists have had no difficulty in obtaining all the rubber base they require, and this without having previously procured a license. But it appears that some eight or nine years ago an agency for the sale of licenses was established in this state, and that they were procured by several dentists. That the rubber was sold in boxes made by the American Hard Rubber Company, and containing a notice that no one, not licensed, could use the gum for dental purposes. That some of the gum was obtained from Roberts in 1860, but the purchaser was, a short time afterwards, informed that the company claimed that he was infringing. That circulars and notices of legal proceedings, contained in dental journals, were seen by most of the dentists, and that it was known, since the renewal of the patent, that the company was pressing its claims by suits, issuing licenses, etc. That from 1861, to 1864 McDonald & Co., druggists, in Sacramento, were agents of the company, and, during that time, sold only to licensed purchasers, but in June, 1864, finding that non-licensed persons had no difficulty in procuring the gum, and having informed the company of this fact, they were told by the latter that the patent was about to expire; that it was doubtful whether a renewal could be obtained; and that, in the meantime, McDonald & Co. might use their discretion with respect to selling to unlicensed purchasers, but that if the patent was renewed vigorous measures would be taken to protect their licenses. No formal proofs were offered in support of the allegations of the bill in respect to the numerous suits commenced to enforce the rights of the complainants, the injunctions obtained by them, etc., etc. But copies of various opinions (in some cases duly certified by the clerk) of courts, in which these actions have been brought, have been handed to the court, it is presumed, rather as authority on the question raised, than as proofs in the case. In no instance, as appears by these opinions, has the defence of dedication received any countenance from the courts. In the present case the proofs, on the part of the defendant, wholly fail to raise even a presumption that the owners of the patent, for a moment, intended to abandon their valuable right of property to the public. The remoteness of California, and their desire to wait until a final and authoritative decision of all the points involved could be obtained in the sharply contested case of Goodyear v. Waite [supra],—decided in 1867,—may have occasioned some delay in the commencing of suits in this state, but, beyond this circumstance, I find nothing from which it can be inferred that the owners of this patent have abandoned their rights. The complainants are therefore entitled to the relief prayed for.

[For other cases involving these patents, see note to Goodyear v. Mullee, Case No. 5,577.]

Case No. 5,561.

GOODYEAR v. BOURN et al.

[3 Blatchf. 266.] [1]

Circuit Court, S. D. New York. May 4, 1855.

PATENTS—BILL FOR INJUNCTION—PLEADING—AMENDMENT.

1. A., a patentee, filed a bill against B. for infringement of his patent, and prayed an injunction, which was granted. A. afterwards moved for leave to amend his bill by adding C. as a plaintiff, and by averring that, under an agreement between A. and C., still in force, C. was the owner of the exclusive right, under the patent, to make and sell the articles as to which B. had infringed, and that B. had notice of the agreement before he infringed: *Held*, that the amendments could not be allowed, and that they would amount, in effect, to the institution of a new and materially different suit, both as to plaintiffs and rights of action.

[Cited in Land Co. of New Mexico v. Elkins, 20 Fed. 546.]

2. It appearing, by the answer, supported by affidavits, that the articles made by B. were made under license from A.; *held*, that the injunction must be dissolved.

This was a bill in equity, filed by the plaintiff [Charles Goodyear] against George O. Bourn and William W. Brown, of Providence, Rhode Island, and John Griswold and two others, of New York. The bill was founded on letters patent [No. 3,633] granted to the plaintiff June 15th, 1844, and reissued to him December 25th 1849 [No. 156], commonly known as the "vulcanizing patent," for vulcanizing India rubber. The bill

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

averred that Bourn and Brown, since the reissue, had made and sold India rubber shoes, vulcanized according to the patent, without license, and had then recently packed up in boxes 28,000 pairs of such shoes, and employed the other three defendants to ship them to Europe, to be sold there; that the shoes were then in New York, under the control of the other three defendants, and about to be sent to Europe for sale; that the licensees of the plaintiff were in the habit of sending large quantities of vulcanized India rubber shoes to Europe for sale, and of paying the plaintiff a tariff on them; that the sale of the shoes in question would injure the plaintiff and his licensees; and that Bourn and Brown were unable to respond in damages. The bill prayed for an injunction to restrain the defendants from making, using, or selling any articles in violation of the patent, and from sending to Europe or elsewhere, any shoes made in violation of the patent. On an application made to Mr. Justice Nelson, at chambers, on notice to the defendants, but without any appearance by them, an order was made directing an injunction to restrain the defendants from making, using or selling any articles of India rubber, vulcanized according to the patent; and directing a further injunction to restrain them from selling or disposing of the shoes in question, unless the defendants should give their bond, with surety to be approved by the clerk as to amount and sufficiency, conditioned that, in the event of the sale or disposition of any of the shoes, the defendants would, if so ordered, account to the plaintiff for the damages sustained by him thereby. The injunction was issued. The plaintiff now moved for leave to amend the bill by adding, as plaintiffs, four foreign corporations, two of Connecticut and two of New Jersey, and by adding averments to the effect that, under an agreement made in July, 1848, between the plaintiff and those corporations, which was recorded in the patent office in August, 1848, and which was still in force, they were the owners of the exclusive right to make and sell India rubber shoes under the patent; that Bourn and Brown had notice of such agreement before they infringed the patent; and that those corporations were now in the enjoyment of the rights they acquired by that agreement. The plaintiff asked that the amendments might be made without prejudice to the injunction, and that the injunction might be continued. The defendants moved, at the same time, on an answer and affidavits, for a dissolution of the injunction.

James T. Brady, for plaintiff.
Nathaniel Richardson, for defendants.

NELSON, Circuit Justice. 1. The amendments asked for cannot be allowed. They would, in effect, amount to the institution of a new suit against the defendants, materially different from the present one, both as to plaintiffs and rights of action. This exceeds the province of amendment, as was held by the supreme court of the United States at the last term. Shields v. Barrow, 17 How. [58 U. S.] 130.

2. The injunction heretofore issued must be dissolved, as the answer, supported by affidavits, shows that the shoes in question were made under a license from the plaintiff. The motion, also, for a further injunction must be denied, for the same reasons.

[See Case No. 5,564.

[For other cases involving this patent, see note to Goodyear v. Central R. Co., Case No. 5,563.]

Case No. 5,562.

GOODYEAR et al. v. CARY et al.

[4 Blatchf. 271; 1 Fish. Pat. Cas. 424.] [1]

Circuit Court, S. D. New York. Feb. 18, 1859.

PATENTS — CONSTRUCTION — "SHIRRED OR CORRUGATED GOODS" — EVIDENCE — ACTS AND ADMISSIONS OF THE PARTIES — TRANSFER OF EXCLUSIVE RIGHTS — "RENEWALS."

1. The meaning of the terms "shirred or corrugated goods," as used in certain agreements made between Charles Goodyear and Horace H. Day, in 1846, defined.

2. Where certain terms are used in a grant, which have a well-known general meaning, such meaning must, in the interpretation of such grant, be given to the terms used, unless it appears that some other or different meaning was intended by them.

3. If such general meaning appears clearly from the grant itself, extraneous evidence will not be resorted to.

4. It is not to be presumed that a grantor intends to grant more than he has a right to grant, or that a grantee intends to receive, by way of grant, that to which he has a full right without a grant.

5. In giving an interpretation to a particular clause of a deed, every part of the deed must be looked to.

[Cited in Straat v. Uhrig, 56 Mo. 482; Mayor of New York v. Starin, 106 N. Y. 19, 12 N. E. 631.]

6. Acts and admissions of the parties to a deed, subsequently to its execution, are legitimate evidence to show what they then admitted to be the meaning of certain terms used in the deed, in order to ascertain the meaning of those terms, when those terms are ambiguous.

7. A patentee, by an agreement executed by him, July 18th, 1844, transferred the exclusive right, under his patent, for the unexpired terms of all "patents or renewals of patents owned by him, or in which he may have an interest, issued or to be issued:" *Held*, that the term "renewal" carried the right to extensions of such patents, including extensions of patents issued to him.

8. The case of Wilson v. Rousseau, 4 How. [45 U. S.] 646, commented on and explained.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 4 Blatchf. 271, and the statement is from 1 Fish. Pat. Cas. 424.]

In equity. This was a motion for a provisional injunction to restrain the defendants [William H. Cary and others] from infringing upon letters patent [No. 3,633] for "improvements in the manufacture of India-rubber" granted to Charles Goodyear June 15, 1844, reissued December 25, 1849 [No. 156], and extended for seven years from June 15, 1858, in so far as said letters patent covered the manufacture of shirred, corrugated or elastic rubber goods, the exclusive right of making and vending which, it was insisted by complainants Day and Hay, had been granted to them, by Charles Goodyear, by a number of conveyances and agreements which had been made between themselves and Goodyear. In the first of these, dated October 29, 1846, Goodyear, after reciting his patents of June 15, 1844, March 9, 1844, and February 24, 1839, covenants, among other things, as follows: "First, That he, the said Charles Goodyear, hath granted, bargained, sold, assigned, transferred, and set over, and doth hereby grant, bargain, sell, assign, transfer, and set over to the said Horace H. Day, his executors, administrators, and assigns: (1) The full, absolute, and exclusive right, license and privilege, to make, use and vend shirred or corrugated goods, to use in the manufacture thereof all or any of the machinery or improvements mentioned and described in and secured by all or any of said letters patent, and also to use, in the manufacture of such shirred or corrugated goods, all or any of the compounds, fabrics or ingredients, and methods of preparing such compounds, fabrics, or ingredients, mentioned or described in and claimed by said letters patent, for and during the unexpired term of said letters patent above enumerated, and of all renewals or extensions of the same."

A subsequent agreement, dated December 5, 1846, was, in full, as follows:

"Whereas, I, Charles Goodyear, of New Haven, in the state of Connecticut, am the holder and owner of four several letters patent granted by the United States of America, to wit: One bearing date of February 24, 1839, two bearing date of March 9, 1844, and one bearing date of June 15, 1844, and possess the sole and exclusive right to the same as far as relates to the use of all or any of the patented articles in the preparing and manufacturing shirred or corrugated goods, except three several licenses for the same, which are simultaneously herewith to be assigned to Horace H. Day, hereinafter named, to be cancelled; and whereas, I have agreed to assign to said Horace H. Day, of Jersey City, the sole and exclusive right to make, vend, and sell to others to be used, shirred or corrugated goods: Now this indenture witnesseth, that for and in consideration of the sum of five thousand dollars, to me in hand paid by the said Horace H. Day, the receipt whereof is hereby acknowledged, and the said Day forever released from the same; and in consideration of the conditions hereinafter contained, by said Day to be performed, I have assigned, sold, and set over, and do hereby assign, sell and set over, to the said Horace H. Day, his executors, administrators, and assigns, the sole and exclusive right, license, and privilege, for the whole of the United States, to use the machinery in said above recited patents described, and to make and vend the shirred or corrugated goods in said patents mentioned, and to use in the preparation thereof, and also in the preparation and manufacture of India-rubber hose, patent boats, Griffith's patent cotton-floaters, and Day's patent chairs and settees, the compounds and fabrics in said letters patent described, for and during the term of said letters patent, and of all renewals and extensions thereof. And the said Charles Goodyear does in like manner, and for the consideration aforesaid, give and grant to the said Horace H. Day, the full and exclusive right, license, and privilege, to use in the manufacture of such shirred or corrugated goods, all improvements in the composition or fabrics or machinery aforesaid, or new compositions, fabrics, or machinery made or to be made by said Goodyear, or for which said Goodyear now holds patents, or may obtain or hold patents, by grant, purchase or otherwise, for and during and until the expiration of the patents, an exclusive right whereunder is above assigned, and of all renewals and extensions thereof. And the said Horace H. Day, in consideration of the premises, promises and agrees to and with said Charles Goodyear, to pay him a tariff or duty of three cents per square yard on all shirred or corrugated goods that may be made by him, and also to stamp every article made by him under this license with the name of said Goodyear, and the dates of his patents, according to law. In witness whereof, the said parties to these presents have hereunto set their hands and seals, this fifth day of December, one thousand eight hundred and forty-six. Charles Goodyear. (L. S.) Horace H. Day. (L. S.)

"Sealed and delivered in the presence of James Bishop. Edgar S. Van Winkle."

And on May 24, 1858, after the reissue, Goodyear executed the following conveyance:

"In consideration of the sum of one dollar and other valuable considerations received and to be received by me from Horace H. Day, as hereinafter provided, I hereby sell, license, and convey, and do hereby agree to confirm the same within three months from the 15th day of June next, by such further full and proper deed of conveyance as he may deem necessary, the full, absolute, and exclusive license, right, and privilege to make, use, and vend my invention of vulcanized rubber, as described and patented in the reissued patent granted to me on December 25, A. D. 1849, for the present and all extended or renewed terms of said patent, as the same may or can be used in the manu-

facture of all braided, woven, cemented, or sewed fabrics, or such as are or can be covered or protected on one or both sides with substances other than rubber, and in all smooth, elastic, shirred goods; and also to make and sell India-rubber threads of vulcanized rubber, and all threads or sheets of rubber which are or can be made or finished by union with or to be covered by fibrous substances. And I hereby authorize and empower the said Day to use my name to prosecute and defend the rights and privileges hereby granted, provided the same be done without expense to me; and the instrument confirming this conveyance shall contain a proper and sufficient power of attorney for such purpose. And the terms and conditions upon which this license shall be held and enjoyed, as to bonuses, not exceeding in the whole the sum of thirty thousand dollars, and the tariffs not exceeding five cents a pound on the product, shall be fixed and determined by Nathaniel Hayward and Thomas A. Jenckes, whose award in the premises shall be final, and shall be made within three months from the 15th day of June next. And to the faithful performance of all the covenants and agreements aforesaid, I hereby bind myself and my legal representatives. In testimony whereof, I have hereunto set my hand and seal this the twenty-fourth day of May, A. D. 1858. Charles Goodyear. (L. S.)

"Signed, sealed and delivered in presence of Gilbert Sweet. Fred'k C. Wagner."

Letters patent [No. 3,461] had been granted to Charles Goodyear March 9, 1844, for a new and useful manufacture of India-rubber goods, called by him "corrugated or shirred India-rubber goods." The patent of June 15, 1844, was for a particular preparation of India-rubber known as "vulcanized rubber," which might be applied to India-rubber goods of every description. If the right to use this preparation of rubber, in the grant from Goodyear to complainants, was limited to goods manufactured under the patent of March 9, 1844, there was no infringement. But if the terms "shirred or corrugated goods," in these grants included, as well, elastic or woven goods of every description, then the defendants were violating the rights of complainants.

Benjamin R. Curtis, Thomas A. Jenckes, and Clarence A. Seward, for plaintiffs.

James T. Brady, Edward N. Dickerson, and George Gifford, for defendants.

INGERSOLL, District Judge. The first of the original deeds containing the grants of right, was executed by Goodyear and Day, on the 29th of October, 1846; another, called "Articles Additional or Supplemental" to those contained in the first-mentioned deed, was executed on the 5th of November of the same year; another, a "Memorandum of Agreement," auxiliary to the last-mentioned deeds, was executed on the same 5th of November; another was executed on the 5th of December of the same year; and another on the 24th of May, 1858.

The first question to which attention must be directed is—what did the parties to these several deeds mean and understand by the terms used in the grants of right in the deeds referred to, namely: "shirred or corrugated goods?" The rights of the plaintiffs under these deeds, or either of them, depend upon the determination of this question. The goods which the defendants sell are elastic woven rubber goods, thread of vulcanized India-rubber, prepared according to Goodyear's patent of the 15th of June, 1844, which has been extended for seven years from June 15th, 1858, forming a part of the warps. Selling or making such elastic woven goods without a license is an infringement of the last-mentioned patent; and, if such elastic woven goods were intended by the parties to the deeds made in 1846, to be included in the terms "shirred or corrugated goods," as used in the grants of right, in either of those deeds, then it follows that what the defendant is doing is in violation of the rights of the plaintiffs Day and Hay.

Where certain terms are used in a grant, which have a well-known general meaning, then, in the interpretation of such grant, such well-known general meaning must be given to the terms used, unless it appears that some other or different meaning was intended by them. The parties differ as to what was the well-known general meaning of the terms "shirred or corrugated goods," as used in the grant, and numerous affidavits have been introduced to prove what their well-known general meaning was when the deeds of 1846 were executed. It will not be necessary, however, to pay any particular attention to these affidavits, if it appears clearly from the deeds themselves, what the meaning was which the parties to the deeds intended should be applied to these terms. The defendants insist that this does appear clearly from the deeds, and that the meaning of the terms "shirred or corrugated goods," used in the grant, was only the goods described in, and patented by, what is called the "shirred goods patent" of Goodyear, issued March 9th, 1844.

To a just determination of the question now under consideration, it is necessary to notice particularly the several patents of Goodyear which are referred to in the deed executed by him and Day, October 29th, 1846. On the 30th of October, 1840, a patent had been obtained by Dupont and Hyatt, for a new and useful improvement in the manufacture of gaiter-boots, by the introduction of gum-elastic gores. On the 7th of November, 1848, a patent was obtained by Richard Solis, for a new and useful improvement of elastic cloth. It was called "elastic

cloth," not "shirred or corrugated" cloth. On the 24th of February, 1839, a patent was obtained by Goodyear for improvements in the mode of preparing caoutchouc, or India-rubber, for the manufacture of various articles. On the 9th of March, 1844, a patent was obtained by him for a new and useful manufacture of goods, which he, in his patent, denominated "shirred or corrugated India-rubber goods." The goods so manufactured and denominated were elastic. The elastic goods which Goodyear manufactured according to his patent, and to which he thus gave the name of "corrugated or shirred India-rubber goods," by which name they have ever since been generally known, were formed "by the stretching of strips or threads of India-rubber, to such extent as may be desired, and covering the strips or threads on opposite sides with laminae of cloth, leather, or any other suitable material, which laminae are united to each other, and to the strips or threads, by means of India-rubber cement, the same being effected so as to produce manufactured articles substantially as in the specification is set forth, which will, by the contraction of the strips or threads of India-rubber, become corrugated, so as to form distinct plaits between them, and present a corded appearance, and will also possess a degree of elasticity limited by the non-elastic material which constitutes one or both of the laminae." The elastic goods manufactured according to the Solis patent, were in that patent called and known as "elastic cloth," and not "shirred or corrugated India-rubber goods." And the only elastic goods which Goodyear ever had the exclusive right to manufacture, were the particular kind of elastic goods made according to this patent of March 9th, 1844, and so called by him "corrugated or shirred India-rubber goods." No one had, however, a right to use, without his consent, in the manufacture of other kinds of elastic India-rubber goods, the particular kind or preparation of India-rubber which had been or should be patented to him. So far as Goodyear was concerned, every one had a right to manufacture all kinds of India-rubber elastic goods, except such as were described in his patent of March 9th, 1844, provided they did not use any particular preparation of India-rubber patented to him. On the same 9th of March, 1844, a patent was granted to Goodyear for a new and useful manner of constructing a machine for manufacturing the "corrugated or shirred India-rubber goods" mentioned and described in the before-mentioned patent. In this specification he states, that he had, in the before-mentioned specification, described the nature of what he denominated "corrugated or shirred India-rubber goods." That name he had given to the particular kind of elastic goods manufactured according to that patent. And, on the 15th of June, 1844, a patent was granted to him for new and useful improvements in the manner of preparing fabrics of caoutchouc or India-rubber.

On the 12th of August, 1855, Goodyear gave to Hutchinson & Runyon, and also to Ford & Co., "a free license to manufacture, use and vend shirred or corrugated goods of every description;" and, in the month of September, in the same year, he gave to Onderdonk & Letson "a concurrent right, together with, and in connection with or separate from, Hutchinson & Runyon and Ford & Co., and the said Charles Goodyear and his associates, a free license to manufacture, use and vend shirred or corrugated goods of every description, in so far as the said Charles Goodyear may have any rights or privileges."

"The agreement of the 29th of October, 1846, between Goodyear and Day, was executed by both parties, under their hands and seals. After reciting that Goodyear owned and controlled all the rights and privileges granted to him by the four before-mentioned patents in his favor, so far as such rights and privileges relate to the manufacturing of shirred or corrugated India-rubber goods, and the use of the machines or improvements for the manufacturing of such goods and the making and use of his patented gum, or compound, in the manufacture of such goods, excepting the licenses of Hutchinson & Runyon, Ford & Co., and Onderdonk & Letson, above-mentioned, Goodyear grants, sells and assigns to Day, "the full, absolute, and exclusive right, license and privilege, to make, use and vend, shirred or corrugated goods; to use, in the manufacture thereof, all or any of the machinery or improvements mentioned and described in, and secured by, all or any of said letters patent; and also to use, in the manufacture of such shirred or corrugated goods, all or any of the compounds, fabrics or ingredients, and methods of preparing such compounds, fabrics or ingredients, mentioned or described in, and claimed by, said letters patent, for and during the said unexpired term of said letters patent above enumerated, and of all renewals and extensions of the same."' He also grants to Day "the like full, absolute and exclusive right, license and privilege, for the like terms and periods, to use all or any of the machinery, compositions or fabrics patented by said Goodyear, or which he shall obtain patents for, in the manufacture of India-rubber hose, of the kind patented by said Day, air-beds and air-pillows of all kinds, Day's patent boat, Griffith's patent cotton-floater, and Day's patent chairs and settees."

The extent of the first-mentioned grant depends upon the meaning of the terms "shirred or corrugated goods," as used in the granting clause of the deed, and as understood by the parties to it, when the grant was made by Goodyear and accepted by Day. That meaning must be gathered from the grant itself in the deed contained, if from it

the true and clear meaning can be ascertained. That meaning depends upon the construction of the deed itself, for deeds must speak for themselves when they are able to speak clearly and understandingly.

The recital in the deed was made for the purpose of showing what was to be the subject of the grant. Goodyear states that he owns the rights secured in the four patents enumerated, so far as such rights relate to the manufacture of "shirred or corrugated India-rubber goods," which were the subject of the grant, except the three licenses named, which were for "shirred or corrugated goods." At that time, the whole right to use vulcanized rubber, in the manufacture of all elastic woven goods and elastic cloth, except "shirred or corrugated goods," made according to the patent of March 9th, 1844, was in the Naugatuck India-rubber Company. The first suggestion that occurs, upon reading the recital, is this: If Goodyear had intended that the grant should comprehend the exclusive right to use his vulcanized rubber, and his other preparations, in the manufacture of elastic woven goods and all wrinkled or corrugated cloth, whether made according to the shirred goods patent or not, under the name of "shirred or corrugated goods," he would have expressly included this right in the exceptions which he made. For it was well known to him that the right, as to woven goods, was in that company.

It should be borne in mind, that Goodyear had no exclusive right to manufacture any kind of elastic India-rubber cloth except such as was manufactured according to the patent of March 9th, 1844, and called "shirred or corrugated India-rubber goods," though he had an exclusive right to a certain kind of prepared or cured India-rubber, which could not be used by any one in the manufacture of any kind of elastic cloths, without his permission. So far as Goodyear was concerned, all kinds of India-rubber elastic goods; or elastic cloths, by whatever name known, except the particular kind of India-rubber cloth made according to his patent of March 9th, 1844, and to which he had an exclusive right, could be made by any one, unless the one making it should use, in the manufacture of it, the particular kind or preparation of India-rubber material patented to him. It is not to be presumed that a grantor intends to grant more than he has a right to grant, or that a grantee intends to receive, by way of grant, that to which he has a full right without a grant.

The grant of right contained in the granting clause of the deed of the 29th of October, 1846, was of an exclusive right, which, at the time, was vested in Goodyear, and not of anything to which Day had a right without such grant. It was of the exclusive right which Goodyear then had to make "shirred or corrugated goods," with the license and privilege to do certain things, which would make that exclusive right more valuable; which certain things were, the use, in the manufacture of the "shirred or corrugated goods," the exclusive right to which had been conveyed, of any of the machinery or improvements mentioned and described in and secured by any of the letters patent; and the use also, in the manufacture of such "shirred or corrugated goods," an exclusive right to which had been conveyed, of any of the compounds, fabrics or ingredients mentioned or described in said letters patent. The terms of the grant, therefore, taken in connection with the recitals in the preamble, without a resort to the subsequent portions of the deed, to aid in their interpretation, import that what was granted was the exclusive right which Goodyear had, by virtue of his patent of March 9th, 1844, to make "shirred or corrugated goods," with the license and privilege to use, in the exercise and enjoyment of such exclusive right granted, certain other rights secured to him, to make that exclusive right more valuable. This was the extent of the grant, as it appears from the language of the granting clause. This was what the parties meant by the terms which they used. So far as it respects "shirred or corrugated goods," that was the extent of the grant. The other patents of Goodyear were to be used only in the manufacture of the "shirred or corrugated goods" secured by the patent of March 9th, 1844. There was no right given to use Goodyear's preparations and improvements in India-rubber, no right to use the vulcanized rubber, in the manufacture of any elastic articles, or elastic goods, or elastic cloths, except the "shirred or corrugated" goods made according to the shirred goods patent.

But, in giving an interpretation to a particular clause of a deed, we must look to every part of it, in order to ascertain whether such interpretation is the true one, to see if, in this deed, any more extended and enlarged meaning can be given to the terms "shirred or corrugated goods," as used in the granting clause, than we have already given to those terms, by the consideration of such granting clause, taken in connection only with the recitals in the preamble contained.

The deed contains several covenants on the part of Goodyear. One is, "that said Goodyear will not hereafter grant any right, license, or agreement to any person or persons, bodies politic or corporate, to manufacture, vend, or use corrugated or shirred goods, or to build, use or vend any of the aforesaid machinery, or to use any of his compounds, in the manufacture of shirred or corrugated goods, and will not himself manufacture or import any corrugated or shirred goods; and, in case of a violation of this section," (of the deed,) "then the covenants of said Day, hereinafter contained, shall not be binding on said Day." The covenants of Day here referred to were, that he would pay tariff and do other acts. It is claimed that this covenant is inconsistent with the construction already put on the

granting clause, and consistent only with the construction given to it by the plaintiffs. This covenant was entered into for the purpose of relieving Day from the obligation of his covenants, in case Goodyear should do certain things, the doing of which would be in violation of the right granted. It was designed more effectually to secure Day in the exclusive right granted. The terms "shirred or corrugated goods" are used three several times in this covenant. It is insisted that, as used in the last two instances, their meaning is different from that intended for them as used in the first part of the covenant; that, in the last two instances, they mean "shirred or corrugated goods" made in a different manner from those manufactured according to the patent of March 9th, 1844; that they mean all India-rubber goods, when made by combining threads or strands of vulcanized rubber with some textile material; and that such latter goods are comprehended in the terms "shirred or corrugated goods." It is admitted that the meaning of the terms, as used in the first part of the covenant, is "shirred or corrugated goods" made according to the patent of March 9th, 1844. The argument is, that the first part of the covenant is, that Goodyear would not license any one to make corrugated goods according to his patent; that that was sufficient to protect Day in the use of the vulcanized rubber, in manufacturing according to that patent; and that the latter portion of the covenant was intended to prevent Goodyear from licensing any one to use his vulcanized rubber and compounds, in the manufacture of other kinds of India-rubber goods, made by combining threads or strands of India-rubber with some textile material.

After the most attentive consideration, I cannot discover anything in this covenant inconsistent with the construction which I have put upon the granting clause. All its provisions are consistent with such construction. There are, in the covenant, four several stipulations on the part of Goodyear: First—That he will not grant any right or license, to any one, to manufacture, vend or use "shirred or corrugated goods." This confessedly refers to the exclusive right, which, at the time the deed was executed, Goodyear had to the "shirred or corrugated goods" made according to his patent of March 9th, 1844. Second—That he will not grant any right or license, to any one, to build or use any of the machinery mentioned in the granting clause. There was no machinery mentioned or alluded to, except the machinery used to make "shirred or corrugated goods" according to the shirred goods patent. This stipulation, also, confessedly refers to the goods made according to that patent. Third—That he will not grant to any one the right to use any of his compounds in the manufacture of "shirred or corrugated goods." The assignment of the right to make "shirred or corrugated goods" according to the patent of March 9th, 1844, did not carry with it any new right secured by the patent of June 15th, 1844. The rights secured by the latter patent were distinct from, and independent of, any rights secured by the former. The first stipulation had reference to the former patent, and the former patent only. In that stipulation, the use of the latter patent was not included. The object of the parties was, as is confessed, to secure to Day, the grantee of the former patent, in the manufacture of the goods secured by that patent, the further exclusive right to use the latter patent. And the intent of the parties, in making this latter stipulation, was to secure that object. There is nothing in this stipulation to show that it had reference to any other object. Fourth—That he (Goodyear) will not manufacture or import any corrugated or shirred goods. There is nothing in this stipulation to show that these terms were used in any different sense from that given to them in the other stipulation. To apply them, in this stipulation, as meaning elastic woven goods, would lead to this result: If Goodyear should manufacture or import woven goods, composed of threads or strands of common gum, which everybody has a right to manufacture and import, and which never were a subject of controversy before the settlement which resulted in the grant in question, then all the covenants which Day had entered into would be discharged.

Another covenant on the part of Goodyear is, "that Horace H. Day, his representatives and assigns, shall have and enjoy the like full, free, and exclusive right, license and privilege to make and use, in the manufacture of shirred or corrugated goods, any improvements made, or to be made, by said Goodyear, or of which he, his representatives or assigns, may become the holders or owners, for which patents have been or shall be obtained, which relate to shirred or corrugated goods, or the machinery for preparing or making the same, or the composition, stuff or fabric of which they may be composed, or the machinery for preparing or finishing such composition, stuff or fabric, and also the right to use such composition, stuff or fabric, in the manufacture of all the other articles in the grants above enumerated." It is claimed that the provisions in this covenant are also inconsistent with the views already taken of the rights granted to Day. The subject-matter of the grant in the first clause was an existing thing, to which Goodyear had an exclusive right, and certain rights to other existing things, the use of which would make the enjoyment of the grant more valuable. The provision as to the future inventions, improvements or patents of Goodyear, secured to Day the use of them only as to the shirred or corrugated India-rubber goods, and the hose, air-beds, air-pillows, Day's patent boat, and Griffith's patent cotton-floater. After a full and careful consideration of this covenant, I can discover nothing in it inconsistent with the construction put upon the granting clause.

By the "shirred or corrugated goods" mentioned in this covenant, are meant the "shirred or corrugated goods" to which Goodyear had an exclusive right, such as were made according to the patent of March 9th, 1844; and the "composition, stuff or fabric" mentioned, refers to the material of which "corrugated goods" made according to that patent might be composed.

The first covenant on the part of Day is, that he will pay to Goodyear a tariff of three cents per square yard, for all shirred or corrugated goods to be made or used by him during the term of said patents, (the four mentioned in the recital to the deeds,) or any of them, or of any renewal or extension thereof, or of any new patent taken out on the surrender of an old one. Then follows this stipulation: "It being understood and agreed by the parties, that all shirred or corrugated goods of any kind, made or used by said Day or his assigns, shall be considered as made and used under this agreement, and subject to said tariff or assessment, excepting from the operation of this clause, however, all shirred or corrugated goods made with strands or threads of native or common gum, when such goods may be manufactured by said Day for the purpose of competing with such goods; and, when so made by him for such purpose, he shall not be liable to pay any duty or assessment thereon." In order to put a proper construction upon the stipulations contained in this covenant, and to understand their true meaning, they should be considered in connection with a covenant on the part of Goodyear, in which he agrees that he "will, at his own expense and cost, prosecute all and every person, or persons, or bodies corporate, who shall infringe, to the injury of said Day, in the use of the privilege hereby granted and conveyed, all or any of the patents above enumerated or referred to, by the manufacture or sale of shirred or corrugated goods; and that he will, with all due diligence, carry on such prosecutions to final judgment, against each and every violator of the same, or until it shall be judicially and beyond appeal decided that said patents so violated as aforesaid are not valid in law." It is claimed by the plaintiffs, that this covenant on the part of Day, when taken in connection with this latter covenant on the part of Goodyear, clearly shows that the parties were dealing with woven goods, or some species of goods not made under Goodyear's shirred goods patent, particularly when those two covenants are considered in connection with another covenant, wherein it is mutually agreed, that, in the event of any other person manufacturing, or importing, or selling shirred or corrugated goods, except such shirred goods as are made with strands or threads of native or common gum, such as is generally used by woven suspender makers, and thereby materially impairing the profits which would accrue to Day when in the exclusive enjoyment of the privileges granted, then the tariffs agreed to be paid are to cease.

There was granted the right to at least two kinds of "shirred or corrugated goods:" First—the right to make such goods according to the Goodyear patent, when the strands or threads of rubber were of native or common gum; and, second, the right to make such goods according to such patent, with the additional right to use, in the making of them, strands or threads of vulcanized rubber, prepared according to the patent of June 15th, 1844. There was also an additional right to use the patented machine to make such goods. These the defendants claim were all the rights conveyed by the first granting clause. At the time of the grant, India-rubber woven elastic goods, with strands or threads of common rubber, and which the plaintiffs claim were included under the name of "shirred or corrugated goods," could be made without infringing on the patent of March 9th, 1844. The exclusive right to make said woven goods was not in Goodyear to grant. The right was in the public. From the covenants last above recited, it appears, First, that Day was to pay tariffs on all "shirred or corrugated goods" included in the grant, or attempted to be included; second, that Goodyear was to protect Day in the enjoyment of all rights which had been secured to him by patent, and granted to Day, and, if he did not, his right to tariff on all goods made should cease; third, that, at some time during the continuance of the grant, it might so happen, that Goodyear would not have it in his power to protect Day in the exclusive right to manufacture a kind of "shirred or corrugated goods" which were composed of threads or strands of common rubber, and upon which Day had agreed to pay tariff; fourth, that, in the latter event, Day was to protect himself, and that, when he did so protect himself, by the manufacture of such goods to compete with the like kind of goods in the market, he should not pay tariff on such goods so made for such purpose, although he should continue to pay tariff on the other kinds of goods made in pursuance of the grant.

Taking the stipulations in these several agreements in connection with each other, it is argued by the plaintiffs, that the parties were treating about other goods, under the name of "shirred or corrugated goods" than such as were made according to the Goodyear patent; that Goodyear could protect Day by suits and by injunctions, so that he could have the monopoly in the market of such goods as were made according to the patent; that, as, during the period of the grant, it might so happen that there would be a kind of "shirred or corrugated goods" made of threads or strands of common rubber, upon which Day was to pay tariff, brought into the market, which would not be in violation of the patent of Goodyear of

March 9th, 1844, against which Day could not be protected by Goodyear, but could only be protected, if protected at all, by competition, such kind of goods were, therefore, different from goods made according to Goodyear's patent; that they were woven goods, or elastic rubber goods, composed of strands or threads of rubber, however made; and that, by the understanding of the parties, as shown in the deed, the deed was intended to secure to Day the privilege to make this latter kind of goods, under the name of "shirred or corrugated goods," with the exclusive right to use, in the making of the same, the vulcanized rubber patent, as well as the right to manufacture according to the shirred goods patent. The argument is plausible, and, if sound, would tend strongly to show, that the view I have taken of the rights conveyed by the granting clause, is too limited.

The deed now under consideration was executed after a long conflict between the parties, as to the rights which were secured to Goodyear by his patents. The stipulations contained in it were entered into (Day recognizing the rights of Goodyear in the matters in controversy) with a view to a settlement of the controversy, and to transfer to Day certain rights which Goodyear had by virtue of his patents. The right to make elastic India-rubber cloth, composed of threads or strands of common rubber, by whatever name called, when the same was not made according to Goodyear's patent of March 9th, 1844, had not been in controversy. There was nothing to settle about that right. Day had as much right in this respect as Goodyear had. The argument assumes, that for the making of this kind of goods, to manufacture which Day had as much right as Goodyear, Day agreed to pay a tariff; and that the goods thus manufactured should, therefore, be considered as being manufactured under the deed, by the name of "shirred or corrugated goods," and as such liable to pay a tariff, except when they might be manufactured by Day for competing with such goods thrown into the market by others.

The grants under the deeds were for the longest period during which any of the four patents was to continue, and for the additional time that any of them might be extended. Day was to have the benefit of all or any of them, and was to pay the tariff as agreed, so long as he had the benefit of any one of the patents, though the others had expired by lapse of time and had not been extended. The tariff was to be paid in consideration of benefits received and enjoyed. The argument of the plaintiffs leads to this result: If the shirred goods patent had been extended, and the vulcanizing patent had not been, then, if Day did what anybody else had a right to do without any permission of Goodyear, namely, make elastic woven goods, or any kind of elastic India-rubber goods, or elastic rubber cloth, (provided it was not made according to the shirred goods patent,) with threads or strands either of common rubber or vulcanized rubber, he would be obliged to pay the tariff. Protection to Day in the rights for which he was to pay tariff, was one great object of the deed. He could not, in the case supposed, be protected by Goodyear, for the making of such goods would not be in violation of any patent; and he could not protect himself by competition, so as to avoid the payment of the tariff, as it respects the goods made with strands or threads of vulcanized rubber, for the stipulation in regard to protection by competition is limited to such goods as are made "with strands or threads of native or common gum." He would, therefore, be obliged to pay tariff, although he was not protected by Goodyear, and was without the power of saving himself from the payment of such tariff, by manufacturing for the purpose of competing with such goods.

A more satisfactory construction can be put upon the stipulations in the covenants just referred to—one that will make such covenants entirely consistent with the views already taken of the rights conveyed by the granting clause, and inconsistent with the views taken of such clause by the plaintiffs. The parties were providing, in the stipulations, not only for a state of things which might exist during the then existing patents, but also for a state of things which might exist when one of them should be extended and the others have expired—when the vulcanizing patent might be extended and the shirred goods patent have expired, and also when the shirred goods patent might be extended and the vulcanizing patent have expired. They contemplated a state of things which at present exists, when the vulcanizing patent has been extended, and when all the other patents have expired. This being the state of things, the shirred goods patent having expired, every one now has a right to make "shirred or corrugated goods," composed of "threads or strands of native or common gum." But no one, except Day, has a right to make such goods of "threads or strands" of vulcanized rubber prepared according to Goodyear's patent of June 15th, 1844. Now there is a state of things which the parties foresaw when they executed the deed and incorporated in it the above covenants, and which they, by said covenants, provide for. Day now has an exclusive right to make "shirred or corrugated goods" according to the directions given in the patent of March 9th, 1844, when the rubber strands or threads are composed of the vulcanized rubber; and Goodyear, having a patent for the vulcanized rubber, must protect him in that right. If he does not, the obligation on the part of Day to pay tariff ceases. Day holds now no exclusive right to make shirred goods according to Goodyear's patent, with "threads or strands of native or common gum," but has a right to make such goods in

common with any one else; and he is obliged to pay tariffs for making such goods "with native or common gum," during the existence of the extended vulcanizing patent, for he so contracted by the deed, unless, in the language of the deed, "such goods may be manufactured by said Day for the purpose of competing with such goods, and, when so made by him for such purpose, he shall not be liable to pay any duty or assessment thereon." The vulcanizing patent is now in existence, and Day can now be protected by Goodyear, when that patent is violated by the use of vulcanized rubber in the manufacture of "shirred or corrugated goods." The shirred goods patent has expired. When such goods are now to be made with "threads or strands of native or common gum," Day cannot be protected by Goodyear against the manufacture of such goods. But, if he makes such goods for "the purpose of competing with the same goods," in the market, he is, according to the stipulations in the deed above referred to, not liable to the payment of tariffs thereon.

On the 5th of November, 1846, there were "articles of agreement" entered into between the parties, under their hands and seals, additional or supplemental to the articles in the first deed, which articles in the first deed were to be construed and governed by the articles in the deed of the said 5th of November, wherein they differed or were inconsistent; but in all other respects, the first deed was to remain in full force. By the deed of the 5th of November, it was stipulated that Goodyear should procure and cause to be assigned to Day, to be canceled, the three several licenses to Hutchinson and Runyon, to Ford & Co., and to Onderdonk & Letson, which, by the first deed, he was excused from doing; and there is a stipulation that the reassignment of said three licenses to Day shall be a condition precedent to the performance of any part of the covenants by him. In these last-mentioned articles there is also a covenant by Day, that, while Goodyear protects him, Day, "in the exclusive right to manufacture and vend shirred or corrugated goods," he, Day, will refrain from doing certain things therein mentioned, thereby showing that what the parties meant by the terms "shirred or corrugated goods" was, the exclusive right which Goodyear had to manufacture and vend such goods, under his patent referred to in the recitals of the deed first executed; for, Goodyear could not protect Day in such exclusive right, unless he had in him such exclusive right.

The second deed, executed by the parties on the 5th of November, 1846, was entitled "memorandum of agreement," and was to be auxiliary to the two other deeds above-mentioned. It contained a stipulation for "a release from the Naugatuck Company, of the right or license to make any articles which, by said before-mentioned agreements, Day is licensed to make." After Goodyear had obtained his vulcanizing patent of the 15th of June, 1844, by a deed executed between him and the Naugatuck India-Rubber Company, dated July 18th, 1844, for certain considerations in the deed named, he granted unto said company the full and absolute license to use any and all of his preparations of India-rubber and improvements in the preparations of India-rubber, for manufacturing cloth or any other article of merchandise, or any articles to which the same may be applicable, for and during the unexpired term or terms of any patent or patents, or renewals of patents, owned by him, or in which he may have an interest, issued or to be issued. This absolute and full license to the Naugatuck Company was also an exclusive one, Goodyear covenanting that he would not grant to any other person a right or license to do what he had granted to the Naugatuck Company a license to do. There was reserved, however, in Goodyear, the right, after the 20th of July, 1844, to sell, for a stipulated sum or price in gross, the exclusive right of making, using and vending his said preparations and improvements for any specific purpose, provided that, before such sale, the Naugatuck Company should have the pre-emptive right to become the purchasers, at and for such stipulated price or sum in gross. Before this deed to the Naugatuck Company, namely, on the 24th of May, 1844, which was prior to the issuing of the vulcanizing patent, Goodyear had assigned to D. L. Suydam the two patents for shirred goods—the patent for the manufacture and the patent for the machinery. This assignment was only for the time the patent had to run, and not for any extended term. The right acquired by Suydam, under this assignment, was conveyed back to Goodyear, by deed bearing date the 10th of May, 1845.

There were certain exceptions in the deed of Goodyear to the Naugatuck Company, which limited the operation of the grant of "the use of any and all his (Goodyear's) preparations of India-rubber and improvements in the preparation of India-rubber, for manufacturing cloths or any other article of merchandise, or any article to which the same may be applicable," to such articles as were not excepted. One of these exceptions was of the right to use said improvements in the manufacture of "napped cloths, coats, capes, mittens and gloves," which were excepted during the whole period of the grant. The right to use such preparation in the manufacture of India-rubber shoes, was excepted for a specific time. After the expiration of such specific time, the right to use said preparation in the manufacture of such shoes was to be in the Naugatuck Company. The right to use the preparation of vulcanized rubber in the manufacture of shirred goods made according to the shirred goods patent of Goodyear, was also excepted so long as Suydam had the exclusive right to manu-

facture such goods. This latter exception is as follows: "And whereas the said Goodyear has heretofore sold to D. L. Suydam, of New York City, the right to manufacture shirred goods, the said right is hereby excepted from the operation of this instrument, in addition to the exceptions above named." By this deed, the Naugatuck Company had no exclusive right to any of the cloths or other articles to be manufactured, whether the cloth was "shirred or corrugated," or not, unless Goodyear's preparation and improvements of India-rubber were used in such manufacture. They had, by the grant, an exclusive right and license to the use of the preparation and improvements of India-rubber in any article to which the same was applied, with certain exceptions.

It is important that it should be understood what rights the Naugatuck Company obtained by virtue of this deed, in order that we may understand what Goodyear and Day meant should be done, when they provided, in the deed, entitled "Memorandum of Agreement," that "a release from the Naugatuck Company, of the right or license to make any articles which, by said before-mentioned agreement, Day is licensed to make, shall be obtained and assigned to said Day, simultaneously with the execution of said articles." This is important, as the plaintiffs claim, that it appears, from the covenant in the "memorandum of agreement" referred to, in reference to a release from the Naugatuck Company, and the manner in which it was executed, that a more extended meaning should be given to the terms "shirred or corrugated goods," than has been given to them when considering the granting clause of the deed first executed by the parties. It should be borne in mind, that, in that deed, Goodyear, in addition to the rights which he granted to Day, in reference to "shirred or corrugated goods," also granted to him the exclusive right, license and privilege, to use his compositions and fabrics, secured to him (Goodyear) by his vulcanizing patent, "in the manufacture of India-rubber hose, of the kind patented by said Day, air-beds and air-pillows of all kinds, Day's patent boat, Griffith's patent cotton-floater, and Day's patent chairs and settees." At that time, the exclusive right to use Goodyear's vulcanized rubber and preparations and improvements patented, in the manufacture of these articles, was in the Naugatuck Company. Consequently, this latter right conveyed to Day would be of little, if of any, avail, unless a release was obtained from the Naugatuck Company. Goodyear, therefore, in that original deed, after having made the grants contained in it, covenanted that he would, at his own cost and expense, repurchase and cancel all assignments and licenses which had been before made by him, touching the rights granted, except the three licenses to Hutchinson & Runyon, to Ford & Co., and to Onderdonk & Letson, so that Day should have the full benefit of the grant. By that covenant, (although the name of the Naugatuck Company is not mentioned,) he, in effect, stipulated that he would obtain from that company a release of the right which they had to use his patented preparations and improvements, in making any of the articles which Day was licensed to make. The covenant, in the "memorandum of agreement," was not more extensive than the covenant in the original deed. It did not require Goodyear to obtain from the Naugatuck Company as much as he was required to obtain by the covenant in the original deed. By the covenant in the original deed, Goodyear obligated himself to obtain from the Naugatuck Company the right which they had to use his vulcanized rubber in the manufacture of "air-beds and air-pillows." By the "articles of agreement," executed November 5th, 1846, the grant, so far as it respects "air-beds and air-pillows," was annulled; and the principal object which the parties had in view, in entering into the stipulation referred to in the "memorandum of agreement," must have been to so limit the duty which Goodyear was under, by his covenant in the first deed, as to free him from the obligation to procure a release from the Naugatuck Company of the right to use vulcanized rubber in the manufacture of "air-beds and air-pillows." There is nothing in either of these covenants to show what was meant by the parties, by the terms "shirred or corrugated goods."

But it is insisted by the plaintiffs, that these covenants should be taken in connection with the release and assignment executed by the Naugatuck Company to Goodyear, of a license to use his preparations and improvements, his vulcanized rubber, in the manufacture of corrugated goods, which license, so released and reassigned, was, at a subsequent period, transferred to Day to be canceled, and was by Goodyear and Day canceled. The release was executed by the Naugatuck Company on the 7th of December, 1846, after all the deeds relating to the grants to Day were finished and completed by delivery. After it was delivered by the Company to Goodyear, it was by him delivered to Day, on the 19th of February, 1847.

The evidence derived from this release to Goodyear, to show what was meant by the term "shirred or corrugated goods," as used in the deed of grant, is extraneous from the deed. It is evidence subsequent to the execution of the deed, to show what the parties then admitted was the import and meaning of the terms "shirred or corrugated goods," at the time they were used in the deed. This evidence is legitimate for this purpose, as well as other acts and admissions of the parties which took place subsequent to the execution of the deed, such as the facts that Day never paid tariff for the manufacture of any corrugated goods, except such as were made according to the patent of March 9th, 1844, that Goodyear always collected tariffs

for woven goods manufactured by other parties, and the numerous other acts and admissions testified to in the many affidavits which have been produced, which go to show that, when the deeds were executed, the parties understood by the terms "shirred or corrugated goods," only such goods as were made according to the shirred goods patent. These extraneous facts are all proper to aid the court in ascertaining what the deeds really mean, when there are difficulties in interpreting their language, in consequence of ambiguities in the terms used. But, when there are no such ambiguities, such evidence is not resorted to. When there are no difficulties in interpreting the language used, the deeds must speak for themselves.

But I feel disposed, in order to see whether there is anything in the release from the Naugatuck Company inconsistent with the construction I have given to the granting clause of the deed, to consider the release separate and distinct from the other acts and admissions of the parties, which took place subsequent to the execution of the deed, and as if it formed a part of the deed. The release from the Naugatuck Company reassigned and transferred to Goodyear all the right, license and privilege which the company had claimed or possessed, under the indenture of July 18th, 1844, or by any other means whatsoever, "to use, in the preparation of any shirred or corrugated goods, or of India-rubber pipe, such as is used by Horace H. Day in his patent hose, Day's patent life-chair and settee, and Griffith's patent cotton floater, and Day's patent boat, any of the improvements by said Goodyear claimed by any patent whatever, or of which he may be the inventor or possessor, and also any right which, by the means aforesaid, or otherwise howsoever, the said Naugatuck India-Rubber Company may have, to manufacture shirred or corrugated goods, or said India-rubber pipe, such as is used by Horace H. Day in his patent hose, Day's patent life-chair and settee, and Griffith's patent cotton-floater, and Day's patent boat." The argument is, that this release, made in pursuance of the requirements of the covenant in the deed contained, purported to transfer to Goodyear a right which the company then had, "to use, in the preparation of any shirred or corrugated goods," any of the improvements of Goodyear claimed by any patents, also any right which they have, either by such means, or otherwise, "to manufacture shirred or corrugated goods;" that the company then had no right either to use, in the preparation of shirred goods made according to the patent of March 9th, 1844, any of the improvements of Goodyear claimed by patent, or to manufacture such goods according to said patent, and that, therefore, the right purported to be reassigned was some other right; and that such other right was the right to use said improvements of Goodyear, claimed by patent, in the manufacture of elastic rubber goods, or articles not made according to the patent of March 9th, 1844, which right then was in the Naugatuck Company, and that elastic-woven rubber goods were included in and covered by the terms "shirred or corrugated goods."

It is apparent, from the indenture entered into on the 18th of July, 1844, between Goodyear and the Naugatuck Company, that the object of Goodyear was to divest himself of all right which he then had to use any and all of his preparations of "India-rubber, and improvements in the preparation of India-rubber, for manufacturing cloths or any other article of merchandise, or any article to which the same may be applicable, for and during the unexpired term of all patents issued to him, bearing any date whatsoever, and for and during the unexpired term of any other patent or patents, or renewals of patents, owned by him, or in which he may have an interest," and to vest the whole right he then had to such use in the Naugatuck Company. His object was to give up all right to such use, and substitute the Naugatuck Company in his place, they performing certain things as a consideration for such substitution. This being the object of both parties to the indenture, as is manifest from the indenture itself, such a construction should be put upon the instrument as will carry out that object. The exceptions in the indenture in favor of third persons, by which the operation of the general terms of the grant is somewhat limited, were not made for the purpose of reserving in Goodyear any portion of the right granted, and which, without such exception, would seem to be included in the general terms of the grant. The general terms of the grant are, "a full and absolute license to use the thing granted, for manufacturing cloths or any other article of merchandise, or any article to which the same may be applicable." Goodyear gave the company the right to use vulcanized rubber in the manufacture of cloths and any article to which it was applicable; and, as it was applicable to his patented shirred goods, under the description of "cloths," and also under the description of "articles of merchandise," &c., he thereby gave the Naugatuck Company a right to use threads or strands of vulcanized rubber, in the manufacture of his patented shirred goods. But this they could not do so long as Suydam had the rights granted to him, so long as his grant was in force. He had the exclusive right to manufacture "shirred or corrugated goods" according to the patent of March 9th, 1844, for the unexpired term of that patent, with the privilege to use, for said unexpired term, Goodyear's other improvements, in such manufacture.

But this did not include the whole right which Goodyear had to the use of his vulcanized rubber, in the manufacture of goods made according to the shirred goods patent.

A valuable right still remained in him. It is necessary, therefore, to look at the exception, to see if that right was reserved to him, for, if it were not so reserved, it passed to the company by the terms of the grant. That exception was as follows: "And, whereas, the said Goodyear has heretofore sold to D. L. Suydam, of New York City, the right to manufacture shirred goods, the said right is hereby excepted from the operation of the instrument, in addition to the exceptions above-mentioned." Nothing is here reserved in Goodyear. Something is excepted in favor of Suydam. The "said right" is hereby "excepted." What is the "said right" which is so excepted from the operation of the general terms in the granting clause? The "said right" which Goodyear had theretofore sold to D. L. Suydam and nothing more. It is, therefore, in this connection, necessary to see what was sold to Suydam; and, when we have ascertained that, we shall know what was the limitation and exception to the general terms of the granting clause.

We have already seen what was sold to Suydam. His rights under the grant from Goodyear would expire on the 9th of March, 1858. They could continue no longer. The grant to Day was for the unexpired term of any of the patents enumerated, and for all renewals and extensions of the same. It was, therefore, at all events, to continue until the 15th of June, 1858; and, as the vulcanizing patent has been extended, the term of the expiration of the grant is not until the 15th of June, 1865. The grant to the Naugatuck Company was also for and during the unexpired term of all patents issued to Goodyear, bearing any date whatsoever, or owned by him, or in which he might have an interest, whether issued or to be issued, and for any extensions of the same. It is claimed by the plaintiffs, that the grant to the Naugatuck Company was not for any extended term. When we come to the consideration of another point made in the case, it will be shown that this grant carried the extended term.

The defendants claim, that when Suydam, on the 10th of May, 1845, reconveyed to Goodyear the right which he had, Goodyear received the reconveyance in trust for the Naugatuck Company, and that, from that time, the right of the company to use the vulcanized rubber, in the manufacture of "shirred goods" made according to the shirred goods patent, commenced and was vested. But the necessities of the case do not require a determination of the latter question. From what has been made to appear, it is manifest that, at the time the release was executed by the Naugatuck Company, they had a right to the use of the vulcanized rubber, "in the manufacture of such shirred or corrugated goods as should be made according to the shirred goods patent after the 9th of March, 1858," which right it was important to Day to have canceled, in order that he might have the full benefit of his extension grant, and that the release was obtained from and executed by the Naugatuck Company, with the view, among other things, that they might be divested of this particular right, and that the same might be canceled, so that Day should have the full benefit of his grant.

In the investigation of the question submitted for decision, we have had occasion to examine with much particularity eight several deeds executed by Goodyear, namely, the deeds to the Naugatuck Company, to Hutchinson & Runyon, to Ford & Co., and to Onderdonk & Letson, and the four deeds to Day, the one to the Naugatuck Company having been executed after Goodyear was divested of the right which he granted to Suydam to make "shirred or corrugated goods," and the remaining seven having been executed after he was reinvested with the right which he had so granted to Suydam. When the deed to the Naugatuck Company was executed, he had a right to convey to them the exclusive right and privilege he thereby granted. The terms used in the deed did carry that exclusive privilege; and they were sufficient to carry the whole and exclusive privilege to use such preparations in the manufacture of corrugated goods or cloths made after his shirred goods patent, and would have carried such whole privilege if a prior right had not been outstanding in favor of Suydam. Therefore the exception in the deed. And the question forcibly suggests itself to the mind, why, if Goodyear intended, in the deeds to Hutchinson & Runyon, to Ford & Co., to Onderdonk & Letson, and to Day, to convey a license to use vulcanized rubber in the manufacture of elastic woven rubber goods, he did not use the terms which he used in the deed to the Naugatuck Company, instead of using the terms "shirred or corrugated goods?" The reason is obvious. It is because he had no right to convey a license to use his vulcanized rubber in the manufacture of elastic woven goods, the entire and exclusive right to them being in the Naugatuck Company. But as, at the dates of these seven deeds, he had the right to the "shirred and corrugated goods" granted to Suydam, with the right to use, in the manufacture of such goods, his preparations, the right granted to Suydam having been conveyed back to him, he intended, in these seven deeds, to grant those rights. This was all that he granted, so far as it respects "shirred or corrugated goods." The licenses to Hutchinson & Runyon, Ford & Co., and Onderdonk & Letson, were free licenses, to be enjoyed connectedly or separately. The grant to Day of the 29th of October, 1846, was of an exclusive right, but subject to the rights previously granted to the last-named firms, which last-mentioned rights, by the articles of agreement entered into on the 5th of November, 1856, were by Goodyear to be canceled, as a condition precedent to the right to hold Day to the covenants which he had entered into.

If there were any doubt as to the meaning of the terms in question, as understood by the

parties at the time the agreement of the 29th of October, 1846, was entered into, and as used by them in that agreement, such doubt would be removed by a consideration of the deed of the 5th of December, of the same year. The last-mentioned agreement was executed by both Goodyear and Day, under their hands and seals. It was made after the several free licenses which had, in the year 1845, been executed to Hutchinson & Runyon, to Ford & Co., and to Onderdonk & Letson, were delivered up to be canceled, and the very day they were canceled, at a time when, after the cancellation, there were no outstanding licenses, in favor of any one of them, to manufacture "shirred or corrugated goods" according to the patent of March 9th, 1854, the grant to Suydam having before then been reassigned to Goodyear.

It appears expressly, by the first deed executed on the 5th of November, 1846, and entitled, "Articles of Agreement," that such articles were to be additional or supplemental to the articles entered into on the 29th of October, of the same year, which articles, in the deed of the earlier date, were to be construed and governed by the provisions in the subsequent "articles of agreement" wherein they might differ or be inconsistent, but in all other respects were to remain in full force; and it appears expressly, by the second deed of the said 5th of November, entitled "Memorandum of Agreement," that it was to be auxiliary to the two preceding deeds. And it is to be inferred, that this deed of the 5th of December was executed for the same purposes for which the two deeds of the 5th of November were executed. It was made for some purpose, and, if it were not made to place the subject of the grant beyond all doubt and dispute, it is difficult to conceive of a reason why it was made; for, in it there are no additional grants made, and no additional covenants on the part of Goodyear, and by it Goodyear was not absolved from any of the covenants which he had previously made. Day entered into no new covenant, and was not absolved from any of the obligations of the covenants previously entered into. The agreement of the 5th of December recited, that Goodyear was the owner of the four several patents already mentioned, and possessed the sole and exclusive right to the same, so far as related to the use of all or any of the patented articles, in the preparing and manufacturing of shirred or corrugated goods, except the three said several licenses for the same, which were simultaneously therewith to be assigned to Day to be canceled. It also recited, that Goodyear had agreed to assign to Day the "sole and exclusive right to make, vend and sell to others, shirred or corrugated goods." This is its exact language, and is substantially the same as that used in the granting clause of the deed of the 29th of October, 1846.

The object of this deed of the 5th of December was, to fulfil and carry into full execution the agreements which Goodyear had before made, to assign to Day the "exclusive right to make, vend and sell to others to be used, shirred or corrugated goods." Goodyear, in full execution of the agreement recited, granted and assigned to Day, and Day accepted, the sole and exclusive right, license and privilege, for the whole of the United States, to use the machinery in any of the recited patents described, and to make and vend the shirred or corrugated goods in said patents mentioned, and to use, in the preparation thereof, (namely, in the preparation of the shirred goods mentioned in the patent,) the compounds and fabrics in the letters patent described, for and during the term of the patent, and of any extension thereof; and an exclusive license to use, in the manufacture of the shirred goods specified, all improvements in the composition, fabrics or machinery mentioned, or new composition, fabrics or machinery made or to be made, and for which Goodyear then held, or might thereafter hold, patents. It is clear, that the only exclusive right to make "shirred or corrugated goods," granted and assigned by this deed, was the exclusive right to make such goods as are described in the patent of March 9th, 1844. The language of the grant is, "the shirred or corrugated goods in said patents mentioned." There were no "shirred or corrugated goods" mentioned in any patent except the patent of March 9th, 1844. The parties considered that a grant to make "shirred or corrugated goods" according to the patent of March 9th, 1844, was a complete fulfilment of an agreement to assign the exclusive right to "shirred or corrugated goods." It is very plain that the meaning of the terms "shirred or corrugated goods," as understood and used by the parties to this deed, was the elastic rubber goods manufactured according to the patent of March 9th, 1844, and in that patent denominated "corrugated or shirred India-rubber goods," and that no other kind of elastic goods was meant by the use of those terms.

But, before leaving this part of the case, it should be noticed, that the general conduct of the parties has been in accordance with the views taken by the court of the agreements of 1846, and above set forth. Day, until a comparatively recent period, the fall of the year 1856, never made any claim that this grant of right to "shirred or corrugated goods" included anything more than the right to the shirred or corrugated goods patented by the patent of March 9th, 1844, with the further right to use, in the manufacture of the same, the other patents. It is true that, for a long period, he was in conflict with Goodyear, denying the validity of Goodyear's patent, the validity of which, under his hand and seal, he had acknowledged, and denying, also, the obligation or binding force of the covenants which he had entered into. During that conflict, he was manufacturing the

"shirred and corrugated goods" after the manner of the patent of March 9th, 1844, and was using, in such manufacture, the prepared India-rubber, patented to Goodyear. He was also manufacturing elastic woven rubber goods not made according to the shirred goods patent, using, in such manufacture, Goodyear's prepared India-rubber. The open conflict between Goodyear and Day terminated in September, 1852. The decision of the court in New Jersey brought it to an end. That decision was, that the patents of Goodyear were valid; that Day was bound by his covenants; and that Day had no right to any use of the Goodyear patents, except what he acquired by virtue of the agreements between him and Goodyear, executed in 1846. Immediately after that decision, Day abandoned the manufacture of elastic woven rubber goods, and sold out his looms for weaving the same. Soon after, he transferred to the Congress Rubber Company all the rights which he had to make "shirred or corrugated goods," which rights subsequently became revested in him. And at no time, from the decision of the court in New Jersey, until the fall of 1856, did he or the Congress Rubber Company, which succeeded to all his rights, make any claim that Goodyear had transferred to him any other right than the right to make the "shirred or corrugated goods" described and mentioned in the patent of March 9th, 1844, though, during that period, other parties were making and selling woven elastic goods containing India-rubber cured or vulcanized according to Goodyear's vulcanizing patent, to compete in the market with the "shirred or corrugated goods" manufactured according to the patent of March 9th, 1844.

The deed of the 24th of May, 1858, executed by Goodyear, purported, for the consideration of one dollar and other valuable considerations, received and to be received by him, as in said deed is provided, to sell and convey to Day, (with an agreement to confirm the same within three months from the 15th of June then next, by such further deed of conveyance as said Day might deem necessary,) the full, absolute and exclusive license, right and privilege to make, use, and vend his (Goodyear's) invention of vulcanized rubber, for the term of the then existing patent, and all extended or renewed terms of said patent, as the same might or could be used in the manufacture of all braided, woven, cemented or sewed fabrics, or such as could be covered, or protected, on one or both sides, with substances other than rubber, and in all smooth, elastic shirred goods; and it was provided that the terms and conditions upon which the license was to be held and enjoyed, as to bonuses, not exceeding in the whole the sum of $30,000, and the tariff, not exceeding five cents a pound on the product, should be fixed and determined by Nathaniel Hayward and Thomas A. Jenckes, whose award in the premises should be final, and should be made within three months from the 15th of June then next.

On this branch of the case, two questions are submitted for consideration: First—Is this deed sufficient to convey the equitable right which it purports to convey, (it being admitted that it did not purport to carry any legal right,) Hayward and Jenckes not being shown to have acted as in the deed is stipulated, provided, at the time it was executed, the equitable right which it purports to convey was vested in Goodyear? Second—Was the equitable right which the deed purported to convey, at the time it was executed, so in Goodyear, that he could, without the concurrence of any one else, in equity convey it? If either of these questions is answered in the negative, then this deed can have no effect in conveying the equitable right purporting to be transferred.

We will first turn our attention to the second question. Goodyear had the right to convey what the deed purported to transfer, unless he had, prior to its execution, parted with that equitable right. It is claimed by the defendants, that, before the execution of this deed, Goodyear did part with such right, to the Naugatuck Company, by the deed to them heretofore mentioned. It is also claimed that he parted with the right by other deeds, which have been produced in evidence. It will be sufficient to dispose of this question, to consider only the deed to the Naugatuck Company. That deed gave the right which it transferred, "for and during the unexpired term of all patents issued to him, bearing any date whatsoever, and for and during the unexpired term or terms of any other patent or patents, or renewals of patents, owned by him, or in which he may have an interest, issued or to be issued." If, by the term "renewed" is meant "extended," and if the term is to be applied to patents "issued to him," then it will follow, especially as Day had full knowledge of the rights granted to the Naugatuck Company, that Goodyear had no right to convey what the deed of the 24th of May, 1858, purported to convey, and that Day, by that deed, acquired no new right which can be protected in a court of equity.

The parties appear to have used the term "renewed" as synonymous with the term "extended." Thus, in the deed of the 24th of May, 1858, the grant is, the use of the invention of vulcanized rubber, for the term of the then present patent, "and all extended or renewed terms of said patent." The then present patent was to expire within twenty-two days. There was an application then pending for an extension, which was afterwards granted. It is evident that the parties did not intend, by the term "renewed," to provide for a reissue of the then present patent, which would expire on the 15th of June, but that they did intend, by the term "renewed," the "extended" patent which had been then applied for. The patent office also

uses the term "renew" as synonymous with the word "extend." Hence, in the extension of the vulcanizing patent, which was made on the 14th day of June, 1858, the language of the commissioner is: "I, Joseph Holt, commissioner of patents, by virtue of the power vested in me by the said acts of congress, do renew and extend the said patent, for the term of seven years from and after the expiration of the first term." The term, "renewal" of patents, was used in the grant to the Naugatuck Company. It was not necessary to carry the right to a reissued patent, for said right would be carried without it. Either this term or some other term or terms synonymous with the word "extended," was necessary to carry the right in an extended patent; and, to carry such latter right, the term "renewal" was introduced into the grant.

The case of Wilson v. Rousseau, 4 How. [45 U. S.] 646, has been referred to, to show that the term "renewal" should not receive the construction which I have given to it. The question in that case arose upon the construction of a covenant executed on the 28th of November, 1829, that, in case of "any improvement in the machinery, or alteration or renewal of either patent, such improvement, alteration or renewal shall accrue to the benefit of the respective parties in interest." At that time, there was no law authorizing an extension of a patent beyond the original term of fourteen years. The first act that authorized an extension was passed in July, 1832 [4 Stat. 559]. Subsequent to the passing of this act and the act of 1836 [5 Stat. 117], the patent was extended, and the question was, whether the extended patent was included in the terms of the covenant. The court, in giving their opinion, use the term "renewal" as synonymous with the term "extension," when they say that, "at the time this covenant was entered into, there was no provision in the patent laws authorizing an extension or renewal of the same beyond the original term of fourteen years. The first act providing for it was passed in July, 1832." The language of that act, in speaking of an "extension," is, "to prolong or renew the term of a patent." And the language of the 18th section of the act of 1836, on the subject of the "extension" of a patent is, "that it shall be the duty of the commissioner to renew and extend the patent." The court, in that case, was "of the opinion that the covenant in question should be construed as having been entered into by the parties with reference to the known and existing rights and privileges secured to patentees under the general system of the government established for that purpose;" that the covenant was entered into "with reference to the established law" as it then was; and that the parties did not intend to provide for any possible change that might be made in the law. The court, therefore, in that case, gave a construction to the term "renewal" with reference to the law as it then was, there being at that time no law with reference to the renewal or extension of patents.

It is claimed, also, that if, by the term "renewed," was meant an extended patent, it yet did not mean the extension of a patent which had been issued to Goodyear, but only an extended patent which was owned by him, without being issued to him. The language of the grant is, "for and during the unexpired term of all patents issued to him, bearing any date whatsoever, and for and during the unexpired term or terms of any other patent or patents, or renewals of patents, owned by him, or in which he may have an interest, issued or to be issued." The grant was a right to the use of any renewed (or extended) patents, in which he (Goodyear) might have an interest, whether the patent which might be renewed, and in which he might have an interest, was then issued or might thereafter be issued. In this point of view, without taking any other view of the clause in question, the language of the grant is broad enough to include a renewal (or extension) of a patent issued to him; for, "all patents in which he might have an interest," include a patent issued to him.

In the deed to the Naugatuck Company, there is a covenant by Goodyear as follows: "And the said Charles Goodyear does hereby, for himself, his heirs, executors, administrators and assigns, covenant and agree to and with the said Naugatuck India-Rubber Company, not to make, use or vend, or to grant to any other person or company whatever, any other license to make, use or vend, said preparations or improvements in the preparation of India-rubber, or to apply the same to any of the purposes to which the same can be usefully applied, during the continuance of the license hereinbefore specified and granted to the Naugatuck Company." This covenant was subject to certain reservations. This covenant admits that the rights granted by the license to the Naugatuck Company might come to an end before the expiration of the right secured to Goodyear by patent, when Goodyear would be permitted to go on and make grants. And it is argued, that if the license granted to the company was, by the terms of the grant, to continue during the term of any extended patent, Goodyear could not grant a right to use "said preparations" to any other person at any time; and that there would be no time, after the time during which the license to the Naugatuck Company was to continue, when grants to such other persons could be made, unless such a construction is put upon the length of time for which the grant to the company is to be enjoyed, as will limit it to the unexpired terms of the patents then in existence, and will not extend it for the term of a renewed patent. In the indenture entered into between Goodyear and the Naugatuck Company, there are several covenants on the part of the com-

pany, on the non-performance of which the license was to be void and of no effect. It is expressly provided that, if the company shall, for the term of one year, neglect or refuse, or be unable from want of means, to prosecute the business contemplated, or to stamp the articles manufactured, so that the object of the instrument shall fail for said term of one year, then, at the expiration of the year, the license shall become and be void, and of no effect, after said year. When it thus becomes void, and of no effect, Goodyear would have the right to grant licenses to use "said preparations or improvements" named in the covenant, to whomsoever he pleased.

When, therefore, the deed of the 24th of May, 1858, was executed, the license to the Naugatuck Company was in full force. While it remained in full force, Goodyear was precluded from the right to make such a license as the last-mentioned deed to Day purported to make. He had, indeed, the right to sell for a stipulated price, or sum in gross, the exclusive right of making, using and vending said preparations or improvements, or of applying the same to or for any specific purpose or purposes, provided that, before the sale, the Naugatuck Company should have the right to become the purchaser thereof, at and for such price or sum in gross; and such sale to a third person could not be made, except on the neglect or refusal, as aforesaid, of the Naugatuck Company to become the purchaser thereof. Goodyear never attempted to exercise this latter right. At the time the deed of the 24th of May, 1858, was executed, the Union India-Rubber Company had succeeded to all the rights which the Naugatuck Company had acquired from Goodyear; and, on the 28th of September, 1858, the said Union Company, for the consideration of the gross sum of thirty thousand dollars, paid to Goodyear, and of certain tariffs agreed to be paid, received a conveyance from him of a full and exclusive license, right and privilege, to use the invention of vulcanized rubber, originally patented June 15th, 1844, and extended for seven years from the 15th of June, 1858, in the manufacture of "all braided, woven, cemented or sewed fabrics, or such as are or can be covered or protected, on one or both sides, with substances other than rubber, and in all smooth elastic shirred goods, and also to make and sell India-rubber threads of vulcanized rubber, and all threads or sheets of rubber which are or can be made or finished by union with, or are to be covered by, fibrous substances."

Having disposed of this question, the necessities of the case do not require me to determine the other question—whether the deed of the 24th of May, 1858, is sufficient to convey the equitable right which it purports to convey, provided, at the time it was executed, such equitable right was vested in Goodyear. And this opinion has already been so extended, that I must avoid the discussion of any questions which have been presented, the determination of which is not necessary to a just disposition of the case. From these views, it follows that the motion for an injunction must be denied.

[For other cases involving patent No. 3,461, see note to Warner v. Goodyear, Case No. 17,183. For other cases involving patent No. 3,633, see note to Goodyear v. Central R. Co., Id. 5,563.]

Case No. 5,563.

GOODYEAR et al. v. CENTRAL R. CO. OF N. J.

[1 Fish. Pat. Cas. 626; 2 Wall. Jr. 356.] [1]

Circuit Court, D. New Jersey. March Term, 1853.

PATENT—DESCRIPTION—SPECIFICATION.

1. Possession of sufficient duration and exclusiveness may be the foundation of an interlocutory injunction, without a trial at law.

2. If there is no allegation or pretense that proceedings at law are collusive, it can not be said to detract from the moral or legal effect of a verdict and judgment, that the plaintiff made so plain a case, that the defendant felt compelled to abandon his defense, and plead guilty.

[Cited in Bridgeport Wood-Finishing Co. v. Hooper, 5 Fed. 66; Alabastine Co. v. Payne, 27 Fed. 560.]

3. The right, franchise, or monopoly granted by a patent, is by the statute made divisible in the category of its locality only.

4. The owner of the legal title to the patent, and the party equitably entitled to the damages, as the person immediately injured by the infringement, are the proper parties to a bill for an injunction.

[Cited in Black v. Allen, 42 Fed. 621.]

5. Where the question of infringement is one that admits of doubt, or where the facts are in dispute, the court will not decide it summarily on a motion for a preliminary or interlocutory injunction.

[Cited in Whitney v. Mowry, Case No. 17,592.]

6. But where the question as stated, admits the facts, and its solution depends upon the construction of the patent, a hearing upon the preliminary motion may be as satisfactory as a final hearing, and shorten litigation.

7. The sale or use of the product of a patented machine is no violation of the exclusive right to use, construct, or sell the machine itself.

8. Where a known manufacture or product is in the market, purchasers are not bound to inquire whether it was made on a patented machine or by a patented process.

9. The patent for a discovery of a new and improved process, by which any product or manufacture, before known in commerce, may be made in a cheaper and better manner, grants nothing but the exclusive right to use the particular process.

10. But, if the patentee be the inventor or discoverer of a "new manufacture or composition of matter, not known or used by others before his discovery or invention," it is clear that his franchise, or sole right to use and

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

vend to others to be used, is the new composition or substance itself.

[Cited in Durand v. Green, 60 Fed. 392.]

11. Patents are granted "to promote science and useful arts." They are not odious monopolies, or restrictions on the rights of the public. For the temporary monopoly given to the inventor, the public receive the full compensation by the publication of the invention.

[Cited in Burke v. Partridge, 58 N. H. 351.]

12. When the specification honestly sets forth the process and mode of compounding a new and valuable composition of matter, courts are bound to give it a liberal construction, and not to fritter it away, or annul its benefits, by formal or subtle objection.

13. The patent should be carefully examined to find the thing discovered, and if it be clearly set forth, the patentee should not suffer from the imperfection or vagueness of the language used in describing its true extent and nature.

[Cited in Geier v. Goetinger, Case No. 5,299.]

14. While the specification is usually, and always ought to be, drawn with the assistance of learned and able counsel, the short description (title) in the patent is usually suggested by the commissioner of patents.

[Cited in Hamilton v. Ives, Case No. 5,982.]

15. This description ought not to be repugnant to the specification; but, provided it honestly sets forth, in a few words, the nature and design of the patent, it is sufficient.

16. The product and the process being both new and proper subjects of a patent, the patentee has a right to prohibit the sale or use of the composition, unless when purchased from persons licensed by him to use the process and vend the product.

[Cited in Welling v. Rubber-Coated Harness Trimming Co., Case No. 17,383. Applied in Ingels v. Mast, Id. 7,033. Cited in Andrews v. Carman, Id. 371; Sewall v. Jones, 91 U. S. 190; Giant-Powder Co. v. California Powder Works, 98 U. S. 126; Tucker v. Dana, 7 Fed. 214.]

17. Where the only inconvenience produced by an injunction is to prohibit the defendants from purchasing and using any fresh infringing articles, no reason for delay can be founded upon inconvenience to the public or the parties. Dickerson, J.

This was a motion for a provisional injunction to restrain defendants from infringing letters patent [No. 3,633] granted to Charles Goodyear June 15, 1844, and reissued [No. 156] December 25, 1849, for "improvement in processes for the manufacture of India rubber," the exclusive use to employ which, in the manufacture of car springs, had been granted to the New England Car Spring Company. The claims are given in the report of the case of Goodyear v. Dunbar [Case No. 5,570]. Both judges delivered opinions upon the motion.

[2] [The act of congress, commonly called the "Patent Acts" (July 4, 1836, c. 357 [5 Stat. 117]), makes it a pre-requisite to the issue or validity of any patent, that the inventor "shall deliver a written description of his invention or discovery, and of the manner and process of making, constructing, using and compounding the same, in such full, clear and exact terms, &c., as to enable any person skilled in the art or science to which it appertains, &c., to make, construct, compound and use the same." With this law in force, Mr. Charles Goodyear, the inventor or discoverer of vulcanized India rubber, obtained a patent for that valuable substance. His invention or discovery was described by him "as a new and useful improvement in the processes for the manufacture of India rubber." His description of "the manner and process of making, constructing, using and compounding the same," or, as it is sometimes called, his specification, first stated the valuable qualities possessed by caoutchouc or India rubber; it being elastic, water proof, and durable. But went on to say, that it was in a measure useless, because it became soft, clammy, and would even dissolve under the action of a moderate degree of heat, and also became hard with cold; that the great desideratum was to get a substance, or preparation of rubber, which would retain its good qualities and remain unaffected by heat or cold; that thus far the only step towards improving this substance, was a discovery that a compound of sulphur with caoutchouc, improved its qualities for some purposes; that the patentee commenced a series of experiments with a view to render India rubber capable of resisting heat and cold, by treating it with heat. That finding that this substance, if subjected to heat by itself, could not be cured, he was led to experiment on it, in combination with other substances; that afterwards he discovered that when compounded with sulphur, and treated with a high degree of heat, good results were obtained; and finally, that a compound of caoutchouc, sulphur and carbonate of lead, when treated with a high degree of heat, produced the desired result; but that this result could be obtained only by a high degree of heat. He then went on to describe the nature of his invention as follows: "The nature of the first part of my invention consists in curing caoutchouc, or India rubber, when combined with, or in the presence of sulphur, by submitting the same to the action of a high degree of artificial heat, at a temperature above solar heat, say from 212° to 350°, or thereabouts; whereby this substance becomes so changed in its properties, as to resist, without material change, the variations of temperature below that under which it is cured, and also the action of the expressed and essential oils, and its other known solvents. And the second part of my invention consists in preparing and curing the triple compound of caoutchouc or India rubber, sulphur, and a carbonate or other salt or oxide of lead, for the purpose above pointed out." He then proceeded to describe the process and relative proportions of the materials which enter into the composition of "his fabric;" and after stating the leading features of his invention to be the effects produced by heat on the rubber thus combined, he concludes as follows: "What I claim as my invention, and desire to secure by letters-patent, is, the curing of

[2] [From 2 Wall. Jr. 356.]

caoutchouc or India rubber, by subjecting it to the action of a high degree of artificial heat, substantially as herein described, and for the purposes specified. And I also claim the preparing and curing the compound of India rubber, sulphur, and a carbonate or other salt or oxide of lead, by subjecting the same to the action of artificial heat, substantially as herein described."] [2]

E. N. Dickerson and James T. Brady, for complainants.

Joseph P. Bradley, for defendants.

Before GRIER, Circuit Justice, and DICKERSON, District Judge.

GRIER, Circuit Justice. It will not be necessary to give an abstract of the several averments of the bill, and answer, in order to a correct application of the question involved in the present motion. The possession under Goodyear's patent is of sufficient duration and exclusiveness to be the foundation of an interlocutory injunction, even if the verdict and judgment in the suit against the agents of Day were not in the case. There is no allegation or pretense that those proceedings were collusive; and it can not be said to detract from the moral or legal effect of a verdict and judgment, that the plaintiff made so plain a case that the defendant felt compelled to abandon his defense, and plead guilty.

The defendants do not deny that they use car springs made of the substance called "vulcanized rubber," nor aver that such rubber was manufactured by the patentee, or any licensee under him; but they rely upon the three following objections, viz: 1. That these are not proper parties to the bill. 2. That the rubber used in the car springs was made by a process in which steam is the chief agent; and is therefore no infringement of the complainants' patent. 3. That the complainants' patent is for a process of curing rubber, and not for the product or manufacture; and consequently that the use of the product is no infringement of the patent.

1st. The same objection as to parties has heretofore been taken in this court, and overruled. The assignments to Dorr and Judson, of certain undivided interests, or shares in the patent, appear at first to contain language apt and sufficient to transfer the legal title; but a further examination of the instrument shows that the intention of the parties is only to confer on them an interest in the profits. The whole power of disposal, and consequently the whole legal title is in Goodyear. The New England Car Spring Company, who have the sole right of using this substance for the manufacture of car springs, are the party in interest. Their right is wholly equitable, as their license, though exclusive, does not amount to a legal transfer of a several title to a portion of the patent. The right, franchise, or monopoly granted by a patentee, is by statute made divisible in the category of its locality only. The owner of the legal title to the patent, and the party equitably entitled to the damages, as the person immediately injured by the infringement, being parties to the bill, it can not be successfully objected to for want of proper parties.

2nd. Where the question of infringement is one that admits of doubt, or where the facts are in dispute, the court will not decide it summarily, on the motion for a preliminary or interlocutory injunction. In this case, the defendants are amply able to respond in damages, and an injunction is not necessary on the ground of any irreparable injury to the complainant, likely to occur before a final decree. But the question as now stated, admits the facts; and its solution will depend on the construction of the patent. It is, therefore, as fully before us as it can be on final hearing; and the parties have, I presume, no desire to protract litigation. In the case of Goodyear v. Day [Case No. 5,569], the specific proposition was not before the court, and was, therefore, not decided. But assuming the general doctrines asserted by the court in that case to be correct, there will be little difficulty in the decision of this question. It requires only the specification of complainants' patent, in order to discover whether the process admitted to have been used in manufacturing the vulcanized rubber used by defendants is substantially the same with that described in the patent, "and to see whether in reality, in substance and effect, the defendants have availed themselves of plaintiff's invention, in order to make that fabric or manufacture;" or whether it is not the mere following out the invention or discovery of the plaintiff, with some variation of the means.

Before plaintiff's discovery, many attempts had been made to use the substance called caoutchouc, or India rubber, in the manufacture of certain goods, in order to have the benefits of its qualities of elasticity and impenetrability by water, imparted to certain fabrics. These had all failed in a great measure because this substance became soft and clammy by heat, and stiff and hard by cold. It was then deemed of great importance to discover some method, if possible, by which these bad qualities might be removed, and its valuable ones retained. That this substance was capable of such a change in its qualities was a fact which science could not demonstrate "a priori," much less point out the means of effecting it. Its discovery must necessarily be empirical, or the result of patient experiment, and judicious observation of phenomena.

That sulphur and some metallic oxydes could be used beneficially in drying the fabric, had been discovered; but no one had ever succeeded in producing a compound or

[2] [From 2 Wall. Jr. 356.]

substance having all the good qualities of caoutchouc, but unaffected by changes of temperature. The patience, energy, and perseverance of Mr. Goodyear, at length succeeded in making the discovery, that, by exposing this substance in combination with sulphur and some metallic oxydes (of which white lead was found to be the best), to a high degree of heat, for a certain length of time, the result so much desired could be obtained. The fabric, product, or manufacture which was the result of this process, was found to be almost indestructible; its elasticity under pressure was vastly increased; heat would not soften it, nor cold harden it, nor water penetrate it. It was a great and useful discovery, rather than an invention. It was not a mere composition of known substances, like a patent medicine; nor the production of a known result, substance, or fabric, by newly-discovered means or process. We know substance only by its qualities.

The fabric or product having qualities which can not be found combined in any other substance, may be called a new substance. But whether we call it a fabric or a manufacture, substance, or product, is immaterial. It is a new product, the result of a new process discovered by the plaintiff. What forms the essence or substance of this discovery? What is the sine qua non, or that without which this composition of matter can not be produced? The specification says it is the application of a high degree of heat —between 212° and 350° of Fahrenheit. You may vary the proportions of sulphur, or change the metallic oxydes, and succeed more or less, if the exposure to heat between these points be continued for a sufficient length of time. But no mere changes in the combined materials will have a beneficial effect without this application of a high degree of artificial heat. Now it must be abundantly evident to the most simple apprehension, that any person having the benefit of plaintiff's discoveries, starting from the platform erected by him, may possibly vary the process and obtain the same result. He may use salts of zinc for salts of lead; arsenic or magnesia for sulphur; or heat by steam instead of air; and many other variations of the relative proportions of the materials might be discovered to be equal to those patented.

Yet it must be equally evident that such person is pirating the plaintiff's invention. Suppose that before Goodyear's discovery, a manufacturer had taken to a chemist's laboratory some India rubber, sulphur, and white lead, and asked him to make him a compound having the qualities now exhibited by the substance known as "vulcanized rubber." He would have received an answer denying the possibility of making such a compound by any process known to scientific men. Now, suppose he had put into the same person's hands the specification of plaintiff's patent, and asked him to discover some means by which the same result might be produced, in mode or proportions different from that set forth in the patent; what science was before incapable of performing by synthesis, or any reasoning a priori, can now be improved by valuable hints derived from analysis. The chemist can now immediately suggest many changes in the process, which may produce equivalent or better results. He could at once suggest that a carbonate of zinc, or some other metallic oxyde, could probably perform the office of white lead; that possibly arsenic, or magnesia, or some other metal or earth might be substituted for sulphur; that sulphur might be used better, perhaps, in a gaseous form; that the high degree of heat so necessary to the process could be as well or better applied by means of steam than dry heated air. Yet, no one whose perceptions are not perverted can fail to see that all such changes of mode or operation —such interposition of chemical equivalents —though possibly improvements on the original process patented, have their foundation on the patentee's first discovery, and start by appropriating or pirating it. It must be obvious, also, that there is not only a distinction, but a wide difference between one who merely invents a new method or process, by which a well-known fabric, product, or manufacture is produced, in a cheaper or better way, and the discovery of a new compound, substance, or manufacture, having qualities never found to exist together in any other material. In the first case the inventor can patent nothing but his process, and not his composition of matter. In the latter, both are new and original, and both patentable —not severally, but as one discovery or invention. It is evident, also, that the question of infringement must, in such cases, depend on different conditions. Steel is a well-known substance, and one who could devise a new and cheaper method of combining the iron and carbon, in order to form it, could patent his process only; and every other person would be at liberty to devise any different process for effecting the purpose.

But if steel, as a substance, was before unknown, the person who first discovered that a composition of iron and carbon could be made to assume such valuable qualities would have a right to patent not only his process, but his product. And no person who had thus taken the benefit of the patentee's discovery, and by it was informed of the valuable qualities of this compound of iron and carbon, could, by varying or improving the mode of process of its production, rob the patentee of his franchise.

But, assuming this patent to be merely for a process, and not for a product or fabric, still, in a question of infringement, the inquiry is, what is the essential or substan-

tial agent in the patentee's process or discovery? The specification affirms it to be a high degree of heat, and that no commixture or combination of substances with caoutchouc will give it these qualities, unless the composition be exposed for a length of time to a high degree of heat. Can any person doubt that the mere substitution of steam for heated air, in such manufacture, is a bold attempt to pirate the patentee's invention, and evade his patent? No learned hypothesis of chemists or philosophers as to the different chemical action of hot steam and hot air, can be received to palliate or protect so gross an invasion of the patentee's rights. We have, therefore, no doubt that the use of steam in place of heated air, in the manufacture of vulcanized India rubber, is a palpable infringement of the patent of Goodyear.

3d. We will notice the third objection made by defendants' counsel, to the complainants' right to an injunction, which is, "That the complainants' patent is for a process only, and not for a product or manufacture; and consequently that the use of the product is no infringement on the patent." If the premises assumed in this proposition are true, the conclusion is undoubtedly correct. A patent grants to the patentee "the full and exclusive right and liberty of making, using, and vending to others to be used, the said invention or discovery." It is evident that the sale or use of the product of a patented machine, is no violation of the exclusive right to use, construct, or sell the machine itself; and that the patent for a new and improved process, by which any product, or manufacture before known in commerce may be made in a cheaper and better manner, grants nothing but the exclusive right to use the particular process. Where a known manufacture or process, is in the market, purchasers are not bound to inquire whether it was made on a patented machine, or by a patented process.

But, if the patentee be the inventor or discoverer of a "new manufacture or composition of matter not known or used by others before his discovery, or invention," it is clear that his franchise, or sole right to use and vend to others to be used, is the new composition or substance itself.

The product, and the process constitute one discovery, the monopoly of which is secured to the inventor or discoverer, as a consideration or compensation for making it known to the public. That the composition of matter now known as "vulcanized rubber," was not known before the discovery patented by Goodyear, and that it has since been most beneficially and extensively applied in numerous manufactures, as a substance having certain qualities not possessed by caoutchouc in its natural state, or any other known substance, are facts well known and admitted by all, except those who have been engaged in pirating the discovery, or whose interests are otherwise concerned in denying the fact. It is true the patent, in this case, does not use the phrase, "vulcanized rubber," a term since invented to denote the newly-discovered manufacture or composition of matter. Patents are granted to "promote science and useful arts." They are not odious monopolies, or restrictions on the rights of the public. For the temporary monopoly given to the inventor, the public receive full compensation by the publication of the invention. And when the specification of a patent honestly sets forth the process and mode of compounding a new and valuable composition of matter, courts are bound to give it a liberal construction; and not to fritter it away, or annul its benefits by formal or subtle objections.

What we consider the true extent and merit of the plaintiff's discovery, we have already stated in this opinion. It only remains to examine whether the patent and specification will bear a construction coextensive with the patentee's rights, arising from such discovery. On account of the great vagueness and indefiniteness of the language used in describing the various arts, machines, manufactures, and compositions of matter, it is almost impossible to describe the real nature of many discoveries or processes, in language free from ambiguity or misconstruction. Different persons, looking at it from different points of view, would describe it in different terms. In the present case, one would describe it as "the art of curing India rubber;" another, "the art of rendering caoutchouc, and manufactures in which it is used, insensible to heat or cold, or the action of most of its known solvents;" another, as a "fabric, manufacture, or new composition of matter, having qualities never before combined in any other known substance, being elastic, water-proof, insensible to acids, to heat, or to cold."

Still, call it what you will, if the patentee has set forth fully the materials, their various proportions, and the processes necessary to the production of this composition of matter, he has done all that the law requires, and should be entitled to its protection. The patent should be carefully examined to find the thing discovered, and if it be clearly set forth, the patentee should not suffer for the imperfection or vagueness of the language used in describing its true extent and nature. Applying this principle to the present case, let us examine the patent, to see if the specification does not set forth a discovery which might be described by the most extended of the descriptions given, as well as the narrowest.

In this country the inventor must file a specification or description of his invention or discovery before he can receive a patent. The patent is required to "contain a short description or title of the invention or dis-

covery, correctly indicating its nature and design." This description ought not to be repugnant to the specification; but, provided it honestly sets forth, in few words, the "nature and design," of the patent, it is sufficient. The specification must be looked to for the full disclosure of the discovery, and the extent of the inventor's claims. It should show what the patentee claims to have discovered or invented; wherein it differs from what was before known; and by what combinations or processes the new material may be compounded. While the specification is usually, and always ought to be, drawn with the assistance of learned and able counsel, the short description in the patent is usually suggested by the commissioner of patents. The extent of the patentee's rights must be judged from the whole instrument taken together, and not from any one sentence.

It is especially proper, in patents for complicated machines, that the specification should clearly set forth what the patentee admits to be old, and what he claims to be of his invention, and that he should be held to such statement. In anomalous cases, like the present, when a new product has been discovered, and the process of compounding it or obtaining it is disclosed, the patentee, by stating his discovery and revealing his process, has done all that he is required to do or can do. The careful separation of new from old, the limitation of claims to particular parts or combinations, can not be required as a substantial part of the specification. If a specification sets forth a discovery, a new composition of matter, and the process for compounding it, that should be taken as the extent of his claim and the measure of his franchise.

The patent describes the discovery or invention as "a new and useful improvement in the processes for the manufacture of India rubber." "As a brief description of the discovery, indicating its nature and design," this may be said to be correct, so far as it goes, for it briefly states the nature of the discovery. But it can not limit the claim of the patentee to narrower bounds than those described in his specification.

The specification first states the valuable qualities possessed by caoutchouc, or India rubber, being elastic, water-proof, and durable; but that it was in a measure useless, because it became soft, clammy, and would even dissolve under the action of a moderate degree of heat, and also, become hard with cold. That the great desideratum was, to get a substance or preparation of rubber, which would retain its good qualities, and remain unaffected by heat or cold. That thus far, the only step toward improving this substance, was a discovery of Nathaniel Hayward, that a compound of sulphur with caoutchouc improved its qualities for some purposes.

That the patentee commenced a series of experiments with a view to render India rubber capable of resisting heat and cold, by treating it with heat. That finding that this substance, if subjected to heat by itself, could not be cured, he was led to experiment on it, in combination with other substances.

That afterward, he discovered that when compounded with sulphur, and treated with a high degree of heat, good results were obtained; and, finally, that a compound of caoutchouc, sulphur, and carbonate of lead, when treated with a high degree of heat, produced the desired result; but that this result could be obtained only by a high degree of heat.

The patentee then goes on to describe the nature of his first invention, as follows: "The nature of the first part of my invention consists in curing caoutchouc, or India rubber, when combined with, or in the presence of sulphur, by submitting the same to the action of a high degree of artificial heat, at a temperature above solar heat, say from 212° to 350°, or thereabouts; whereby this substance becomes so changed in its properties, as to resist, without material change, the variations of temperature below that under which it is cured, and also the action of the expressed and essential oils, and its other known solvents. And the second part of my invention consists in preparing and curing the triple compound of caoutchouc or India rubber, sulphur, and a carbonate, or other salt, or oxyde of lead, for the purpose above pointed out.

He then proceeds to describe the process and relative proportions of the materials which enter into the composition of the "fabric."

He concludes by stating the leading features of his invention to be the effects produced by heat on the rubber thus combined, and concludes, as follows: "What I claim as my invention, and desire to secure by letters patent, is, the curing of caoutchouc or India rubber, by subjecting it to the action of a high degree of artificial heat, substantially as herein described, and for the purposes specified. And I also claim, the preparing and curing the compound of India rubber, sulphur, and a carbonate of other salt, or oxyde of lead, by subjecting the same to the action of artificial heat substantially as herein described."

Now, what is this India rubber, cured "substantially as herein described?" It is clearly not merely an improved method or process of producing an old and well-known composition or material, but it is a new product, fabric, manufacture or composition of matter, having qualities possessed by no other known material. This is what is described and claimed in the patent—a new product as well as a new process.

The product and process being both new and proper subjects of a patent, the patentee has a right to prohibit the sale or use of the composition, unless when purchased from persons licensed by him to use the process

and vend the product. If precedent be needed for this doctrine, the case of Hancock v. Sommerville, in the English court of common pleas, tried in June, 1851, will be found directly in point.

Hancock had seen samples of vulcanized rubber made by Goodyear, and had succeeded in discovering the process for preparing it. His patent was "for improvements in the preparation or manufacture of caoutchouc in combination with other substances, which preparation, or manufacture, is suitable for leather, cloth, and other fabrics, water-proof, and for various other purposes for which caoutchouc is employed."

The claim in the specification was in these words: "What I claim as my invention or discovery, is—First, the combination of caoutchouc with silicate of magnesia, whereby manufactured caoutchouc is rendered free from that clammy and adhesive character which it usually possesses; secondly, I claim the modes herein described of combining asphalte with caoutchouc: and, thirdly, I claim the treating of caoutchouc (either alone, or in combination with silicate of magnesia, or other substances) with sulphur when acted on by heat, and thus changing the character of caoutchouc herein described."

The infringement charged upon the defendants was the importation and sale of articles made by Mr. Goodyear. Hancock was decided to be an independent, original inventor, though posterior to Goodyear, because the substance manufactured by Goodyear did not disclose the process by which it was compounded, or manufactured. And the sale of articles in England, manufactured by Goodyear, was adjudged to be an infringement of Hancock's rights as secured by his patent. The patent of Hancock describes his invention. "An improvement in the preparation," etc. His specification and claim set forth a new product, and a new process, in terms not as well chosen as those of Goodyear's patent; yet not even a doubt was suggested by counsel that the sale or use or articles manufactured by Goodyear was an infringement of Hancock's patent, provided his patent could be supported. We should ill protect our patentee (who is admitted to be the first inventor) if we should permit articles manufactured by Hancock to be placed in competition with Goodyear here, while the English courts, in the construction of a similar patent, restrain the sale of Goodyear's articles in England. Yet such would be the necessary consequence of a decision of this point adverse to the complainant.

It follows that the plaintiffs are entitled to their injunction. But the court will not allow it to have the effect of stopping railroad cars having springs made of this composition, without license. It is to be presumed that the defendants have no intention or desire to continue litigation, or to encourage those who are pirating the plaintiff's invention; and believing that the object of the parties is to have these questions decided, and their respective rights ascertained, without regard to the matter of damages, which are, in this case, of small amount, and the cause having been fully and ably argued by the learned counsel, I have given the case more than the usual consideration which it is customary to give, on motion for an interlocutory order. My general practice has been to postpone the consideration of difficult or doubtful points till the final hearing of the cause and not to decide the whole merits of a cause on a mere preliminary motion.

DICKERSON, District Judge. In this case, the bill charges that Charles Goodyear, one of the complainants, having a patent for the improvement in curing caoutchouc, or India rubber, by which is produced the material or manufacture now known as vulcanized rubber, assigned to the other complainants, "The New England Car Spring Company," the right to use the material in the manufacture of car springs; and that the defendants are using car springs made of the same material, and thereby infringing the rights of the complainants, and it prays an injunction, and an account.

The defendants resist the application for various reasons: First. Because the proper parties, complainants, to wit, Judson & Dorr, are not joined, they being assignees or licensees. Second. Because the patent of Goodyear is for a new mode or process, and the defendants only use the articles produced by such process, and which were not made or procured to be made by themselves, and therefore no bill can be sustained. Third. Because the article used, is itself the subject of a distinct patent. It is vulcanized rubber, manufactured into an article of merchandise. Fourth. Because it is not a case where a preliminary injunction should be granted, because: 1. Defendants are in good credit. 2. No irreparable injury to complainants will be produced by waiting. 3. Great public inconvenience would ensue if injunction be granted. 4. The complainants have not established their right at law. Fifth. Because the manufacture of the article in question is not an infringement, as it is manufactured by the use of steam, which courts have decided is not an infringement.

Upon examining the bill, and the affidavits on behalf of the defendants and these objections, it is quite manifest that there is no material fact in the case which is controverted. As to parties, there is no dispute, but that these parties, complainants, are proper parties; but the allegation is, that others, to wit, Judson & Dorr, as assignees, or licensees, are also interested in the patent, and therefore should have been joined. I will not inquire whether they would be necessary parties, if an account were to be taken. It is enough at this time to say, that the present application is for an injunction, and they are certainly not

necessary parties for that purpose. The next objection is, that the bill will not lie against the defendants, for the mere use of the article, as the patent is only for the process, or mode of making it; and this leads directly to the inquiry as to the extent and character of the patent.

The rules of construction upon such inquiry, I think, are properly defined by Justice Story, in several cases which came under his decision. In the case of Ames v. Howard [Case No. 326], he says that "It has always been the course of the American courts to construe these patents fairly and liberally, and not to subject them to any over-nice and critical refinements. The object is to ascertain what, from the fair sense of the words of the specification, is the nature and extent of the invention claimed by the party; and when the nature and extent of that claim are apparent, not to fritter away his rights upon formal or subtle objections, of a purely technical character." In the case of Blanchard v. Sprague [Id. 1,518], he says: "Patents, then, are clearly entitled to a liberal construction, since they are not granted as restrictions upon the rights of the community, but are granted to promote science and useful arts." And in the case of Ryan v. Goodwin [Id. 12,186], it is said: "If, therefore, there be any ambiguity or uncertainty in any part of the specification, yet, if, taking the whole together, the court can perceive the exact nature and extent of the claim made by the inventor, it is bound to adopt that interpretation, and to give it full effect."

With these rules of construction for a guide, I proceed to examine the patent and specification of Mr. Goodyear now in question. He commences by saying: "I have invented a certain new and useful improvement in the manner of preparing fabrics of caoutchouc or India rubber, and the following is a full, clear, and exact description of the principles or character which distinguishes them from all other things before known." And in the latter part of the specification he says: "Although I have only described the mode of preparing and curing sheets of India rubber, it will be obvious that my method is applicable to articles of any desired form." The clear and obvious meaning of which is, that he has discovered how to make of India rubber a new thing or manufacture, which, in principle and character, is distinguished from any other thing before known.

He then proceeds, as by law required, to describe the mode or process by which he produces the result; showing that the effect is produced by mixing certain materials with the India rubber, and submitting it to a high degree of heat; but he does not claim the discovery of any particular process or manner of applying the heat, but says that "the operator may communicate the heat in any suitable manner or form;" nor does he claim, in his description or specification, any particular form, or manner, or process of combining the different ingredients, and preparing them to be submitted to the action of the heat. On the contrary, he expressly claims in his specification, that "the leading feature of his invention, and that which chiefly constitutes the substance or essence of its usefulness, is the discovery of the effects produced on India rubber by the action of artificial heat, at a temperature above that to which the fabric would be exposed in ordinary or common use."

What is it, then, that he claims as his invention or discovery, in order to entitle him to a patent? The law requires that he should have discovered or invented some new and useful art, machine, manufacture, or composition of matter. It must, therefore, be a manufacture. It is not the process, alone, which he claims as being new, in his invention, but the thing itself. In the first part of the specification, he states that the fabrics which he prepares, and the improvements, are distinguished from all other things before known; and in the latter part he says, that the leading feature of his discovery, and of that which constitutes the essence of its usefulness, is the discovery of the effects produced on India rubber by the action of heat, and that effect is vulcanized rubber. At the close of his specification, he claims the curing of caoutchouc, or India rubber, by subjecting it to the action of a high degree of artificial heat, substantially as therein described, and for the purpose specified.

This may not be the most appropriate form of words to meet the views of the applicant, as contained in the former part of his specification. The question, however, is not whether these are the most appropriate terms; but what is the meaning of those terms, when taken in connection with the other parts of the specification and description. The word "curing," as here used, must be considered as a technical term. If the expression, "curing of India rubber by the application of heat, as therein described," be construed to mean the converting of India rubber into a new substance or manufacture, now known as vulcanized rubber, it will be consistent with the other parts of the specification and description; and ex vi termini, it will bear that construction better than any other. Whereas, if it be construed to be a claim for a new process, it will be inconsistent with the other parts of the specification, and in violation of the obvious meaning of the applicant.

I am, therefore, of opinion, that, upon a fair construction of the specification and description in this case, it appears that Charles Goodyear has discovered a new and useful manufacture now known as vulcanized rubber; and that the right and liberty of making, constructing, using, and vending the same to others to be used, is secured to him by letters patent.

This view of the case is sustained by the

decision of the courts in England, upon the Hancock patent, which is for the same invention. In this patent, Hancock claims "the treating caoutchouc, either alone or in combination with other substances, with sulphur, when acted on by heat, and thereby changing the character of caoutchouc, as described." The one claims "curing," and the other "treating," India rubber. And in order to understand the meaning of either of the words as applicable to the subject-matter, it is necessary to refer to the description and other parts of the specification, by which it will appear that they mean the same thing. And yet the courts of England protected Hancock against the sale of shoes made of vulcanized rubber in this country, and sent there as merchandise.

In the case of Cormick v. Keane [unreported], the patent was for "an improvement in the making or manufacturing of elastic goods or fabrics applicable to various useful purposes." It was, in fact, an improvement in making shirred goods, and after describing the manner of doing it, the patentee concludes his specification thus: "By thus combining the strands of India rubber with yarns of cotton, flax, or other non-elastic material, I am enabled to produce a cloth which shall afford any degree of elastic pressure, according to the proportion of the elastic or non-elastic material. It remains only to add, that the strands of India rubber are, in the first instance, stretched to their utmost tension, and rendered non-elastic (as described in my former specification), and being in that state introduced in the fabric, they acquire their elasticity by the application of heat after the fabric is made. Lastly, as my invention consists solely in the employment of strands of India rubber in connection with yarn, in the way described for manufacturing elastic goods or fabrics, I have not deemed it necessary to describe any particular kind of machinery for carrying the same into effect, as such machinery is well known, and forms no part of my invention."

Upon that patent the suit was brought; and the jury, upon evidence showing that the defendants had only sold goods similar to those patented, found that they had infringed the patent, and the verdict was sustained. On the argument of the cause at bar, the defendants, among other objections, contended that the invention was not the subject-matter of a patent; that it was neither a new manufacture nor an improvement in any old manufacture, but merely the application of a known material to a purpose before known. But in giving judgment, the court say: "Whether it is new or not, or whether it is an improvement of an old manufacture, was one of the questions for the jury upon the evidence before them. But that it came within the description of a manufacture, and so far is an invention which may be protected by a patent, we feel no doubt whatever. The materials, indeed, are old, and have been used before, but the combination is alleged to be, and (if the jury are right in their finding) is new, and the result or production is equally so."

This case is singularly like the one under discussion, and strongly confirms the view which I have taken of it.

The third objection necessarily falls with the second.

The defendants insist, in the fourth place, that this is no case for a preliminary injunction, because it is not pretended that the defendants are insolvent, nor that the complainants would suffer irreparable injury by waiting until final hearing.

But it is manifest that neither the public nor the defendants would suffer any inconvenience at this time by restraining them from purchasing and using any vulcanized rubber car springs, except those which they now have in use; and, therefore, no reason for delay can be founded upon inconvenience to the public or the parties. On the contrary, it should be the desire of the defendants, and it is interesting to all others wishing to use car springs of this character, to have the earliest possible decision upon the subject.

As to the allegations that Goodyear has not established his right at law, that he is not the original inventor, and that his renewed patent is void, these are points which were settled in the case of Goodyear v. Day [Case No. 5,569], in this circuit, and I have seen nothing since to alter my opinion on the subject.

As a further objection to a preliminary injunction, it is said that the infringement is denied. The defendants do not deny that they use the car springs, but say that the rubber is prepared by the application of steam, and therefore no infringement; and this is made the subject of their last general objection to granting the injunction at any time. I was somewhat surprised to find this objection taken by the defendants at all, but much more when I found my own opinion in the case of Goodyear v. Day [supra], cited in support of the position. In that case, the right to use steam in vulcanizing rubber was not raised, except as applicable to an objection started by the defendants, that the reissued patent of 1849, embraced a different and more extensive use of heat than the original patent of 1844, which was surrendered upon examining the two patents and specifications. I was satisfied that there was no foundation for the objection, and therefore I remarked that, "I did not inquire whether the complainant might use heat in the form of steam, for the purpose of curing rubber, as that was not an issue." And I am at a loss to discover how the defendants in this cause can use that opinion to support their position, and more especially as by reference to a former part of the same opin-

ion, when remarking upon the patent of 1844, I say, "Under this specification, he had the undoubted right to use heat of any kind then known." It is true that this case was a mere dictum, but it was, and still is, my opinion. Mr. Goodyear, in his specification, uses the term, "heat, or artificial heat," without distinguishing any particular kind of heat; and it appears to me that the maxim, "qui haeret in litera, haeret in cortice," most applies to any one who should contend that there was any essential difference, whether the heat be applied by means of steam or hot air, both being heated by the combustion of fuel. A similar distinction was, indeed, once attempted as to Daniell's patent, in which the invention consisted in immersing rolls of cloth in hot water. Another patent was obtained for subjecting similar rolls of cloth to the operation of a steam bath, instead of immersing them in hot water, but it was held to be an infringement.

Unfortunately for the position of the defendants in the case, the complainant, Goodyear, did, in fact, use steam for vulcanizing rubber, as it appears by his description, in which he says "this heating process may be effected by running the fabrics over heated cylinders, but I prefer to expose them to an atmosphere of artificial heat, of the proper temperature, etc." Now, it is well known that these cylinders are heated by steam, and it is also known that the car springs of the defendant are made by placing the rubber in a cylinder, and submitting the cylinder to the action of steam, so that the only difference between them is, that in the one case, the rubber is placed inside of the cylinder, and the steam applied to the outside; in the other, they change places, and the rubber takes the outside of the cylinder, and the steam the inside.

So, it appears that Goodyear did, in fact, contemplate and describe the use of steam in vulcanizing rubber; but he made no claim to that particular mode, for the plain reason that it is included in the claim of applying heat generally. I am, therefore, of opinion, upon a view of the whole case, that the complainants are entitled to their injunction.

[NOTE. Patent No. 3,633 was granted to C. Goodyear, June 15, 1844; reissued December 25, 1849 (No. 156); again reissued November 20, 1860 (No. 1,085). For other cases involving these patents, see Goodyear v. Providence Rubber Co., Case No. 5,583; Same v. Congress Rubber Co., Id. 5,565; Same v. Hills, Id. 5,571a; Same v. Phelps, Id. 5 581; Same v. McBurney, Id. 5,574; Same v. Day, Id. 5,569; Same v. Bourn, Id. 5,561; Same v. Bishop, Id. 5,558, 5,559; Same v. Mullee, Id. 5,579; Same v. Hullihen, Id. 5,573; Same v. Chaffee, Id. 5,564; Same v. Dunbar, Id. 5,570; Same v. New York Gutta-Percha Co., Id. 5,580; Same v. Beverly Rubber Co., Id. 5,557; Rubber Co. v. Goodyear, 9 Wall. (76 U. S.) 788, 807; Suydam v. Day, Case No. 13,654; Washing-Machine Co. v. Earle, Id. 17,219; Day v. Newark India-Rubber Manuf'g Co., Id. 3,685; Goodyear v. Day, Id. 5,568; Same v. Cary, Id. 5,562; Gardner v. Goodyear Dental Vulcanite Co., 131 U. S. 103; Ex parte Robinson, Case No. 11,932.]

Case No. 5,564.

GOODYEAR et al. v. CHAFFEE et al.

[3 Blatchf. 268.] [1]

Circuit Court, S. D. New York. May 4, 1855.

EQUITY PRACTICE—REGULARITY OF SERVICE—ANSWER—PATENTS—INFRINGEMENT IN ANOTHER DISTRICT—INJUNCTION.

1. A defendant who appears and puts in an answer in a suit in equity, waives all objections to the regularity of the service upon him of the subpoena to appear and answer.

2. Where it appeared, on a motion to this court for an injunction to restrain the infringement of a patent, that the infringing articles were made and sold in Rhode Island, and that the defendant resided there, and carried on there the business of making and selling the articles, the injunction was refused, on the ground that the defendant was beyond the process of injunction, that the issuing of it would be inoperative and useless, and that the proper place to file a bill for an injunction was in Rhode Island.

[Cited in Jones v. Osgood, Case No. 7,487; Mellen v. Ford, 28 Fed. 639.]

This was a bill in equity, filed by Charles Goodyear and four foreign corporations, two of New Jersey and two of Connecticut, against Edwin M. Chaffee and George O. Bourn, both of Providence, Rhode Island, and John Griswold and another of New York. The bill was founded on letters patent [No. 3,633] granted to Goodyear, June 15th, 1844, and reissued to him December 25th, 1849, [No. 156], commonly known as the "vulcanizing patent," for vulcanizing India rubber. It averred that, in July, 1848, those corporations became, by an agreement with Goodyear, which was recorded in the patent office in August, 1848, and which was still in force, the owners of the exclusive right to make and sell India rubber shoes under the patent; that Chaffee had notice of such agreement before he committed the infringements complained of; that those corporations were now in the enjoyment of the rights they had acquired under that agreement; that, since the reissue, Chaffee and Bourn, as partners with or interested with William W. Brown, of Providence, under the firm of E. M. Chaffee & Co., had made and sold shoes of vulcanized India rubber, in violation of the patent and of the rights of the plaintiffs; that, in June, 1853, 30,000 pairs of such shoes, made by the firm of E. M. Chaffee & Co., and the title to which was in them, had come into the possession of the other two defendants to be shipped to Europe for sale; that the four corporations had, for many years, been in the habit of sending large quantities of vulcanized India rubber shoes to Europe for sale, and of paying the plaintiff Goodyear a tariff on them; that the sale of the shoes in question would injure the plaintiffs; and that the members of the firm of E. M. Chaffee & Co. were unable to respond in damages. The bill prayed for an injunction to restrain Chaffee and Bourn from

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making, using, or selling any articles in violation of the patent. The plaintiffs now moved for an injunction. It appeared that all the shoes made or sold by E. M. Chaffee & Co., were made and sold at Providence, Rhode Island. The defendant Bourn was not served with process. The defendant Chaffee was served in New York. It appeared that he had gone to New York in pursuance of a summons served upon him in Rhode Island, by the United States marshal there, to attend this court as a witness on the trial of a suit pending therein; that the sole purpose of his going to New York was to attend this court as a witness in that suit, and that he remained in New York for that purpose only; that he attended the court while that suit was on trial, as a witness therein; that, while so attending, and while the court was in session, and while that suit was on trial, he was served with the subpoena in this suit, in the court room, and in the actual presence of the court. It was, therefore, urged by the defendant Chaffee, in opposition to the motion for injunction, that he had not been regularly brought into court. Both Bourn and Chaffee had appeared and answered the bill.

James T. Brady, for plaintiffs.
Nathaniel Richardson, for defendants.

NELSON, Circuit Justice. 1. The defendant, Chaffee, waived any objection to the service of the subpoena, by causing his appearance to be entered and putting in an answer. It is unimportant, therefore, to inquire into the regularity of the service.

2. The motion for the injunction must be denied. The case shows that the defendants Bourn and Chaffee are residents of another jurisdiction, and carry on there the business which is claimed to be in violation of Goodyear's patent. They are consequently beyond the process of injunction, and the issuing of it would be inoperative and useless. If the plaintiffs desire to enjoin them, they must file their bill in the jurisdiction where the business complained of is carried on.

[See Case No. 5,561.
[For other cases involving this patent, see note to Goodyear v. Central R. Co., Case No. 5,563.]

Case No. 5,565.

GOODYEAR v. CONGRESS RUBBER CO. et al.

[3 Blatchf. 449.] [1]

Circuit Court, S. D. New York. March 19, 1856.

PATENTS—LICENSE FOR SPECIFIED PURPOSE—VIOLATION OF TERMS OF LICENSE — TRANSFER OF LICENSEE'S RIGHTS — RIGHTS OF THE PARTIES—LICENSE TARIFFS—LIEN.

1. G., a patentee, gave an exclusive license to D. to use his patent for a specified purpose only, D. covenanting not to use it for any other purpose, and to pay G. a specified tariff. D. used the patent for other purposes. G. then sued D., in New Jersey, to restrain the violation of the patent, and obtained a decree for an accounting before a master. After the rendering of the decree, C., with knowledge thereof, took from D. a conveyance of said license. C. went on making the article covered by the license, and refused to pay G. what D. owed him for violating said covenant, or to account to G. for the amount due from D. for tariffs under the license. G. now filed a bill against D. and C., to set aside the conveyance as fraudulent, or that C. be permitted to retain it only on condition that he should pay to G. what D. owed him for breach of said covenant, and the amount of the tariffs due to G. under the license: *Held*, on demurrer by C. to the bill, that G. had no lien on the license, to secure the tariffs, and, therefore, that the bill set up no title or equity as against C., as respected the amount due from D. at the time of the conveyance to C.

2. The unpaid tariffs due from D. to G. afforded no ground for enjoining C. from acting under the license, and whether the conveyance from D. to C. was fraudulent or not, was not material as it respected G.

3. As respected any attempt to evade the New Jersey decree, the question could not arise until that decree became final.

4. The bill could not be sustained against C., either to aid in enforcing that decree, or in collecting from D. the amount of tariffs due from him to G. at the time of the conveyance from D. to C.

5. But, as the bill averred that C., though still making the article covered by the license, refused to pay tariffs therefor: *Held*, that C. took the license subject to the obligation to pay the specified tariffs on what he should make under it.

6. The bill was sufficient to compel C. to pay the tariffs due for his use of the license, or be enjoined from its use.

[Cited in Magic Ruffle Co. v. Elm City Co., Case No. 8,949; McKay v. Smith, 29 Fed. 296; Shipman Engine Co. v. Rochester Tool Works, 34 Fed. 747.]

This was a bill in equity, brought by [Charles Goodyear] a citizen of Connecticut against [Horace H. Day] a citizen of New York, and a corporation created by the laws of New York, and four other citizens of New York, as corporators of said corporation. The defendants demurred to the bill. The facts sufficiently appear in the opinion of the court.

James T. Brady, for plaintiff.
Francis B. Cutting, for defendants.

INGERSOLL, District Judge. The bill shows that the plaintiff was the inventor of "a new and useful improvement in the processes for the manufacture of India-rubber," which was secured to him by a patent; that, subsequently thereto, he entered into a contract with the defendant Day, under seal, by which he licensed Day to use the improvement patented, for manufacturing shirred or corrugated goods, in consideration of the sum of $10,000, although but $5,000 were actually paid, and also in consideration of a covenant on the part of Day, that, so long as the plaintiff should protect Day in the

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exclusive right to manufacture such shirred goods, Day would not manufacture any other articles of vulcanized rubber except such as were provided for in the covenant, and that Day would pay the plaintiff three cents for every square yard of shirred goods made by him; that Day has been protected by the plaintiff in the exclusive enjoyment of the privilege of manufacturing shirred goods; that, soon after said covenant was entered into, Day commenced to manufacture and sell India-rubber goods secured by said patent, other than shirred goods, contrary to his covenant; that, thereupon, the plaintiff filed his bill, in the circuit court of the United States in New Jersey, against Day, to restrain him from any further violation of the plaintiff's rights, as secured by said patent and by said covenant; that said cause in New Jersey came on to be heard on pleadings and proofs, and that it was therein decreed that an account be taken of the damages which the plaintiff had sustained by reason of the violations by Day of the plaintiff's rights, and that he be directed to pay what might be found due to the plaintiff under said covenant, and that Day produce his books and accounts before the master appointed by the court for that purpose, and submit himself to a personal examination before the master, touching the matters specified in the decree; that, before the rendition of the decree, and during the pendency of the suit in New Jersey, Day fraudulently conveyed away all his property in New Jersey, and that, after the rendition of the decree, he fraudulently conveyed his right acquired by the contract with the plaintiff, to the defendants, the Congress Rubber Company; that, since said fraudulent transfer, the Congress Rubber Company continue to manufacture shirred goods, claiming to have the right which Day acquired by the contract with the plaintiff, and refuse to pay the plaintiff the amount due from Day to him for the violation of his covenant, or to account with the plaintiff for the amount due from Day for tariffs under the contract with the plaintiff; that there is due to the plaintiff, in the suit pending in New Jersey, from Day, not less than $100,000; that he has put all of his property out of his hands fraudulently, and with the intent to defeat the decree obtained by the plaintiff in New Jersey; that the plaintiff has no means to realize said amount, except out of the property fraudulently transferred by Day; and that the Congress Rubber Company, when they took the fraudulent transfer from Day, had full notice of the suit pending in New Jersey, and of the decisions that had been made therein, and of the rights of the respective parties thereto. The bill prays, among other things, that the assignment made by Day to the Congress Rubber Company, of the agreement between the plaintiff and Day, may be decreed to be fraudulent and void as against the plaintiff, and be set aside and annulled as against him, or that the Congress Rubber Company be permitted to retain such agreement only on condition that they pay the amount of the damages which Day owes to the plaintiff for the breach of said covenant, and for the violation of the rights of the plaintiff secured by said patent, and the amount of the tariffs due to the plaintiff under the agreement made between him and Day, and that the Congress Rubber Company and Day be enjoined from parting with, disposing of, incumbering, or in any way using, the right under said agreement granted by the plaintiff to Day, until Day or the Congress Rubber Company shall have accounted with and paid over to the plaintiff the damages due to him for the breach of the said agreement, and the tariffs due under the same.

By the agreement entered into between the plaintiff and Day, by which Day was licensed to manufacture and sell shirred or corrugated goods under the plaintiff's patent, upon the terms therein expressed, and which agreement is made a part of the bill, Day had a right to sell and assign to whom he pleased the rights vested in him by that agreement.

The object contemplated by the bill is, to deprive Day and his assigns, the Congress Rubber Company, of all benefit from the license to manufacture shirred or corrugated goods under the license granted by the plaintiff to Day, unless or until they pay the amount of damages which Day owes to the plaintiff for the breach of his covenant and the violation of the plaintiff's rights, and to be recovered in the suit in New Jersey, and unless or until they pay the amount of tariffs due to the plaintiff for the manufacture of shirred or corrugated goods under the agreement entered into between the plaintiff and Day, when the plaintiff licensed Day and his assigns to manufacture and sell such goods. The question raised by the demurrer to the bill is, whether the bill is sufficient for this object, either wholly or in part. It appears by the bill, that the subject matter of complaint in the suit in New Jersey was, that Day had manufactured and was manufacturing large quantities of India-rubber goods, which were composed of rubber and sulphur, and white lead and its oxides, and which were completed and finished by the application of a high degree of artificial heat, according to the process patented by the plaintiff, and which were other goods than such goods as, by the license, Day might lawfully make, to the great injury of the plaintiff, and that the plaintiff sought redress in that suit for that injury. It also appears, that it was decided, in that suit, that Day should be permitted to retain his agreement with the plaintiff, and should be bound by its conditions, and that it was ordered that an account be taken of the damages which the plaintiff had sustained by reason of the violations of his rights by Day, and that Day should pay over whatever might be found due to the plaintiff

under said covenant, or for the damages which the plaintiff had sustained by the violation of his patent contrary to the covenant.

At a previous term of this court, the plaintiff made a motion for a preliminary injunction, in pursuance of the prayer of the bill. The motion was founded on the bill, and on certain affidavits, and was denied. In disposing of that motion, the court decided certain points, which have a controlling bearing upon the questions presented by the demurrer. It decided, first, that Goodyear had no lien on the agreement between him and Day, to secure the tariffs stipulated therein, and that, therefore, no title or equity was set up in the bill, against the Congress Rubber Company, as it respected the amount due from Day, under the agreement, at the time of the assignment; second, that the unpaid tariffs due from Day to Goodyear, afforded no ground for enjoining the Congress Rubber Company from acting under the contract, and, that whether the assignment from Day to the Congress Rubber Company was fraudulent or not, was not material, as it respected Goodyear; third, that, as it respected the alleged attempt to evade the decree of the circuit court of the United States for New Jersey, the question could not arise until that decree became final, and that, till then, no one could assert, legally speaking, what it had been, or what steps might be necessary to enforce it. It would follow, therefore, from the opinion given by this court, in disposing of the motion for a preliminary injunction, and which opinion must govern the question now presented, that the bill cannot be sustained against the Congress Rubber Company, either for the purpose of aiding in the enforcement of the decree which, at some future time, may be passed against Day by the circuit court in New Jersey, or for the purpose of collecting from Day the amount of the tariff which was due from him to Goodyear at the time of the assignment from Day to the Congress Rubber Company. If, therefore, it cannot be sustained for any other purpose, it must be adjudged to be insufficient.

The bill alleges, not only that Day, prior to the assignment by him to the Congress Rubber Company, manufactured shirred goods under the license, and refuses to pay the tariff agreed to be paid, but, also, that the Congress Rubber Company, since said assignment, "pretend that they have acquired the right to use the complainant's invention, for the purpose of manufacturing shirred goods, and, under such pretence, the said company, and others confederated with them, have continually, since the said transfer, been engaged in manufacturing shirred goods, and selling the same, and refuse to pay the complainant not only the damages which Day owes for the violation of his agreement, but refuse, also, to account with the complainant for the amount due him by Day for tariff under said agreement." And the prayer of the bill is, among other things, that the Congress Rubber Company be permitted to retain such agreement granting a license, and which they have by assignment from Day, only on condition, among other things, that they pay the amounts of tariff due to the plaintiff under said agreement, that is, only on condition that they, among other things, pay the amounts of tariff due to the plaintiff for the manufacturing of shirred goods by them under said license, since the same was assigned by Day to them. The question involved in this part of the case, as thus presented, does not appear to have been decided by the court in disposing of the motion for a preliminary injunction.

When the Congress Rubber Company took, by assignment from Day, the license granted by the plaintiff to Day and his assigns, to manufacture shirred goods under the plaintiff's patent, they took it with the incumbrance attached to it. That incumbrance was a duty and obligation to pay to the plaintiff three cents for every square yard of shirred goods manufactured by them by virtue of the license. When, therefore, after the assignment, the Congress Rubber Company manufactured, by virtue of the license, a quantity of shirred goods, there was a duty and obligation resting upon them, to pay to the plaintiff a tariff of three cents for every square yard of such goods manufactured. It appears, by the bill, that they have, since such assignment, manufactured, and that they continue to manufacture, such shirred goods, and that they refuse to perform such duty and obligation.

When a license is granted to any one, to use a patent in the manufacture of goods, which license is accompanied with an obligation in favor of the patentee, on the part of the one to whom it is granted, to do or not to do a particular thing, and which obligation is the consideration upon which the license is granted, he upon whom the obligation rests, must perform it, and, if he will not perform it, an injunction will be granted, to restrain him from any further right to use the patent under the license. Woodworth v. Weed [Case No. 18,022]; Wilson v. Sherman [Id. 17,833]. The bill is, therefore, sufficient for the purpose of compelling the Congress Rubber Company to pay the tariffs due to the plaintiff since the assignment by Day to them. With this view of the case, the demurrer must be overruled.

NELSON, Circuit Justice. I have examined the opinion prepared by my Brother INGERSOLL, and am inclined to think that there is enough in the bill and prayer to sustain the ground taken by him. The bill may bear the construction of a charge that the Congress Rubber Company refuse to pay the tariffs accruing under their use of the patent, with a corresponding prayer. The present case is, on principle, somewhat stronger than Woodworth v. Weed and Wilson v. Sherman [supra], as it stands upon general equitable prin-

ciples, the court having jurisdiction from the residence of the parties.

[Patent No. 3,633 was granted to C. Goodyear, June 15, 1844; reissued December 25, 1849 (No. 156). For other cases involving this patent, see note to Goodyear v. Central R. Co., Case No. 5,563.]

Case No. 5,566.

GOODYEAR v. DAY.

(Circuit Court, D. New Jersey. 1852.)

PATENTS — ABANDONMENT—LICENSE—PARTIES TO AN ACTION FOR INFRINGEMENT — ACTS OF COMMISSIONER—ASSIGNMENT—JUSTIFICATION FOR INFRINGEMENT — COURT OF EQUITY —PLEADING—FEIGNED ISSUE—PRIOR USE—CONSTRUCTION OF GRANT—REISSUE.

1. The question of abandonment must always depend, in a great measure, on the peculiar nature of the subject matter. The mere sale of a peculiar manufacture—as vulcanized rubber—which does not, on its face, disclose the nature of the compound, or the mode of producing it, is not such an abandonment. Even under the English laws, the sale in England of manufactured rubber goods imported from abroad, was held not to be an abandonment, or such a use of the thing—as the material itself did not disclose the means of making it—as would invalidate a patent granted to an original inventor there subsequently to such sale.

2. The publication of an invention on discovery by a defective specification is not an abandonment.

3. A mere licensee need not be made a party plaintiff in an action of infringement, though he may be benefited by the decree or judgment in the case. Neither need a party interested as cestui que trust, in the profits of the patent, be made a party, when the conveyance to such party reserves to the patentee the whole and sole power of disposal, and consequently the legal title.

4. Since the act of 1836 [5 Stat. 117], the commissioner of patents acts quasi judicially on the subjects of originality and novelty and utility of invention. He is bound to inquire and decide these questions before granting a patent. Such action, however, being ex parte, is not conclusive on those who are not parties to the proceeding.

5. An assignment of an interest in a patent, but reserving to the grantor the whole and sole power of disposal, conveys no legal title, but the assignee is only a cestui que trust, to the extent of his interest, in the profits.

6. It is no justification of the infringement of a renewed patent that the infringer had stolen and used the invention with impunity before the patent was amended. Section 7 of the act of 1839 [5 Stat. 353] gives no protection to those who may have seized upon an invention on discovery disclosed in a patent, whose specification may happen to be defective or insufficient.

7. A court of equity will not, in a decree intended to put an end to litigation as to patent interests, attempt to undo what has been done, and set aside what has already been adjudicated between the parties.

8. An assertion in an answer to a bill filed for the infringement of a patent, that the defendant had not used the compound in the proportions described in the plaintiff's patent, but had used other and better compounds, is a mere evasion, or rather an admission that he has been attempting to evade while actually infringing the patent.

9. D. having, during the pendency of certain actions against him, brought by G. for the infringement of G.'s patents, made a settlement with G., and having secured the exclusive right to use said G.'s patents, and also consenting that a judgment should be taken against him in one of such suits: *Held*, that D. had thereby admitted the validity of G.'s patents, and that he was estopped from denying their validity in any subsequent suit that might be brought against him by G.

10. The question of abandonment must always depend in a great measure on the peculiar nature of the subject matter. The mere sale of a peculiar manufacture—as vulcanized rubber—which does not, on its face, disclose the nature of the compound, or the mode of producing it, is not such an abandonment.

11. A feigned issue to try the validity of a patent will not be granted at the request of a defendant, who has been guilty of frequent infringements, and who has before allowed judgments to be taken against him in actions at law, and taken a license under the patent, and when no mistake or misrepresentation is alleged, nor the discovery of new evidence, nor that anybody but himself disputes the validity of the patent.

12. Semble, that improvements made by workmen, working under the pay of an inventor, and making experiments under his directions, are to be considered for the credit and benefit of such inventor.

13. In examining questions of identity and infringement, it is to be first ascertained wherein consists the substantial peculiarity which distinguishes the art or invention patented. Whoever adopts or appropriates such distinctive peculiarity or principle without license of the patentee, appropriates the invention, and infringes the patent, if the specification be correctly drawn.

14. The patent is prima facie evidence that the patentee is the original inventor or discoverer of the thing patented, and that the same is new and useful.

15. How far the use of an invention for a time, so long as it could be kept a secret, and securing a patent only when there was danger of discovery, would invalidate a patent granted: query.

16. The fact that things described in an original patent had been in public use, in the interval between the issue of the original and the reissue, does not prevent an inventor of the right to resume them in a reissue.

17. The mistake of claiming too little, in the original patent, has an equal claim to correction with that of claiming too much. If an original patent include two inventions, and its validity on that account is doubted, a separate renewal is just and proper. Section 13 of the act of 1836 contemplates two classes of cases, in which reissues may be granted: First, where a patent shall be inoperative and invalid by reason of a defective or insufficient description or specification: second, where that objection arises, by reason of the patentee claiming in his own specification, as his own invention, more than he had or shall have a right to claim as new. As to the first case, although the description or specification be clear and distinct to describe some improvement or invention, yet if it does not describe the particular invention intended to be described, it is inoperative and invalid, according to the sense of the law, and will justify a surrender and reissue.

18. A reissued patent is not void, because the things claimed in the original had been in public use in the interval between the original and reissued patent. Such a publication is not an abandonment or dedication.

Before GRIER, Circuit Justice, and DICKERSON, District Judge.

[Cited in Law, Pat. Dig. 95, 112, 151, 168, 245, 266, 272, 280, 302, 351, 363, 437, 514, 606.

614, 624, to the points stated as above. Nowhere more fully reported; opinion not now accessible.]

Case No. 5,567.

GOODYEAR v. DAY.

Circuit Court, D. New Jersey. 1850.

PROVINCE OF JURY — FRAUD — GENERAL ISSUE—PLEADINGS—IMMATERIAL ISSUE — PATENTS—EXCLUSIVE LICENSE — SUIT FOR TARIFF — DEFENSES.

1. The jury must find the issues as presented, and assess the damages for the breach, if any, of the thing alleged. It makes no difference that it is an immaterial issue.

2. Where fraud is charged upon a party, in respect to his patent, it must be made out, at least prima facie.

3. Under a plea of the general issue, evidence may be introduced to show fraud or fraudulent representations on the part of the plaintiff as to the subject matter of the suit.

4. Where a patentee, G., gave to a person, D., an exclusive right or license to use his, G.'s, patented invention, for a certain consideration or tariff, G. agreeing, however, to take up and cancel all other licenses granted by him, and there being a covenant between G. and D., that in the event of others claiming grants and using such invention, and thereby impairing the profits which would accrue to D., that then such tariff would cease, *held*, in an action of covenant for non-payment of such tariff, and other non-compliances, that it was a good defence that others used the invention and impaired the right of D., and that it was of no consequence whether G. was unable to restrain other parties from such use, or whether it was to his advantage or not to do so.

5. If a party, by his pleading, tender an immaterial issue, the jury must find the issue as presented, and assess damages for the breach, if any, of the thing alleged. It makes no difference that it is an immaterial issue.

Before GRIER, Circuit Justice.

[Cited in Law, Pat. Dig. 235, 339, 342, 468, 589, to the points stated as above. Nowhere more fully reported; opinion not now accessible.]

Case No. 5,568.

GOODYEAR v. DAY.

[1 Blatchf. 565;[1] 1 Fish. Pat. Rep. 385.]

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

COURTS—JURISDICTION—CITIZENSHIP.

A citizen of Connecticut brought a suit in equity in this court against a citizen of New Jersey, for a breach of contract, and prayed an account: *Held*, that this court had no jurisdiction of the case, neither party being a citizen of New-York, although the subject matter of the contract was a patent.

[Cited in Goodyear v. Union India Rubber Co., Case No. 5,586; Blanchard v. Sprague, Id. 1,516; Randolph v. Robinson, Id. 11,561; Consolidated Fruit Jar Co. v. Whitney, Id. 3,133; Teas v. Albright, 13 Fed. 412.]

[Cited in Slemmer's Appeal, 58 Pa. St. 164; Middlebrook v. Broadbent, 47 N. Y. 448.]

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

In equity. The bill in this case was founded upon a special agreement entered into between the plaintiff [Charles Goodyear] and the defendant [Horace H. Day] on the 29th of October, 1846, adjusting several suits pending between them concerning patent-rights claimed by the plaintiff relative to the manufacture of India-rubber. It charged a breach of the agreement, and prayed an account, &c. The plaintiff now moved for an injunction. The facts appear by the opinion of the court.

F. B. Staples, for complainant.
George Sullivan, for defendant.

NELSON, Circuit Justice. The plaintiff is a citizen of Connecticut, and the defendant a citizen of New-Jersey, as appears upon the face of the bill; and an objection has been taken to the jurisdiction of the court for the want of proper parties. The objection is undoubtedly fatal, as, in order to give jurisdiction, the suit must be between a citizen of the state in which it is brought, and a citizen of another state. Judiciary act of 1789, § 11 (1 Stat. 78). Here neither party is a citizen of New-York, where the suit is brought.

It was attempted to sustain the jurisdiction on the ground that the suit was brought under the patent act [of 1836 (5 Stat. 117)], where jurisdiction depends on the subject matter, without reference to citizenship or residence; and that the gravamen laid was the infringement of patent-rights. But there is no foundation for this position. The bill is not constructed for the purpose of presenting a question of the infringement of a patent; but is brought for the violation of a contract. We can regard it in no other light. Motion denied.

Case No. 5,569.

GOODYEAR v. DAY.

[2 Wall. Jr. 283; Merw. Pat. Inv. 655.][1]

Circuit Court, D. New Jersey. Sept. 28, 1852.

PATENTS—PERPETUAL INJUNCTION—SENDING CASE TO JURY—WHO ENTITLED TO PATENT—REDUCING SPECULATION TO PRACTICE.

1. Where a court of equity, having heard a case on full proofs, is well satisfied of the originality of an invention, the regularity of a patent, and of the fact of infringement, it will not send the case to a jury to have its verdict prior to granting a perpetual injunction. It will grant it at once, especially if the questions in the case, though questions of fact, are of that kind that a court can decide them on the testimony of men of science, as well as, or better than a jury; and where a jury trial would be long, costly or troublesome.

[Cited in Buchanan v. Howland, Case No. 2,074; Roberts v. Reed Torpedo Co., Id. 11,910; McMillin v. Barclay, Id. 8,912; Wise v. Grand Ave. Ry. Co., 33 Fed. 278.]

[1] [Reported by John William Wallace, Esq. Merw. Pat. Inv. 655, contains only a partial report.]

2. It is not necessary for the protection of a patent, that the patentee should be the first person, who conceived the practicability or existence of the thing patented, but who, though making important experiments, was unable to bring them to any successful or valuable result. He who reduces speculation to practice, whose experiments result in discovery, and who then afterwards first puts the public into practical and useful possession of the compound, art, machine or product, is entitled to the patent right.

[Cited in Singer v. Walmsley, Case No. 12,900; Howe v. Williams, Id. 6,778; Jones v. Van Kirk, Id. 7,500; La Baw v. Hawkins, Id. 7,960; Moore v. Thomas, Id. 9,776; Yale Lock Manuf'g Co. v. Scovill Manuf'g Co., 3 Fed. 295; Washburn & Moen Manuf'g Co. v. Haish, 4 Fed. 905; Tucker v. Dana, 7 Fed. 214; Whittlesey v. Ames, 13 Fed. 893.]

[Cited in Lamson v. Martin, 159 Mass. 565, 35 N. E. 78.]

This was a case in equity for the infringement of a patent right in the manufacture of vulcanized India rubber. The bill prayed a perpetual injunction. The answer denied the allegations, and concluded by praying "a trial by jury of the various issues of fact formed by it." The argument involved many interesting inquiries; but facts were so interfused throughout the whole case, in the questions of law, that these last have not been found very capable of being reported. The pleadings were long; the proofs and exhibits very full, amounting to about 4000 printed pages; and they had been taken under an order, that they should be read either at law or in equity. The witnesses were numerous, and the questions were of a kind requiring much attention and intelligence. Both parties assumed to act under patents. The case having been set down for final hearing on the proofs and exhibits, and having been fully, learnedly and ably argued through a number of days by several counsel on both sides, Daniel Webster being of counsel for the complainant, and Rufus Choate of counsel for the defendant, the main question of law was, whether in the face of the answer, denying positively the complainant's merits, and all infringement of his patent, and praying for a trial by jury of the issues involved, the court would, under any circumstances, grant a perpetual injunction against him without a previous verdict. Another question partially mingled with a question of fact, was, what amount of prior discovery is necessary to deprive a subsequent discoverer of the merit of such originality as the law requires for the protection of a patent.

On the question of fact, the amount of prior discovery and the originality of Goodyear's results, the history of the case was essentially this. The gum called "India Rubber," long known in Eastern countries, was first introduced, it would appear, into Europe by scientific French travellers, in 1736. They analyzed it in France, but without any profitable result. It became known in this country, about 1820. In 1823, five hundred pairs of gum shoes were imported and sold at Boston. At a somewhat later date, its valuable properties were strongly believed in, and the substance itself became the subject of scientific investigation in this country. Dr. Comstock, of Hartford, Conn., discovered, about 1828, that by dissolving it in turpentine, it could be made plastic, and spread upon cloth; a discovery for which he obtained a patent. Many other persons were convinced about the same time, that it could be made an article of great domestic or social use; but none of them could ever show how. Dr. Howe manufactured it in 1829, at New York. Considerable factories of it were established soon after in different parts of New England. A factory at Roxbury began operations in 1832, was incorporated in 1833, and for some time pursued business with great apparent success. Numerous other factories, encouraged by the Roxbury factory, were in operation in 1834–5 and 6: and numbers of different articles were made there. The incurable difficulty of all these articles,—and it was a difficulty which rendered many of them entirely worthless,—was, their susceptibility to atmospheric variations of heat and cold. Exposed to warmth, they became soft, gluey and stuck together. Exposed to cold, they became perfectly rigid. All the factories failed; having produced nothing approaching the very extraordinary and valuable invention of vulcanized rubber. Notwithstanding this, there were many individuals, who were not entirely discouraged. They were deeply impressed with a belief, that gum caoutchouc was a most valuable substance, and could and would be made subservient to numerous most useful social ends. Some of these persons were more or less busy in experimenting; and many experiments were made. Some of them were senseless; some quite ingenious, and a few were in or alongside of the track of true science. Among these were the experiments of a very ingenious man, named Hayward, who, in 1838, discovered that a compound of sulphur with the gum greatly improved its qualities for some purposes, particularly that of spreading it upon cloth, the object for which he used it: and he obtained, in 1839, a patent for this discovery; which patent Goodyear afterwards bought of him. But neither Comstock's, Hayward's, nor any body else's discoveries produced the desired compound. In 1838, the factories of India rubber goods had, with perhaps one or two exceptions where Hayward's patent was used, all come to an end.

Still after Hayward's discovery, the value of sulphur, or of kindred substances in improving the qualities of rubber, was known to many persons. The possibility of greatly increasing the value of it, by relieving the gum of its gluey nature when exposed to heat, and of its rigidity when exposed to cold, was strongly conjectured. Great numbers of experiments were made by individuals in many different and distant places,

with sulphur, with heat, and many other processes. But although many men supposed they were very near to a discovery, and, as was now testified, many professed to believe that they could and would discover the desideratum, and knew that great benefits would be produced by the use of sulphur, gum and heat; as a matter of fact, no one did or could produce the thing wanted until it was produced, complete and perfect, and was patented as his own invention by Mr. Charles Goodyear, in or about the year 1844.

Goodyear had begun experimenting in 1834; he at that date turned his attention to the precise object of clearing this gum of its stickiness, its gluey nature, its tendency to harden in the cold, and soften in the heat. He began his experiments at Philadelphia. In the spring of 1835, he removed to New York; in the summer of 1836, he went to New Haven; in the spring of 1837, to Staten Island; in the fall of 1837, he visited the almost deserted factory at Roxbury. In the summer or fall of 1838, he went to Woburn, where Hayward was trying experiments with sulphur. Here Goodyear bought the sulphur patent, and hired Hayward to assist him in his operations, and work for him a year. He went on with his experiments, and within four or five months, that is to say, in January, 1839, he made an elementary discovery of metallic or vulcanized rubber. In the fall of 1839, he carried on experiments at Lynn; and in like manner at Roxbury, in 1840; but keeping up his experiments, nevertheless, at Woburn, where his family lived.[2] In the fall of 1840, he went to Northampton; in 1841, he removed to Springfield. His experiments were still going on at Woburn; as Hayward had come into his employment again for one year, from April, 1841. At Springfield, Goodyear continued his experiments, till he had so far perfected his invention, as to apply for a patent. This was in January, 1844. He then went to Naugatuck, in Connecticut, and started a factory, and soon after vulcanized India rubber became one of the most useful, extensive and best known products of civilized life.

The great peculiarity of the vulcanizing process may be thus stated: If you take a compound of sulphur and rubber in a dry state, and grind and mix them together, and apply heat, the consequence is, that the substance softens and softens as the heat increases, until it reaches a certain height in the thermometer, say 212° Fahrenheit. All the experimenters but Goodyear, while they knew the effect of heat to a certain extent, and knew that it was valuable in producing the compound of the gum with sulphur, yet having found that a considerable degree of heat softened and rendered it more and more plastic, were of opinion, naturally enough, that if heat were carried still higher, the whole substance would melt. They reasoned a priori, and founded their conclusions upon a general knowledge of the effect of heat. But Goodyear, as the result of untir-

[2] Goodyear pursued his experiments under a great deal of ridicule and reproach and at the same time in the greatest economical restrictions. These last had brought heavy debts upon him. He had a wife and several children, from whom, under the barbarous laws which then prevailed, of imprisonment for debt, he had been carried away and put in prison. In the course of the trial, an affecting letter was brought to light, written from the debtor's jail, in Boston. Here it is: "Debtor's Prison, April 21, 1840. To Mr. John Haskins or Luke Baldwin.—Gentlemen: I have the pleasure to invite you to call and see me at my lodgings, on matters of business, and to communicate with my family, and possibly to establish an India rubber factory for myself, on the spot. Do not fail to call on the receipt of this, as I feel some anxiety on account of my family. My father will probably arrange my affairs in relation to this hotel, which, after all, is perhaps as good a resting place as any this side the grave. Yours, truly, Charles Goodyear."

"I believe," said Mr. Webster, in his noble speech in this case, "that the man who sits at this table, Charles Goodyear, is to go down to posterity in the history of the arts in this country, in that great class of inventors, at the head of which stands Robert Fulton, in which class stand the names of Whitney, and of Morse, and in which class will stand 'non post longo intervallo,' the humble name of Charles Goodyear. Notwithstanding all the difficulties he encountered he went on. If there was reproach, he bore it. If poverty, he suffered under it; but he went on, and these people followed him from step to step, from 1834 to 1839, or until a later period, when his invention was completed, and then they opened their eyes with astonishment. They then saw that what they had been treating with ridicule, was sublime; that what they had made the subject of reproach, was the exercise of great inventive genius; that what they had laughed at was the perseverance of a man of talent with great perceptive faculties, with indomitable perseverance and intellect and had brought out a wonder as much to their astonishment, as if another sun had risen in the hemisphere above. He says of his cell in the debtor's jail, that 'it is as good a lodging as he may expect this side the grave;' he hopes his friends will come and see him on the subject of India rubber manufacture; and then he speaks of his family and of his wife. He had but two objects, his family and his discovery. In all his distress, and in all his trials, his wife was willing to participate in his sufferings, and endure everything, and hope everything; she was willing to be poor; she was willing to go to prison, if it was necessary, when he went to prison; she was willing to share with him everything; and that was his only solace. May it please your honors, there is nothing upon the earth that can compare with the faithful attachment of a wife; no creature who for the object of her love, is so indomitable, so persevering, so ready to suffer and to die. Under the most depressing circumstances, woman's weakness becomes mighty power; her timidity becomes fearless courage; all her shrinking and sinking passes away, and her spirit acquires the firmness of marble—adamantine firmness, when circumstances drive her to put forth all her energies under the inspiration of her affections. Mr. Goodyear survived all this, and I am sure that he would go through the same suffering ten times again for the same consolation. He carried on his experiments perseveringly, and with success, and obtained a patent in 1844 for his great invention."

ing experiment, found out, that although the application of heat produced a melting effect upon this compound, rendering it more and more plastic and soft, as the degree of heat augmented, yet when that heat, going on, had got up to a certain much higher degree, its effect was the reverse of what it had been, and then the rubber composition commenced to vulcanize and harden; in fact to make metallic, the vegetable substance. And in adding to the compound of sulphur and gum used by Hayward, a carbonate or other salt, or oxide of lead, and subjecting the whole to this high degree of heat, was the distinguishing merit of Goodyear's process.

Mr. Choate, against the injunction.

No case can be produced, in which such an injunction was decreed unless on a reference by assent to the chancellor. In Bacon v. Jones (decided in 1839) 4 Mylne & C. 433, Lord Cottenham says, after a cause comes to a hearing, without a trial at law, the court may proceed and grant an injunction "although this is certainly not very likely to happen, and I am not aware of any case in which it has happened." This doctrine is thus summed up in Drewry, Inj. c. 3, § 6: "The ultimate object of a bill in equity to protect a patent is a perpetual injunction which can in general only be granted at the hearing, and it has been very lately decided that where a patentee files a bill alleging infringement and praying an account and perpetual injunction, but does not immediately or within any reasonable time apply for an interlocutory injunction, he cannot have a perpetual injunction at the hearing, if the defendant raises a question as to the validity of the title, nor will he be allowed to retain the bill with liberty to bring an action; for the court will not permit the plaintiff to delay to the hearing the trial of the legal right which he might have had at any time after filing the bill, and thus to put the defendant in a position to have a chancery suit hanging over him for years. The course the court will adopt in such a case will be to dismiss the bill with costs." In Motley v. Downman (A. D. 1837) 3 Mylne & C. 14, Lord Cottenham says: "I can hardly conceive of a case in which the court will at once interfere, by injunction, and prevent a defendant from disputing the plaintiff's legal title."

2. In this jurisdiction, chancery deals with legal and not with equitable rights. It will therefore refer to the common law to determine the existence of the right, which, when established, it will protect. Harman v. Jones, 1 Craig & P. 299.

3. The whole series of cases, both English and American, are an uniform administration of this doctrine. Dodsley v. Kinnersley (1761) Amb. 406; Baskett v. Cunningham (1762) 2 Eden, 138; Hill v. Thompson (1817) 3 Mer. 622; Sullivan v. Redfield (1825) [Case No. 13,597]; Rogers v. Abbott (1825) [Id. 12,004]; Ogle v. Ege (1826) [Id. 10,462]; Martin v. Wright (1833) 6 Sim. 297; Bramwell v. Halcomb (1836) 3 Mylne & C. 739; Motley v. Downman (1837) Id. 14; Bacon v. Spottiswoode (1839) 1 Beav. 382; Bacon v. Jones (1839) 4 Mylne & C. 433; Collard v. Allison (1839) Id. 487; Harman v. Jones (1841) 1 Craig & P. 299; Spottiswoode v. Clarke (1846) 2 Phillips, 154; Stevens v. Keating (1847) Id. 333; and in Pidding v. Franks (1849) 1 MacN. & G. 56.

4. The answer, it is to be observed, denies entirely the validity of the complainant's patent, and his merits generally. "A denial, in answer as to the validity of the patent, or the fact of infringement, will be sufficient to entitle the defendant to further investigation in an action at law." Curt. Pat. § 340.

5. Day claims under a patent himself. Drewry (Inj. c. 3, § 4) says: "It was held in an early case, that in a conflict between parties both claiming under patents, the court could not grant an injunction till the right had been tried at law, and I am not aware of any modern decision overruling this doctrine as to a conflict between two patents." Curtis (Pat. § 339) thus confirms the rule: "It seems that where both parties claim under patents, the court cannot grant an injunction until the rights have been tried at law."

On the question of originality, the counsel then went into an analysis of the evidence showing with great labour a case, which was essentially that set forth in the statement, and arguing from it, that the discoveries of Hayward and others took from Goodyear the merit of such originality as was requisite to sustain a monopoly.

Mr. Webster, for the injunction.

1. It never was an absolute rule of law in England, that the jury trial should precede a perpetual injunction. The question whether such a trial should be ordered, has been determined according to the sound discretion of the court. Hindmarch says, in his treatise on Patents (pages 216, 356): "If no action has been tried between the parties, the court may either itself determine any question raised respecting the validity of the patent, or may send the question to a court of law to be determined, retaining the bill until the question is determined." Few v. Guppy, 1 Mylne & C. 487.

2d. The cases in England in which an injunction was refused at the hearing, were presented on the pleadings only, not on pleadings and proofs; and the court punished the plaintiff for laches, in not taking some means to have his title tried. Such is the case of Bacon v. Jones, 4 Mylne & C. 433, cited and relied on by the other side. The first sentence of Lord Cottenham's opinion confirms our view of the case. And in the course of his opinion, the chancellor says: "In this case I have not heard any reason suggested why the plain and ordinary course was not taken by the plaintiffs of previously establishing

their right at law." In another case (Wilson v. Tindal, Webst. Pat. Cas. 730) Lord Langdale says, after speaking of an interlocutory injunction: "Notwithstanding this order, the defendant may put in his answer; he may displace all affidavits which have been filed on both sides. The plaintiff and the defendant may respectively proceed to evidence; they may bring their cause on for hearing, and upon the hearing of the cause, the whole case, the law regarding the patent, and the facts which will appear upon the depositions will have to be reconsidered and that reconsideration may for any thing that can be known to the contrary, justly end in a result different from that which I have come to upon the present occasion. The defendant having his option to adopt this course of proceeding, has at the bar expressed his desire to have this matter tried at law." And he remarks: "It is not the right of parties in every case to have an action tried in a court of law; it is a question of convenience, and the court is to exercise a fair discretion."

3d. Our case is presented on the entire proofs taken by both parties in this very cause, and directed to be read in the cause by order of this court.

4th. The court has the power to determine the cause on the entire merits, and should do so unless there is either a positive rule of law, or some controlling necessity requiring aid from a jury. There is no such law or necessity. It is settled that when equity directs a trial at law, it yet has the power to disregard the finding of the jury, and proceed to decree according to its own views of the case. That covers the whole ground. If you are not obliged to regard the finding of a jury when it comes before you, then of course, it must be in discretion whether to award an issue or not. This judicature is composed of two judges. There is a mass of testimony respecting a patent-right, and an alleged violation of that patent-right. The court has listened with great patience to the reading of that evidence and to the comments upon it. We leave it with the court, thus acquainted with the evidence, seeing the entire case, to say whether it feels that its conscience needs to be enlightened as to the merits of this controversy by a trial at the bar of this court or elsewhere. Is there in this judicature a member who feels a reasonable conscientious doubt on any vital question of fact in this cause? It is proper to state it in that way because it is a question of discretion. It is not a question of right to be demanded on the one side or the other; it is a question of discretion (Harmer v. Plane, 14 Ves. 130, 131), arising after the collection of a vast body of evidence, after the promulgation of that evidence, after a final hearing of that evidence, and when the cause is ripe for decision, and a perpetual injunction, unless the court feels conscientiously that there is something affecting the right of the parties still untold, which they cannot with conscientious conviction settle themselves, and in regard to which they have conscientious reasons to believe a jury would enlighten them. The cases, where there is the disposition to send questions of equity to law, to be tried in the progress of an equity suit, are much less usual in our practice than in England. They are left more to the good sense of our tribunals. The necessity of expediting business, and the fact which every body knows, that a court of enlightened judges is not only as competent, but more competent to settle questions arising under the construction of a patent, so often mixed of law and facts, (for there is hardly a question that is not mixed of law and facts arising under a patent,) a combination of them leads courts not uselessly to send patents to law, to be tried by a jury.

II. There is not a single question of fact in the case we have said, on which the court can feel the least doubt. We assert that Goodyear is the first man upon whose mind the idea ever flashed, or to whose intelligence the fact ever was disclosed, that by carrying heat to a certain height it would cease to render plastic the India rubber, and begin to harden and metallize it. If there is a man in the world who found out that fact before Goodyear, who is he? Where is he? On what continent does he live? Who has heard of him? What books treat of him? What man among all the men on earth has seen him, known him, or named him? Yet it is certain that this discovery has been made. It is certain that it exists. It is certain that it is now a matter of common knowledge all over the civilized world. It is certain that ten or twelve years ago it was not knowledge. It is certain that this curious result has grown into knowledge by somebody's discovery and invention. And who is that somebody? If Goodyear did not make this discovery, who did make it? Who did make it? If the other side had endeavoured to prove that some one other than Mr. Goodyear had made this discovery, that would have been fair. But they do not meet Goodyear's claim by setting up a distinct claim of any body else. They attempt to prove that Goodyear was not the inventor, by little shreds and patches of testimony. Here a little bit of sulphur, and there a little parcel of lead; here a little degree of heat, a little hotter than would warm a man's hands, and in which a man could live for ten minutes or a quarter of an hour; and yet they never came to the point. There are birds which fly in the air, seldom lighting, but often hovering. Now this is a question not to be hovered over, not to be brooded over, and not to be dealt with as an infinitesimal quantity of small things. It is a case calling for a manly admission and a manly defence. I ask again, if there is any body else than Goodyear who made this invention, who is he? Is the discovery so plain that it might have come about by accident? It is likely to work important changes in the arts every where. It intro-

duces quite a new material into the manufacture of the arts, that material being nothing less than elastic metal. It is hard like metal, and as elastic, as pure original gum elastic. It is as great and momentous a phenomenon occurring to men in the progress of their knowledge, as it would be for a man to show that iron and gold could remain iron and gold, and yet become elastic like India rubber. It would be just such another result. Now, this fact cannot be denied; it cannot be secreted; it cannot be kept out of sight; somebody has made this invention. That is certain. Who is he? There is not in the world a human being that can stand up, and say that it is his invention, except the man who is sitting at that table. The learned counsel may prove that A. made a part, and B. made a part, and C. made a part, but A., B., C., and D., and all the rest of the alphabet disclaim this as their invention. I say, therefore, at this hour in which I have the honour to be speaking to this court, that there is not a man on the foot-stool who pretends this is his invention but one—not a man. Is that not enough? The invention exists. Every body knows and understands it, and every body connected in former times with the manufacture of India rubber has been astonished and surprised at it. There have been many respectable witnesses in this case, and the best and most intelligent of them say, after having been engaged in attempts in this manufacture for years and years, losing their time and fortunes, they never heard of or imagined any such thing, as the vulcanization of rubber until Goodyear's invention was made.

GRIER, Circuit Justice. It is true that in England the chancellor will generally not grant a final and perpetual injunction in patent cases, when the answer denies the validity of the patent, without sending the parties to law to have that question decided. But even there the rule is not absolute or universal; it is a practice founded more on convenience than necessity. It always rests on the sound discretion of the court. A trial at law is ordered by a chancellor to inform his conscience; not because either party may demand it as a right, or that a court of equity is incompetent to judge of questions of fact, or of legal titles. In the courts of the United States, the practice is by no means so general as in England, or as it would be here, if the trouble of trying issues at law devolved upon a different court.

Cases involving inquiries into the most complex and difficult questions of mechanics and philosophy, are becoming numerous in the courts. Often questions of originality, and infringement of patents, do not depend so much on the credibility of witnesses or the weight of oral testimony, as on the application of principles of science and law to admitted facts. It is true, that in matters of opinion, both mechanics and learned professors will differ widely. But still the question is not to be decided by the number, credibility, or respectability, of such witnesses; but by the force and weight of the reasons given for their respective opinions. It is no reflection on trial by jury to say, that cases frequently occur, in which ten out of twelve jurors do not understand the principles of science, mathematics, or philosophy, necessary to a correct judgment of the case. Besides, much of the time of the courts is lost, where twelve men will not agree upon any verdict; or when they have agreed, the conscience of the chancellor, instead of feeling enlightened, rejects it altogether.

A select or special jury of philosophers, if they could be got, would perhaps not prove more satisfactory or obviate the difficulty. In a late case involving the validity of Morse's telegraph patents, which was heard in Philadelphia, a final injunction was decreed without a verdict to establish the patents; and many other cases might be cited from other circuits, if necessary, in support of this practice, showing that the courts of the United States do not always consider it a proper exercise of their discretion to order such issues to be tried at law, before granting a final injunction.

In the present case there are many reasons why the court will not thus exercise their discretion: 1st. Because this case has been set down for final hearing on the exhibits and proofs, without any motion or order of the court for such an issue. 2d. After a patient hearing of very able counsel, and a careful consideration of the testimony, the court feel no doubt or difficulty on these questions, which would be removed or confirmed by a verdict. 3d. It would require three or four weeks at least, to try this case before a jury, if this library of testimony were read to them; and at least as many months, if the witnesses were examined viva voce, as they probably would be; and, after all this expenditure of time and labour, it is even more than probable, that from the confusion created by the great length of the testimony and argument in court, or the force and effect of those urged from without, no verdict would be obtained, and most certainly none that would alter the present conviction of the court.

Without requiring the aid of a jury, we shall therefore proceed to examine the questions both of fact and law, which affect the validity of the complainant's patents.

(After doing this, THE COURT concluded with the following remarks.)

The testimony shows that many persons had made experiments—that they had used sulphur, lead, and heat, before Goodyear's patents, and probably, before his discovery. But to what purpose? Their experiments ended in discovering nothing, except, perhaps, that they had ruined themselves. The great difference between them and Goodyear is, that he persisted in his experiments, and

finally succeeded in perfecting a valuable discovery, and they failed. It is usually the case, when any valuable discovery is made, or any new machine of great utility has been invented, that the attention of the public has been turned to that subject previously; and that many persons have been making researches and experiments. Philosophers and mechanicians may have, in some measure, anticipated, in their speculation, the possibility or probability of such discovery or invention; many experiments may have been unsuccessfully tried, coming very near, yet falling short of the desired result. They have produced nothing beneficial. The invention, when perfected, may truly be said to be the culminating point of many experiments, not only by the inventor, but by many others. He may have profited indirectly by the unsuccessful experiments and failures of others; but it gives them no right to claim a share of the honour or the profit of the successful inventor. It is when speculation has been reduced to practice, when experiment has resulted in discovery, and when that discovery has been perfected by patient and continued experiments—when some new compound, art, manufacture, or machine, has been thus produced, which is useful to the public, that the party making it becomes a public benefactor, and entitled to a patent.

And yet when genius and patient perseverance have at length succeeded, in spite of sneers and scoffs, in perfecting some valuable invention or discovery, how seldom is it followed by reward! Envy robs him of the honour, while speculators, swindlers, and pirates, rob him of the profits. Every unsuccessful experimenter who did, or did not, come very near making the discovery, now claims it. Every one who can invent an improvement, or vary its form, claims a right to pirate the original discovery. We need not summon Morse, or Blanchard, or Woodworth, to prove that this is the usual history of every great discovery or invention.

The present case adds another chapter to this long and uniform history. But notwithstanding the indomitable energy and perseverance with which this attempt to invalidate the patent has been pursued, the volumes of testimony with which it is oppressed, and the great ability with which it has been canvassed in the argument, we are of opinion that the defendant has signally failed in the attempt to show that himself or any other person discovered and perfected the process of manufacturing vulcanized India rubber before Goodyear. We shall give therefore our decree of perpetual injunction.

[Patent No. 3,633 was granted to C. Goodyear, June 15, 1844; reissued December 25, 1849 (No. 156). For other cases involving this patent, see note to Goodyear v. Central R. Co., Case No. 5,563.]

GOODYEAR (DAY v.). See Case No. 3,678.

Case No. 5,570.

GOODYEAR et al. v. DUNBAR et al.

[3 Wall. Jr. 310; 1 Fish. Pat. Cas. 472; 18 Leg. Int. 397.] [1]

Circuit Court, D. New Jersey. Nov. Term, 1860.

INJUNCTION—PATENTS—WILLFUL INFRINGEMENT—MISTAKE OF LAW OR FACT—INTERFERING PATENTS.

1. The remedy by injunction, though necessary in certain cases to do complete justice, is, nevertheless, one which should always be cautiously granted, and more especially where it is demanded before a decree of the court on final hearing of the merits.

2. If the defendant shows a belief that he has a just defense, and is not a willful pirate of the plaintiff's invention, it should be a case of an evident mistake of law or fact, or both, in the defense which he sets up, which will justify the court in using their festinum remedium.

[Cited in American Nicholson Pav. Co. v. City of Elizabeth, Case No. 312; Sargent Manuf'g Co. v. Woodruff, Id. 12,368; Yuengling v. Johnson, Id. 18,195; Edison Electric Light Co. v. Columbia Incandescent Lamp Co., 56 Fed. 498.]

3. Where the defendant is acting under letters patent, which cover his process or machine, he has a prima facie right to continue his manufacture, and should not be disturbed by a preliminary injunction.

This was a motion [by Charles Goodyear and the New England Car Spring Company] for a provisional injunction, to restrain the infringement of letters patent [No. 3,633] granted to Charles Goodyear, June 15, 1844, and reissued [No. 156] December 25, 1849. The process consisted in mixing rubber and sulphur in certain proportions, and subjecting the compound to a high degree of heat. The claims of the reissued patent were as follows: "What I claim as my invention, and desire to secure by letters patent, is the curing of caoutchouc, or India rubber, by subjecting it to the action of a high degree of artificial heat, substantially as herein described, and for the purpose specified. And I also claim the preparing and curing of the compound of India rubber, sulphur and a carbonate or other salt or oxide of lead, by subjecting the same to the action of artificial heat, substantially as herein described."

The defendants [Hiram P. Dunbar and Henry W. Joslin] claimed under letters patent granted to Henry W. Joslin, January 11, 1859, for an "improvement in the treatment of India rubber," which consisted in combining sulphuret of zinc with India rubber or caoutchouc, and submitting the compound thus formed to the action of heat, by which, in its nature and qualities it becomes so altered as not to be affected by heat, unless of a higher temperature than that used in its preparation. The claim of Joslin's patent was as follows: "The use and employment of sulphuret of zinc, either artificial or native, substantially prepared by the aforesaid pro-

[1] [Reported by John William Wallace, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and statement are from 1 Fish. Pat. Cas. 472, and the opinion is from 3 Wall. Jr. 310.]

cess described, in combination with India rubber, for the purpose of curing or vulcanizing it in form and manner as set forth, without the use of free sulphur in any way, in combination with the rubber."

E. N. Dickerson and James T. Brady, for complainants.

Joseph P. Bradley, for defendants.

GRIER, Circuit Justice. The defendant, in virtue of his patent, has a primâ facie legal right to manufacture his compound by his process. Whether this process is a mere colorable change from the older patent, or whether his manufacture is the same combination or compound with that described in the plaintiff's patent, is the great question in dispute between the parties. So far as the judgment of the patent office affects the case, this question may be considered as having been decided in favor of defendant. The issue between the parties is an important one, and not a question of such easy solution as some may think at first view. But I do not feel called upon to decide it on the present motion. It is enough for the present that the defendant is acting under apparent legal authority, "primâ facie" good; having the decision (ex parte, it is true, and therefore not conclusive) of what has been called a "quasi judicial tribunal."

It is possible that on a final hearing I may differ in opinion with them, and quite as possible that a higher tribunal might differ with me. The question is, therefore, at this time: "Ought I, under such circumstances, to issue a preliminary injunction, and give the plaintiff a remedy before he has established his right on a final hearing?" By doing so I may do an irreparable wrong to the defendant, in breaking up his trade or business. If the plaintiff should be injured by the continuance of defendant's manufacture, he will recover ample damages by the final decree of the court; as there is no allegation that defendant is insolvent, or likely to become so. The motion for a preliminary injunction is therefore overruled. But the defendant is ordered to keep an account of all that is manufactured and sold by him.

I may here say for the information of the bar, that whenever a defendant presents a case showing a bonâ fide issue in fact or law, or, as in this case, a primâ facie right to continue his manufacture, founded on a decree of the patent office, and a consequent public grant, I will not grant a preliminary injunction, and thus issue execution before judgment. I will not decide the whole merits of a bonâ fide issue in fact, on ex parte affidavits, nor anticipate the final judgment of the court on the legal questions, as if they had been brought out on a demurrer.

The remedy by injunction, though necessary in certain cases to do complete justice, is nevertheless one which should always be cautiously granted, and more especially where it is demanded before a decree of the court on final hearing of the merits. If the defendant shows a belief that he has a just defence, and is not a willful pirate of the plaintiff's invention, it should be a case of an evident mistake of law or fact, or both, in the defence which he sets up, which will justify the court in using their festinum remedium. Injunction refused; but the defendant ordered to keep an account.

[For other cases involving patent No. 3,633, see note to Goodyear v. Central R. Co., Case No. 5,563.]

Case No. 5,571.

GOODYEAR v. EVANS.

[6 Blatchf. 121; 3 Fish. Pat. Cas. 390.] [1]

Circuit Court, S. D. New York. April 23, 1868.

PATENTS—CONSTRUCTION OF REISSUE — INFRINGEMENT—ADVERSE PATENTS—PRIMA FACIE RIGHT TO USE.

1. The reissued letters patent, Nos. 556 and 557, granted to Henry B. Goodyear, administrator of Nelson Goodyear, May 18th, 1858, for an "improvement in the manufacture of India-rubber," on the surrender of the original patent, granted to Nelson Goodyear, May 6th, 1851, are valid.

2. It is an infringement of those reissued patents to use, for dental purposes, India-rubber prepared in accordance with letters patent granted to Edwin L. Simpson, October 16th, 1866, for an "improvement in dental rubber," and to vulcanize it, and then to use the product.

3. The Simpson patent is not an adverse patent to the Goodyear reissues, or one for the same invention covered by the Goodyear reissues, and does not confer upon the holder of it any prima facie right to use, without license, any thing covered by the Goodyear reissues, or warrant the withholding of an injunction to restrain a party working under the Simpson patent from infringing the Goodyear reissues.

[Approved in Goodyear v. Berry, Case No. 5,556.]

In equity. This was a motion for a provisional injunction to restrain the defendant [George Evans] from infringing letters patent [No. 8,075] for an "improvement in the manufacture of India-rubber," granted to Nelson Goodyear, May 6, 1851, reissued in two divisions, Nos. 556 and 557, to Henry B. Goodyear, administrator of Nelson Goodyear, deceased, and extended to said administrator for seven years from May 6, 1865. So much of the inventions covered by said reissues as applied to dentistry and dental purposes was assigned to the Goodyear Dental Vulcanite Company. The claims of the original and reissued patents of Goodyear will be found in the report of Goodyear v. Honsinger [Case No. 5,572]. The defendant claimed to manufacture dental plates under letters patent granted to Edwin L. Simpson for "improve-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 6 Blatchf. 121, and the statement is from 3 Fish. Pat. Cas. 390.]

ment in dental rubber," October 16, 1866, the specification of which is as follows:

"To all whom it may concern: Be it known, that I, Edwin L. Simpson, of Bridgeport, in the county of Fairfield and state of Connecticut, have invented a new improvement in dental rubber, and I do hereby declare the following to be a full, clear, and exact description of the same: The rubber now used for dental purposes has incorporated with it large proportions of free sulphur, for the purpose of vulcanizing the rubber after it is formed. The odor and taste occasioned by the presence of this sulphur is extremely obnoxious to many persons, and occasions the principal, if not the only, objection to the use of rubber for dental purposes. To overcome this objection, and produce vulcanized rubber for dental purposes without the actual or apparent presence of sulphur, is the object of my invention, and consists in preparing the rubber for vulcanizing by the introduction of a peculiar vulcanizing compound for which I have applied for letters patent in even date herewith; and that others skilled in the art may be enabled to prepare and use my improved rubber, I will proceed to describe my manner of so doing. I will first describe the vulcanizing compound, as set forth in the specification accompanying my application for patent as aforesaid. I first boil linseed or other vegetable oil to the consistency of honey (this I do to facilitate the preparation), thoroughly mix two ounces of benzoin gum with one pound of pulverized sulphur; then to each quart of the boiled oil add one pound of the prepared sulphur, carefully subjecting this mixture to a moderate heat, sufficient only to cause the two substances to react upon each other until they pass from a semi-fluid to a semi-hard state, having a honeycomb or spongy appearance. This forms my vulcanizing compound, and differs from that patented to me February 28, 1865, in that the benzoin gum is added, which, by its vaporizing qualities, more perfectly expels the fumes of the sulphur as well as the odor from the oil, and renders the compound nearly, if not perfectly, odorless, and when combined with India-rubber, or similar gums, and subjected to a regulated heat, will cause the same to undergo the change known as vulcanizing. To produce my rubber for dental purposes, to one pound of India-rubber or gutta percha, add ten to fourteen ounces of my above described compound; the greater the quantity of the compound the harder will be the rubber. After curing, twelve ounces I believe to be the proper quantity for general purposes. Thoroughly mix the compound and rubber by grinding between warm rolls. To produce the requisite color, I add chrome red, or lake pink, in quantities to produce the requisite color, and when thoroughly mixed, the substance will be in a plastic state, and in this state rolled into thin sheets and ready for the dentist's use. The dentist forms the plate in the ordinary manner for other rubber, and when so formed, it should be subjected to a heat of 320 degrees Fahrenheit, for about four hours, proportionately less time as the degree of heat is greater; otherwise treat as ordinary rubber, and the plate thus prepared will be as tasteless and odorless as metal plate, and will not tarnish the fillings or other gold in the mouth of the wearer. Having, therefore, thus fully described my invention, what I claim as new and useful, and desire to secure by letters patent, is: Combining the within described vulcanizing compound with India rubber in the proportions herein named, and substantially in the manner and for the purposes specified. Edwin L. Simpson."

C. F. Blake, A. Pollok, and C. M. Keller, for complainants.

H. T. Blake and S. D. Law, for defendant.

BLATCHFORD, District Judge. The reissued patents in this case cover the invention of what is known as "hard India-rubber." Reissue No. 556 is for the process, and reissue No. 557 is for the product. No. 556 claims "the combining of sulphur and India-rubber, or other vulcanizable gum, in proportions substantially as specified, when the same is subjected to a high degree of heat, substantially as specified according to the vulcanizing process of Charles Goodyear, for the purpose of producing a substance or manufacture possessing the properties or qualities substantially such as described, and this I claim, whether the said compound of sulphur and gum be, or be not, mixed with other ingredients, as set forth." No. 557 claims "the new manufacture or substance herein above described, and possessing the substantial properties herein described, and composed of India-rubber, or other vulcanizable gum, and sulphur, in the proportions substantially such as described, and, when incorporated, subjected to a high degree of heat, as set forth, and this I claim, whether other ingredients be, or be not, used in the preparation of the said manufacture, as herein described." The Goodyear Dental Vulcanite Company, who are joined as plaintiffs in this suit, are the owners of the exclusive right under the reissued patents, for the extended term, to the inventions covered thereby, as applied to dentistry, and for dental uses, within and throughout the United States. The bill alleges an infringement of the reissued patents by the defendant, by the manufacture, use, and sale of hard rubber for dental purposes, and by the making and using of hard rubber for plates for artificial teeth, and by the sale of such plates, such hard rubber being made substantially according to the process described in the reissued patents. It is shown, that the defendant has made dental plates for artificial teeth, and artificial gums and palates, of India-rubber, manufactured in accordance with letters patent of the United States, granted to Edwin L. Simpson, October 16th, 1866, for an "improvement in dental rubber," the

India-rubber being manufactured by A. R. Hale, and the plates being vulcanized by the defendant, in the manner described in the Nelson Goodyear patent, with only the difference, that the time required for vulcanization is longer under the Simpson patent.

It is claimed on the part of the defendant, that, in using, for dental purposes, India-rubber prepared according to the Simpson patent, and vulcanizing it, and then using the product, he does not employ either the process or the product covered by the Goodyear reissues. These reissued patents have been fully sustained by this court, after a thorough investigation into the novelty of the invention and the validity of the patents. The main decision in favor of the patents, on all the questions involved, was in October, 1862, in the case of Goodyear v. New York Gutta Percha Co. [Case No. 5,580], on a final hearing in equity. Subsequently, in the case of Goodyear v. Wait [Id. 5,587], a suit brought for an infringement of the patents by the manufacture of plates of hard vulcanized rubber for artificial teeth, and by the sale of plates so made, this court upheld the patents against all the defences set up. Among those defences were, that the reissued patents were void, because, on the reissue, there was a division into two reissued patents, one for the process and the other for the product; that the descriptions in the specifications were not sufficiently full and clear; and that the invention, so far as respects the application of the product to dental purposes, had been dedicated to the public. On this last point, Mr. Justice Nelson, in the opinion delivered by him in the case, held that the proofs in the case showed that great and extraordinary exertions had been made, by the proprietors of the dental branch of the patent, to get the article into common use, and to prevent piracies, and that there had been no dedication or abandonment of their right.

For the purposes of this motion, therefore, all questions must be regarded as settled, except the question, whether it is an infringement of the Nelson Goodyear patents to use hard rubber prepared according to the Simpson patent. The Goodyear reissues, in their claims, claim, that the India-rubber and the sulphur must be combined substantially in the proportions described in the specifications. What are those proportions? The specifications state them to be about from four ounces to a pound of sulphur to a pound of India-rubber. They also state, that, in working the vulcanizing process of Charles Goodyear (that is, to make what is called "soft rubber,") the best results are obtained by the use of the smallest proportional quantity of sulphur which will suffice to produce the change termed vulcanization, and which is usually not over one ounce of sulphur to a pound of gum, but that so small a proportional quantity of sulphur would entirely fail to produce the result obtained by the Nelson Goodyear process. Again, the specifications say: "The character of the new manufacture or substance is dependent upon the use of caoutchouc, and a sufficiently proportional quantity of sulphur, and a sufficiently high degree of heat, continued long enough to induce the change indicated; and, although much latitude may be taken in the proportional quantity of sulphur, a proportion much less than four ounces to the pound of caoutchouc will utterly fail to produce the new substance or manufacture herein above described." "The change indicated" is the production of a compound having the "hard and tough properties found, in various degrees, in ivory, bone, tortoise shell and horn, and the spring-like property, under flexure, of whalebone, and which, in the process of manufacture, is plastic, so that it can be moulded or modelled with facility into any desired shape, and which, when completed, may be wrought and polished to as high a degree as any of the native substances for which it is a substitute."

The specification of the Simpson patent says: "The rubber now used for dental purposes has incorporated with it large proportions of free sulphur, for the purpose of vulcanizing the rubber after it is formed." It is evident, that, by "rubber" here, is meant the compound of India-rubber and sulphur, before it is vulcanized, and in the condition in which it is when prepared for dental purposes, and ready to be vulcanized. The specification proceeds: "The odor and taste occasioned by the presence of this sulphur, is extremely obnoxious to many persons, and occasions the principal, if not the only, objection to the use of rubber for dental purposes. To overcome this objection, and produce vulcanized rubber for dental purposes, without the actual or apparent presence of sulphur, is the object of my invention, and consists in preparing the rubber for vulcanizing by the introduction of a peculiar vulcanizing compound." The patentee then describes the mode of making this vulcanizing compound. He says: "I first boil linseed or other vegetable oil to the consistency of honey, (this I do to facilitate the preparation,) thoroughly mix two ounces of benzoin gum with one pound of pulverized sulphur; then, to each quart of the boiled oil add one pound of the prepared sulphur, carefully subjecting this mixture to a moderate heat, sufficient only to cause the two substances to react upon each other, until they pass from a semi-fluid to a semi-hard state, having a honeycomb or spongy appearance." He also says, that the benzoin gum, "by its vaporizing qualities, more perfectly expels the fumes of the sulphur as well as the odor from the oil, and renders the compound nearly, if not perfectly, odorless, and, when combined with India-rubber, or similar gums, and subjected to a regulated heat, will cause the same to undergo the change known as

vulcanizing." To produce the rubber for dental purposes, he adds, to one pound of India-rubber, from ten to fourteen ounces of the vulcanizing compound, twelve ounces being the proper quantity for general purposes, the hardness of the rubber, after curing, increasing with the increase in the quantity of the vulcanizing compound. The compound and the rubber are thoroughly mixed, by being ground between warm rolls, and coloring matter is put in, if desired. The mixture is plastic, and is rolled into thin sheets, and is then ready for the dentist's use. The dentist forms the plate in the ordinary manner for other rubber, and then vulcanizes it by subjecting it to a heat of 320 degrees, Fahrenheit, for about four hours, or for a proportionately less time, with a higher degree of heat. Otherwise, it is treated as ordinary rubber, "and the plate, thus prepared, will be as tasteless and odorless as metal plate, and will not tarnish the fillings, or other gold, in the mouth of the wearer." The claim of the patent is this: "Combining the within described vulcanizing compound with India-rubber, in the proportions herein named, and substantially in the manner and for the purposes specified."

This specification does not pretend that the product formed by combining the vulcanizing compound with India-rubber, and subjecting the mixture to heat until it undergoes the change known as vulcanizing, differs, in any of its qualities or properties or capacities, from the product formed according to the Nelson Goodyear patents, except in being tasteless and odorless. It is not pretended that it does not possess all the properties which the specifications of the Nelson Goodyear reissues state are possessed by the product described in those reissues, and all the properties which the product formed by the process described in those reissues in fact possesses. It may possess some other qualities, such as being tasteless and odorless, and thus not obnoxious to those who dislike the odor and taste of sulphur, and not tarnishing gold, but still it possesses all the intrinsic, valuable, and distinctive qualities, as a product, which belong to the Nelson Goodyear product. It may be an improvement, and patentable, and yet it does not follow that it can be made or used without the permission of the owners of the Nelson Goodyear patents. On the face of the Simpson specification, the invention seems to be one merely for getting rid of the odor and taste of the sulphur used. The specification expressly states, that the object of the invention of Simpson is to overcome the objection to the odor and taste occasioned by the presence of free sulphur in the rubber used for dental purposes. The patentee does not pretend that he is not going to prepare hard vulcanized rubber, or that he is not going to vulcanize it by applying heat to a combination of India-rubber and sulphur. On the contrary, he says he is going to produce vulcanized rubber, and that he is going to do it "without the actual or apparent presence of sulphur." He does not venture to say that he can vulcanize the rubber without the actual presence of sulphur, but as the product has no odor or taste of sulphur, and thus there is no apparent presence of sulphur, he says that he produces the vulcanized rubber "without the actual or apparent presence of sulphur." That sulphur is actually used by him in making what he calls his vulcanizing compound, is fully set forth in his specification, and the quantity of sulphur is given; and the entire point of the invention, as the specification discloses it, is, that the benzoin gum, by its vaporizing qualities, expels the fumes of the sulphur and the odor of the oil, and renders the compound odorless. The specification then explicitly says, that the vulcanizing is effected by subjecting to heat the mixture formed by combining with India-rubber the compound composed of the oil, the benzoin gum and the sulphur. Therefore, sulphur is used,—"pulverized sulphur," as the specification says. It is actually present, although not apparently present, because its fumes are expelled by the use of the benzoin gum. It is there for all the practical purposes of vulcanizing, but it is not there to be smelt or tasted. The invention of Simpson is clearly, therefore, only an improvement on that of Nelson Goodyear, embodying the latter, and not capable of being used without using the latter, provided it involves the use of sulphur in the proportions covered by the Nelson Goodyear reissues.

The plaintiffs produce the depositions of four chemical experts, Thomas Antisell, chief chemist of the agricultural department of the patent office at Washington, and formerly chief examiner in said office, Henri Erni, formerly chief chemist in said department, and now an examiner in the patent office, Dubois D. Parmelee, a chemist in the city of New York, and Eben N. Horsford, professor of chemistry in Harvard University. Dr. Antisell has analyzed a piece of the vulcanizing compound, made according to the Simpson patent, and states its ingredients and their proportions. He finds in 100 parts of it 66.25 parts of rubber and foreign matter, 12.25 parts of free sulphur, and 21.50 parts of coloring matter, and says that it contains the ingredients, and in the proportions, described in the Nelson Goodyear reissues, and that, if heated according to the vulcanizing process, hard rubber, such as is described and claimed in such reissues, must be produced. Erni, Parmelee, and Horsford say, that they have each examined the Simpson specification, with a view of determining the proportion of sulphur to the pound of rubber, contained in the vulcanizing compound described therein. Erni and Horsford say, that, by following the specification, they find that the compound, when vulcanized, does not contain less than four

ounces of sulphur to sixteen ounces of rubber. This they demonstrate by a detailed calculation, which they set forth. Parmelee, by following the Simpson specification, calculates that, in the compound ready for vulcanization, there is about 4¾ ounces of sulphur to 16 ounces of rubber. Erni and Horsford say, that Dr. Antisell's analysis shows 4.34 ounces of sulphur to 16 ounces of rubber; and they and Parmelee say, each of them, that his deduction is corroborated by Dr. Antisell's analysis, because there is, in fact, as shown by the analysis, a greater loss of linseed oil by heat than is allowed in the calculations. Erni and Horsford allow a loss of one-sixth of the weight of the oil, in heating it. Parmelee allows a loss of a little more than one-third of the weight of the oil. Erni, Parmelee and Horsford, all of them, say, that the compound of Simpson is made in accordance with the invention of Nelson Goodyear. The result of this analysis is what was to be expected. The article, before analysis, has the properties of the Nelson Goodyear hard rubber. It is known to be made by the use of sulphur, rubber, and heat, under a description which shows a use of not less than four ounces of sulphur to a pound of rubber. The analysis shows that it contains not less than four ounces of sulphur to a pound of rubber. Sulphur is known to be the vulcanizing agent, and it is stated, in the Nelson Goodyear specifications, and known to be the fact, that a quantity of sulphur not much less than four ounces to a pound of rubber, is required to produce, with the aid of heat, hard vulcanized rubber. Nothing more is needed to establish clearly that the use of the Simpson vulcanized product, is an infringement of reissue No. 557, and that the manufacture of it by the Simpson process, is an infringement of reissue No. 556.

The reissued patents being fully established, and there being no doubt on the question of infringement, there would seem to be no doubt of the propriety of granting an injunction. But the defendant claims that the fact of the issuing of the Simpson patent is ground for withholding an injunction. The Simpson patent, however, can be of no avail to any greater extent than it purports to go. It is evidence merely of the novelty of what it claims, that is, the combining with India-rubber a compound, composed of benzoin gum, sulphur, and oil, prepared in the manner stated. That is all. A patent for such combination cannot confer upon the holder of it even a primâ facie right to make the combination without the license of a person holding a subsisting prior valid patent for the combination of sulphur and India-rubber, without the benzoin gum and the oil, any more than the patent to the latter can confer upon the latter the right to make, without the consent of the former, the combination covered by the patent held by the former. The defendant furnishes no evidence, by analysis of the Simpson rubber, to controvert the analysis testified to by the plaintiffs' experts, and all the affidavits on the part of the defendant as to the quantity of sulphur contained in Simpson's vulcanized product, and as to the question of non-infringement, are altogether vague, general, and unsatisfactory, and the defendant does not satisfactorily meet the deductions and calculations drawn by the plaintiffs' experts from the language of the Simpson specification.

No case has been cited in which an injunction has been refused, where the subsequent patent set up by the defendant contained itself satisfactory evidence on its face, when read by experts, that its process involved an infringement of the prior patent. The Simpson patent, in the sense of the law, and of the decisions as to granting injunctions, is not an adverse patent, or one for the same invention as the plaintiffs', or one conferring upon its holder any primâ facie legal authorthority to use, in working it, any thing before patented by the Goodyear reissues. An injunction must be issued, as prayed for.

[For other cases involving these patents, see note to Goodyear v. Mullee, Case No. 5,577.]

Case No. 5,571a.

GOODYEAR v. HILLS.

BACON v. SAME.

[3 Fish. Pat. Cas. 134.] [1]

Supreme Court, District of Columbia. Dec., 1866.

PATENTS—APPLICATION FOR INJUNCTION—VALIDITY—REJECTION OF INVENTOR'S APPLICATION FOR PATENT.

1. The only question arising on an application for injunction is whether the complainant presents an undebatable case.

2. It becomes the duty of the court not only to ascertain the validity of the patent, with such certainty as to advise the court that it ought to interpose its writ of injunction, but also to inquire whether the defendant is in contumacy of that right.

3. The law makers have admonished inventors and the public that if before an application they suffer more than two years to elapse in the use of an invention, they shall absolutely forfeit all right and title thereto.

4. As to any laches by which the application may be followed, the inventor is left under the dominion of common law principles.

[Cited in Bevin v. East Hampton Bell Co., Case No. 1,379.]

5. When his application is rejected, the judgment of condemnation by the patent office advertises to the country, at least, that he stands in no better position than before the applica-

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

tion was made. The country is advised that at that stage of the invention he has no rights.

6. More especially is he himself advised by rejection, of his want of right, for he is a party to the proceedings, and more immediately damnified.

7. The rejection of the application would, at least, be regarded, in the logic of equity, as a notice to him to proceed with diligence to traverse and reverse the judgment of the office.

8. Whether a patent applied for 1855, rejected in 1856, allowed to sleep for eight years, during which time the invention went into public use, and revived by a new application in 1864, is valid, quaere.

9. Where an application was made for a provisional injunction under two patents, in two suits, on behalf of the same equitable owner, and there appeared to be a community of interest, advice and policy between them, so that an injunction upon one of them which was valid, might be made to serve the purpose of an injunction upon the other, the validity of which was doubtful. *Held*, that, while an injunction under the doubtful patent was refused, the defendant would be allowed to tender reasonable security for payment for such use as he might make of the valid invention.

In equity. There were two motions, made in the supreme court of the District of Columbia, for provisional injunctions to restrain the defendant from infringing two separate patents, the legal title to which was vested in different parties, who held both in trust for the use of the Goodyear Dental Vulcanite Company. The first patent [No. 8,075] was for an "improvement in the manufacture of India rubber," granted to Nelson Goodyear, May 6, 1851, and reissued to Henry B. Goodyear, his administrator, May 18, 1858, in two divisions numbered 556 and 557 respectively. The second patent [No. 43,009] was for an "improvement in artificial gums and palates," granted to John A. Cummings, June 7, 1864, and more particularly referred to in the case of Dental Vulcanite Co. v. Wetherbee [Case No. 3,810]. The defendant was a dentist in the city of Washington who had manufactured plates or palates for artificial teeth of hard rubber, thus, as it was claimed, infringing the patents of Goodyear for the product and process (Goodyear v. New York Gutta Percha Co. [Id. 5,580], and the patent of Cummings for the special application of hard rubber to artificial gums and palates.

A. Pollok and J. J. Coombs, for complainant.

W. F. Mattingly and J. H. Bradley, for defendant.

CARTTER, J. Henry B. Goodyear, as the administrator of Nelson Goodyear's estate, and as the patentee, and Samuel A. Duncan, as the sole licensee of the right to use the invention for dental purposes, filed their bill against Thomas O. Hills, and ask the court to interpose its temporary injunction against the use of the process of Goodyear's invention, and of the material resulting from that process (called, I believe, technically, "vulcanite"), so far as that material and process are appropriated to dental purposes. The merits of the controversy, as discussed before me, are resolved first into the consideration of the question whether the proper parties are made complainants here; and secondly, granting the validity of this patent, whether the patentee has forfeited his rights to it by a dedication to the public.

These are the only questions seriously raised, although something has been said in regard to the validity of the patent. The subject of the patent has, under a modification, traveled through more than the lifetime of a patent, involving expenses which, it is said, left the inventor without reward, in consideration of which fact the commissioner of patents very properly, as far as is shown to me, granted an extension of seven years. It is this extension of the patent which is now before the court. This patent has been sufficiently in controversy in the courts and otherwise to have become an established fact. Its integrity, as appears in the proof, has been tested by an expenditure of over two hundred thousand dollars, and by repeated adjudications in the courts, through a period contemporaneous with the life of the original patentee. This last grant is made to the inventor's descendants, in consideration of the fact that the original patentee never realized any benefit from his genius; and this corresponds to the very familiar history of many inventors—that the beneficiaries of the generation in which the privilege is granted are never to see the fruition of their labors. As far as the validity of this patent is concerned, there can be no question; there ought to be no litigation.

On the question of forfeiture, or dedication to the public, I will simply remark, that so far from the evidence showing any laches, on the part of the owners of the patent, which would work such forfeiture or dedication, to my mind it shows the most persevering diligence on their part in asserting and maintaining their rights under the patent. But this patent does not stand alone; and it is impossible to consider this case in its full merits, without reference to another, which is now traveling parallel with it. I refer to the case of Josiah Bacon against Thomas O. Hills. Bacon is the assignee of one Cummings, and the trustee of a company now in process of formation, a company at present existing in its elements alone, and waiting for the sovereignty of Massachusetts to give it a legal being, which company has become virtually the assignee of both patents, but an assignee in such wise as not to take the legal title to these patents from the respective patentees and their assignees, as the case appears to me. In that regard I think the proper parties, so far as I am advised, are before the court, whatever may be the explanations of the case made before it reaches a final hearing. Under this marriage of the two

patents in the interest of the company, common agents are appointed, and a common demand is made upon the dental profession for tribute. What the necessity of this may be, it is unnecessary to discuss. I can conceive that the motive may be to make the more meritorious support the defects of the less meritorious patent—that the patent of shorter life may be made to vitalize that having in prospect a longer period of duration. But whatever may be the motive for the union, the union exists, and, as I view it, is material to the consideration of the case.

The Cummings patent, upon which I am now commenting, dates its existence, as nearly as I can recollect the facts, from the brief argument presented to me, to a caveat filed as early as 1852. A formal application for a patent was presented in 1855, but rejected in 1856, when it took a long sleep. It was granted in 1864, having been revived a short time previous, after its sleep of eight years under an adverse judgment of the patent office. It is further in evidence before me informally, and all the testimony has been presented by affidavits, that during this winter season of the invention, it went into common use. The dental profession adopted it with great reluctance, beginning, perhaps, as far back as 1854, and employing it reluctantly from that time to 1864, inclusive. Since this period it has come into general use, on account of its economy, and, so far as appears from the proof, its great superiority in every respect. Indeed, while the case was under discussion, the superior advantages of this invention were so glowingly painted by the learned counsel that I was almost inclined to reject the old molars of fifty-five years for a set of artificial teeth, although the former were ancient friends. The argument seemed to represent that it would be a luxury to exchange a set of nature's dentistry for this modern substitute. This transition from an invention to universal use, occupied a period of rest between 1856 and the application which preceded the final granting of the patent, I believe in the year 1864. The impression, at least, was made upon my mind, that eight years intervened between the rejection and the final issue of the patent. The question presented in this connection is, whether the patentee acquiring title under these circumstances, is brought within the protection of the law.

It is not necessary for me in this stage of the case and upon the motion now pending, to determine what would be my ultimate judgment in regard to this point. The only question arising upon an application for an injunction, it appears to me, is whether the complainant presents an undebatable case. The validity of this patent comes here endorsed by the decision of the circuit court for the district of Massachusetts, where Judge Clifford seems to have had no difficulty whatever in pronouncing that this interval of eight years formed no impediment to the rights of the patentee. But the conclusion is much clearer to my mind than the logic which leads to it. The opinion proceeds upon the hypothesis that no interval of effort, no relaxation of diligence, can follow an application for a patent, and that the application, as soon as alive, continues to live by virtue of the momentum which first put it in operation. That may be so; but I confess I do not see it clearly. The law makers have admonished inventors and the public, that if before an application they suffer more than two years to elapse in the use of the invention, they shall absolutely forfeit all right and title thereto. It is true that the legislative admonition relates to the period preceding the application. But it appears to me, as far as the court can be guided by its own judgment, that the inventor is left under the dominion of common law principles, in regard to any laches by which the application may be followed. Is it the law that because an inventor files his application, which is refused by the office, he may sleep upon his rights indefinitely, and that at any period in his lifetime, or that of his representatives, the application may be revived, as against the public? I think not. Prima facie, I think he would have to show a reason why he should be so permitted. The judgment of condemnation by the office, advertises to the country, at least, that he stands in no better position than before the application was made. The country is advised, by the deliberation of the only tribunal provided by law for the ascertainment, at that stage of the invention, of his right, that he has none. More especially is he himself advised of that fact, for he is a party to the proceedings, and more immediately damnified by the rejection of the application. That rejection would at least be regarded, in the logic of equity, as a notice to him to proceed with diligence to traverse and reverse the judgment of the office. I can not say, on the brief reflection that I have been able to give this case, under the pressure of the labor that has been upon me, during the period of the hearing, that this patentee has an invulnerable patent. And while I do not wish to anticipate the judgment of a further and fuller investigation, which will supervene the pendency of this suit, yet I am prepared to say that at this stage, upon this motion, the case presented is not one to call for the intervention of an injunction.

So much for the two cases in severalty. I ought here to remark that I have come to this conclusion with some misgivings; for this patent has not only been confirmed, in its integrity, by the decision of a circuit court in the case to which I have already referred but has received the sanction of Judge Giles, of Baltimore, upon a motion precisely similar to the one I have before me. I have listened to these opinions with the

deference due to the distinguished gentlemen by whom they were delivered; but I confess that I am in fault in not being able to agree with either of them.

This disposes, imperfectly, of my view of the condition of these two parties. And still the question recurs, what is my duty with reference to the issue of an injunction? It will be perceived by this reasoning, that I believe in the vitality of one of these patents as an indubitable proposition; and that there is, in my mind, such doubt as to the other, as not to allow it the force of a conclusive right, and therefore as not to entitle it to the benefit of an injunction. The whole embarrassment that follows grows out of the community of interest and the community of advice, between the two parties, and the community of police for the preservation of the interests of the two parties. They are represented by common counsel, by common agents, they have common interests; and still the legal interest is held in severalty. The respondent in these cases has informally expressed a willingness to regulate his use of the substance protected by the Goodyear patent, and thus become tributary to that patent; while, at the same time, he protests that he will not recognize the validity of the patent of Cummings. If the respondent had presented this readiness of compliance in a tangible form, which called upon the complainants, in rejecting it, to reject a certainty; if he had reduced his avowals, informally made, to definiteness, distinctly pledging a continued compliance with the terms of the Goodyear patent, I should have no hesitation about the matter. For it becomes a duty, in the consideration of this question, not only to ascertain the validity of the Goodyear patent with such certainty as to advise the court that it ought to interpose its writ of injunction, but also to inquire whether the respondent is in contumacy of that right; whether he is seeking to defeat and defraud the patentee of his property, or of a just consideration for its use. While I would be able to satisfy my own mind in regard to that fact, in case a definite tender had been made in a form of responsibility, I am embarrassed by the vague and indefinite character of the propositions presented, and must regulate my present judgment accordingly. Without consuming any more time, or repeating any more of the case, I think the parties will understand the position of my judgment, in announcing the result, which is, a denial of an injunction under the Cummings patent, and the granting of a temporary injunction in favor of the Goodyear patent, subject to removal at any time when the party defendant shall present a tangible tender of reasonable security for payment to the complainants for such use as may be made of the invention, or that which is the equivalent of such security; which is to be judged of by the chancellor, when a motion is made to dissolve the injunction.

Case No. 5,572.

GOODYEAR et al. v. HONSINGER.

[2 Biss. 1; 3 Fish. Pat. Cas. 147.] [1]

Circuit Court, N. D. Illinois. March Term, 1867.

PATENTS—PRIOR ADJUDICATION — DIVIDING PATENT — INJUNCTION NOT ALWAYS GRANTED ON VALID PATENT — EFFECT OF ACTS OF ORIGINAL PATENTEE—SHOULD ASSERT HIS RIGHTS.

1. When there has been a prior adjudication in another court, in which the validity of a patent has been fully contested and sustained, the court will, upon a motion for a preliminary injunction, consider the validity of the patent as prima facie established.

2. Whether a patent for a process can be reissued and divided into two patents, one for the process, and the other for the product produced by the process, quaere.

3. It is always unfair to those who are licensed to use the particular article or method, under letters patent, to allow, by laches, others to use what the licensees alone have a right to use under their licenses.

4. A court of equity, while it may be satisfied the patent is valid, does not feel inclined, where those claiming under the patent have been negligent in enforcing their rights, to interfere in all cases, by an absolute peremptory injunction.

5. Those who hold under an extension, are to be visited with the consequences of the acts of the owners of the original patent. They take the extension as it falls to them on the expiration of the patent, and are not to be reinstated in all the rights of the original patentee.

6. Where a patentee has stood by for a series of years, and permitted, or not formally objected to the use of the article claimed under the letters patent, such conduct ought to be visited to some extent upon him. Courts of equity ought to demand of patentees reasonable diligence in asserting their rights.

In equity. This was a motion for a provisional injunction, to restrain defendant from infringing letters patent [No. 8,075] for an "improvement in the manufacture of India rubber," granted to Nelson Goodyear May 6, 1851, re-issued to Henry B. Goodyear, administrator of Nelson Goodyear, deceased, May 18, 1858, in two divisions [Nos. 556 and 557], and extended to Henry B. Goodyear, for seven years from May 6, 1865. On July 17, 1866, so much of the invention as applied to dental purposes was assigned to Samuel A. Duncan.

The claims of the original patent were as follows: "What I do claim, etc., is the combining of India rubber and sulphur, either with or without shellac, for making a hard and inflexible substance hitherto unknown, substantially as herein set forth. I also claim the combining of India rubber, sulphur, and magnesia or lime, or a carbonate or a sulphate of magnesia or of lime, either with or without shellac, for making a hard and inflexible substance hitherto unknown, substantially as herein set forth."

The disclaimer and claim of re-issue 556

[1] [Reported by Josiah H. Bissell, Esq.; reprinted in 3 Fish. Pat. Cas. 147; and here republished by permission.]

was as follows: "It is well known that it has been proposed to produce a hard substance from caoutchouc, by passing it through highly heated liquid sulphur, but this has not been attended with practical success. I do not wish to be understood, however, as making claim broadly to the union of caoutchouc and sulphur in the proportions named, however these substances may be united and treated. But what I do claim as the invention of the said Nelson Goodyear, and desire to secure by letters patent, is the combining of sulphur and India rubber, or other vulcanizable gum, in proportions substantially as specified, according to the vulcanizing process of Charles Goodyear, for the purpose of producing a substance or manufacture possessing the properties or qualities substantially as described; and this I claim, whether the said compound of sulphur and gum be or be not mixed with other ingredients, as set forth.

The disclaimer and claim of re-issue 557 was as follows: "I do not wish to be understood as making claim broadly to a manufacture or substance produced by the admixture of caoutchouc and sulphur, nor as making claim broadly to a manufacture or substance by subjecting the compound of caoutchouc and sulphur, whether with or without other substances, to a high degree of heat, as, prior to the invention of Nelson Goodyear, caoutchouc and sulphur had been compounded, and such compound alone, as well as other ingredients, had been subjected to a high degree of heat, but not to produce the manufacture or substance having the character peculiar to the said manufacture or substance invented by the said Nelson Goodyear. What is claimed, etc., is the new manufacture or substance herein above described, and possessing the substantial properties herein described, and composed of India rubber, or other vulcanizable gum, and sulphur, in the proportions substantially as described, and when incorporated, subjected to a high degree of heat, as set forth, and this I claim, whether other ingredients be or be not used in the preparation of the said manufacture, as herein described."

A. Pollock, S. A. Goodwin, and F. H. B. Latrobe, for complainants.

S. S. Fisher, for defendant.

DRUMMOND, District Judge. In 1844 Charles Goodyear obtained a patent from the United States for a new discovery, which he claimed he had made by combining caoutchouc with sulphur in certain proportions, which letters patent were surrendered in 1849, and a re-issue was made by the government upon the original letters patent. The product thus described by Charles Goodyear in his letters patent and re-issue, was, as is well known, somewhat pliable in its character, not hard or stiff. In 1851 Nelson Goodyear claimed that he had made an improvement upon the invention of Charles Goodyear, and letters patent were issued to him on the 6th of May.

The discovery which he claimed he had made was, that by combining in certain proportions sulphur and caoutchouc, a hard substance was produced, somewhat in the nature of horn or ivory, susceptible of a polish. This was called hard rubber, or, in consequence of the heat that was applied to it, "a high degree of artificial heat," as he terms it in his specifications, vulcanite. . Nelson Goodyear died July 10, 1852; and it being claimed by his representatives that there was an error or mistake in the letters patent and the specifications as they were issued in May, 1851, application was made for a re-issue, and accordingly, on May 18, 1858, a re-issue was made to the administrator of Nelson Goodyear, consisting of two patents, numbered 556 and 557. These patents were issued, the one for the "method," as it is called, of producing the result claimed by Nelson Goodyear in his letters patent and specifications of May, 1851; the other was for the product. The patent would run, (the re-issue, as a matter of course, claiming nothing more than was claimed in the original patent,) from 1851 to 1865.

The patent then expiring, application was made under the law in force to the commissioner of patents for the extension of the patent, and accordingly, May 6, 1865, an extension was granted to the administrator of Nelson Goodyear, who thus becomes a party to this suit; and on July 17, 1866, an assignment was made to Samuel A. Duncan of the right under the patent and re-issue, so far as the invention was to be applied to dental uses. The two complainants now file their bill against Dr. Honsinger, a dentist of this city, claiming that he has violated the invention secured by the original letters patent, re-issue and extension.

I stated, during the progress of the argument, that on this motion I should consider it as prima facie established that the patent was valid. In 1862 a decree was rendered by Mr. Justice Nelson, Judge Smalley, of the district court, sitting with him, upon this extension and re-issue granted in 1858. That suit was very closely contested, and the patents thoroughly considered by the court; and a decree was rendered, establishing the validity of the patents, and of the rights under the re-issue.

The only criticism I feel inclined to make upon the re-issue in 1858 is as to the manner in which it was made—consisting of two letters patent, and two distinct specifications and claims—one for the "method" by which the product is obtained, and the other for the product itself. It has occurred to me as a question, whether the two things claimed are not essentially the same in their nature. The invention was a certain product, obtained in a particular way; and the claim, as set forth in one of the specifications, is "the combining of sulphur and India rubber, or other vulcan-

izable gum, in proportions substantially as specified, when the same is subjected to a high degree of heat, substantially as specified, according to the vulcanizing process of Charles Goodyear, for the purpose of producing a substance or manufacture possessing the properties and qualities substantially as described, and this, whether the compound of sulphur or gum be or be not mixed with other ingredients, as set forth;" in the other —where the mere product is claimed—the claim is set forth in this language: "The new manufacture or substance herein above described, and possessing the substantial properties described, and composed of India rubber or other vulcanizable gum and sulphur in the proportions substantially such as described, and, when incorporated, subjected to a high degree of heat, as set forth, and this whether other ingredients be or be not used in the preparation of the said manufacture herein described."

Now I am inclined to think that the patent is only valid for the particular method described, by which the result is produced. The product, obtained in the manner described, is the invention, and for that letters patent might issue—whether or not this product by possibility could be produced by the compounding of other materials, is a question that it is not necessary to discuss at this time. I shall consider the letters patent as valid, Judge Nelson and Judge Smalley having adjudicated upon their validity.

Then, as to the infringement by the defendant;—it is true that some affidavits have been filed by him, one particularly, in which he claimed that he did not admit to a witness, whose affidavit is on file, that he had violated the patents of the plaintiffs. But I do not understand him to deny that he has used for dental purposes, the product which the complainants claim, in the manner set forth under the letters patent.

I understand that it is stated in the specifications that there may be certain coloring matter introduced into the material from which hard rubber or vulcanite is to be created, and so whatever either experience or skill might suggest in relation to that coloring matter, could be added; and as the idea is distinctly set forth in the specifications, it could be easily varied by any one according to his fancy. The leading idea is there, and if some other coloring matter is used, which is not specifically set forth in the letters patent, I think that would not affect the validity of the patents themselves. Therefore I also take it for granted under the affidavits, that the defendant has used what is claimed under the letters patent, and so has infringed.

The only difficulty I have had in the examination of the case, and which I may say I had during the progress of the argument, was and is in consequence of what has taken place since the re-issue in 1858. What are the facts in relation to that? The American Hard Rubber Company became possessed of the rights, the original patent and re-issue, so long as they might exist under the original patents, that is to say, until 1865. Under these rights they manufactured the hard rubber or vulcanite. They also prepared what is called "a plastic compound" which could be vulcanized at the will of the dentist, or of any one else who understood the mode of creating vulcanite. It was colored, and prepared in every respect for the dentists, and all they had to do was simply to apply the artificial heat to make it vulcanite, or hard rubber—such a material as to enable them to use it for their special purpose—a plate for artificial teeth or otherwise.

There is no doubt that the claim to this product, vulcanite, was always set up by the representatives of Nelson Goodyear, and that they denied the right of the dentists to use it for their special purpose, without the consent of the patentee, or his representatives. This claim was set forth by publication, by application to the dentists to obtain licenses, and in other forms. It, however, was not acquiesced in by the dental profession. The affidavits filed in this case show that in 1855, possibly in 1854, this material first began to be applied to dental purposes, and in three or four years it came into general use, both by those who had licenses and those who had not. The American Hard Rubber Company about this time, began to manufacture this plastic compound, colored, for the special use of the dentists, and it was sold by their agents from that time until the expiration of the patent.

It is set forth in the bill (and such is the statement of Ropes in his affidavit) that in all instances this preparation thus made by the American Hard Rubber Company, was labelled in a way to indicate to the public that it could be used and manufactured into vulcanite by those dentists only who had licenses under the patent; and if the case had stood here, alone, unaffected by anything that occurred afterward, I should have reached a different conclusion on the application, from that at which I have arrived from other facts in the case, to which I will now advert.

Notwithstanding the issuing of the licenses under the patent to the number of two thousand, as is said in the bill, and the manufacture of this plastic compound by the American Hard Rubber Company, with the labels on the parcels thus manufactured, it is undoubtedly true that a large number of the dentists of the United States declined to accept such licenses, or pay for them under the patent. It is also true, that, notwithstanding the prohibition contained upon the label of the article as manufactured, the agents of the American Hard Rubber Company did knowingly sell it to dentists who had no licenses. The reason why this was permitted, and the way in which the effect of those sales is sought to be avoided, is thus set forth in the bill: "The great expense of prosecuting infringements in the different parts of the Unit-

ed States, in some of which the recovery would not equal the unavoidable expenses of the suits not taxable as costs, and the near approach of the expiration of the term for which said letters patent were originally granted, at which time the operations of the said American Hard Rubber Company in the West would cease by limitation, deterred the American Hard Rubber Company, who were to bear the whole expense of the litigation, from prosecuting any more suits."

It was unfair, and is always unfair, to those who are licensed to use the particular article or method, under letters patent, to allow others to use what the licensees have thus purchased. It is true that this conduct may be explained. There may be circumstances such as would not warrant any inference against the patentee, from such conduct; as, for instance, if the patentee were unable to prosecute the parties thus infringing the patents; or, if circumstances were such as to indicate that there was no acquiescence, expressed or implied, in the violation; or, as appears in this case, that there was a suit pending in one of the circuit courts of the United States, where the right under the patent was to be tested. That would constitute a reason why the patentee, or those claiming under him, should not involve themselves in great expense while there might be a question as to the validity of the patent. So far as it goes, that is a sufficient justification for the parties claiming under this patent. But it does not go the full extent to which I think the patentee ought to go when he comes into court and asks for the summary remedy of injunction, without qualification, and without condition. I am constrained to believe that in this case the representatives of the patentee had the ability to prosecute those who infringed their rights under the patent, and that it was, to some extent, a voluntary acquiescence in a fact which was notorious, and which the affidavits show must have been known to the patentees or their representatives—that this article was sold in the market—was being purchased by dentists from time to time for a series of years, and was being used by them for their own special purposes. Under such circumstances, a court of equity, while it may be satisfied that the patent is valid, does not feel inclined, to interfere, in all cases, by an absolute peremptory injunction, without condition or qualification.

I take it that these complainants, although they claim under the extension, are to be visited with the consequences of the acts of their predecessors, the American Hard Rubber Company. They take the extension just as it fell to them on the expiration of the patent from the successors of those claiming under the original patent and the re-issue, and, of course, are not to be reinstated in all the original rights of the patentees, in every respect, as they stood when the original letters patent were issued, or the re-issues were given.

But, as I said during the argument, I desire to protect the rights of all the parties; I shall, therefore, in this case make a special order. I am satisfied of the validity of the letters patent and the re-issues, and have no doubt that the defendant has infringed. I shall accordingly issue an injunction against the defendant, with leave to him, at a future time, to come in and have the injunction dissolved, upon giving adequate security to the complainants.

It has been said that, to some extent, the granting such an order as this, on such a condition, is to deprive the complainants of their rights under the letters patent; that there is nothing so potent as a peremptory writ of injunction, without qualification or condition. There can be no doubt of that. It suspends at once, so far as the mandate of the court can do it, all acts of use under the letters patent, by any one, except with the consent of the patentee or his representatives. But when the patentee has stood by for a series of years, and permitted, or not objected in the way in which the law authorizes him to object, to the use of the article claimed under the letters patent, I think that such conduct ought to be visited, to some extent, upon the patentee.

The unconditional injunction of the court places the dentists in the power of the patentees. A conditional injunction of the court, allowing it to be dissolved on giving security, it may be said, places the patentee in the power of the dentists; and yet, to some extent, the same consequences follow—for example, an absolute, unconditional injunction can only operate in terrorem over other parties using the article without the consent of the patentee, by compelling them to take out licenses. After injunction is granted unconditionally, the patentee can go to all who use the vulcanite, and say to them: "You must take out a license, or I will file a bill and have an injunction issued against you, as I have already against your brother dentist." But so it is in the other case. The patentee can go to the dentists who use this article without permission, and say to them: "I will file a bill against you, and will compel you to give security, as I have already compelled your brother dentist."

I admit that the one aspect of the case is more potential for the rights of the patentee, than the other. But from what I have already said, it will be seen that I visit, to some extent, upon the patentee the consequences of his own laches. This was the view I took, a short time since, on full consideration of a case growing out of a patent to parts of a sewing machine. I think that courts of equity ought to demand of patentees reasonable diligence in asserting their rights. Of course, the rule is flexible, subject to be changed by the peculiar circumstances of each case. A court of equity should always act fairly and justly, so as to protect the rights of patentees, although they may not, owing to various circumstances, prosecute their rights so soon or so early as,

under other circumstances, they ought to do.

Now I take this course, for this reason. The view that I take of the rights of the complainants and the defendant will be understood on both sides. There is a litigation now pending, in which the rights of the patentee will be fully ascertained. The only change, as asserted by the present litigation, from what was claimed in the former—the one terminated in 1862, by Judge Nelson and Judge Smalley—is, I suppose, in the application of this particular material to dental purposes. As I understand, that question was not distinctly in issue in that case.

I shall give the complainants a peremptory writ of injunction now, allowing the defendant to move to dissolve it at a future time to induce the other dentists, who are not parties to this suit to make some satisfactory arrangements with the patentees. I should feel very much inclined, if the dentists should prove recusant, refractory, or unreasonable, to grant hereafter, on application, a peremptory writ of injunction, without condition or qualification. What I want to do is to protect the rights of the complainants and the rights of the defendant and of the public.

The order of the court will be, that the injunction issue against the defendant, with leave to him, within ten days, to come in, and, on notice, move to dissolve the injunction upon giving adequate security to the complainants. I do not want to compel these dentists actually to pay anything now to these patentees for licenses, but to give adequate security to do so. If the patentees are not willing to take the personal obligation of the dentists, I want them to be compelled to give security satisfactory to the parties to pay them in case these patents are sustained by the appellate court, or whenever the litigation may be terminated. I have dictated the order in this form, because I did not wish to compel the complainants to file other bills, and prosecute other litigation.

[For other cases involving these patents, see note to Goodyear v. Mullee, Case No. 5,577.]

Case No. 5,573.

GOODYEAR et al. v. HULLIHEN.

SAME v. WINGERTER.

SAME v. LUNSFORD.

[2 Hughes, 492; 3 Fish. Pat. Cas. 251.] [1]

District Court, D. West Virginia. Aug., 1867.

EQUITY JURISDICTION—REMEDY AT LAW—ACT OF JULY 4, 1836—PATENTS — SUIT BY FOREIGN ADMINISTRATOR—INVENTION OF INTESTATE—NOTARIES—ASSIGNEE — EXTENDED TERM — SUIT AT LAW.

1. Section 17 of the act of July 4, 1836 [5 Stat. 124], provides that all actions, etc., under the patent laws, shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States. There is, therefore, nothing in the objection to the jurisdiction of the court in equity, that the complainant could obtain redress at law.

[Cited in Blake Crusher Co. v. Ward, Case No. 1,505.]

2. The reasons which exist for requiring an administrator, in ordinary cases, to qualify in the state in which he sues, do not apply to suits brought by an administrator to whom a patent has been granted for the invention of his intestate, for the infringement thereof.

3. In such cases the administrator is a trustee holding the legal title, and the patent is not assets in his hands belonging to the personal estate of the intestate, but is a franchise granted to the administrator for the benefit of the heirs at law, or devisees of the deceased inventor.

[Cited in Wilson v. Tootle, 55 Fed. 216.]

4. Where a notary public, in signing a jurat, appended to his name the words "notary public," and affixed a seal bearing his name and the words "notary public:" *Held*: That was sufficient compliance with the act of September 16, 1850 [9 Stat. 458].

5. The fact that a person was an assignee under the original term of letters patent furnishes no presumption that he is interested in the extended term.

6. An inventor may bring an action at law, or, if he prefer to do so, he may in the first instance seek redress in equity without having established his right at law.

In equity. These were motions, on the part of complainants [Henry B. Goodyear, administrator of Nelson Goodyear, deceased, and Samuel A. Duncan] for provisional injunctions, to restrain the defendants [M. F. Hullihen, Charles Wingerter, and Thomas Lunsford] from infringing reissued letters patent Nos. 556 and 557, granted to Henry B. Goodyear, administrator of Nelson Goodyear, deceased, May 6, 1851, and more particularly referred to in the report of the case of Goodyear v. Honsinger [Case No. 5,572]; and on the part of the defendants, for postponement, and for further time for answer. The defendants were charged with infringing the patents by using hard rubber for dental purposes, and the facts were substantially the same as those in like cases heretofore reported.

B. Stanton and W. Bakewell, for complainants.

G. H. Lee, M. P. Amiss, J. S. Wheat, and D. Peck, for defendants.

JACKSON, District Judge. These cases came before me, at chambers, on a motion by complainants for a preliminary injunction to restrain the defendants, who are dentists in the city of Wheeling, from the use of hard rubber, or vulcanite, for the purposes of dentistry. The complainants base their claim for injunction on certain reissued letters patent, Nos. 556 and 557, granted to Henry B. Goodyear, administrator of Nelson Goodyear, deceased, on the 18th May, 1858, being reissues of original letters patent [No. 8,075], granted 6th May, 1851, to Nelson Goodyear,

[1] [Reported by Hon. Robert W. Hughes, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and statement are from 3 Fish. Pat. Cas. 251, and the opinion is from 2 Hughes, 492.]

for improvement in the manufacture of India-rubber. They set forth in their bill of complaint that Samuel A. Duncan, one of the complainants, is the exclusive owner of the right to use hard rubber for dental purposes, and to practice such invention as applied to dentistry under said reissued patents; that suits have been brought in other circuits, on said letters patent, and that the validity thereof has been fully vindicated and sustained, and that each of the defendants in the three several bills filed has infringed said said letters patent, and refuses to make compensation therefor to the owners of the right thus invaded. It appears from the statements of these bills, and it is otherwise known to the court, that several suits have been brought for infringement of these reissued patents, Nos. 556 and 557, and that said patents have been thereby sustained and their validity and sufficiency fully established. This question I may then consider as settled, and regard the validity of these patents as beyond all question.

At the hearing of the motion just argued several objections were made by the defendants' counsel, as well for the purpose of showing that the complainants are not entitled to a preliminary injunction as also for obtaining further time in which to answer the bills filed. The first of these objections is, that the complainants could obtain all the redress they are entitled to by action at law for infringement of their patents, and are not therefore entitled to the interposition of a court of equity. The fact to which I have adverted, that these patents passed under the judicial scrutiny of more than one of the justices of the supreme court sitting in circuit, and of other circuit courts of the United States, and have been sustained, takes away all possible reason which might exist for requiring that the complainants should first establish their right at law; besides, the 17th section of the act of congress of 4th July, 1836 [5 Stat. 124], settles this question, by enacting that "all actions, suits, controversies, and cases arising under any law of the United States granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States, or any district court having the power and jurisdiction of a circuit court; which courts shall have power, upon a bill in equity filed by any party aggrieved, in any such case, to grant injunctions according to the course and principles of courts of equity, to prevent the violations of the rights of any inventor as secured to him by any law of the United States, on such terms and conditions as said courts may deem reasonable." There is nothing, therefore, in this objection.

The next point made by the defendants' counsel is that Henry B. Goodyear has offered no proof that he is the administrator of Nelson Goodyear, deceased, and that, even if that fact is to be taken as sufficiently proven, for the purposes of the pending motion, by the allegations of the bill, it is necessary that the administrator should take out letters of administration in this state in order to entitle him to sustain a suit here as such administrator.

It does not appear to me that this point is well taken; the reasons which exist for requiring an administrator, in ordinary cases, to qualify in the state in which he sues, do not apply to suits brought by an administrator to whom a patent has been granted for the invention of his intestate, for infringement of the rights thus granted. Under the act of congress patents are granted, in case of the decease of the inventor, to the executor or administrator of such person, in trust for the heirs-at-law of the deceased, in case he shall have died intestate, but if otherwise, then in trust for his devisees (Act July 4, 1836, § 10), and reissues are also granted to the executor or administrator (Act July 4, 1836, § 13). In such cases the administrator is a trustee holding the legal title, the patent is not assets in his hands belonging to the personal estate of the intestate, but is a franchise granted to the administrator for the benefit of the heirs-at-law or devisees of the deceased inventor. There is therefore no reason for requiring him to qualify in this state; besides which, the question may be considered as set at rest by the authority of the following cases, cited in argument by complainants' counsel: "It is not necessary in an action by an administrator that he should produce his letters of administration. The patent being renewed to him as administrator is proof that he had satisfied the officer authorized to grant a renewal, of his being administrator, and it is not competent for the court to go behind this decision." Woodworth v. Hall [Case No. 18,016]. "An administrator of a patentee residing in one state may commence an action in the United States circuit court of another state for the recovery of damages for an infringement of a patent, without taking out letters of administration in the latter state." Smith v. Mercer [Id. 13,078].

It is further objected, that the bills filed by complainants are not sworn to, or rather that the affidavits annexed to the bills are not properly certified by the notary public by whom the oath in each case was administered. The affidavits have the following caption:

"United States of America, District of Massachusetts, County of Suffolk—ss."

The certificate of the notary and the seal attached are as follows:

"Sworn to before me this 21st day of November, A. D., 1866.

"N. Austin Parks, "Notary Public. "Suffolk Co., Mass. N. Austin Parks, Notary Public."

It is claimed that the officer should state in

his certificate that he is a notary public, and that such certificate is given under his notarial seal. Under the Code of Virginia, which is also the law of this state, this objection might probably be well taken, but with this question we have here no concern, as the sufficiency of the certificate rests on the provisions of the act of congress and not on the law of the state.

The act of congress of 16th of September, 1850, § 1 [supra], provides that "in all cases in which, under the laws of the United States, oaths or affirmations or acknowledgments may now be taken or made before any justice or justices of the peace of any state or territory, such oaths, affirmations, or acknowledgments may be hereafter also taken or made by or before any notary public duly appointed in any state or territory, and when certified under the hand and official seal of such notary, shall have the same force and effect as if taken or made by or before such justice or justices of the peace." The certificate in this case is signed by N. Austin Parks, who appends to his name the words "notary public;" there is therefore no doubt as to the capacity in which he acted. There is a seal affixed, and this seal bearing the name of the officer who signs the certificate, it is clearly his seal. It also has on it the words "notary public," and therefore sufficiently sets forth his official character. Whether an ordinary notarial seal, not bearing the officer's name, would have sufficed, it is not necessary here to decide, as the seal affixed to these bills relieves the question of any doubt as to the person whose seal it is, and his official character. I am, therefore, clearly of opinion that the certificate is sufficient. It is somewhat remarkable that this objection, if well taken, has not been raised in any of the cases of litigation under these patents, in which the bills and certificates to the affidavits have been precisely like these now under consideration. The suit recently brought before Justice Nelson in New York was managed for the defence by some of the ablest counsel in the United States, and it can hardly be supposed that this objection, if there were anything in it, would not have been made, especially as the chief object of the defendant in that case, as in all the others, seems to have been to interpose every objection that would delay the hearing. This general acquiescence of the bar furnishes a strong presumption that the form of affidavit and the certificate have been deemed sufficient.

The last objection to the sufficiency of the bills is, that they set forth that a Mr. Poppenhusen has acquired by assignment or otherwise an interest in these patents, giving him a joint interest in the subject-matter of the suit, and that it is therefore necessary to make him a party thereto. The bills recite the grant of letters patent to Nelson Goodyear on 6th of May, 1851, the surrender of the original patent and reissue thereof on 18th of May, 1858, in two patents, and that Poppenhusen became interested in such reissued patents. But the original term of the patent and reissue thereof expired on 6th of May, 1865, and with the expiration of the first term the interest of all parties holding under the patentee by license or assignment terminated, so that Poppenhusen ceased to be interested in these patents on 6th of May, 1865, before the filing of these bills, and it is not alleged in the bill, and cannot be presumed without such allegation or other proof, that he has any interest in the extended term under which the present complainants claim. The bills being filed by Henry B. Goodyear, administrator, to whom these patents were extended, and Samuel A. Duncan, claiming as sole grantee of the right to use the invention for the purposes of dentistry, the proper parties are made complainants, and this objection falls to the ground.

This disposes of all the formal objections made to the bills filed by complainants, and it remains to consider the reasons set forth by all these defendants in their affidavits filed, for urging a postponement of the hearing and obtaining further time to answer the bills. The defendants allege that they are not prepared, because they cannot procure counsel to prepare their answers, that the practice in patent cases is a specialty in the profession, and that no attorneys in this part of the district have given the requisite attention to that branch of the law to qualify them for preparing a suitable defence or answer. Notice of the motion for preliminary injunction was served on these defendants early in July last. They appeared by counsel in the United States district court held at Wheeling on the day fixed for hearing, and successfully resisted the application for that term, and the hearing was postponed until this time, of which postponement they were fully advised, and to which they assented. They have again appeared by counsel, who have ably argued the pending motions, so that I am not able to perceive any want of capacity on their part to apprehend the questions involved. Under all these circumstances the absence of other counsel, whose attendance they desired but were unable to procure, can furnish no ground for further delay. These defendants have had a full month in which to prepare their defence and procure counsel, and no further time can reasonably be asked. For these reasons, the motion made on the part of the defendants for further time in which to file their answers is overruled.

This brings me to the consideration of the main question before me, whether, upon the bills of complaint and accompanying affidavits, the complainants are entitled to the preliminary injunctions as prayed for. The bills set forth that Nelson Goodyear was the original and first inventor or discoverer of a new and useful improvement in India-rubber, known as hard rubber or vulcanite, for

which letters patent of the United States were issued to him on 6th May, 1851, for the term of fourteen years; that Nelson Goodyear died on 10th July, 1852, and his brother, Henry B. Goodyear, was appointed his administrator on 20th September, 1852. It appears that his original patent was inoperative and insufficient to afford full security to the invention, by reason of covering two separate and distinct inventions, and because it did not protect against the importation of articles of hard rubber from foreign countries, unless it could be proved by what process they were manufactured, which could not be done. To overcome this difficulty, the commissioner of patents, on surrender of the original patent, and a careful re-examination, as required in such cases, granted a reissue by two patents (reissue Nos. 556 and 557), dated 18th May, 1858, for the residue of the original term of fourteen years, from 6th May, 1851, which were issued to Henry B. Goodyear, administrator of Nelson Goodyear, deceased, one covering the process of making the hard rubber, and the other the product of the hard rubber, as an article of manufacture previously unknown. It is alleged, and is in evidence, that these two reissued patents, Nos. 556 and 557, were on the 5th May, 1865, renewed and extended by the commissioner of patents for the term of seven years from the 6th May, 1865. It is further alleged in these bills, that the complainant, Duncan, obtained on 17th July, 1866, the sole and exclusive right and license under said extended patents to manufacture, use, and sell, and to grant to others the right to manufacture, use, and sell, hard rubber for dental purposes, and is entitled to all damages recovered by suits against parties infringing said patents by the use of hard rubber in dentistry; that the owners of said patents have been diligent in prosecuting their rights thereunder, have brought several suits against parties infringing the patents, and have obtained final decrees sustaining the validity thereof, and that they have granted a large number of licenses to dentists for the use of said invention. It further appears by the allegations of the bills, and by the affidavits filed by complainants, that the defendants are infringing these patents by the use of hard rubber for dental purposes, and the affidavits of the defendants themselves state that they are using hard rubber, which they suppose to be the same as covered by the patents in question.

The law is designed for the encouragement and protection of inventors, to secure to them the exclusive right in their inventions for a limited term, and to furnish to them adequate remedies for the invasion of their rights. An inventor may bring an action at law against parties infringing his patent, and the court has power to treble the damages awarded by the jury, or, if he prefer to do so, he may in the first instance seek redress in equity, without having established his right at law, and the court is authorized to inhibit and restrain the further infringement of the patent, by writ of injunction, and to grant a decree for the payment of such damages as the patentee may be found to have sustained. In the present instance the complainants have elected to pursue their remedy in equity, and have prayed for an injunction and account. The invention which forms the subject-matter of these patents is one of very great public utility, which has conferred incalculable benefits on the arts and sciences, and entered very extensively into the business operations of a very large portion of the community; it therefore commends itself very strongly to the consideration and protection of courts of law and equity. The complainants, having expended large sums of money in the introduction of this invention into public use, and in necessary litigation to maintain their rights against those who seek to avail themselves of this valuable discovery without paying for its use, have a right to look to the courts for redress, and it is my duty, in administering the law, to see that that protection and redress, which I am placed here to afford and administer, are not withheld. I regard it as my plain and imperative duty to grant, in these cases, the relief which the law affords to the owners of patents for meritorious inventions, when their rights appear to have been disregarded and infringed. It is therefore ordered and decreed that a preliminary injunction be granted against the defendant, M. F. Hullihen, and against Charles Wingerter, and against Thomas Lunsford, in these cases, as prayed for in the bills of complaint, such injunctions to continue until the further order of the court.

[For other cases involving these patents, see note to Goodyear v. Mullee, Case No. 5,577.]

GOODYEAR v. LUNSFORD. See Case No. 5,573.

Case No. 5,574.

GOODYEAR v. McBURNEY et al.

[3 Blatchf. 32.][1]

Circuit Court, S. D. New York. Sept. 12, 1853.

PATENTS — INFRINGEMENT — SUIT AT LAW IN BEHALF OF LICENSEE—DEFENSES—RELEASE —REPLICATION—AMENDMENT.

1. Under section 14 of the act of July 4, 1836 (5 Stat. 123), an action at law for the infringement of a patent may properly be brought in the name of the patentee, in behalf of a licensee under him, who is damaged by the infringement.

[Cited in Goodyear v. Bishop, Case No. 5,558; Nelson v. McMann, Id. 10,109; Brush-Swan Electric Light Co. v. Thomson-Houston Electric Co., 48 Fed. 226; Brush Electric Co. v. Electric Imp. Co., 49 Fed. 74.]

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

2. Where, in an action so brought, the defendant sets up a release from the patentee, a replication is proper, setting up the license, the bringing of the suit for the benefit of the licensee, notice to the defendant of the license and its recording, prior to the release, want of power in the patentee to give the release, and that it was given without the licensee's authority or consent.

[Cited in Jackson v. Allen, 120 Mass. 77.]

3. When, and on what terms, leave will be granted to file an amended replication setting up those matters.

This was a motion for leave to file an amended replication to a plea of puis darrein continuance. The action was case for the infringement of letters patent [No. 3,633] granted to the plaintiff [Charles Goodyear] for improvements in the manufacture of India-rubber. The plea was put in in September, 1851, by [Charles] McBurney and Cheever, two of the defendants. It set up a release, under seal, of these defendants, by the plaintiff, from "all claims, demands, actions, causes of action, and suits at law or in equity, for or on account of any and all infringements or violations of and upon any and all patents which the plaintiff ever owned, then owned, or could claim for improvements in the manufacture of India-rubber." To this plea the plaintiff replied, in March, 1852, simply traversing the release, The plaintiff now moved for leave to file an amended replication, setting up that, prior to the giving of the release, the plaintiff had granted an exclusive license, under the letters patent sued on, to one Greacen, to use the patented improvement in the manufacture of India-rubber steam-packing; that the defendants had been making that article in violation of the patent, to the damage of Greacen; that the suit was brought for the benefit of Greacen as well as that of the plaintiff, and to recover the damages for the use of Greacen; that the plaintiff, when the suit was brought and when the release was given, did not own the rights so granted by license, and had no power to give the release; that the license was recorded in the patent office before the release was given, and that the defendants also had actual notice of it before taking the release; that, when the release was given, the defendants were liable to the plaintiff in a large sum on account of his individual interest in the patent, exclusively of Greacen's right under it; and that the release was not intended by the parties to it to release the damages for which the defendants were liable in respect to Greacen's rights, and was given without Greacen's authority or consent. The motion was founded on an affidavit, made by Greacen's agent, verifying the truth of the proposed amended replication, and setting forth that the suit was commenced for Greacen's benefit as well as the plaintiff's, by his, the agent's, direction; that the release was given without his, the agent's, authority and consent; and that he, the agent, did not know that the release was pleaded or replied to until long after the replication was put in.

George C. Goddard, for plaintiff, contended that the amendment was allowable under section 32 of the act of September 24, 1789 (1 Stat. 91), that the amended replication was the proper method of protecting the rights of Greacen (citing Timan v. Leland, 6 Hill, 237), and that Greacen could not have sued in his own name, under section 14 of the act of July 4, 1836 (5 Stat. 123).

Edgar S. Van Winkle, for defendants.

NELSON, Circuit Justice. The suit is properly brought in the name of the patentee, in behalf of the party holding a license to use.

There has been much neglect and delay in this proceeding, on the part of Greacen; but I cannot say that he shall be debarred from contesting in the usual way the matters set up in the plea. The motion is granted, on payment of the costs of opposing it, and of putting in a rejoinder to the replication.

[For other cases involving this patent, see note to Goodyear v. Central R. Co., Case No. 5,563.]

Case No. 5,575.

GOODYEAR v. MALLEC.

[See Case No. 5,579.]

Case No. 5,576.

GOODYEAR v. MATHEWS.

[1 Paine, 300;[1] 1 Robb. Pat. Cas. 50.]

Circuit Court, D. Connecticut. April Term, 1814.

PATENTS—LAW OF 1793—PRIOR USE—IMPROVEMENTS.

1. A patent, under the law of 1793 [1 Stat. 318], is valid, although the invention may have been in use for years anterior to the patent, if the patentee was the original inventor.

[Cited in Treadwell v. Bladen, Case No. 14,154; Whitney v. Emmett, Id. 17,585; Shaw v. Cooper, 7 Pet. (32 U. S.) 317.]

2. A patent for an entire machine is valid, although the invention consists only of an improvement on such machine; but the patentee is entitled to an exclusive use of no more than his improvement.

[Cited in Treadwell v. Bladen, Case No. 14,154.]

[Cited in Rheem v. Holliday, 16 Pa. St. 350.]

This was an action on the case [by Amasa Goodyear against Ancon Mathews] for the breach of a patent right. The patentee, G. W. Robinson, was the inventor of a mode of casting hard metal buttons, with wire eyes, in metal moulds, and the plaintiff was the assignee of the patent. It appeared on

[1] [Reported by Elijah Paine, Jr., Esq.]

the trial, that several years before the date of the patent, the patentee had taken out another patent for the same thing, but had described his invention so imperfectly that the patent was void. The present patent was taken out [May 14, 1812], nothing having been done to affect the old one. For several years, during the first patent, the public had disregarded it, and used the invention without restraint.

N. Smith and S. P. Staples, for plaintiff.

S. H. Woodruff and T. S. Williams, for defendant, contended that the invention having been used publicly and freely for several years before the date of the patent declared on, the patentee could not resume the exclusive use of his invention as he had attempted. And also, that the patent was too broad, and covered more than the invention.

LIVINGSTON, Circuit Justice (charging jury). The first question of law which occurs in this cause is, whether the defendant be liable for using the plaintiff's improvement, provided it shall appear that the invention was known or used previous to the application for the patent, if the plaintiff can show that he was actually the inventor anterior to such knowledge or use by others. This is a question of some difficulty, and one which will never be considered as satisfactorily settled, until it be decided by the supreme court of the United States. But the circuit courts for the districts of Pennsylvania and of New-York having decided the same question, this court prefers, in the present case, to adhere to those decisions. The opinion of the court then is, that if you are satisfied that moulds of the construction described in the patent, were known and in use at the time of obtaining the patent, yet if at the same time you believe that the patentee was the inventor of these moulds, although such invention may have been years previous to his application for a patent, he or his assignees are entitled to recover. If a patent be taken out for an entire machine, when the invention consists only of an improvement on such machine, it is said by the defendant's counsel that the whole patent is void. This, gentlemen, is not the opinion of the court;[2] for although a patent be obtained for more than the improvement, the patentee is not entitled to more than his improvement, nor is he at liberty to make, use, or vend the original discovery, or to prosecute any person who shall use such original discovery without engrafting on it the improvement invented by the patentee, especially in a case like the present, where the application was for a patent for the invention of a new and useful improvement in moulds for casting metal buttons.

[2] See Whittemore v. Cutter [Case No. 17,601]; Lowell v. Lewis [Id. 8,568]; Evans v. Eaton [Id. 4,559], contra.

Case No. 5,577.

GOODYEAR et al. v. MULLEE et al.

[5 Blatchf. 429; 3 Fish. Pat. Cas. 209.][1]

Circuit Court, S. D. New York. July 31, 1867.

PATENTS—VIOLATION OF INJUNCTION — INFRINGEMENT—IMPROVEMENT IN MANUFACTURE OF INDIA RUBBER.

1. Circumstances stated, under which defendants charged with violating an injunction issued to restrain the infringement of letters patent, are entitled to little favor or consideration.

2. The extent of the claims of the two letters patent Nos. 556 and 557, reissued to Henry B. Goodyear, as administrator, &c., of Nelson Goodyear, deceased, May 18, 1858, for an "improvement in the manufacture of India rubber," defined.

3. The patentee is not limited, by those patents, to a quantity of sulphur not exceeding one pound to a pound of gum, provided the substance produced has the qualities of the substance referred to in his patents.

4. It is an infringement of those patents, to make a substance having the properties of the substance referred to in those patents, by compounding as much as twenty-two ounces of sulphur with a pound of gum and subjecting the mixture to the heating process described in those patents.

5. It is a violation of an injunction against the infringement of those patents, for a defendant to fit up machinery and keep it in running order, in a factory which he knows is making hard India rubber in violation of those patents.

In equity. These were separate motions for attachments against the two defendants [William Mullee and John Miller] for alleged violations of an injunction. The injunction was a perpetual injunction, issued on the 18th of October, 1866, in pursuance of a decree made on a final hearing in this cause. The injunction restrained the defendants from "making, manufacturing and selling, in violation of" letters patent of the United States, reissued on the 18th of May, 1858, to Henry B. Goodyear, as administrator of the estate of Nelson Goodyear, deceased, for "a new and useful improvement in the manufacture of India rubber," and known and distinguished as reissues Nos. 556 and 557, and extended for seven years from May 6, 1865, "any combs or other articles which are made and manufactured of India rubber, or other vulcanizable gum, mixed with sulphur, or any equivalent therefor, either with or without auxiliary ingredients, in the proportion of one pound of India rubber, or other vulcanizable gum, to about from four ounces to a pound of sulphur, and then subjecting such mixture of India rubber, or other vulcanizable gum, and sulphur, or any equivalent therefor, to a high degree of artificial heat, substantially as described and claimed in the said two reissued letters patent." [The original patent, No. 8,075, was granted to N. Goodyear, May 6, 1851.] This injunction was served on the defendant Mullee on the 6th of November, 1866,

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

and on the defendant Miller on the 20th of December, 1866.

Abbett & Charles M. Keller and William J. A. Fuller, for plaintiffs.

Edmund Wetmore, Thomas Darlington, and Gardner Spring, for defendants.

BLATCHFORD, District Judge. Both of the defendants have been infringing these patents for several years, at three places in Pennsylvania, and at New York City, and the various establishments in which they have been working have been broken up by the process of the courts. All the establishments in which Miller has worked since 1862 have been factories engaged in infringing these patents. They are skilful workmen, fully acquainted with the process and the article described in the Goodyear patents. Mullee learned the business of making combs in the factory of the plaintiff [Conrad] Poppenhusen. On the 22d of December, 1862, the defendants, having been engaged in infringing these patents, and having thus rendered themselves liable to suit therefor, entered into a written agreement with the plaintiff Poppenhusen, who is the sole licensee, under the patents, for the manufacture and sale of combs and other articles, which agreement, after reciting that Mullee and Miller had rendered themselves liable to a suit for their infringement of the patents, and that it was deemed expedient by the parties that a settlement should be made to prevent all future legal proceedings, contained the following provisions: (1) Mullee and Miller admitted the validity of the patents, and agreed that they would never, during the existence of the patents, or of any extension of them, "engage, either directly or indirectly, or in any way, shape or manner, in the manufacture of any article, of any kind, made of what is known as vulcanite, or the hard compound of India rubber or other vulcanizable gums, or in the sale of the same, and will not aid, assist or abet any one who is engaged, or may hereafter engage, in the manufacture or sale of such articles;" (2) Poppenhusen released Mullee and Miller from all damages which he had sustained by reason of their infringements of the patents, and agreed that he would never at any time collect such damages from them. Notwithstanding this agreement, the defendants went on persistently infringing the patents, by making India rubber combs in violation of them. For such an infringement by them this suit was brought, which resulted in the injunction, the alleged violation of which is complained of. These facts are referred to, for the purpose of showing how little favor or consideration the defendants are entitled to, and how improbable it is, that, if they have in fact violated the injunction, they have done so innocently and unwittingly.

In regard to Mullee, it appears, that since the injunction was served upon him, he has made and sold combs composed of India rubber and sulphur vulcanized by a high degree of artificial heat, and having the properties possessed by the article described in the Goodyear patents. These combs he made at Chesterville, in Pennsylvania, and brought to New York as samples to obtain orders, where some of them were sold by his agent, from whom he received the pay therefor. The only defence set up by Mullee, in excuse for this act, is, that, in the combs in question, the India rubber and sulphur are combined in the proportion of eighteen ounces of sulphur to sixteen ounces of India rubber, and that the combs are made by a process used for combining the India rubber with the sulphur, whereby it is possible to combine as much as twenty-two ounces of sulphur with sixteen ounces of India rubber, and then vulcanize the compound by a high degree of artificial heat, so as to produce a useful article of hard India rubber. It is alleged that this process and the article resulting are not covered by the Goodyear patents, and that, therefore, Mullee, in making the combs in question, has not been guilty either of violating the injunction or of infringing the patents. It is important, therefore, to inquire as to what is covered by these patents.

Nelson Goodyear, in December, 1849, filed in the patent office a caveat, containing a description of the invention for which he applied for a patent in December, 1850, and for which he obtained the patent on the 6th of May, 1851. It was reissued in two parts on the 18th of May, 1858. In the caveat he states, that his "invention or discovery consists in the production, by means of a composition of India rubber and sulphur subjected to intense heat, of a new and useful substance, hitherto unknown, resembling, in hardness, bone or horn, but more extensively applicable, and less costly in use, than either of those substances;" that "the main and indispensable ingredients of the composition are India rubber, or caoutchouc, and sulphur;" that of these he takes "certain proportions, say equal parts by weight of each," and mixes them "thoroughly in any convenient manner;" that "these proportions may, however, be considerably varied, without changing materially the product;" that "no precise rule of proportions can be given, or definite limits assigned, when sulphur alone is combined with rubber;" and that "a much less quantity of sulphur than four onces to a pound of rubber would be insufficient in any case." In the patent of May, 1851, after describing the process of compounding the India rubber and sulphur and combining with them other ingredients, he states as follows: "The proportions specified of both these compounds may be considerably varied, without materially changing the result, but in no case will a much less quantity of sulphur than four ounces to every pound of caoutchouc be sufficient, in which respect, particularly, my compounds differ very essentially from every other composi-

tion of India rubber in use, as, in all other rubber compositions, the least quantity of sulphur that will suffice to cure the article, is aimed at."

The patents of May, 1858, are a division into two reissues, one, No. 556, for the process, and the other, No. 557, for the product. No. 556 states, that the improvement covered by that patent "consists in thoroughly mixing India rubber, or other vulcanizable gum, with sulphur, whether with or without auxiliary ingredients, in the proportion of about four ounces to a pound of sulphur to a pound of the gum, and then subjecting the same to a high degree of artificial heat, as in the said vulcanizing process of Charles Goodyear, until the compound shall have acquired the required hard and tough property found, in various degrees, in ivory, bone, tortoise shell and horn, and the spring-like property, under flexure, found in whalebone." No. 557 states, that the invention covered by that patent "consists in the production of a new manufacture or artificial substance having the hard and tough properties found, in various degrees, in ivory, bone, tortoise shell and horn, and the spring-like property, under flexure, of whalebone, and which, in the process of manufacture, is plastic, so that it can be moulded or modelled with facility into any desired shape, and which, when completed, may be wrought and polished to as high a degree as any of the native substances for which it is a substitute, which said manufacture or artificial substance is produced by the admixture of Indian rubber, or other vulcanizable gums, and sulphur, in the proportions of one pound of the gum to about from four ounces to a pound of sulphur, whether alone or with other substances, and then subjected to a high degree of heat, which should not be less than from 260° to 275° Fahrenheit's scale, during a period of six or more hours, or until the required degree of hardness has been obtained." No. 556 and No. 557 then both of them go on to describe the mode of procedure in working the invention, and they both use this language: "The India rubber, or any of the allied gums which are known to be vulcanizable by the before named process of Charles Goodyear, is thoroughly mixed with sulphur, as for the well known vulcanizing process, but in different proportions, as, in the working of the said vulcanizing process of the said Charles Goodyear, the best results are obtained by the use of the smallest proportional quantity of sulphur which will suffice to produce the change termed vulcanization, and which is usually not over one ounce of sulphur to a pound of gum, while so small a proportional quantity of sulphur would entirely fail of producing the result obtained by the improved process of the said Nelson Goodyear. After the gum and sulphur have been thoroughly incorporated, and while the compound is in a plastic state, it may be rolled into sheets, or put into any form desired, by moulding or otherwise, and then, whether in moulds or otherwise, subjected to a high degree of heat, which should not be less than from 260° to 275° of Fahrenheit's scale, in a steam or other heater, and kept there about six hours or more, that is, until the compound substance has attained the required degree of hardness." The patents then go on to speak of the substitution, for purposes of economy and other objects, of other substances, for a portion of the sulphur, in the compound, and afterwards state: "The various additional or auxiliary ingredients only affect the product in degree, as the character of the new manufacture or substance is dependent upon the use of caoutchouc, and a sufficient proportional quantity of sulphur, and a sufficiently high degree of heat, continued long enough, to induce the change indicated. And, although much latitude may be taken in the proportional quantity of sulphur, a proportion much less than four ounces to a pound of caoutchouc will utterly fail to produce the new substance or manufacture hereinabove described."

These patents have heretofore been before this court. In the case of Goodyear v. New York Gutta Percha Co. [Case No. 5,580], decided on final hearing, before Mr. Justice Nelson and Judge Smalley, in October, 1862, it was set up, as a defence to a bill in equity filed for the infringement of the patents, that the defendants were manufacturing hard India rubber under a patent granted to Austin G. Day, November 9, 1838, and by a process different from that described in the Goodyear patents. The court, Mr. Justice Nelson delivering its opinion, upheld the validity of the patents and the novelty of the inventions covered by them, after a full investigation. It was claimed, in that suit, by the defence, that the hard compound made under the Day patent was made by a process differing, in length of time, in the degree of heat, in the proportion of the ingredients, and in the mode of equalizing the temperature, from that described by Nelson Goodyear. Day claimed in his patent three things: (1) Running the heat, for vulcanizing the hard compound, through the high range of temperature, and the comparatively great length of time, set forth in his patent, that is, commencing the heat at about 275° and carrying the same to 300° and upwards; (2) making the compound of two parts by weight of rubber, or other vulcanizable gum, and one part of sulphur, when such composition is preparatory to such running of the heat; (3) equalizing the temperature, in the heating apparatus, by mechanical means, as set forth. This court decided, in the case referred to, that there was nothing on the subject of the degree of heat in making the hard compound, described in the Day patent, that was not found in the Nelson Goodyear patents; and that, in view of what was stated by Nelson Goodyear, in his caveat and patents, in regard to the proportional quantities

of India rubber and sulphur to be used in making the compound, there was no ground for Day's claim to an improvement in that respect.

Now, in view of the language contained in the caveat and patents of Nelson Goodyear, and of the construction thus put by this court upon the patents, it is manifest that the invention of Nelson Goodyear consists in producing a substance having the qualities named by him, and produced by mixing sulphur with a vulcanizable gum, in the proportions of one pound of gum to a quantity of sulphur sufficient to produce such substance, and then subjecting the compound to a degree of artificial heat sufficiently high to produce such substance, for a length of time sufficient to produce it. As to the quantity of sulphur, the patentee says, in effect, that you will not obtain the desired result if you use materially less than four ounces of sulphur to a pound of gum, but that, beyond that quantity, any quantity that will induce the change indicated, is within the scope of his invention and claim. So, in regard to the degree of heat, he says, in effect, that you will not obtain the desired result if you use a less degree of heat than one from 260° to 275° of Fahrenheit, continued six hours or more, but that you will still be within the range of his invention, if you apply to such compound a sufficiently high degree of heat, continued long enough, to induce the change indicated. There is no foundation for the suggestion, that the patentee is limited to a quantity of sulphur not exceeding one pound to a pound of gum, or that a quantity of sulphur as great as twenty-two ounces to a pound of gum is not within the claims of his patents, provided the substance produced has the qualities of the substance referred to in his patents.

The combs made and sold by Mullee are made of a substance which has the properties of the substance referred to in the patents, and is compounded of the ingredients named in the patents, mixed in proportions within the range covered by the patents, and subjected to the heating process described in the patents. Mullee does not claim that his combs were made under any patent, but he refers to an application for a patent made May 14, 1867, by one Stanton Mullee, and to a caveat filed July 5, 1867, by the defendant Mullee himself, as describing the particular process by which the combs were made. The caveat is not produced, although the affidavit of the defendant Mullee states, that the combs were made particularly under the invention set forth in the caveat. It is alleged, however, that the combs were made according to the process described in the application referred to, which is put in evidence. The specification, forming part of that application, states, that the invention has for its object the production of a hard rubber compound, which shall contain a much larger proportion of sulphur, and which can be made much cheaper than by any previously known process. It then describes the process, which consists in grinding the sulphur, and then passing it successively through three sieves, each finer than the preceding one, and then drying it, and then grinding the rubber and placing it in a mixing mill, containing two rolls, one of them heated, to which the rubber adheres, when the dry sulphur is applied to it in small quantities at a time, until the proper quantity is taken up. The specification then says, that the quantity of sulphur "should never be less than a pound of sulphur to one pound of rubber," and may be "increased to twenty-two ounces to a pound of rubber, when a still cheaper article is desired." It then describes the apparatus for heating, and states the degrees of heat used, which are within the range covered by the Goodyear patents. There is nothing in all this which takes the process or the product out of the scope of the Nelson Goodyear patents, or enables the process to be used for making the product, or the product to be made by the process, without liability for thereby infringing the Goodyear patents.

The defendant Mullee has, therefore, infringed the patents and violated the injunction, and an attachment must issue against him. He has made and sold, in violation of the patents, combs made of India rubber mixed with sulphur, in the proportion of one pound of India rubber to about from four ounces to a pound of sulphur, the mixture being subjected to a high degree of artificial heat, substantially as described and claimed in the patents. It is true, that he disclaims all intention of disregarding or contemning the process of this court, and, in view of the peculiar language of the injunction, it is possible he may have honestly supposed that, if he used more than a pound of sulphur to a pound of gum, he was not infringing the patents. There are many circumstances, however, in the case, which militate against this view, and, in the proceedings on the attachment, an opportunity will be offered to both parties to produce further testimony on this point, with a view to determining as to what punishment shall be awarded for the contempt.

In regard to the defendant Miller, he has, since the service on him of the injunction, been guilty of fitting up machinery and keeping it in running order, in a factory in Herkimer county, New York, which he knew was making hard India rubber in violation of the patents. This business he continued for some two months. He has been guilty of a clear violation of the injunction and an attachment must issue against him. He attempts to excuse himself by alleging that, before he entered on this business, he took the advice of his counsel, and was informed that he could right-

fully work for wages in the factory of another person, whether the product of the factory was an infringement of the Nelson Goodyear patent or not; and that he had no intention of committing a contempt of the process or authority of this court. The advice was unsound, and there is much evidence tending to show that the excuse is a mere pretence and ought not to be allowed. But the point will be disposed of hereafter. Let attachments issue against both of the defendants.

[NOTE. For other cases involving these patents, see Goodyear v. Evans, Case No. 5,571; Same v. Berry, Id. 5,556; Same v. Rust, Id. 5,584; Same v. Wait, Id. 5,587; Same v. New York Gutta Percha Co., Id. 5,550; Same v. Mullee, Id. 5,578, 5,579; Same v. Allyn, Id. 5,555; Same v. Honsinger, Id. 5,572; Same v. Hullihen, Id. 5,573.]

Case No. 5,578.

GOODYEAR et al. v. MULLEE et al.

[3 Fish. Pat. Cas. 259; 5 Blatchf. 463.][1]

Circuit Court, S. D. New York. Sept. 17, 1867.

PATENTS—VIOLATION OF INJUNCTION—IMPUTATION OF KNOWLEDGE TO DEFENDANT.

1. The defendant claimed that he had not knowingly violated an injunction issued on the Goodyear "hard rubber" patent, because he believed that he had a right, under the injunction, to make and sell articles containing more than sixteen ounces of sulphur to sixteen ounces of India rubber, and he had made and sold no other articles. On testimony that a comb sold by him contained, by analysis, less than sixteen ounces of sulphur to sixteen ounces of rubber, the court held that he had wilfully violated the injunction.

2. But, as it appeared that he had already been imprisoned fifty days, and had not given bail, which had been fixed at $2,000, and could not give it, and had a family and no means, the court released him on his own recognizance, in the sum of $2,000, for his appearance, whenever ordered to appear, further proceedings on the attachment to be suspended indefinitely, but to be resumed if the defendant should thereafter be guilty of violating the injunction, or on other good cause to be shown.

This was a motion [by Henry B. Goodyear, as administrator, etc., and Conrad Poppenhusen] for attachments against the defendants [William Mullee and John Miller] already referred to in the report of the case of Goodyear v. Mullee [Case No. 5,577]. The matter having been referred to a master to take testimony as to the intention of the defendants in violating the injunction, the case came up upon his report.

Abbett & Fuller and Chas. M. Keller, for complainants.

T. Darlington, E. Wetmore, and Gardner Spring, Jr., for defendants.

[1] [Reported by Samuel S. Fisher, Esq., and by Hon. Samuel Blatchford, District Judge, and here compiled and reprinted by permission. The syllabus is from 5 Blatchf. 463, and the statement and opinion are from 3 Fish. Pat. Cas. 259.]

BLATCHFORD, District Judge. This case came before me in July last, on separate motions for attachments against the defendants for alleged violations of an injunction. The injunction was a perpetual one, issued in this suit October 18, 1866, in pursuance of a decree made on a final hearing herein. The injunction restrained the defendants from "making, manufacturing, and selling, in violation of" letters patent of the United States, reissued May 18, 1858, to Henry B. Goodyear, as administrator of the estate of Nelson Goodyear, deceased, for "a new and useful improvement in the manufacture of India rubber," and known and distinguished as reissues Nos. 556 and 557, and extended for seven years from May 6, 1865, "any combs or other articles which are made and manufactured of India rubber, or other vulcanizable gum, mixed with sulphur, or any equivalent therefor, either with or without auxiliary ingredients, in the proportion of one pound of India rubber, or other vulcanizable gum, to about from four ounces to a pound of sulphur, and then subjecting such mixture of India rubber, or other vulcanizable gum and sulphur, or any equivalent therefor, to a high degree of artificial heat, substantially as described and claimed in the said two reissued letters patent." This injunction was served on the defendant Mullee, November 6, 1866. On the motion against Mullee I decided that he had infringed the patents and violated the injunction, and that an attachment must issue against him. An attachment was accordingly issued, and he was taken into custody under it on the 31st of July last. His bail was fixed at two thousand dollars, but he has not given bail, and has been ever since and still is in custody. On the 6th of August he was brought before the court, and an order was made referring it to a master to take testimony on the question whether or not he intended to violate the injunction in doing the acts, or any of them, referred to in the affidavits of James Carton and William Ober, made herein (and which were the foundation of the motion for attachment), and to report such testimony to the court. The master has taken the testimony, and the case now comes up on this report. The testimony taken covers nearly two hundred manuscript pages of foolscap, and was not submitted to the court until September 11th. The reference was made to aid the court in determining what punishment should be awarded for the violation of the injunction. Both of the parties to the suit have examined witnesses on the question of the intent of the defendant in doing the acts mentioned in the affidavits referred to.

The defendant disclaims all intention of disregarding or contemning the process of the court. He avers that, after he was served with the injunction, he did not make or sell any hard rubber combs that did not contain more than sixteen ounces of sulphur

to sixteen ounces of India rubber, and that he believed he had a right to make and sell hard rubber combs containing more than sixteen ounces of sulphur to sixteen ounces of India rubber. He also avers, that the combs mentioned in the affidavits of Carton and Ober were made of a compound of eighteen ounces of sulphur to sixteen ounces of India rubber. A great deal of testimony has been taken as to the doings of the defendant at the factory at Chesterville, Pennsylvania, where he was engaged in making hard rubber combs during the period between the service on him of the injunction and the service of the papers for the motion for an attachment. This testimony is directed to the point as to the relative proportions of India rubber and sulphur used by the defendant, during that time, in the manufacture of hard rubber combs. The defendant claims, that the testimony shows, that he never, during that time, used a less proportion of sulphur to India rubber than sixteen ounces of sulphur to sixteen ounces of India rubber. When the case was before me on the former occasion, I held that the patentee was not limited to a quantity of sulphur not exceeding one pound to a pound of gum, and that a quantity of sulphur as great as twenty-two ounces to a pound of gum was within the claims of the patents, provided the substance produced had the qualities of the substance referred to in the patents. The defendant averred that he supposed the patents to be limited, in the upward range, to a quantity of sulphur not greater than sixteen ounces to sixteen ounces of gum, and that he had acted in good faith on that supposition, in making and selling the particular combs complained of. It does not appear when those combs were made. The affidavit of Carton sets forth that the defendant sold to him, at New York, about fifty gross of hard rubber combs; and that the first sale was made during the latter part of June, 1867. A comb, forming one of the fifty gross, is annexed to Carton's affidavit. The affidaxit of Ober sets forth that the defendant sold to him two gross of hard rubber combs at New York, in June, 1867. A comb, forming one of the two gross, is annexed to Ober's affidavit.

The testimony given before the master, on the point as to whether the defendant used, in making hard rubber combs, after the service on him of the injunction, more or less than sixteen ounces of sulphur to sixteen ounces of gum, is conflicting, and, if the case stood upon the testimony of the witnesses as to what the defendant did at the factory at Chesterville, after the injunction was served on him, it would perhaps be difficult to arrive at any satisfactory conclusion on the subject, and, certainly, difficult to say that it was clearly shown that, after he was served with the injunction, he made combs containing less than sixteen ounces of sulphur to sixteen ounces of gum. But there is one piece of evidence which is conclusive to show that the defendant violated the injunction knowingly and wilfully. The defendant, on the motion for the attachment, produced the affidavit of Charles A. Seely, a professional chemist of eminence, to the effect that it was possible to detect the percentage of sulphur in any given quantity of the compound composed by mixing India rubber, or other vulcanizable gum, with sulphur, and subjecting such mixture to a high heat under pressure, the means being a nice chemical analysis of such compound in the manufactured state. During the reference before the master, Professor Seely, on the 28th of August, 1867, by consent of both parties, took one of the two combs attached to the affidavits of Carton and Ober, for the purpose of analyzing it, and ascertaining the proportions of India rubber and sulphur in it. It was a condition of the consent, that the results of the analysis should be subject to inspection by either party, and should be certified to the court. An affidavit made by Professor Seely, September 5th, 1867, states, that he has analyzed the sample of hard rubber comb which he so received; that it contained forty-five and fifty-nine hundredths per cent. (45.59) of sulphur; and that there were no indications from which it could be inferred that the balance of the compound was anything else than India rubber. This gives a proportion, in the sample, of thirteen ounces and four-tenths of an ounce of sulphur to sixteen ounces of rubber. It does not appear whether it was the comb sold to Carton or the comb sold to Ober which Professor Seely analyzed, but it was one of them. This analysis shows, that the defendant has, since the injunction was served on him, violated it, by selling at least one comb of hard rubber containing less than sixteen ounces of sulphur to sixteen ounces of India rubber. The analysis is not gainsayed or questioned, and the clear inference, from Professor Seely's affidavit, is, that the only ingredient in the sample, besides sulphur, was India rubber, and that all which was not sulphur was India rubber. The unanswered and satisfactory testimony of this analysis contradicts and overthrows the allegation of the defendant that he has made no sale of hard rubber combs, since he was served with the injunction, that did not contain more than sixteen ounces of sulphur to sixteen ounces of India rubber. And, although, as stated in my former opinion, it is possible that the defendant may, in view of the peculiar language of the injunction, have honestly supposed that, if he used more than a pound of sulphur to a pound of gum, he was not infringing the patents, yet, in selling the comb analyzed by Professor Seely, the defendant was guilty of a clear violation of the plain terms of the injunction, and such violation must be held to have been committed wilfully and with knowledge. The result of this analysis leads strongly to the presump-

tion that all the combs sold to Carton and Ober, as set forth in their affidavits, would, on analysis, show like results. It becomes unnecessary, therefore, to consider further the question of the intent of the defendant in doing the particular acts complained of.

The defendant is, for this wilful violation of the injunction of this court, amenable to punishment. He has already been imprisoned nearly fifty days. He has not given bail, which was fixed at $2,000, and the giving of which would have secured his temporary release, and it is stated that he was unable to procure such bail. He has a wife and three children, the oldest under ten years of age, and an affidavit made by his wife sets forth, that he has no property, to her knowledge, except a little household furniture, and that all the property owned by herself or her husband, to her knowledge, including all moneys in her possession, or held to her credit, does not exceed in value four hundred dollars. A severe admonition has been administered to the defendant, and, although the plaintiffs have been put to large expense in prosecuting this attachment, which the defendant, if possessed of the means of doing so, ought to be compelled to reimburse, a requirement to that effect would, in this case, if such reimbursement were made a condition of the release of the defendant, probably result in a continuance of his imprisonment for an indefinite period. While, therefore, I am not disposed now to say that the punishment which the defendant has received is adequate to the offence, and to discharge him absolutely from the attachment, I am disposed to release him on his own recognizance, in the sum of two thousand dollars, for his appearance in this court whenever ordered to appear, further proceedings on the attachment to be suspended indefinitely. Those proceedings can be resumed if the defendant shall hereafter be guilty of violating the injunction, or on other good cause to be shown. An order will be entered accordingly.

[For other cases involving this patent, see note to Goodyear v. Mullee. Case No. 5,577.]
[See Case No. 5,579.]

Case No. 5,579.

GOODYEAR et al. v. MULLEE et al.

[3 Fish. Pat. Cas. 420.] [1]

Circuit Court, E. D. Pennsylvania. May, 1868.

PATENTS—INDIA RUBBER—DECREE MORE PERSUASIVE THAN VERDICT—INJUNCTION—PLEADING—IMPROVEMENTS.

1. The term "India rubber" has been used as a generic name for gums having the qualities of caoutchouc.

2. Nelson Goodyear might claim as his invention, a new and useful art or manufacture hitherto unknown and of immense value and importance.

3. A decree of a court of chancery has some value, and is more persuasive evidence than the verdict of a jury.

4. It is immaterial whether the answer be received as an affidavit or as an answer upon a motion for a preliminary injunction when the facts relied upon in rebuttal are sufficient to refute, but, it is not necessary to entitle the complainant to an interlocutory injunction that there should be a special prayer for such process, where the bill shows a prima facie case for an injunction.

5. The complainant may rebut by proper testimony any allegations made in the affidavits of the respondent in answer to the motion.

[Cited in Farmer v. Calvert Lithographing Co., Case No. 4,651.]

6. An improvement on a patented invention may entitle the party making it to a patent, but he can not pirate the original invention.

This was a bill in equity filed [by Henry B. Goodyear and Conrad Poppenhusen] to restrain the defendants [William Mullee, J. H. McLellan, H. M. Hover, and others] from infringing letters patent [No. 8,075] for an "improvement in the manufacture of rubber," granted to Nelson Goodyear, May 6, 1851, and reissued and extended to Henry B. Goodyear, administrator, in two divisions known as reissues 556 and 557, and more particularly referred to in the cases of Goodyear v. New York Gutta Percha Comb Co. [Case No. 5,580], and Goodyear v. Mullee [Id. 5,577]. The defendants were charged with infringing this patent by the manufacture and sale of combs made of hard rubber. They relied in evidence upon a patent granted to William Mullee, dated March 31, 1868, for a process of making hard rubber, and offered affidavits to show that they used a larger proportion of sulphur to the rubber than was described in Nelson Goodyear's patent.

Edwin L. Abbett and George Harding, for complainants.

Furman Shepherd, for defendants.

GRIER, Circuit Justice. I do not think it necessary to notice the very numerous questions which have been argued and commented upon by the learned counsel. I shall only state the conclusions I have arrived at, without attempting to vindicate them by argument.

1. The complainant sets forth certain patents for what he calls "a new and useful improvement in the manufacture of India rubber." This has been used as a sort of generic name for gums having the qualities of caoutchouc. In fact, he might claim to have invented a new and useful art or manufacture hitherto unknown, and of immense value and importance. He has been in possession of his monopoly for many years; the originality of his claim, and his sole right to use it, has been tested by numerous litigations with infringers and decrees of the courts, as set forth in his bill. A decree of a court of chancery has some value, and is more persuasive evidence than the verdict of a jury.

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

2. The recital of these facts is sufficient to entitle the complainant to his preliminary injunction. This motion has been postponed at the request of the respondent's counsel, and an answer has been filed in the meantime. Whether that answer be received only as an affidavit or not is not very material under the circumstances, as the facts relied upon in rebuttal completely refute it.

It is objected to the sufficiency of the bill to entitle complainant to an interlocutory injunction, that there is no special prayer for such process, or no recital of the facts that are shown in aggravation of the respondents' conduct. But this objection can not be supported. The bill shows a prima facie case for an injunction.

The complainant when he gave notice of his application, could not know what defense would be alleged in the affidavits of respondent. He has a right, therefore, to rebut by proper testimony any allegations so made or defense set up against the motion. The fact that complainant's counsel read all his testimony in opening his case, was of no importance if such facts could be adverted to in any stage of the argument.

The other facts used in rebuttal or by way of cumulative aggravation of the respondents' conduct, should act as an equitable or moral estoppel to the pretences set up by them.

1. That not only had all the questions as to the validity of the complainants' patents been settled by decrees of courts of equity in numerous cases, but that in a bill to restrain Mullee himself from infringing their patents, a decree was given against him.

2. That he obstinately continued to infringe.

3. That he was imprisoned for contempt of court for such conduct.

4. That in consideration that the complainant would release him from damages that might be recovered against him, he covenanted that he would no more contest his title, and cease from all interference. This was in New York.

5. Another injunction was afterward issued from this court.

6. That his operatives resisted the marshal in the service of the process of the court and were indicted and punished for so doing.

7. That all the questions now raised were fully discussed and tried between the present parties in the patent office, where a patent was given to respondent for some improvement in the process, which was admitted by his counsel and decided by the commissioner, would be servient and subordinate to the complainant's patent.

8. An improvement on a patented invention may entitle the party making it to a patent, but he can not pirate the original invention.

9. The objection that the bill is not filed by p oper parti.s is witho_t founda ion ei.her in law or in fact.

10. This obstinate and persistent attempt to infringe complainant's rights and to hinder the injunction is accounted for by the fact that the party is insolvent and damages cannot be recovered of him.

Justice demands that the injunction issue according to the prayer of the bill.

[For other cases involving this patent, see note to Goodyear v. Mullee, Case No. 5,577.]

Case No. 5,580.

GOODYEAR v. NEW YORK GUTTA PERCHA, ETC., CO.

[2 Fish. Pat. Cas. 312.] [1]

Circuit Court, S. D. New York. Oct., 1862.

PATENTS—INDIA RUBBER—QUALITIES OF ARTICLE STATED IN DESCRIPTION—WHETHER INVENTOR BOUND THEREBY.

1. The novelty of the reissued letters patent, Nos. 556 and 557, granted to Henry B. Goodyear, administrator of Nelson Goodyear, deceased, May 18, 1858, for improvements in the manufacture of India rubber, examined and sustained.

2. The process described in letters patent granted to Austin G. Day November 9, 1858, is an infringement of reissues Nos. 556 and 557, granted to Henry B. Goodyear.

3. A patentee is not bound by the qualities imparted to the article in his description; but, by the qualities of the article, as derived from the product of the process or compound patented.

This was a bill in equity filed [by Henry B. Goodyear and Conrad Poppenhusen] to restrain the defendants [the New York Gutta Percha & India Rubber Vulcanite Company and others] from infringing letters patent [No. 8,075] for an "improvement in the manufacture of India rubber," granted to Henry B. Goodyear, administrator of Nelson Goodyear, deceased, May 6, 1851, and surrendered and reissued May 18, 1858, in two divisions, numbered 556 and 557 respectively.

The claim of the original patent was as follows: "What I do claim, etc., is the combining of India rubber and sulphur, either with or without shellac, for making a hard and inflexible substance hitherto unknown, substantially as herein set forth. And I also claim the combining of India rubber, sulphur, and magnesia or lime, or a carbonate or a sulphate of magnesia or of lime, either with or without shellac, for making a hard and inflexible substance hitherto unknown, substantially as herein set forth."

The disclaimer and claim of reissue 556 was as follows: "It is well known that it has been proposed to produce a hard substance from caoutchouc by passing it through highly-heated liquid sulphur; but this has not been attended with practical success. I do not wish to be understood, however, as making claim broadly to the union of caoutchouc and sulphur in the proportions named, however these substances may be united and treated. But what I do

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claim as the invention of the said Nelson Goodyear, and desire to secure by letters patent, is the combining of sulphur and India rubber, or other vulcanizable gum, in proportions substantially as specified, when the same is subjected to a high degree of heat, substantially as specified, according to the vulcanizing process of Charles Goodyear, for the purpose of producing a substance or manufacture possessing the properties or qualities substantially as described; and this I claim whether the said compound of sulphur and gum be, or be not, mixed with other ingredients, as set forth."

The disclaimer and claim of reissue 557 was as follows: "I do not wish to be understood as making claim broadly to a manufacture or substance produced by the admixture of caoutchouc and sulphur; nor as making claim broadly to a manufacture or substance by subjecting the compound of caoutchouc and sulphur, whether with or without other substances, to a high degree of heat, as, prior to the invention of Nelson Goodyear, caoutchouc and sulphur had been compounded, and such compound alone, as well as other ingredients, had been subjected to a high degree of heat, but not to produce the manufacture or substance having the character peculiar to the said manufacture or substance invented by the said Nelson Goodyear. What is claimed, etc., is the new manufacture or substance herein above described, and possessing the substantial properties herein described, and composed of India rubber, or other vulcanizable gum, and sulphur, in the proportions substantially as described, and when incorporated, subjected to a high degree of heat, as set forth, and this I claim, whether other ingredients be, or be not, used in the preparation of the said manufacture, as herein described."

Charles Goodyear had invented and patented, in 1844, a process for vulcanizing India rubber, which consisted in mixing sulphur and rubber in proportions varying from one to three and one-fifth ounces of sulphur to a pound of rubber and with or without carbonate of lead, and subjecting the compound, for some time, to a heat of from 212° to 350° F., depending on the thickness of the composition. This produced the ordinary flexible vulcanized rubber of commerce. Nelson Goodyear discovered that by increasing the proportion of sulphur from four to sixteen ounces of sulphur to a pound of rubber, and exposing the compound to the degree of heat named by Charles, he produced a hard substance now known as "vulcanite," "like ebony or ivory, susceptible of polish and with an elasticity similar in kind to that of tempered steel." When free sulphur only was used, in combination with the rubber, the patentee says that the proportion of each should be nearly equal; but, by adding magnesia, or lime, or the carbonates or sulphates thereof, or gum shellac, resin, oxides or salts of lead or zinc, or similar substances, he declares that the quantity of sulphur might be reduced to four ounces when combined with a pound of rubber.

G. D. Sargeant, C. M. Keller, and E. W. Stoughton, for complainants.

L. Abbett, W. J. A. Fuller, and T. A. Jenckes, for defendants.

NELSON, Circuit Justice. The bill in this case was filed upon two reissued patents granted to the complainant as administrator of Nelson Goodyear, deceased, the original discoverer of new and useful improvements in the manufacture of India rubber. The original patent to him bears date May 6, 1851. The reissued patents May 18, 1858. This invention relates to an improvement in the process of preparing India rubber and other vulcanized gums described in the previous well-known patent of Charles Goodyear, and by which improved process a new substance is produced, distinct in character from that produced by the invention of Charles Goodyear, and used for wholly different purposes. It is generally known as the "hard rubber compound." The two reissued patents claim —the one the process of manufacturing the hard rubber compound—the other the product. There was some doubt if the claim in the original patent embraced both these improvements, though fully described in the specification.

The utility of this improvement is not questioned. It has been before the courts incidentally heretofore, and was the subject of observation. In the case of Poppenhusen v. Falke [Case No. 11,280], decided in October term, 1861, on what is known as the "Tin Foil Patent," Judge Shipman, in delivering the opinion of the court, observed: "That in the year 1851, Nelson Goodyear patented the peculiar substance known as the 'hard' compound of India rubber. He produced this remarkable material by combining sulphur with the native rubber in certain proportions, and subjecting the compound to a high degree of heat. The material produced by the combination, when operated on by the proper degree of heat, proved to be of great value, and well adapted to a great variety of uses. It is free from the disagreeable odor, impenetrable to ordinary fluids, hard like ebony or ivory, susceptible of polish, and with an elasticity similar in kind to that of tempered steel. For many purposes of utility and ornament, its value is proved by its extensive use in the community."

The only serious question arising out of the facts in this case is, as to the originality of the invention by Nelson Goodyear. This has been strenuously contested by the learned counsel for the defendants, and requires some notice. The proofs show that Goodyear began his experiments with a view to the improvement, as early as the year 1847, and that he had nearly completed them as

early as the summer of 1849. In December of that year, he filed a caveat in the patent office, containing a description of the invention, and which embraces substantially all the information required at this day to manufacture the article. This, as we have seen, was followed up by a patent dated May 6, 1851, the application bearing date December, 1850.

The defense of want of novelty in Goodyear is placed mainly upon two grounds: 1st. The patent of Austin G. Day, dated November 9, 1858, and 2d. Patent to Charles Hancock, England, enrolled July 11, 1846. There are other criticisms in the proofs, and referred to in the argument of counsel, bearing upon this question, but we regard them as too unimportant to require any particular notice.

We have said that the patent of Austin G. Day has been relied on to show want of originality in Goodyear. Perhaps this is not quite an exact statement of the ground taken by the defense under that patent.

The defendants claim that they carry on their manufacture of the compound under this patent, and set up that the process is different from that of Goodyear. The process of Goodyear is found in the caveat of December, 1849, the patent of May, 1851, and in the reissues of May, 1858. In the caveat he says: "My invention or discovery consists in the production, by means of a composition of India rubber and sulphur subjected to intense heat, of a new and useful substance hitherto unknown, resembling in hardness bone or horn, but more extensively applicable, and less costly in use, than either of those substances." "The main and indispensable ingredients of the composition are India rubber, or caoutchouc, and sulphur; of these I take certain proportions, say equal parts by weight of each, and mix them thoroughly in any convenient manner. These proportions," he observes, "may, however, be considerably varied without changing materially the product." Again he observes: "No precise rule of proportions can be given, or definite limits assigned when sulphur alone is combined with rubber"—"that a much less quantity of sulphur than four ounces to a pound of rubber would be insufficient in any case."

In his patent of May, 1851, he observes: "Further experiments made by me since the filing of the caveat, have confirmed the entire success of my invention." And then after describing the process—first, compounding India rubber and sulphur, and second, combining with them other ingredients—he states: "The proportions specified in both these compounds may be considerably varied without materially changing the result, but in no case will a much less quantity of sulphur than four ounces to every pound of caoutchouc be sufficient, in which respect particularly my compounds differ very essentially from every other composition of India rubber in use; as in all other rubber compositions the least quantity of sulphur that will suffice to cure the article is aimed at." The description in the reissued patents is more full and in greater detail, but substantially the same—the difference consists in separating the claim and the issuing a patent for each.

Now, Austin G. Day's patent is dated November 9, 1858, nine years after the filing of Goodyear's caveat, and seven after his patent, and in his specification he says: "I took up the hard rubber manufacture at the time of the issue of the Nelson Goodyear patent of 1851, having a single object in view, namely, the manufacture of a hard elastic compound in which I used with success both rubber and gutta percha."

Again he says: "My invention consists in a special mode of making hard but highly elastic gum compound, by a process differing in length of time, in the degree of heat, and in the proportion of the ingredients, and in the mode of equalizing the temperature from that described by Nelson Goodyear."

He then claims, 1st. "The running the heat for vulcanizing flexible and elastic hard gum compounds through the high range of temperature, and the comparatively great length of time, substantially as set forth, that is to say, commencing the heat at about 275 deg., and carrying the same to 300 deg. and upward, substantially as described." 2d. "The making as described, the flexible and elastic hard gum composition of two parts, by weight of rubber or other vulcanizable gum, and one part sulphur, when such composition is preparatory to running of the heat, as described in these specifications."

Now, as to the degree of heat to be applied in the manufacturing of this hard compound, Nelson Goodyear, in his patent of May, 1851, refers to the patent of Charles Goodyear of 1844, reissued 1849, which gives a range from 212 deg. to 350 deg., depending on the thickness of the composition, and adds: "In most cases the heat will be required to be raised as high as 260 deg. or 275 deg., and the time of exposure of heat will range from three to six hours, or longer." The caveat stated the range between 250 deg. to 300 deg., depending upon size of compound.

It is quite apparent, from this reference to the several patents, that there is nothing on the subject of the degree of heat in manufacturing the hard compound described in the Austin patent, but what is found in that of Nelson Goodyear. Then as to the proportions of India rubber and sulphur, Austin adopts two parts rubber and one sulphur. Goodyear, in his patent of 1851, states that the best proportions will be about equal parts; that the proportions may be considerably varied without materially changing the result; but that in no case should it be less than four ounces of sulphur to a pound of rubber. The caveat contained the same substantially.

We perceive no ground for the claim to any improvement by Austin in this branch of the

case. Much was said on this argument, and also, by witnesses on the part of the defendants, in respect to the qualities imparted to the hard compound by the patentees in the descriptions. Goodyear, in his patent of 1851, claims the "combining of India rubber and sulphur, etc., for making a hard and inflexible substance, hitherto unknown, substantially as described." In his caveat he describes it as a hard and stiff substance, resembling, in some respects, horn, or bone, and adapted to similar or more extensive uses.

Austin, in his patent, describes the article as "a flexible and elastic hard gum composition." Now, it is apparent, from our previous examination of the patents of the respective parties, that this is simply a dispute about terms or words. The proofs also establish the same. An article of the same description of the hard rubber compound, and of the same qualities, was manufactured under the Goodyear patent from the time it was granted, as is made under the Austin patent; and we may add, made under the former patent in Goodyear's factory, by Austin himself, who was in the service of the establishment. The idea of the learned counsel for the defendants seems to be that the patentee is bound, by the qualities imparted to the article, rather than by the qualities of the article, as derived from the product of the compound patented. It would be a waste of time to attempt the refutation of so plain an error.

The main ground to establish the defense of the want of novelty in Goodyear's is the English patent of Hancock, July 11, 1846. It is quite apparent, on an inspection of this patent, that the patentee had not carried his experiments so far as to have produced the hard rubber compound of Goodyear, nor, as is obvious, had he any distinct or practical knowledge of it. His combination or composition to produce the article is found in the third paragraph of the patent, which is a combination of India rubber or gutta percha, "with orpiments, liver of sulphur, or other sulphuret having like chemical properties;" and he gives one general rule of proportion of orpiment or other sulphuret to be used, not to exceed twenty-five per cent., as applicable to the compound of all the products, whether soft or hard.

But what is more decisive is this: he observes that "in making any of these compounds, a portion of sulphur may be used in place of an equal portion of orpiment or sulphuret; but I consider the use of sulphur to be objectionable, because of the offensive smell which it imparts to the article, and of the tendency which sulphur has to effloresce or exude from the surface." No such consequence results from the compound of Goodyear. On the contrary, as already stated, "it is free from any disagreeable odor, impenetrable to ordinary fluids, like ebony or ivory, susceptible of polish, and with an elasticity similar in kind to tempered steel."

This view is confirmed by a reference to the later patent of Hancock, enrolled August 10, 1847. In this he refers to his previous one, and observes that in the specification there he had recommended that sulphureting of gutta percha should be effected by means of sulphurets, such as orpiment, or liver of sulphur, in preference to sulphur itself, etc. "I have since, however, ascertained that if a very minute portion of sulphur be used along with sulphuret, a better result is obtained from a combination of the two than from either substance alone." It is clear that even in 1847, after the experiments of Goodyear had begun, this patentee had not obtained any distinct idea of the American hard rubber compound. Without pursuing the case further, we are satisfied that the defense falls, and that the complainants are entitled to the decree.

[For other cases involving this patent, see note to Goodyear v. Mullee, Case No. 5,577.]

Case No. 5,581.

GOODYEAR et al. v. PHELPS et al.

[3 Blatchf. 91.] [1]

Circuit Court, N. D. New York. Nov. 28, 1853.

PATENTS—INFRINGEMENT BY A CORPORATION—LIABILITY OF ITS DIRECTORS AND AGENTS.

The directors of a manufacturing corporation, who manage and superintend its business, and under whose direction it manufactures and sells articles which are an infringement of a patent, and its agents, who conduct its business of selling such articles, are responsible for such infringement, and will be restrained by injunction.

[Applied in Poppenhusen v. Falke, Case No. 11,279. Cited in Goodyear v. Berry, Id. 5,556; Jones v. Osgood, Id. 7,487; Needham v. Washburn, Id. 10,082; American Cotton-Tie Supply Co. v. McCready, Id. 295; Cahoone Barnet Manuf'g Co. v. Rubber & Celluloid Harness Co., 45 Fed. 584; Edison Electric Light Co. v. Packard Electric Co., 61 Fed. 1006.]

In equity. This was an application [by Charles Goodyear and the New England Car-Spring Company] for a provisional injunction [against Anson G. Phelps and others] to restrain an infringement of letters patent [No. 3,633], granted to Charles Goodyear, June 15th, 1844, and reissued December 25th, 1849 [Nos. 156 and 157], for an "improvement in India-rubber fabrics." It appeared that five of the defendants were stockholders in and directors of a Connecticut corporation; that another of the defendants was a stockholder in the corporation, and its secretary and general agent; and that the articles claimed to infringe were made by the corporation at its factory in Connecticut, and sold at its office in New York by such secretary and general agent, and by one of said directors, who was its selling agent. It was urged by the defendants, among other things, that they were not liable individually for the infringement charged, but that the corporation alone was liable.

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

James T. Brady, for plaintiffs.

Francis B. Cutting and George Gifford, for defendants.

NELSON, Circuit Justice (after disposing of various points raised by the defendants). A point has been made, that the defendants are not liable for the infringement charged, as the only participation alleged in the same is as stockholders of an incorporated company, which company is engaged in manufacturing and selling the patented article. However that may be, it appears that the defendants are either directors of the company, who have the management and superintendence of the business, and under whose direction the articles are manufactured and sold, or are the agents of the same, concerned in conducting the business. On this ground, I am of opinion that they are responsible, and are properly made parties defendants. Injunction ordered.

[For other cases involving this patent, see note to Goodyear v. Central R. Co., Case No. 5,563.]

Case No. 5,582.

GOODYEAR v. PROVIDENCE RUBBER CO.

[See Case No. 5,583.]

Case No. 5,583.

GOODYEAR v. PROVIDENCE RUBBER CO. et al.

[2 Cliff. 351; 2 Fish. Pat. Cas. 499.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1864.

PATENTS — EQUITY — FEIGNED ISSUE — VERDICT OF JURY — STATE REGULATIONS — PRACTICE IN FEDERAL COURTS — BILL FILED BY EXECUTOR — SPECIFICATION OF PATENT — REISSUE — ACT OF MARCH 3, 1837 — PATENTABILITY OF BOTH PRODUCT AND PROCESS — DECISION OF COMMISSIONER OF PATENTS — PROCEEDING TO SET ASIDE PATENT — FRAUD.

1. The general rule is, that an interlocutory order for issues to a jury in an equity suit will not be directed until the proofs are taken and publication has passed.

2. It is not indispensably necessary, as a matter of law, in any case, that any question in an equity suit in a federal court should be sent to a jury.

3. When feigned issues are directed by the court sitting in equity, it is generally done upon the ground that the evidence in the record is not of a character, or not sufficient to afford the means of a satisfactory conclusion; but the verdict of the jury is only advisory, and may be set aside or even overruled.

[Cited in Garsed v. Beall, 92 U. S. 695; Johnson v. Harmon, 94 U. S. 378.]

4. State regulations to the extent that they define the rules of property are regarded as furnishing the rule of decision, but they do not control or affect the process or practice of the federal courts.

5. The equity practice of the federal courts, when not controlled by an act of congress or the rules prescribed by the supreme court, is in general regulated by the chancery practice of the parent country as it existed prior to the adoption of what are called the "New Rules."

[Cited in Evory v. Candee, Case No. 4,583; Griswold v. Bragg, 48 Fed. 520.]

[Cited in Griswold v. Bragg, 48 Conn. 579.]

6. In this case the bill of complaint was not founded on the title of the original patentee, but on the derivative title of the first-named complainant, to whom, as executor of the patentee deceased, the patent was reissued; therefore, objection to the right of the complainants to maintain their bill, because only one of the persons named as executors in the last will and testament of the original patentee was made party to the bill, cannot be sustained.

[Cited in Carew v. Boston Elastic Fabric Co., Case No. 2,397; Thomas v. Shoe Mach. Manuf'g Co., Id. 13,911.]

[See note at end of case.]

7. The reissued patent, under these circumstances, is a new contract between the government and the executor, since the decease of the original patentee.

[See note at end of case.]

8. Where other persons named as executors did not join with the complainant in proving the will of an original patentee, or in the surrender or reissue of the original patent, they need not be made parties to a bill of complaint for the infringement of the said reissued patent.

[Cited in Grover & B. S. M. Co. v. Florence S. M. Co., 18 Wall. (85 U. S.) 579.]

9. The objection to the maintenance of a bill in equity founded on letters-patent, that the specification did not set forth the invention in such full, clear, and exact terms as would enable any person skilled in the art to practise the invention, is not open to the defendants, when no such defence is set up in their answer, and the record shows that application was made to the court to amend in that particular.

[Cited in Jennings v. Pierce, Case No. 7,283.]

10. Under the fifth section of the act of March 3, 1837 [5 Stat. 10], when a patent is properly returned for correction and reissue, the patent office is authorized to reissue the original in several parts, if the patentee desires it, and pays the additional sum or sums required by law.

[Cited in Fassett v. Ewart Manuf'g Co., 58 Fed. 365.]

11. A new product or article of manufacture, and the process by which the same is produced, may be the proper subjects of separate patents.

[Cited in Merrill v. Yeomans, Case No. 9,472; Milligan & Higgins Glue Co. v. Upton, Id. 9,607. Applied in Badische Anilin & Soda Fabrik v. Hamilton Manuf'g Co., Id. 721; Tucker v. Dana, 7 Fed. 214. Cited in Judd v. Fowler, 10 C. C. A. 100, 61 Fed. 821.]

[See note at end of case.]

12. An inventor claimed "curing caoutchouc or India-rubber, by subjecting it to a high degree of artificial heat"; also "curing the compound of India-rubber, sulphur, and a carbonate or other salt or oxide of lead, by subjecting the same to the action of artificial heat"; but in the descriptive part of the specification declined to limit himself to the exact compound last named, and set out others. A reissue of the patent claimed "a combination of India-rubber with sulphur, with or without other ingredients, chemically altered by the ap-

[1] [Reported by William Henry Clifford, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission.]

plication of heat." It was *held*, that the latter claim, when construed in the light of the description, was not invalid by reason of embracing more than the former.

[Cited in Cahart v. Austin, Case No. 2,288; Carew v. Boston Elastic Fabric Co., Id. 2,397; Smith v. Merriam, 6 Fed. 718.]

[See note at end of case.]

13. The reissued patent having been issued in two parts, one claiming a process and the other the product thereof, the claim for the process, when construed in view of both the earlier and later specifications, was *held* not to be broader than the corresponding claim in the original, in so far as it claimed mixing with the rubber other ingredients than sulphur; but the second claim of the reissue was held void, because it included not only India-rubber when compounded with sulphur and subjected to artificial heat but other vulcanizable gums,—no other gums having been described in the original patent nor in the one to which the claim was appended.

[Cited in Carew v. Boston Elastic Fab. Co., Case No. 2,397; Jones v. Sewall, Id. 7,495; Wonson v. Peterson, Id. 17,934; Atwood v. Portland Co., 10 Fed. 287.]

[See note at end of case.]

14. The commissioner of patents has full power to examine and decide upon an application for reissue; and as there is no provision made for an appeal, the decision must in general be regarded as conclusive in all collateral proceedings.

[Cited in Tucker v. Burditt, Case No. 14,216; In re Day, 27 Fed. 680.]

15. In a proceeding between the government and a patentee to set the patent aside, or in an application for an extension, proof of fraud is conclusive, but it must be clear and satisfactory.

16. In this case, proof that the extension was obtained by fraud, was *held* insufficient; but if it had been full, it would not have availed the respondents, because they were shown to have consented to the acts complained of.

[Cited in Seymour v. Osborne, 11 Wall. (78 U. S.) 543.]

17. After the originality of Charles Goodyear's invention has been repeatedly affirmed by the circuit courts of the United States, and there has been no effort made to call the decisions in question, under the circumstances of this case, those decisions were followed by this court.

18. Construction of the license under which the defendants claimed to manufacture the articles covered by the complainants' patents.

[19. Cited in Kelleher v. Darling, Case No. 7,653, to the point that patents, in certain cases, may be good in part and void in part, the rule being that whenever a patentee, through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, has claimed more than that of which he was the original inventor, his patent shall be valid for all that part which is truly and justly his own, provided the same be a material or substantial part of the thing patented.]

Bill in equity to recover damages for an alleged infringement of certain letters-patent, and praying for an account and for an injunction. The complainants were Charles Goodyear, executor of the last will and testament of Charles Goodyear deceased, the Union Rubber Company, a corporation created by the laws of the state of New York, and the Phoenix Rubber Company, a corporation created by the laws of the state of Connecticut. The respondents were the Providence Rubber Company, a corporation created by the laws of Rhode Island, Augustus O. Bourn, William W. Brown, and Edwin M. Chaffee, who were also citizens of the last-named state. The patents set up in the bill of complaint were, the original patent to Charles Goodyear, deceased, of the 15th of June, 1844 [No. 3,633], and the patent for the same invention, reissued to the original patentee of the 25th of December, 1849 [No. 156], which was further duly extended by the commissioner of patents on the 15th of June, 1858, for the additional term of seven years from the time of such extension. The bill of complaint also alleged, that the original inventor died on the 1st of July, 1860, and that the extended patent was duly surrendered and reissued to Charles Goodyear, executor, on the 20th of November, in the same year [No. 1,085].

The complainants claimed to be the sole and exclusive licensees of the original patentee, for the manufacture and sale of certain goods particularly enumerated in the bill of complaint; and their title to the exclusive right so claimed was alleged to be derived from three licenses exhibited in the record, which were duly executed by the original patentee during his lifetime. The licenses referred to were, first, the license granted to the Naugatuck India-Rubber Company, under date of July, 1844, which, as the complainants contended, was an exclusive license, conferring the right to manufacture everything (save the articles therein excepted) that could be made out of India-rubber. Secondly, the license to Jonathan Trotter, dated the 5th of February, 1847, which was for the manufacture of wearing apparel of every name and description for men and boys, excepting boots and shoes, bathing-caps, gloves, and mittens. Thirdly, a license to the firm of William Rider and Brothers, on the 1st of July, 1848, which was for the manufacture of army and navy equipments, and various other articles therein specified. The record contained stipulations which admitted the granting of the several patents set up in the bill of complaint, and the execution and assignment of all the licenses under which the corporation complainants claimed the exclusive right to manufacture and sell rubber goods. The answer was filed on the 1st of December, 1862, denying that Charles Goodyear deceased was the original and first inventor of the improvements described in the original patent; and also denying that the respondents had been guilty of any infringement, as alleged in the bill of complaint. Special defences were also set up in the answer, and before the proofs were all taken, the respondents appeared and moved the court to pass an order for feigned issues or issues of fact to be tried by a jury. The parties were heard upon the motion at the time it was

presented, and the court refused to pass the order, but postponed the motion to be further heard with the merits. The refusal to grant the motion was placed upon the ground that, under the circumstances of this case, it was premature.

The defendants claimed to manufacture under a license to Edwin M. Chaffee, of date June 25, 1846, which was expressed to be "a free license to use the said Goodyear's gum-elastic composition for coating cloths, for the purpose of japanning, marbling, and variegate japanning, together with all the rights to make and dispose of the aforesaid japanned and marbled or variegated cloths, in and so far as the said Charles Goodyear has obtained any rights, patents, or privileges, and in virtue of all his inventions, patents, and improvements made in the manufacture of India-rubber or gum-elastic goods, and which shall be made hereafter by the said Charles Goodyear. And in virtue of all letters-patent, or patent rights of the United States of America, granted to and belonging to, and which shall be granted to and belonging to the said Charles Goodyear, for any and all inventions and improvements in the manufacture of India-rubber goods." It was insisted by the complainants that the license of the defendants was intended to be restricted to the manufacture of boots and shoes, and that the license granted to certain of the complainants (before referred to) was exclusive in the grant of the right to make army and navy equipments, ponchos, blankets, bulbs for syringes, and certain other enumerated articles. The other points in dispute, as to the effect and construction of the licenses held by both parties, may be understood from the discussions of counsel and the opinion of the court.

B. R. Curtis, C. S. Bradley, Wingate Hayes, and J. Hervey Ackerman, for complainants.

The Union India-Rubber Company and the Phoenix Rubber Company, being licensees under Goodyear's patent, have the right to join the name of his representative in a suit brought to protect their rights as licensees. Goodyear v. McBurney [Case No. 5,574]; Goodyear v. Bishop [Id. 5,558]. The question whether Charles Goodyear, Jr., is executor or not, can only be raised by a plea in abatement. Childress v. Emory, 8 Wheat. [21 U. S.] 642; Kane v. Paul, 14 Pet. [39 U. S.] 33. The reissue of letters-patent to an executor, by the commissioner of patents, is conclusive that such executor has been duly appointed. Woodworth v. Hall [Case No. 18,016]. If the licenses of the complainants are exclusive, their right to stop the defendants is complete. Whether this patent was fraudulently extended or not cannot be inquired into in this suit. That is a question exclusively between the sovereignty granting the extension and the patentee. Field v. Seabury, 19 How. [60 U. S.] 324, 332; Gibson v. Gifford [Case No. 5,395]. Letters-patent are matter of record, and the general rule is that they can only be avoided in chancery, by a writ of scire facias sued out on the part of the government or by some individual prosecuting in its name. This is the settled English course sanctioned by numerous precedents, and there is no statute or precedent in this country establishing a different course. Jackson v. Lawton, 10 Johns. 24. And this is true, though it were issued by mistake, or obtained by fraud or misrepresentation. People v. Mauran, 5 Denio, 389, 398. Though these citations are made from cases respecting patents for lands, it is submitted the same principles must apply and govern the case of an invention or discovery; because in both cases the patent is a grant made by the government or sovereignty to some person or persons of some privilege, property, or authority. Both are issued in the name of the United States by like authority and in the same manner. The decision of the commissioner of patents in granting an extension is conclusive; such was the intention of the act allowing him to extend a patent. Colt v. Young [Case No. 3,032]. As the commissioner's decision was made by a special tribunal, with full powers to examine and decide, and as there is no provision for an appeal to any other jurisdiction, the decision is final within the law. Foley v. Harrison, 15 How. [56 U. S.] 433, 448; Patent Laws 1836, c. 357, § 18; Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 458, 459. The action of the commissioner of patents in reissuing a patent, which is strictly an ex parte proceeding, is not inquirable into, unless a clear case of fraud is made out. Much less is it, then, in the case of an extension which in its very nature is a judicial proceeding, providing for public notice (of sixty days) to be given, in the section of country most interested adversely to the extension of the application, that any person may appear and show cause why the extension should not be granted, the taking of testimony, a hearing of applicant and contestant before the commissioner, and a decision on the evidence. Patent Act 1836, § 18 [5 Stat. 124]; Day v. Goodyear [Case No. 3,678]; Battin v. Taggart, 17 How. [58 U. S.] 84; Woodworth v. Stone [Case No. 18,021], approved in Brooks v. Fiske, 15 How. [56 U. S.] 228; Brooks v. Bicknell [Case No. 1,944]; Field v. Seabury, 19 How. [60 U. S.] 332. If there was any fraud, defendants knew of it. Saratoga & S. R. v. Row, 24 Wend. 74. They have confirmed and ratified the fraud by accepting and working under a license granted after the extension. Edmunds v. Hildreth, 16 Ill. 216; Bronson v. Wiman, 10 Barb. 406. They stipulated not to oppose the extension. There is no proof of damage to them in consequence of the fraud. Fraud and damage must be coupled to entitle a party to relief. Clark v. White, 12 Pet. [37 U. S.] 196; Jackson v. Eaton, 20 Johns. 478; Story, Eq. Jur. § 203. Defendants were willing the extension should be obtained, and

"volenti non fit injuria." The evidence of fraud must be strong and cogent. Clark v. White, 12 Pet. [37 U. S.] 196; Henry v. Henry, 8 Barb. 588, 592. See Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 458.

It is a favorite principle governing the action of every court, and especially that of a court of equity, that where an act is susceptible of two constructions, one of which will destroy and the other sustain it, the latter is always to be preferred. This simply supposes legality, rather than illegality. Hence the maxim, "Ut res magis valeat quam pereat." The license to the Naugatuck Company was recorded September 16, 1844, and properly so. A license with a covenant that the parties will not grant any conflicting license, may be deemed a grant of an interest in the patent, and therefore to be recorded. Any subsequent grant or license, after such record, would be void as against the first. Washburn v. Gould [Case No. 17,214.] Respondents allege that the reissues of the patent of June 15, 1844, are void. That question cannot be inquired into in this suit, for the action of the commissioner granting the reissue is conclusive, unless a clear case of fraud is made out. Day v. Goodyear [supra]; O'Reilly v. Morse, 15 How. [56 U. S.] 63; Allen v. Blunt, [Case No. 216]; Battin v. Taggart, 17 How. [58 U. S.] 84; Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 458, 459. If the action of the commissioner was not conclusive, the reissue of this patent has twice been judicially declared valid. Goodyear v. Day [Case No. 5,566]; Goodyear & N. E. Car-Spring Co. v. Elastic Car-Spring Co. [Id. 5,588]. These decisions were recognised and acted upon by this court in an action against these parties. It must be regarded as res judicata. The claim for the product "vulcanized rubber" is not broader than the invention of Goodyear. The product is not claimed independently of the process by which it is produced. The claim is for the new article of manufacture, which is a combination of rubber with sulphur, whether with or without other ingredients, chemically altered by the application of heat, as described. If there are other methods substantially different, they and the products thereof belong to the inventors or the public. The phrase "whether with or without other ingredients" must be construed in view of the specification. One method described therein is with sulphur alone, and another is by combining it with other ingredients. The claim, then, is for either of these two methods. The claim for "subjecting India-rubber or other vulcanizable gums mixed with, or in the presence of sulphur, to the action of heat," &c., is not void by reason of claiming "other vulcanizable gums." The gist of the invention is not the material employed, and this does not limit the invention. The gist of the invention is the new process, and if that process is followed, the material operated upon does not take the process out of the scope of the invention. Hotchkiss v. Greenwood, 11 How. [52 U. S.] 248.

J. H. Parsons, A. Payne, and C. Cushing, for defendants.

This suit cannot be maintained, for the reason that the will of Charles Goodyear, deceased, names three executors, and but one of them is made a party complainant. Selw. N. P. 803; Wankford v. Wankford, 1 Salk. 308; Williams, Ex'rs, 235, note 2; 3 Bac. Abr. 33; 1 Saund. Pl. & Ev. 1111; 1 Chit. Pl. 20; Bodle v. Hulse, 5 Wend. 313; Cro. Jac. 420. The patent granted to Charles Goodyear, June 15, 1844, and reissued December 25, 1849, and extended June 15, 1858, was invalid. And the strongest proof is that the executor, in applying in 1860 for a reissue, claimed in the proposed new specification "all other ingredients," those claimed in the reissue of 1849 being only "a carbonate, or other salt, or oxide of lead." The reissues of this patent, granted on the 20th of November, 1860, to Charles Goodyear, Jr., claiming to be executor of Charles Goodyear, deceased, were invalid. On the 15th of June, 1844, a patent was granted to Charles Goodyear, deceased. On the 25th of December, 1849, the same was reissued, it having been surrendered, the bill alleges, "on account of a defective specification." The patentee having died in July, 1860, his son, the first party named in the bill, claiming to be executor of his father's will, surrendered the reissued patent of 1849, and the same was again reissued to him, as an executor, on the 20th of November, 1860, in two patents. The language of the claim of the reissued patent of 1849 is this: "What I claim as my invention, and desire to secure by letters-patent is the curing of caoutchouc, or India-rubber, by subjecting it to the action of a high degree of artificial heat, substantially as herein described, and for the purpose specified. And I also claim, the preparing and curing the compound of India-rubber, sulphur, and a carbonate or other salt, or oxide of lead, by subjecting the same to the action of artificial heat, substantially as herein described."

The claims of the reissued patent of 1860, or rather of the two patents, in which form it was then reissued, are these: Of the first: "What is claimed as the invention of Charles Goodyear, deceased, is the new manufacture called vulcanized India-rubber, which is a combination of India-rubber with sulphur (whether with or without other ingredients) chemically altered by the application of heat, substantially as described." Of the second: "What is claimed as the invention of Charles Goodyear, deceased, is caoutchouc, or India-rubber, or other vulcanizable gums, mixed with or in the presence of sulphur (whether with or without other ingredients) and subjected to the action of heat, for the purpose of affecting its qualities or properties as described."

Now the differences between the reissue of

1848 and that of 1860 are these: The first claimed the curing of caoutchouc, or rubber, and sulphur by subjecting it to heat. And also the preparing and curing the compound of rubber, sulphur, and a carbonate or other salt or oxide of lead, by subjecting it to heat. The second claims: 1st. The new manufacture called vulcanized India-rubber. 2d. The subjecting caoutchouc, or India-rubber, or other vulcanizable gums, mixed with or in the presence of sulphur, to the action of heat, for the purpose of affecting its qualities. 3d. The so subjecting such compound, whether with or without other ingredients, to the action of heat, &c. The first is for a process only; the second for the process and the product. The first limits the gums to be mixed and cured to caoutchouc, or India-rubber; the second claims not only these, but all vulcanizable gums. The first limits the other substances, with which caoutchouc, or rubber, and sulphur may be mixed, to a carbonate or other salt, or oxide of lead; the second claims all other ingredients whatever. The defendants consequently claim that this patent, as reissued, is wholly invalid, because it claims more than either the original invention or the reissued patent of 1849. It is "too broad, and not warranted by law." O'Reilly v. Morse, 15 How. [56 U. S.] 112. Gutta-percha is neither caoutchouc nor India-rubber; but it is notoriously a "vulcanizable gum."

The reissue of 1849 claims more than the original did. The original claimed "a carbonate or other salt or oxide of lead"; the reissue claims all vulcanizable gums to be subjected to heat in combination with sulphur, whether with or without other ingredients. Now, there are some vulcanizable gums which cannot be vulcanized with the process set out in Goodyear's specification of 1849; add, however, two, sometimes three additional ingredients, and they can be vulcanized. The license to the Naugatuck Company is not an exclusive license. The words "full and absolute" do not mean exclusive. The parties themselves so understood, for the license provides that in case Goodyear shall sell rights to others, the company shall have a claim for damages. Thus the instrument itself contemplates the granting of other rights under certain specified conditions, and the company has its remedy on the violation of these conditions, which clearly proves that it is not, nor was it at the time it was made, an exclusive license. As to the language and expressed intent necessary to constitute an exclusive license, see Gayler v. Wilder, 10 How. [51 U. S.] 495; Brooks v. Byam [Case No. 1,948]. But suppose the license was exclusive, defendants claim to manufacture under a license from Charles Goodyear, June 25, 1846, and that this was given with the assent of the Naugatuck Company, and with a waiver of its preemptive right in favor of the licensee, E. M. Chaffee. It is the grant of a free right or license to Chaffee, first, to use Goodyear's metallic gum-elastic composition, for coating cloths for the purpose of japanning, marbling, and variegate japanning; and, second, together with all the rights to make and dispose of such japanned or marbled and variegated cloths, in and so far as Goodyear has obtained any rights, patents, or improvements, and in all that he may have, and in all patents granted and to be granted or belonging to said Goodyear. The extension, on the 14th of June, 1858, of the patent granted Charles Goodyear, deceased, by the commissioner of patents, was procured by said Goodyear upon a false and fraudulent representation, for the purpose of deceiving the commissioner and the public, and of obtaining said extension, in fraud of the requirements of the act of congress in this behalf. The fraud in the extension of 1858 consisted, first, in collusion between the friends and certain pretended opponents of the patent, whereby the commissioner was deceived.

In discussing the law, as applicable to the fraud thus proven, the defendants begin, by asserting the principle, that fraud avoids everything ab initio, both in law and equity, "whether the object be to deceive the public or third persons, or one party endeavor thereby to cheat another." Bouv. Law Dict. 547, and cases there cited. See Dalamere's Case, 1 Plowd. 346; Fermor's Case, 2 Coke, 202; U. S. v. Gomez, 23 How. [64 U. S.] 326; Whittemore v. Cutter [Case No. 17,600]; Odiorne v. Winkley [Id. 10,432]; Gray v. James [Id. 5,718]; Whitney v. Emmett [Id. 17,585]; Stimpson v. West Chester R. Co., 4 How. [45 U. S.] 380; Clum v. Brewer [Case No. 2,909]. The defendants are entitled to have the material issues of fact in this case submitted to a jury. The first question of fact raised is, whether the patent granted Goodyear, June 15, 1844, reissued December 25, 1849, extended June 15, 1858, was valid. This patent has never since the date of its original issue been before a jury. It has never received a final adjudication from a court of last resort. See Davis v. Palmer [Id. 3,645]; Reutgen v. Kanowrs [Id. 11,710]; Park v. Little [Id. 10,715]; Carver v. Braintree Co. [Id. 2,485]; Parker v. Stiles [Id. 10,749]; Battin v. Taggert 17 How. [58 U. S.] 85.

The second question is, whether or not the reissues of 1860 are valid. This question was discussed, in its legal aspect, under the third point of the brief. The court may be satisfied, in view of the rules of law as gathered from the authorities there cited, that this patent, as reissued, is absolutely void upon its face, as compared with the surrendered patent, and that no further discussion is to be had upon it. If not, they are proper questions for a jury, under this point, and special reasons why they should be tried by one. The answer denies, absolutely, the validity of this reissue, on all grounds. Then we may ask a jury: Was there any fraudulent intent on the part of the executor in applying for this reissue? Did he know what men of science had done between 1849 and 1860? Was this

extension applied for deliberately and fraudulently, and with the design to make this patent "more elastic and expansive, and more available for the suppression of all other inventions?" The question whether the reissue is for a new or another invention, or contains a broader claim, is proper for a jury. So is the question of fraud in obtaining it. Stimpson v. West Chester R. Co., 4 How. [45 U. S.] 404; Carver v. Braintree Co. [supra]; Battin v. Taggert, 17 How. [58 U. S.] 85; Brooks v. Fiske, 15 How. [56 U. S.] 220. This third issue raised is, whether or not the articles made or the process by which they are made by the defendants infringe any rights of the complainants. The question certainly deserves to be considered and to be the subject of a trial by jury, whether the gums discovered after the Goodyear invention, are not, in fact, different substances, on which his patent will not act, and to which it could not have been intended to apply; and, consequently, it is certainly a fair question to be submitted to a jury, whether or not the process or processes, which the defendants use, are infringements of the Goodyear process; and this constitutes a special reason why issues should be granted in this case.

It is an almost universal rule that fraud is a question for a jury to decide. Burlew v. O'Niel [Case No. 2,167]; Sherwood v. Marwick, 5 Greenl. 295; McDonald v. Trafton, 3 Shep. [15 Me.] 225; Myers v. Hart, 10 Watts, 104. The defendants now refer the court to authorities upon the general question of issues out of chancery, their nature, and in what cases they will be granted. See 2 Daniell, Ch. Pr. 1085, 1118 et seq.; 2 Smith, Ch. Pr. 74 et seq.; Adams, Eq. 376 et seq., and notes; Story, Eq. Jur. § 1478. See, also, Kent v. Burgess, 11 Sim. 361, in which the court granted issues before the publication of the evidence. See, also, Casborne v. Barsham, 2 Beav. 80. Courts of equity have, for a great number of years, where questions of fact have been disputable, thought it a more proper exercise of their jurisdiction to have them tried by a jury. Dawson v. Chater, 9 Mod. 90; O'Connor v. Cook, 8 Ves. 535; Dexter v. Providence Aqueduct Co. [Case No. 3,864]. A jury trial will be ordered where such a course will be most conducive to the ends of justice. New Orleans Gas Light and Banking Co. v. Dudley, 8 Paige, 452. See, also, Belknap v. Trimble, 3 Paige, 601; East India Co. v. Donald, 9 Ves. 274; Garwood v. Eldridge, 1 Green, Ch. [2 N. J. Eq.] 290. If important rights are depending on questions of fact, a feigned issue may properly be awarded. Apthorp v. Comstock, 2 Paige, 482. See, also, Bishop of Winchester v. Fournier, 2 Ves. Sr. 446. The strictest application of the rule is, that the granting of issues is a matter resting in the discretion of the court. Hampson v. Hampson, 3 Ves. & B. 43. See, also, Field v. Holland, 6 Cranch [10 U. S.] 8; Brockett v. Brockett, 3 How. [44 U. S.] 691; Adams, Eq. 815; 3 Greenl. Ev. § 266.

CLIFFORD, Circuit Justice. The general rule is that an interlocutory order for issues to a jury in an equity suit will not be directed until all the proofs are taken and publication has passed. The reason for the rule, as stated, is that such an order should not in general be granted at all where the truth of the facts can be conveniently and satisfactorily ascertained by the court itself; and as that question cannot usually be determined in advance of publication, the motion should be deferred to that stage of the controversy. Whitaker v. Newman, 2 Hare, 302; Dale v. Roosevelt, 6 Johns. Ch. 255; U. S. v. Samperyac [Case No. 16,216a]; Clayton v. Meadows, 2 Hare, 29; Adams, Eq. 376; Baker v. Williamson, 2 Pa. St. 116; Johns v. Erb, 5 Pa. St. 237.

Oral testimony undoubtedly, if the order be granted, may afterwards be introduced before the jury, but the better practice is to defer the granting of the motion until the whole evidence to be taken under the equity rules is before the court. Lee v. Beatty, 8 Dana, 207. The federal courts under the constitution of the United States and the laws of congress, as now existing, have the power of deciding every question of law or fact which may arise in equity suits over which they have complete jurisdiction, and consequently it is not indispensably necessary as matter of law in any case that any question in an equity suit should be sent to a jury. Fornshill v. Murray, 1 Bland, 485; Ward v. Hill, 4 Gray, 593.

Trial by issue, indeed, forms no necessary appendage to a court of equity even in the parent country, and never did, except that, perhaps, an heir at law, where the object of the suit was to divest him of a freehold estate of which his ancestor died seised; or the rector of a parish, where his common-law right to tithes was drawn in question, might be entitled to issues as matter of right. Excepting those cases, it is clear that the motion for issues was always regarded as one addressed to the sound discretion of the chancellor; and it was for him to determine whether, in view of the whole evidence, as exhibited in the record, he would decide the controversy himself or send it to the common-law courts for the opinion of a jury. 2 Daniell, Ch. Pr. 1090.

When the chancellor directs such an issue, he, in general, does it upon the ground, that the evidence produced before him in the record, is not of a character, or not sufficient, to enable him to arrive at a satisfactory conclusion. Such being the state of the case, he directs the issue to be tried by a jury, for the purpose of collecting additional evidence to enable him to decide the cause. Consequently the verdict, when certified from the court to which the issues were sent, is never to be regarded as conclusive, but only as advisory, and may be set aside, or even overruled. Silsby v. Foote, 20 How. [61 U. S.] 385; 3 Greenl. Ev. § 261. The circuit court held in that case that the patent was valid, notwithstanding the verdict of the jury to the contrary, and also that the defendant had been

guilty of an infringement; and the supreme court affirmed the decree.

Judge Story also says, in substance and effect, that the verdict is never, in point of law, conclusive upon either party. Story, Eq. Jur. § 1479; Barnes v. Stuart, 1 Younge & C. Ex. 119; Chit. Eq. Dig. 2856. The practice accordingly is, that the party against whom the verdict is, has the right, notwithstanding the verdict, to proceed in the cause, and if the evidence was not closed under the rules, or if closed, by leave of court first had and obtained, to go into evidence in support of his case. Ansdell v. Ansdell, 4 Mylne & C. 454. Twelve years ago a similar application was made to the presiding justice of the Third circuit, and he refused to grant the motion, substantially upon the ground that the merits of the controversy involved no difficulties which would be removed or confirmed by the verdict of a jury. Goodyear v. Day [Case No. 5,569].

Applying those rules to the present case, it only remains to say, that upon a careful examination of the record it does not appear that the questions presented, and the state of the evidence, are such that the verdict of a jury is necessary to enable the court to reach a satisfactory conclusion. Reference will only be made to such of the defenses, set up in the answer, as were urged upon the consideration of the court at the final hearing. Defences set up in the answer, which were not pressed at the argument, will be regarded as waived. The argument for the respondents objects to the right of the complainants to maintain the suit upon four special grounds, which will be separately considered, before proceeding to the examination of the questions usually regarded in such cases as more immediately involving the merits of the controversy.

The first special objection is, that only one of the persons named as executors in the last will and testament of the original patentee is made a party to the bill of complaint. The second objection is, that the reissued patents on which the suit is founded are invalid, because the description of the alleged invention, and of the manner and process of making, constructing, using, and compounding of the same, as contained in the respective specifications, is not set forth in such full, clear, and exact terms, as to enable any person skilled in the art or science to which it appertains to practise the invention. The third objection is, that the last-mentioned reissued letters-patent are severally invalid, because the present patentee claims therein more than was invented by the original applicant, or, in other words, that the reissued letters-patent are invalid, because they, or either of them, are not for the same invention as that for which the original patent was issued. The fourth objection is, that the extension of the patent granted to the original patentee, as already described, was procured by false and fraudulent representations, and therefore was null and void.

When there were several executors, the general rule at common law was that they must all join in the suit, though some were not of the required age, or had not proved the will, or had actually renounced before the ordinary. Smith v. Smith, Yel. 130; Brookes v. Stroud, 1 Salk. 3; Hensloe's Case, 5 Coke, 64; Creswick v. Woodhead, 4 Man. & G. 811; Bodle v. Hulse, 5 Wend. 313.

The reasons assigned for the rule were that all have the right to sue, and that neither the delay in proving the will, nor the renouncement before the ordinary, were sufficient to bar the right, and consequently that the executors not joined were still at liberty, whenever they pleased, to come in and accept the trust. 4 Bac. Abr. 41; 2 Williams, Ex'rs, 1588.

The principle of the rule is, that where the right to sue is derived under the will of the testator, the right to sue is equal in all the executors, and in such cases all must join in the suit, as in debt on bond given to the testator, or in a suit upon a bill of exchange or promissory note given to him while in full life. But where the right to sue is derived under the probate, and not under the will, as where the promise is to the executor, and of course subsequent to the death of the testator, the executor alone may sue, to whom the promise was given. Brassington v. Ault, 2 Bing. 177; 1 Saund. Pl. & Ev. 1111.

When the action in on a contract with the decedent, or for a tort to the goods before they actually came to the possession of the executor, the suit can be brought only on the title of the decedent, and consequently can only be maintained in a representative character; but where it is on a contract with the executor, express or implied, made after the death of the testator, or where it is for the price of goods sold by the executor, or for the tortiously taking the goods from his possession, or for converting or detaining the goods after the same are so taken, or for any tort to the goods while in the possession of the executor, the opinion is expressed in some jurisdictions that the suit, under such circumstances, can only be maintained by the executor in his own right, and the fact that he is named in the contract, in the first example supposed, will not have the effect to change the nature of the remedy. Kline v. Guthart, 2 Pen. & W. 491; Heron v. Hoffner, 3 Rawle, 393; West v. Chappell, 5 Gill, 228; Gayle v. Ennis, 1 Tex. 184.

Other courts hold, and perhaps for better reasons, that executors may in all cases sue in their representative character, where the money when recovered would be assets belonging to the estate, but all courts concede that the rule, as last stated, can only apply where all the executors participate in the contract, and that it does not make those parties to the contract who were not parties in point of fact. Heath v. Chilton, 12 Mees. & W. 638; Cowell v. Watts, 6 East, 405; Powley v. Newton, 6 Taunt. 453; 1 Chit. Pl. 204.

All concede, as before remarked, that where

the promise is to the testator, the suit, to be regular, must be in the name of all the executors named in the will, if alive; but the same authorities agree, that the defendant can only take advantage of the nonjoinder of one or more of the number by plea in abatement, after oyer of the probate, unless the defect is apparent on the face of the record 1 Wm. Saund. 292i, note k; 1 Saund. Pl. & Ev. 1111; Packer v. Willson, 15 Wend. 345.

The rule, as stated in a work of standard authority, is, that if only one of several executors or administrators bring an action, either of debt or assumpsit, or in tort, it is settled that the defendant can only take advantage of the non-joinder of the executor or administrator by pleading in abatement, after oyer of the probate or letters of administration, that the other executor or administrator therein mentioned, is alive and not joined in the action. 1 Chit. Pl. 20.

Unless the defendant plead the non-joinder in abatement, he is estopped from setting up the defence, as he cannot be allowed to prove the fact of non-joinder under the general issue. The correct practice on the part of the plaintiff is to sue in the name of all the executors, and if, on the return of the sheriff or marshal, one or more named in the will refuse to appear and qualify and join in the prosecution of the suit, the residue must resort to the process and proceeding of summons and severance. 2 Williams, Ex'rs (4th Am. Ed.) 1186, note t.

The practice is, that if one or more of the executors will not join with the rest in prosecuting the action, the court will issue a writ of summons ad sequendum simul, and upon their non-appearance at the return of it, will give judgment of severance so as to enable the rest to proceed without them. 1 Tidd, Pr. (per Troubat) 129; 20 Vin. Abr. 51 W. 55.

Such are the material rules and the course of proceeding upon this subject in actions in common-law jurisdictions, where there are no paramount statutory regulations. Most of the states have such regulations, rendering it competent for such of the executors as have proved the will, to prosecute the suit without the necessity of resorting to any such proceeding as that to which reference has been made. Were this a suit at common law, the complainants assume that the statutory regulations of this state would furnish the rule of decision. But it is unnecessary to examine that question at the present time. State regulations, to the extent that they define the rules of property, are regarded as furnishing the rule of decision, but they do not control or affect the process or practice of the federal courts. Wayman v. Southard, 10 Wheat. [23 U. S.] 1.

The present suit, however, is not one at common law, but is a bill in equity, wherein the laws of the state have no pretence of application in the question under consideration. In the federal courts the equity practice, when not controlled by an act of congress or the rules prescribed by the supreme court, is in general regulated by the chancery practice of the parent country, as it existed prior to the adoption of what is called the "New Rules." Suppose it were otherwise, however, and that the question presented was really one to be controlled by the analogies of the common law, still it is quite obvious that the objection cannot be sustained. The bill of complaint is not founded on the title of the original patentee, but on the derivative title of the first-named complainant as executor of the last will and testament of Charles Goodyear, deceased. Were the suit founded on the last patent issued to the decedent, as it subsisted at the time of his decease, the analogy of the common law, if applicable to the case, would support the theory of the respondents. But such is not the fact, as every one must admit who has read the pleadings. The reissued patent on which the suit is founded is a new contract made between the government and the first-named complainant since the decease of the original patentee. The proofs show that the other persons named as executors did not prove the will, and that they had nothing to do either with the surrender or the reissue of the letters-patent on which the suit is founded. The consequence was that they were not named in the letters-patent, and, of course, are not patentees in any sense whatever. The damages to be recovered, if any, may belong to the estate, but it is clear, even in cases where the rules of the common law apply, that the circumstances that the damages to be recovered may become assets, is not sufficient of itself to make any one a party to the contract who did not participate in the transaction, and who was not so in point of fact.

The second special objection is, in effect, that the description of the alleged invention, and of the manner and process of making, using, and compounding the same, as contained in the respective specifications, is not set forth therein in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to practise the invention. The reply of the complainants to this objection is, that such a defence is not open to the respondents, because none such is set up in the answer; and upon a careful examination the suggestion appears to be correct. The record shows that application was made to the court for leave to amend the answer in that behalf, but upon full consideration the motion was denied. The suggestion of the complainants is decisive, and the objection is accordingly overruled. Foster v. Goddard, 1 Black [66 U. S.] 518; Sims v. Guthrie, 9 Cranch [13 U. S.] 19; Harrison v. Nixon, 9 Pet. [34 U. S.] 483; Boon v. Chiles, 10 Pet. [35 U. S.] 178; Tripp v. Vincent, 3 Barb. Ch. 613.

The next objection of the respondents is, that the respective reissued letters-patent on which the suit is founded are invalid, because

the present patentee claims in each of them more than was invented by the original applicant. The original patent was granted to the inventor on the 15th of June, 1844, as alleged in the bill of complaint. The same was surrendered and reissued to the original patentee on the 25th of December, 1849, on account of a defective specification. The letters-patent, as reissued, were extended on the 15th of June, 1 58, for the further term of seven years. The inventor died on the 1st of July, 1860, and his son Charles Goodyear, Jr., was appointed his executor. His first step, as such executor, was to surrender the patent, as previously reissued to the inventor, and the same was thereupon reissued to him, as executor, in two parts. The last-mentioned letters-patent are those on which the present suit is founded.

The proposition of the respondents is, that both of those patents are void for several reasons. Briefly described, one of the patents is for a new product or manufacture, and the other is for a new process or method by means of which the new product or manufactured article is produced. The theory of the respondents is, that they are both void. 1. Because the subject-matter of the respective claims ~~—~~ not separable. 2. Because each of the respective claims, as they insist, is broader than the invention made by the original patentee.

In the judgment of this court, the first objection is wholly untenable. The legal effect of the fifth section of the act of the 3d of March, 1837, is to authorize the patent office, whenever a patent is properly returned for correction and reissue, under the thirteenth section of the prior act of congress conferring such authority, to reissue the same in several patents for distinct and separate parts of the thing patented, provided the patentee shall desire it, and shall pay the additional sum or sums required, as specified in the provision. 5 Stat. 192. No doubt can be entertained that a new product or manufacture, and a new process or method of producing the new article, are the proper subjects of separate and distinct claims in an original patent; and if so, then it is equally clear that the patentee under that provision, upon a return of the patent for correction and reissue, and upon complying with the conditions therein specified, may have several patents for the distinct and separate parts of his invention

The second objection, however, is entitled to more weight, and will deserve more consideration. The claim of the patent, as reissued to the original inventor, was as follows: "What I claim as my invention, and desire to secure by letters-patent, is the curing of caoutchouc, or India-rubber, by subjecting it to the action of a high degree of artificial heat, substantially as described, and for the purpose specified; and I also claim the preparing and curing the compound of India-rubber, sulphur, and a carbonate or other salt, or oxide of lead, by subjecting the same to the action of artificial heat, substantially as herein described." Appropriate words are used in both claims referring back to the descriptive portions of the specifications.

India-rubber, as the patentee states, was useless in its native state for many of the purposes for which it may be used, for the reason that it will become soft and sticky, and finally dissolve under the action of a moderate degree of heat. His effort was to discover some method of preparing it by which its melting or softening property should be removed or neutralized. Partial results were at first attained, but not sufficient to render the discovery of general practical utility. At length, however, he became impressed with the idea that the native rubber might be subjected to heat, in the process of preparation, at some degree of temperature beyond the highest to which the fabric would be exposed in its ordinary use. Experiments were accordingly instituted, and the result was that the patentee discovered that he could accomplish the desired end.

Those experiments showed that the native rubber, when subjected to heat by itself, could not be cured or deprived of its sticky or soluble properties, which led him to experiment upon it in connection with other substances. When compounded with sulphur, by the application of a high degree of artificial heat, he obtained a good result, but when compounded with sulphur and the carbonate of lead he obtained the best results. All the experiments, however, showed that a satisfactory result could not be obtained without the action of a high degree of artificial heat, which the patentee states is the great agent in his method of curing the native rubber. The nature of the first part of the invention, as stated by the patentee, consists in curing the native rubber when combined with, or in the presence of, sulphur, by submitting the same to the action of a high degree or artificial heat.

The second part of the invention consists in preparing and curing the compound of the native rubber, sulphur, and a carbonate or other salt, or oxide of lead, for the accomplishment of the purpose described. "Any other mode of reducing and dissolving the India-rubber, and compounding it with the other substances," says the patentee, "may be substituted for that above described; and although I have described the compound as consisting of India-rubber, sulphur, and white lead, I do not mean to limit myself to this compound. When a high degree of artificial heat is used, as good results may be and have been obtained by me, by dispensing with the lead; and it is immaterial, so far as regards the principle of my invention, whether the sulphur is incorporated with the India-rubber by admixture in the solid form, or spread on the surface thereof, or combined therewith in the gaseous or other form, previous to or during the process of curing by heat."

The claim of the patent for a new and useful improvement in the manufacture of caoutchouc, as reissued to the present patentee, is as follows: "What is claimed as the invention of Charles Goodyear, deceased, is the new manufacture called vulcanized India-rubber, which is a combination of India-rubber with sulphur (whether with or without other ingredients), chemically altered by the application of heat, substantially as described."

The phrase, "whether with or without other ingredients," is the one to which the objection under consideration is particularly applied. The rule, "Ut res magis valeat quam pereat," is as applicable to patents as to any other instruments in regard to which it is the duty of the court to adopt a liberal construction, in order to give effect to the intention of the parties. Ryan v. Goodwin [Case No. 12,186]; Evans v. Eaton, 3 Wheat. [16 U. S.] 512.

The duty of the court is to collect the intention of the parties from the whole instrument, and, if practicable, to adopt such construction as will give it effect, and render it available for the purpose for which it was granted. Applying that rule to the present case, it is obvious that the objection to the first patent, on which the suit is founded, cannot be sustained.

Reference is made in the body of the specification to the use of sulphur, in combination with the native rubber, and to the subjecting of the compound to the action of a high degree of artificial heat, precisely as in the prior patent issued to the original patentee. Mention is then made, substantially as in the prior patent, that other substances, to wit, white lead, or other salts of lead, may be combined with the mixture composed of native rubber and sulphur, "thereby forming a triple compound." Plainly, therefore, the words "other ingredients," as used in the claim, refer to the ingredients other than native rubber and sulphur, as used in the specification; and when so understood, the language of the claim is free from objection.

The description of the claim in the other patent, on which this suit is founded, is in the following words, to wit: "What is claimed as the invention of Charles Goodyear, deceased, is the subjection of caoutchouc, or India-rubber, or other vulcanizable gums, mixed with or in the presence of sulphur (whether with or without other ingredients), to the action of heat, for the purpose of affecting its qualities or properties as described. The same objections are made to this claim as to the claim of the preceding patent, and they must be overruled for the same reasons.

But another objection is taken to this claim of a very different character. The express terms of the claim make it include not only native rubber, when compounded with sulphur and subjected to a high degree of artificial heat, but all other vulcanizable gums, whether with or without other ingredients. Nothing of the kind is described in any one of the patents granted to the original inventor, nor even in the patent to which the claim is annexed.

Under the circumstances, I am of the opinion that the claim of this patent is broader than the invention of the original patentee, and consequently that it is void, because it is not for the same invention as the patent which was surrendered as the foundation of the reissue. O'Reilly v. Morse, 15 How. [56 U. S.] 112; Battin v. Taggert, 17 How. [58 U. S.] 83; Burr v. Duryee, 1 Wall. [68 U. S.] 531; Leroy v. Tatham, 14 How. [55 U. S.] 175.

The fourth special objection is, that the extention of the patent granted to the original patentee, was procured by false and fraudulent representations, and therefore was null and void.

The answer alleges that the licensees of the patentee had the exclusive management and control of the application for the extension; that they paid the expenses of the application; and that for the purpose of fraudulently procuring the commissioner to grant the same, they paid large sums of money to sundry persons, to induce them to withhold or withdraw opposition to the application, and thereby wilfully and fraudulently caused the suppression of facts which, if they had been made known to the commissioner, would justly and legally have prevented him from granting the extension.

Special mention is then made of a person who appeared and made opposition to the application, and the allegation is, that the licensees, for money, induced him to withhold his opposition, but not to withdraw his appearance, in order that it might fraudulently appear that all the facts which could be adduced against the application, were brought to the notice of the commissioner.

Strong doubts are entertained whether the allegations of the answer are sufficient to constitute a defence in this case, but it is not necessary to place the decision upon any such ground, as I am of the opinion that the defence cannot avail the respondents for several reasons, which will be briefly stated.

Suit is brought in this case against the respondents as infringers, and in the judgment of this court, the defence that the patent as reissued to the original patentee, was extended by fraud, as set up in the answer, cannot avail them as a justification for the acts alleged in the bill of complaint. Field v. Seabury, 19 How. [60 U. S.] 332; Gibson v. Gifford [Case No. 5,395].

The decision of the commissioner was made by a tribunal with full powers to examine and decide, and inasmuch as there is no provision for an appeal to any other jurisdiction, the decision must in general be regarded as final, in all collateral proceedings. Colt v. Young [Id. 3,032]; Foley v. Harrison, 15 How. [56 U. S.] 448; Bartlett

v. Kane, 16 How. [57 U. S.] 263; Jackson v. Lawton, 10 Johns. 24.

Where the imputation of fraud arises in a proceeding between the government and the patentee, to set the patent aside, or where the question arises between the patentee and a third person whose rights of property were directly involved in the question of extension, proof of fraud in obtaining the extension is sufficient to defeat the patent; but the proof, to avail the party making the imputation, must be clear and satisfactory. Battin v. Taggert, 17 How. [58 U. S.] 84; Woodworth v. Stone [Case No. 18,021]; Brooks v. Fiske, 15 How. [56 U. S.] 228; Brooks v. Jenkins [Case No. 1,953]; Field v. Seabury, 19 How. [60 U. S.] 332.

The proof in this case that the extension was procured by fraud is not satisfactory. On the contrary, it shows, taken as a whole, that the extension was granted on account of the just claim of the inventor, and the great merit of the invention. But if it were otherwise, still the defence, under the circumstances of this case, cannot avail the respondents, in the judgment of this court, because they consented to the acts which are now the subject of complaint. Saratoga, & S. R. Co. v. Row, 24 Wend. 74.

Suppose the patent was duly extended, still the respondents contend that they are not liable, because they insist that Charles Goodyear, deceased, was not the original and first inventor of the improvement embodied in the first-mentioned reissued letters-patent on which the suit is founded. That proposition embraced both of the reissued letters-patent described in the bill of complaint; but having come to the conclusion that the other is void, because the claim is broader than the invention, it is unnecessary to remark further upon it at the present time. The record shows that the questions involved in that proposition have been repeatedly heard and determined in the circuit courts of the United States. Suffice it to say, that this court, under the circumstances, considers it proper to follow those decisions. Many years have elapsed since they were announced, and, so far as appears, there has been no effort made to call them in question. They are believed to be correct, and consequently are adopted upon the point under consideration.

My conclusion, therefore, is, that Charles Goodyear was the original and first inventor of the improvement described in the first-mentioned reissued patent on which this suit is founded. The admission of the respondents is, that in the manufacture of India-rubber goods they use a compound of India-rubber in which sulphur is present when the composition is subjected to the action of artificial heat, so as to produce the changes and effects mentioned in the bill of complaint. Taken as a whole, the evidence is so full that the respondents must be regarded as infringers, unless justified under a certain license set up in the case, that it seems unnecessary to pursue the investigation.

The last proposition submitted by the respondents is, that they are not infringers, because they manufacture their goods under a license from the original patentee, which, as they insist, is valid and outstanding, and is a complete defence to the present suit. The license referred to is dated the 25th of June, 1846, and is signed by the original patentee. Free license is thereby granted to E. M. Chaffee, his executors, administrators, and assigns, for and in consideration of $1, to use the said Goodyear's metallic gum-elastic composition for coating of cloths for the purpose of japanning, marbling, and variegate japanning, at his own establishment, but not to be disposed of to others for that purpose without the consent of said Goodyear. Two answers are made by the complainants to that defence. 1. They refer to a license of prior date held by them, and contend that by the true construction it confers upon them the exclusive right to use any and all of the inventor's improvements for manufacturing cloths, or any other article of merchandise, or any article to which the same may be applicable. 2. But if the court holds otherwise, then they contend, in the second place, that the license under which the respondents profess to act, confers no authority even upon the licensee therein named to manufacture any of the articles specified in the bill of complaint.

The first proposition of the complainants, in the judgment of this court, cannot be sustained, because the patentee expressly reserved to himself, his heirs, executors, administrators, or assigns, the right to sell for a stipulated price or sum, in gross, the exclusive right for the unexpired period or periods, for which the same may be vested in him or them, of making, using, or vending said preparations or improvements, or of applying the same to or for any specified purpose or purposes only, or to and for all the purposes and uses to which said improvements may be adapted or applied. The legal effect of the proviso following the reservation is not, in the judgment of this court, to render the reservation void, but only to impose upon the party granting the license, the obligation to extend the pre-emption right of purchase to the licensees, and in case of non-compliance with his agreement, to render him liable in damages.

Granting all that, still I am of the opinion that the complainants must prevail upon the second ground. The respondents' license, or the one under which they claim to act, authorizes the licensee therein named, to use the inventor's metallic gum-elastic composition for coating cloths, for the purpose of japanning, marbling, and variegate japanning; but there is not a word in it to justify the conclusion that it confers any authority to manufacture the articles which are the subject of controversy in this suit. Abund-

ant evidence appears on the face of the instrument, that it was intended to apply only to the particular style of goods therein mentioned and described. First, the licensee was to have a free license to use the described composition for coating cloths for the purpose of japanning, marbling, or variegate japanning. Second, he was to have all the right to make and dispose of the aforesaid japanned, marbled, or variegated cloths, in and so far as the patentee had obtained any rights, patents, or privileges. Third, the patentee covenanted not to dispose of concurrent rights to any other person or persons, for the manufacture of cloths for the purposes aforesaid. Fourth, the licensee was to pay at the rate of three cents per square yard of cloth japanned, marbled, or variegated as aforesaid. Fifth, he was to keep regular books of account of all manufactured cloths to be japanned. Sixth, the license closes with these words: "In the event of any improvement being made in the manufacture or composition of said gum-elastic for the aforesaid purposes, such improvements shall become the property of said Goodyear, and may be patented by him at his own expense, and for the use of the licensees, and his assigns, for the purposes aforesaid, according to the terms of this license, so far as said improvements may apply to the manufacture of japanned, marbled, and variegated cloths, as aforesaid."

For these reasons, I am of the opinion that the respondents, acting under that license, are restricted to the manufacture of cloths to be japanned, marbled, and variegated, as therein described, and that it confers no authority to manufacture any of the articles specified in the bill of complaint. Decree for complainants.

[NOTE. An appeal was then taken to the supreme court, and two motions were made,—the first by the appellees, to dismiss the appeal as not having been taken to the proper term; and the other by the appellants, to reduce the amount of the bond given on appeal. The opinion of the court was delivered by Mr. Chief Justice Chase, who said that although a decree was entered "as" of a prior date, the date of an order settling apparently the terms of a decree to be entered later, the rights of the parties in respect to the appeal are to be determined by the date of the actual entry of the final decree. He also said that security was not required in double the amount of the decree, but only that it be sufficient. 6 Wall. (73 U. S.) 153. The case was then heard on its merits, and the judgment was affirmed in an opinion by Mr. Justice Swayne. He said that, where a patent was granted to one executor, he could maintain a suit thereon as if he had been designated in the patent as trustee instead of executor. This is a specific grant by the government, and vests the legal title exclusively in him. In a reissue, the claim may be enlarged, or restricted so as to give it validity, and secure the invention. A process and the product may both be the subject of a patent, as being wholly disconnected, and independent of each other. 9 Wall. (76 U. S.) 788.

[For other cases involving these patents, see note to Goodyear v. Central R. Co., Case No. 5,563.]

Case No. 5,584.

GOODYEAR v. RUST.

[6 Blatchf. 229; 3 Fish. Pat. Cas. 456.] [1]

Circuit Court, D. Connecticut. Nov. 7, 1868.

PATENTS—HARD RUBBER—VULCANITE.

The use of the process described in the patent granted to Edward L. Simpson, for preparing hard rubber or vulcanite, is an infringement of the Nelson Goodyear hard rubber patent.

[Cited in Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co., 54 Fed. 679.]

This was a motion [by Henry B. Goodyear and others] for a provisional injunction to restrain the defendant [T. S. Rust], who was a dentist, from infringing letters patent reissued to Henry B. Goodyear, administrator of Nelson Goodyear, deceased, May 18, 1858, and more particularly referred to in the report of the case of Goodyear v. Berry [Case No. 5,556]. The defendant was using the Simpson rubber described in letters patent granted to Edward L. Simpson, October 16, 1866, the nature of which is set forth in the opinion of the court.

Charles F. Blake and Hubbard & Hyde, for plaintiffs.

Stephen D. Law and H. T. Blake, for defendant.

SHIPMAN, District Judge. The validity of this patent has been so often sustained by adjudications, that no question will be considered, in deciding the present motion, except that of infringement. The bill of complaint in this case is supported by affidavits, which clearly entitle the plaintiffs to the injunction prayed for, unless the defendant's proofs overcome or avoid their effect. The defendant works under the patent of Edward L. Simpson, and uses the compound made in accordance with the process described in that patent. The plaintiffs allege, that this process is clearly within the scope of Goodyear's invention, as described in his patent, and is, therefore, an infringement of their rights. This is denied by the defendant, and the question, so far as it is necessary for the determination of this motion, is now to be decided.

Avoiding all useless rehearsal of the details of this Goodyear patent, and of the repeated litigations to which it has been subjected, it may be briefly stated, that the process covered by it is secured by mixing about four ounces of sulphur and one pound of rubber, and subjecting this mixture to not less than from 260° to 275° of heat, Fahrenheit's scale. This, under proper conditions of place and time, produces the compound or substance known as "vulcanite,"

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 6 Blatchf. 229, and the statement is from 3 Fish. Pat. Cas. 456.]

a material now well known in the mechanic arts. The vital question involved in the present controversy, relates to the proportions of sulphur and rubber, and the degree of heat. Does the Simpson process substantially embrace these proportions and this degree of heat? If it does, then it is an infringement of the plaintiffs' rights.

The defendant denies that the Simpson process does embrace all these proportions, as effective agents or active forces in accomplishing the work of vulcanization. In support of this denial, he has adduced affidavits of distinguished chemists, who give a delineation of the elements which enter into Simpson's mixture and produce his vulcanite. It will be sufficient, in this place, to refer to the affidavit of Professor Seely, as that contains all the materials of the defence to this motion. Professor Seely says, that the substances used by Simpson in the preparation of his hard rubber, are sulphur, gum-benzoin, oil, and common rubber, and that his manner of using these substances, as set forth in his patent, is as follows: He mixes two ounces of benzoin with sixteen ounces of sulphur, and to sixteen ounces of this mixture he adds one quart of linseed oil. This mixture, of sulphur, benzoin, and oil is then subjected to the proper degree of heat, and the result is the substance which he calls his "vulcanizing compound." To make hard rubber, or vulcanite, he takes from ten to fourteen ounces of this compound and one pound of rubber, and thoroughly mixes them, by grinding between warm rolls. He then subjects this mixture of rubber and vulcanizing compound to a heat of 320° Fahrenheit. The result is a vulcanite.

Without rehearsing the details of the analysis presented by Professor Seely, it may be stated, that the quantity of this compound which is necessary to perfectly vulcanize one pound of rubber, contains, in some form, not much less (to use the language of Goodyear's specification) than four ounces of sulphur. In other words, this amount of sulphur goes into this quantity of the compound, and forms one of its original elements. About half of this sulphur chemically combines with the oil, and forms what Professor Seely calls "vulcanized oil," and the other half exists, in the mass of vulcanized oil, in the form of free sulphur. Vulcanized oil alone, when mixed with rubber, will not vulcanize the latter, according to the evidence before me. Professor Seely says: "The effect of vulcanized oil, on mixing and heating with rubber, is not at all chemical. The rubber does not, in any chemical sense, become vulcanized. Whatever advantage there be in the use of vulcanized oil with rubber, must be wholly due to physical and molecular causes, and cannot be accounted for on any theory of vulcanization based on Goodyear's processes. A quantity of vulcanized oil containing four, or even sixteen, ounces of sulphur, may be mixed and heated with one pound of rubber, and not an atom of Goodyear's hard rubber can be produced." He then goes on to say: "Simpson's compound is composed of vulcanized oil and free sulphur. When the compound is rolled and heated with rubber, the free sulphur, no doubt, acts upon the rubber with its full efficiency; and, in estimating the vulcanizing, or hardening, properties of the compound, the value of the free sulphur, if any, must be conceded. It is, therefore, necessary to compute the amount of free sulphur in Simpson's compound." This computation he then proceeds to make, and the result is, as I have stated—one-half of the sulphur is combined with the oil chemically, and the other half remains free, or, as Professor Silliman expresses it, is "entangled in the mass of this compound." Professor Seely says, of this compound: "The free or effective sulphur is exactly one-half of the whole contents of sulphur." What part the benzoin plays in the compound does not appear from the evidence. But I gather, from Simpson's specification, that "its vaporizing qualities more perfectly expel the fumes of the sulphur, as well as the odor from the oil, and render the compound nearly, if not perfectly, odorless." In the performance of this office, it may be an improvement on Goodyear's process.

It is conceded, then, that vulcanized oil (oil and sulphur chemically combined) will not produce, when mixed with rubber and heated, vulcanite. There is no proof that the benzoin renders the vulcanized oil any more effective as a vulcanizing agent. It is equally conceded, by the defendant's evidence, that the quantity of free sulphur in Simpson's compound cannot alone vulcanize. It is asserted that the vulcanized oil, and the free sulphur scattered through it, do successfully vulcanize, whenever the mass of compound applied to one pound of rubber contains, in the whole, not much less than four ounces of sulphur in all, free and combined. Such a proportion of the mass to the pound of rubber is necessary to comply with the conditions of Simpson's patent. We have, then, Goodyear's invention, which consists in combining not much less than four ounces of sulphur, with one pound of rubber, and submitting the same to not much less than 260° to 275° of heat, Fahrenheit's scale. We have Simpson's process, which consists in combining not much less than four ounces of sulphur, with one pound of rubber, and subjecting the same to a heat of 320°, Fahrenheit's scale. The distinction which is sought to be made between these two compositions, or processes, is founded upon the claim that, in Simpson's one-half of the sulphur is first chemically combined with oil, forming a new substance termed vulcanized oil, and, while there, though acting in the same mass with the remaining half of the sulphur, as an auxiliary vulcanizing agent, acts in a

different way from the free sulphur itself. In other words, half the quantity of sulphur necessary to vulcanize under Goodyear's process, has disappeared, and exists no longer, except as it is represented in a new chemical substance called vulcanized oil. The other half remains. But neither the half that remains, nor any quantity of the new agent, can alone vulcanize. Yet the two, acting together, at once perform this important office, and produce the same result as Goodyear's combination.

I have said that it appears, from the evidence, that the chemically combined elements of the compound of Simpson will not alone, when mixed with rubber, and heated, produce vulcanite. I infer this from the language already cited from Professor Seely's affidavit, where he says: "A quantity of vulcanized oil containing four, or even sixteen, ounces of sulphur may be mixed and heated, with one pound of rubber, and not an atom of Goodyear's hard rubber can be produced. Simpson's compound is composed of vulcanized oil and free sulphur." I have not failed to notice that the language is, that the vulcanized oil, in combination with the rubber, will not produce "an atom of Goodyear's hard rubber." But, as the whole scope and direction of the defence are aimed at establishing a distinction between the processes, and not between the products, I can come to no other conclusion than that the compound alone, if destitute of free sulphur, would not, when mixed with rubber, perform the office of vulcanization. It is true, that the compound when made according to the patent of Simpson, always contains one-half of the sulphur in a free state, but it is agreed, on all hands, that this amount of free sulphur alone will not vulcanize. So the evidence, in whatever light we view it, proves that that portion of the compound which contains the elements in chemical combination is powerless, without the aid of the uncombined free sulphur, which is scattered through the pores of the combined mass.

Now, it may be asked, how do these two agents, namely, vulcanized oil and free sulphur, perform, by their united forces, the work of vulcanization? No part of this work is assigned, by the evidence, to the benzoin. It cannot be done by the chemically combined oil and sulphur alone. It cannot be done by the free sulphur alone. The latter, to the extent of its effective power, for all that appears in this case, works in the same way that it does in Goodyear's process. The effect of the former, (oil and sulphur chemically combined,) Professor Seely says, is not chemical, but "must be due wholly to physical and molecular causes." But, whether the auxiliary vulcanizing force, whatever it is, exerted by the chemically combined oil and sulphur, is supplied by the latter or not, does not appear by the proof. From what has long been known, however, of the vulcanizing power of sulphur, when mixed with rubber, and heated, that agent, though combined with another substance, would naturally be looked to as the seat of this force. It may be true that, as Professor Seely says, the effect of vulcanized oil, in hardening rubber, is due not to chemical, but "to physical and molecular causes." Of the nature or significance of this distinction, in the scientific sense, I do not presume to speak. But I do not see how this fact avoids Goodyear's patent. I do not find, in his specification, any evidence that he rested his invention upon any such nice scientific distinction, or that he limited his claim to sulphur, when working through chemical, as distinguished from physical or molecular laws. If the validity of his patent rests upon such a scientific problem as this, I think its solution should, in the present case, be left to final hearing. The suggestion of such a problem, in ex parte affidavits, at a very late stage of a series of protracted litigations, in which every other defence has thus far failed, is not a valid answer to this motion. There can be no question that Simpson uses a degree of heat within the scope of Goodyear's patent. Let an injunction issue.

[For other cases involving this patent, see note to Goodyear v. Mullee, Case No. 5,577.]

Case No. 5,585.

GOODYEAR v. TOBY.

[6 Blatchf. 130.] [1]

Circuit Court, N. D. New York. May 1, 1868.

PATENTS—BILL IN EQUITY—PLEA—WANT OF CERTIFICATE AND AFFIDAVIT—WAIVER — INFRINGEMENT—WHETHER ALL WRONG-DOERS ARE NECESSARY PARTIES.

1. Where, in a suit in equity, a plea to the bill is filed, unaccompanied by any certificate of counsel, or any affidavit of the party, as required by the 31st equity rule, and the plaintiff, instead of disregarding the plea, or moving to take it from the files, or setting it down for argument, files a demurrer to it, and the cause is then regularly brought to argument, on the question of the sufficiency of the plea, the want of the certificate and affidavit must be regarded as waived by the plaintiff.

[Cited in Filer v. Levy, 17 Fed. 610.]

2. To a bill against a single defendant, alleging the infringement of a patent, by sales by him of the patented article, a plea was filed alleging that the sales were not made by the defendant alone, but were made by him and another person named in the plea: *Held*, that the plea was bad, because it did not allege that such other person was yet living, and within the jurisdiction of the court.

3. Whether, in a suit in equity for an account, for the infringement of a patent, all joint wrong-doers are necessary parties defendant, quere.

This was a bill in equity, alleging the infringement of letters patent, by repeated sales of the patented article, and prayed for a discovery, for an injunction, and for an account of profits. The defendant [William B. Toby] filed a plea to the bill, alleging

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

that all such sales, made prior to a day specified, were made by a firm composed of the defendant and one Snow, as partners, and not by the defendant alone, or with his knowledge or consent; and that all sales subsequently made, were made by a firm composed of the defendant and one Worden, and not by the defendant alone, or with his knowledge or consent. The plaintiff [Henry B. Goodyear, administrator of Nelson Goodyear] filed a demurrer to the plea.

HALL, District Judge. There was not attached to, or filed with, the plea in this case, any certificate of counsel, that it was, in his opinion, well founded in point of law, or any affidavit of the party, that it was not interposed for delay, as required by the 31st equity rule. That rule provides, that no demurrer or plea shall be allowed to be filed, unless upon such certificate, and when supported by such affidavit; but the plaintiff, instead of disregarding the plea, or moving to take it from the files, and instead of setting the plea down for argument, according to the 33d equity rule, and the practice of this court, filed a demurrer to the plea, substantially in the form of a demurrer to a plea in a suit at law. As there is no joinder in demurrer among the papers submitted, it is possible that the counsel for the respective parties became aware that no demurrer, or joinder in demurrer, was necessary, in order to test the sufficiency of the plea.

It was urged, at the hearing, that the plea should be overruled, or, rather, that the demurrer should be allowed, because no certificate of counsel was filed with the plea, and, also, because the plea was not supported by an affidavit that it was not interposed for delay. But these irregularities cannot be made available on the present hearing. The cause was placed upon the calendar, and was regularly brought to argument, upon the question of the sufficiency of the plea, and this must be considered as equivalent to setting down the plea for a hearing, and as a waiver of any irregularity in the filing of the plea. These objections are, therefore, overruled.

The plea does not allege that Snow, or Worden, is yet living. This would seem to be a fatal objection to the plea, even if it should be conceded that these persons, if living, are necessary parties to the bill. Under the 47th equity rule, the want of proper parties is not a fatal defect, if the parties are out of the jurisdiction of the court; and it is quite clear, that, in order to constitute the fact of a want of parties a good defence, it should be shown by the plea that the persons alleged to be necessary parties, are alive and within the jurisdiction of the court.

It may well be doubted, whether, in the case of a bill for an account for an infringement of a patent, the plaintiff is bound to make all joint wrong-doers parties to his bill; for, if they are liable severally, as well as jointly, in equity, as they clearly are at law, the plaintiff may proceed against any one of them alone, under the 51st equity rule. But the objection before stated is fatal to the plea, and it is, accordingly, overruled and disallowed, with costs.

Case No. 5,586.

GOODYEAR et al. v. UNION INDIA RUBBER CO.

[4 Blatchf. 63.] [1]

Circuit Court, S. D. New York. June 30, 1857.

PATENTS—LICENSE—BILL IN EQUITY — ENFORCEMENT OF COVENANTS—JURISDICTION OF FEDERAL COURTS.

Where a license was granted under a patent, with covenants that the licensee should pay certain tariffs, and keep correct accounts, and permit his books to be examined, but there was no express provision that, if the covenants were broken, the rights granted should revert to the licensor, and a bill was filed by the licensor against the licensee, praying for a decree that the covenants should be performed, and for an injunction to prevent the use of the patent, under the license, until the covenants should be performed, and the citizenship of the parties did not give to the court jurisdiction of the suit: *Held*, that the subject-matter did not give the court jurisdiction; that the suit was not one to prevent the violation of any right of the licensor, secured by any law of the United States, within section 17 of the patent act of July 4, 1836 (5 Stat. 124), but was one to prevent the violation of the rights secured by the covenants; and that the court had no jurisdiction of the case.

[Cited in Merserole v. Union Paper Collar Co., Case No. 9,488; Magic Ruffle Co. v. Elm City Co., Id. 8,949; Dowell v. Griswold, Id. 4,041; Hartell v. Tilghman, 99 U. S. 554; White v. Lee, 3 Fed. 224. Applied in Teas v. Albright, 13 Fed. 412. Cited in Albright v. Teas, 106 U. S. 620, 1 Sup. Ct. 556.]

In equity. This was an application for a provisional injunction. Soon after the plaintiff Goodyear obtained his patent for vulcanized India-rubber, in the year 1844, he granted licenses to certain parties to manufacture certain kinds of India-rubber goods, the licensees covenanting to pay certain tariffs, to keep true accounts, to permit the licensor to inspect their books at all reasonable times, and to do certain other things. The rights originally granted by the licenses from Goodyear, became vested in the defendants, a corporation created by the laws of the state of New York, and located and doing business in the city of New York, who became bound to perform the covenants entered into by the original licensees. Goodyear, in December, 1856, transferred all his right to his patent, and all claim for tariffs against the defendants, and all other de-

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

mands against them, to the plaintiff Judson. No tariffs had been paid by the defendants for more than three years prior to the filing of the bill, and, for that time, they had refused to permit their books to be inspected. They urged that they had good reasons for not paying, and for refusing to permit their books to be inspected. The bill described the plaintiffs as "William Judson of the city of New York, and Charles Goodyear, a citizen of the United States, now residing in the city of London," and the defendants as "the Union India Rubber Company, a corporation created and established by the laws of the state of New York, and carrying on business within said state." The bill set out the patent; the assignment to Judson; the original licenses granted by Goodyear; the rights of the defendants under the licenses; the obligation of the defendants to pay the tariffs, and to perform all the covenants entered into by the original licensees; and their neglect and refusal. It prayed that the defendants might be decreed to render correct accounts of all the articles made under the licenses, and to pay over the tariffs stipulated to be paid, and to account for articles made in violation of the patent, and for the damages sustained by breaches of their covenants, and that, until they had so accounted and paid over such tariffs, they might be enjoined from manufacturing or selling any articles made by the use of the patent, the right to manufacture which had been granted by the licenses, and that they might be also enjoined from any further violation of the patent. There was, also, a prayer for general relief, and for a provisional injunction.

James T. Brady, for plaintiffs.

Francis B. Cutting and William Curtis Noyes, for defendants.

INGERSOLL, District Judge. Several important questions were presented on this motion, and elaborately argued by counsel. The view taken by the court of one of the questions, renders it unnecessary that the others should be considered, as the result arrived at in considering that one question, disposes of the case. That question is the question of jurisdiction. It is clear that the citizenship of the parties does not give the court jurisdiction. The parties plaintiffs are William Judson and Charles Goodyear. The defendants are the Union India Rubber Company. Judson is described as of the city of New York. Goodyear is described as a citizen of the United States, residing in London. The defendants are a corporation created by the laws of the state of New York, and located in the city of New York. The court, therefore, has no jurisdiction, unless the subject-matter of the bill gives jurisdiction; and it is insisted by the defendants that the subject-matter of the bill does not give jurisdiction.

By the constitution of the United States, the judicial power extends not only to controversies between citizens of different states, but also to all cases in law and equity, arising under the laws of the United States; and the 17th section of the patent act of July 4, 1836 (5 Stat. 124), under which it is claimed by the plaintiffs, that the court has jurisdiction, provides "that all actions, suits, controversies and cases, arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as at law, by the circuit court of the United States, or any district court having the powers and jurisdiction of a circuit court; which courts shall have power, upon a bill in equity filed by any party aggrieved, in any such case, to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any inventor, as secured to him by any law of the United States."

There can be no violation of any right secured to a patentee under a law of the United States giving to him the exclusive right to use the thing patented, provided such thing patented is used by a licensee under a license or grant made by the patentee, upon such licensee's entering into a covenant that he will do certain things, so long as the license or grant remains in full force. If such licensee uses the patented invention beyond the limits of the license or grant, or in a way not authorized by the license or grant, then there has been a violation of a right secured to the patentee under a law of the United States giving to him the exclusive right to use the thing patented, although such licensee performs, according to their terms, all the covenants entered into by him. If such licensee uses the patented invention within the limits of the license or grant, and performs the covenants which he has entered into, there is no violation of any of the patentee's rights of any kind. If, in the use of the thing granted, the licensee does not perform his covenants, although there is, by such non-performance, a violation of the rights of the patentee, such violation is not a violation of the rights of the patentee as secured by a law of the United States, but a violation of his rights as secured by the covenants. He has, by the license or grant, parted with a portion of that which was secured to him by the laws of the United States, and has, in lieu thereof, taken a right secured by a covenant. If a patentee parts with the whole right secured by his patent, either for cash, or upon the purchaser's entering into a covenant to pay him a certain sum of money, or to do certain other things, the patentee has, after such sale, no right vested in him secured by any act of congress. A suit to enforce the covenants would not be a case arising under a law of

the United States. The use of the whole thing sold cannot be a violation of any rights of the patentee secured by the laws of the United States, so long as the deed of sale remains in full force, for he has parted with all such rights. And, when a portion of the right is parted with, the rule must be the same, as it respects such portion.

The weight of authority in adjudged cases, sustains the view thus taken of this question. The case of Woodworth v. Weed [Case No. 18,022], decided in 1846, was an application for an injunction. The plaintiff had granted to the defendant a license to construct and use one of the Woodworth planing machines, for which the defendant agreed to give, and did give, five several promissory notes, in all amounting to four hundred dollars, the defendant agreeing that, if either of said notes was not paid when it fell due, then the license and permission should be void, and the same should revert to the plaintiff. There is no such express stipulation in the licenses granted by Goodyear, under which the Union India Rubber Company claim. A bill was brought to enjoin the defendants from using the machine licensed, and the court ordered that an injunction should issue, as prayed for, unless the defendant paid the notes in sixty days. In that case, no exception was taken to the jurisdiction of the court. The bill charged that the license had become void, and that, according to its terms and conditions, the defendant had no longer any right to use the machine, and prayed for an injunction to restrain its use. There was no prayer for the payment of the notes. The court say: "From the terms of the agreement, the license was forfeited the moment one of the notes became due and unpaid, and it was optional with the plaintiff to resort to his remedy at common law, to enforce the collection of the notes, or to treat the rights of the defendant as forfeited under the stipulation in the agreement." The plaintiff chose to do the latter, and not to seek payment for the notes.

The case of Wilson v. Sherman [Id. 17,833], decided in June, 1850, was also a bill for an injunction against a license under the Woodworth patent, to restrain him from the further use of the machines licensed. The only ground of objection urged by the defendant's counsel to the jurisdiction of the court was, that the machines complained of were in another judicial district. The jurisdiction of the court was sustained. It appears, from the opinion of the court, that, as in the case of Woodworth v. Weed [supra], one of the conditions annexed to the grant of license had been violated, and that, according to its terms and spirit, all right and title to use the machines licensed had become forfeited. The complaint in that case was that the defendants had done that which by the license they had no right to do. The complaint in the case now under consideration is, that the defendants have neglected to do what they ought to have done.

In the case of Goodyear v. Day [Case No. 5,568], decided in October, 1850, it was held that the court had no jurisdiction of the case as presented by the bill, and that the subject-matter contained in the bill gave the court no jurisdiction; and, as the court had no jurisdiction in consequence of the citizenship of the parties, the bill was dismissed. There was no prayer in that bill that the defendant be enjoined from using the patent, unless such prayer was comprehended in the general prayer for relief. The prayer was, that the defendant be enjoined from violating the covenants which he had entered into, to pay tariffs for the license to use certain patent rights, and for an account. In that case, it was attempted by the plaintiff's counsel, to sustain the jurisdiction on the ground that the suit was brought under the patent act, and that the gravamen laid was the infringement of patent rights. But that attempt failed.

The case of Brooks v. Stolley [Id. 1,962], decided in 1845, was a bill in favor of the licensor of a patent right, against a licensee. The ground of complaint was, that the licensee had violated the covenants which he had entered into upon the granting of the license, the keeping of which covenants, it was claimed, was a condition to the grant. There was a prayer for an injunction against using the machine licensed, and a conditional one was granted. An exception was taken, that, as both parties were citizens of the same state, the court had no jurisdiction. But the jurisdiction was sustained, on the ground that the subject-matter of the bill gave jurisdiction.

If there be any doubt, on the cases above referred to, as to the weight of authority upon the question now under consideration, all such doubt is removed, after an examination of the case of Wilson v. Sandford, 10 How. [51 U. S.] 99. That case was subsequent to the cases of Goodyear v. Day, and Brooks v. Stolley [supra]. The bill in Wilson v. Sandford was for an injunction, and appears to have been, in substance, very like the bill in the present case. It was brought by a licensor of a patent right against a licensee. The license was given upon the payment of $1400, to wit, $200 in cash, and the remainder in notes; and the complaint was, that the notes had not been paid. There was a provision in the license, that, if the notes or any of them were not paid at maturity, then all the rights granted by the license should revert to the licensor, who should be reinvested in the same manner as if the license had not been made. The notes were not paid. The licenses in the present case contain provisions that the licensees shall pay certain tariffs, and keep correct accounts, and permit their books to

be inspected at all reasonable hours; and the complaint is that the defendants have not paid the tariffs, and have not kept true accounts, and have not permitted their books to be examined. There is no express provision in their licenses, that if they do not keep their covenants, the rights granted by the licenses shall revert to the licensor. The court, in the case in 10 Howard, say: "The dispute in this case does not arise under any act of congress, nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles."

In the case of Hartshorn v. Day, 19 How. [60 U. S.] 211, the court, in commenting on the effect upon a license, of the nonperformance, by the licensee of a patent right, of covenants made by him, say: "The payment of the annuity" (covenanted to be paid) "was not a condition to the vesting of the interest in the patent in Judson, and, of course, the omission or refusal to pay, did not give to Chaffee" (the patentee) "a right to rescind the contract, nor have the effect to remit him to his interest as patentee." "The remedy for the breach could rest only upon the personal obligation" of the covenantor. The weight of authority, therefore, in the federal courts, is clearly, that this court has no jurisdiction of the case now under consideration.

The decisions of state courts sustain these views. The jurisdiction of the circuit courts in cases arising under the patent laws, without regard to the citizenship of the parties or the amount in controversy, is exclusive. Curt. Pat. § 496. State courts have no jurisdiction to entertain a suit, either in law or equity where the gravamen laid, is the infringement of patent rights. Dudley v. Mayhew, 3 Comst. [3 N. Y.] 9. But, in the case of Rich v. Atwater, 16 Conn. 409, which was a bill to enforce, by injunction, the rights of the plaintiff under a special agreement made, upon a license given to the defendant, to use the patented invention, it was held that the court had jurisdiction; that such a suit was not a suit which, by the patent law, belonged to the federal courts; and that the gravamen was the breach of a contract. The gravamen, in this case, is the breach of a contract. Without such breach, there would be no pretence of the violation of any of the plaintiffs' rights. Jurisdiction is not given to the circuit court, by the patent act, of all suits where patent rights are the subject of inquiry. An action for fraud in the sale of a patent right is cognizable by the state courts. Cognizance of such an action is not given to the circuit court by the patent act. Peck v. Bacon, 18 Conn. 377. With this view of this question, the motion must be denied, for want of jurisdiction.

Case No. 5,587.

GOODYEAR et al. v. WAIT.

[5 Blatchf. 468; 3 Fish. Pat. Cas. 242.][1]

Circuit Court, S. D. New York. Sept. 18, 1867.

PATENTS—HARD INDIA RUBBER — PATENTABILITY OF BOTH PRODUCT AND PROCESS—CLEARNESS OF DESCRIPTION.

1. The original letters patent granted to Nelson Goodyear, May 6th, 1851, for his invention in connection with what is known as "hard India rubber," was a patent for the process and not for the product.

2. The reissued patents granted May 18th, 1858, on the surrender of such original patent, are both of them valid, although one is for the process and the other for the product.

3. Those patents are not open to the objection that they do not describe the invention in such full, clear and exact terms, as to enable any one of ordinary skill in the art to make the hard rubber without experiment or further invention; nor to the objection that, so far as respects the application of the compound to dental purposes, it has been dedicated to the public.

[Cited in Fassett v. Ewart Manuf'g Co., 58 Fed. 364.]

This was a bill in equity, filed [by Henry B. Goodyear and others] to restrain the defendant [Thomas G. Wait] from infringing letters patent [No. 8,075] for an "improvement in the manufacture of India rubber," granted to Nelson Goodyear, May 6, 1851, reissued in two divisions numbered 556 and 557, May 18, 1858, and extended for seven years from May 6, 1865, to Henry B. Goodyear, administrator of Nelson Goodyear, deceased. The defendant was charged with infringing the patent in the manufacture and sale of plates for artificial teeth, substantially as in the case of Goodyear v. Hills [Case No. 5,571a].

Charles F. Blake, Charles M. Keller, and Edwin W. Stoughton, for complainants.

S. D. Law and George T. Curtis, for defendant.

NELSON, Circuit Justice. The bill is filed in this case to restrain the defendant from an infringement of the invention of Nelson Goodyear in the manufacture of hard rubber or vulcanite. The patent is for an improvement in the process of Charles Goodyear in preparing India rubber. (See his patent, reissued in December, 1849, on the surrender of the one bearing date in June, 1844). The improvement consists in thoroughly mixing the rubber with sulphur, in the proportion of from four ounces to a pound of sulphur to a pound of rubber, and then subjecting the same to a high degree of heat, as in the vulcanizing process of the said Charles Goodyear, until the compound shall have acquired the required hard and tough property found in ivory, bone, tortoise-shell, and horn, and the spring-like prop-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 5 Blatchf. 468, and the statement is from 3 Fish. Pat. Cas. 242.]

erty, under flexure, found in whalebone. The degree of heat suggested is not less than from 260° to 275° of Fahrenheit's scale, in a steam or other heater, for about six hours or more, that is, until the compound substance has obtained the required degree of hardness. The first patent to Nelson Goodyear was issued May 6th, 1851. It was surrendered and reissued May 18th, 1858, for a defective specification. On the surrender, two patents were issued, one for the process, and the other for the product or new manufacture.

The defendant is charged with having been engaged in making, using, and selling a large amount of such hard rubber as is described in the patents, for dental purposes, that is, in the manufacture of plates for artificial teeth, and in the sale of the same, made partly with and from the rubber aforesaid.

The first objection taken to the patents is, that they are void for want of authority in the commissioner to issue them. It rests mainly on the ground, that both the process and the product, which were described in the original patent, both being new, constituted but one invention, and that the claim for either, in a patent, would protect the exclusive right to both. The argument is certainly ingenious, and, in connection with the decision of Judge Grier in the case of Goodyear v. Central R. Co. [Case No. 5,563], is entitled to consideration. It was there held, at the circuit, that the new process of Charles Goodyear in vulcanizing India rubber, embraced the new product, and that the claim for the former protected the latter; and it is insisted, on the part of the learned counsel, that the rule applies e converso, that the claim for the product will cover and protect the process, and that, as the claim in the original patent was for the product, which covered and embraced within it the process, there could be no necessity for the surrender and reissue of the two patents. I think the counsel mistaken in supposing that the original patent claimed the product or substance. It was "for combining India rubber and sulphur, &c., for making a hard and flexible substance, &c., substantially as herein set forth"—a claim, I am strongly inclined to think, for a process instead of the product. But this does not affect the force of the argument, which is, that either claim excludes the other.

But the answer to this view seems to me conclusive. It must be admitted, as a general proposition, that a new process, producing a useful result or product, is patentable; and further, that a new composition of matter or substance which is useful is also patentable. Indeed, it is conceded that the rule is not applicable to the case of a new process producing an old and useful result. There, the process must be claimed, for the result or product, being old, cannot be. But it is insisted that it is otherwise if the product be new. I doubt the soundness of the distinction, and must hold that the inventor is entitled to the allowance of both claims, in either aspect. As it respects the decision in the case of Goodyear v. Central R. Co. [supra] I have reason to know that Judge Grier felt considerable embarrassment in making it, from which he would have been relieved if there had been a claim for the product or substance.

As to the separate patents, I agree that both claims might properly have been embraced in one patent. But this question is one that is very much left, and reasonably so, to the good sense and discretion of the commissioner. It is often a nice one, and occasions frequent embarrassment to the department, as I know from conversations with some of the most eminent men who have filled the place. My conclusion on this point is, that the original patent was properly surrendered, in order to amend the claim, and that its reissue in two patents was unobjectionable.

The next objection is, that the patents do not describe the invention in such full, clear and exact terms, as to enable any one of ordinary skill in the art, to make the hard rubber without experiment or further invention. This is partly a question of law, and partly one of fact.

First, as to the question of law. It must be remembered, that the invention in question is an improvement in the process of preparing India rubber, described in the patent of Charles Goodyear, which had been issued as early as 1844—a process well known to those skilled in the art at the time of the issuing of the original patent to Nelson Goodyear in 1851, and of the two reissues in 1858. The main difference between Charles Goodyear's patent and these consists in the different proportions of the mixture of rubber and sulphur. This new mixture by Nelson Goodyear, when vulcanized, produced a new substance, not only distinct from that of Charles, but applicable to entirely different and distinct uses and purposes. Now, the description must be read in the light derived from the knowledge that existed of the Charles Goodyear patent, his process, and the practical use of the same. In Charles Goodyear's patent, the least amount of sulphur mixed with the India rubber that would be sufficient to produce vulcanization, was regarded as the best proportion. Hence, the quantity did not usually exceed one ounce of sulphur to a pound of rubber. This produced what may be called the "soft vulcanized rubber," when compared with the invention in question, and best answered the uses and purposes to which it was applied by its inventor. Nelson Goodyear increased the proportion of sulphur, and produced his new substance, and, after referring to Charles Goodyear's invention, and the improvement desired, to wit, producing the article of hard rubber, declares the improvement to consist "in thoroughly mixing India rubber, or other vulcanizable gum, with sulphur, whether with or without auxiliary ingredients, in the proportion of about from four ounces to a pound of sulphur to a pound of the gum, and then sub-

jecting the same to a high degree of artificial heat, as in the vulcanizing process of Charles Goodyear, until the compound shall have acquired the required hard and tough property," &c. The range of heat given in the Charles Goodyear patent is from 212° to 350°, but, for the best effect, approaching as near as may be to 270°. The range given by Nelson Goodyear, in another part of his patent, is not less than 260° or 275° of Fahrenheit. He also states, that much latitude may be taken in the proportional quantity of sulphur, but that a proportion much less than four ounces to a pound of rubber would fail to produce the new substance.

This question is not a new one in court. It was very fully considered in the case, on the same patents, of Goodyear v. New York Gutta Percha & India Rubber Vulcanite Co. [Case No. 5,580], decided in October, 1862, and it was there held, that the description in the patents, both as respects the proportions of sulphur and rubber and the degree of heat to which the compound was to be subjected in order to produce the new substance, was sufficiently full and certain within the requirements of the patent law. The same question had been decided in the same way previously, in the cases pending on the Charles Goodyear patent of 1849. I do not intend to go over the argument again that led me to the conclusion then arrived at; but I will add, that the proofs in the present case, in my judgment, confirm the correctness of the former decisions. As already stated, the proportions of the mixture are about from four ounces to a pound of sulphur to a pound of rubber, which I understand as meaning, that any proportion of sulphur between four ounces and a pound to a pound of rubber, properly mixed and subjected to the required heat, will produce the substance. What uncertainty is there in this, or what necessity of experiment, on the part of a person of ordinary skill in the art, to make the compound? The inventive faculty is exhausted in the directions given to make the article. All the work that remains to be done is that by the hands of the skilful workman. I agree, that if it could be shown that the mixture, as described, when properly reduced to practice, failed to produce the article, the patent could not be upheld. But that is a different question from the one here presented, namely, whether the description is sufficiently clear and certain.

I have said that the proofs in this case tend to confirm what was my conclusion on this point when the patents were formerly before me. It appears, that the proportions of the ingredients composing the compound put on the market, by the proprietors of these patents, for dental purposes, were twelve parts in weight of rubber, and six of sulphur, with nine of vermilion, as coloring matter. Thousands of pounds per annum of this compound, have been sold to dentists throughout the United States, and it was and is regarded by them as the best article in the market, and has been in almost universal use since its application to dentistry. It is the article that has been used by some three thousand licensees, as well as by the infringers, perhaps a still greater number. One of the leading witnesses for the defendant thinks the best proportion to be sixteen ounces of rubber, eight and a half of sulphur, and seven of vermilion, nearly the proportions used by the plaintiffs. Another, Mr. Starr, a dentist of twenty-four years' standing, and familiar with the use of hard rubber for dental purposes, from its first application, thinks a quarter of a pound to a pound of rubber, with nine ounces of vermilion, the best. This adopts the minimum of sulphur given in the patent. Another, Mr. Wildman, a professor in a college of dental surgery, thinks that the proportions of forty-eight parts of rubber and twenty-four of sulphur, with thirty-six of vermilion (which reduced would be six parts of sulphur, twelve of rubber, and nine of vermilion) are best. This agrees with the plaintiff's article in common use. In every instance, the proportions are within the limit given by the patentee.

It seems to be supposed by many of the experts on the part of the defendant, that because the patentee has given a margin in the proportion of sulphur, it requires invention—experiments, as they call it—to find the exact proportion, although he instructs them to take any proportions within the limit mentioned, and, for aught that appears to the contrary, in the evidence, any such proportion would make the article. Most of the experts agree that the proportions may be varied, and yet a good article be produced, which shows, that if an exact and fixed proportion were given, and the inventor was to be confined to it, the patent would not be worth the paper on which it is written. The same observations are true as it respects the range of heat; and, in addition, the degree or prolongation of heat will oftentimes depend upon the thickness or bulk of the compound, and, perhaps, the amount of sulphur. But all this difficulty an intelligent workman will soon overcome, in the manufacture of the article. The heat is to be applied until the compound has acquired the requisite hardness. But I do not intend to pursue this point of the case, as I regard it concluded by the two decisions already referred to, so far as this court is concerned. As it respects the vermilion, or other coloring matter, the kind and quantity depend on the taste of the party using the compound. No definite rule could be given. The mixture does not vary the substantial uses of the article.

The next objection to the patents is, that, so far as respects the application of this compound to dental purposes, it has been dedicated to the public. I shall not enter upon the legal question which was so fully and ably discussed on the argument—whether or not such a dedication could be made—as,

upon a careful perusal of all the proofs in the case, I am satisfied that no such dedication, in point of fact, can be maintained.

The subject of the application of the compound of hard rubber to dental purposes engaged the attention of the proprietors as early as 1854–'55, and afterwards, in 1857–'58, the application to those purposes had become so far perfected that agencies were established, for the vulcanization of dental plates, in the city of New York, and elsewhere, and public notice was given of the same to the profession. Infringements were immediately commenced, and, among the first, by the firm of L. E. Christopher & Co. A suit was brought against that firm, for an infringement, by the American Hard Rubber Company, which then had acquired this interest in the patent; and circulars were issued to the dentists, notifying them of the infringement. The defendants sold out to E. A. L. Roberts, and left the city of New York, where they had resided. A suit was then commenced against Roberts, and, in October, 1859, an injunction was obtained against him. Other suits were also brought against infringers, who were enjoined. This company, besides issuing numerous circulars, proposing to vulcanize for dentists cases of teeth, issued a quarterly publication, called "The Vulcanite," which was commenced in May, 1860, and ended in May, 1862. The numbers of each quarter varied from as high as six thousand to as low as two thousand. These numbers were sent free to all the dentists in the United States whose addresses could be procured, and to all the dental depots, surgical instrument manufacturers, and dental colleges. I have the number for May, 1862, before me. Among other things, it contains a list of the names of the agents of the company, located in different parts of the country, with notice that the agents will furnish the compound to licensees only; and also a list, covering some five pages, closely printed, of licensees, residing in most of the states of the Union. The company also put into the market the compound, at various dental depots in many parts of the country, especially in the principal cities, which was made in sheets and put up in paper boxes, each box containing one pound, on the cover of which was a label, and which, among other things, stated, that "this gum is furnished to our agents, and others, on the express condition that it shall be sold only to our licensees." The company further, at the same time, employed traveling agents, who visited the dentists at their homes, for the purposes of selling rights under the patent, and who succeeded in selling some three thousand. It is proper, also, to remark, that nearly all of the compound used by dentists in the city of New York, and elsewhere, was purchased by them from the depots of the company, in boxes having this label upon them. The defendant, who was a witness in his own behalf, admits that he purchased his compound in boxes, at S. S. White's depot, and that it was put up by the American Hard Rubber Company, and contained the label above mentioned. This was one of the company's depots. He admits, also, that there was a restriction on the sale of the compound, but says that he could always procure it, though not a licensee. He further admits, that, in 1864, he was called on to take out a license; that he replied that there was great dissatisfaction, among the dentists, at the way the company had managed, and that the licensees were not protected; and that he offered to take out a license if the company would protect him, and prevent infringers from using the compound at the next door. He admits, also, that he saw the circulars issued by the company, warning against infringements; that he saw several numbers of the publication called "The Vulcanite;" that they were left at his office; and that he saw in them articles on the subject of vulcanizing dental plates. He also recollects the suit against Roberts, and one against Toland, a dentist, in 1861.

I could extend this opinion much further, in referring to proofs all tending to show great and extraordinary exertions, on the part of the proprietors of this branch of the patent, to get the article into common use, and to prevent piracies, by means of litigation, and otherwise; but I regard the examination that has already taken place as quite satisfactory to show that no dedication or abandonment of their right has been established, and especially, none as respects the present defendant. His own testimony is abundantly sufficient to repel the conclusion as to himself. There must be a decree for the plaintiffs, and a reference, with a permanent injunction.

[For other cases involving this patent, see note to Goodyear v. Mullee, Case No. 5,577.]

GOODYEAR (WARNER v.). See Case No. 17,183.

GOODYEAR v. WINGERTER. See Case No. 5,573.

Case No. 5,588.

GOODYEAR & N. E. CAR-SPRING CO. et al. v. ELASTIC CAR-SPRING CO.

[Nowhere reported; opinion not now accesible.]

GOODYEAR DENTAL VULCANITE CO. v. BENJAMIN. See Case No. 5,597.

GOODYEAR DENTAL VULCANITE CO. (CELLULOID MANUF'G CO. v.). See Case No. 2,543.

Case No. 5,589.

GOODYEAR DENTAL VULCANITE CO. v. DAVIS et al.

[3 Ban. & A. 115;[1] 12 O. G. No. 14, p. 1.]

Circuit Court, D. Massachusetts. Oct. 5, 1877.[2]

PATENTS—IMPROVEMENT IN ARTIFICIAL GUMS AND PALATES—CELLULOID AND VULCANITE PLATES—INFRINGEMENT.

1. The decision of the supreme court in Smith v. Goodyear Dental Vulcanite Co. [93 U. S.] 486, must be considered as final, not only as to the validity, but as to the construction, of the Cummings patent for an improvement in artificial gums and palates.

2. The article patented by Cummings being a set of artificial teeth, consisting of a plate of hard rubber or vulcanite, with teeth, or teeth and gums, secured thereto in the manner described in the patent, by embedding the teeth and pins in the vulcanizable compound, so that it should surround the teeth and pins while the compound is in a soft state, before it is vulcanized, and so that, when the compound is vulcanized, the teeth are firmly secured by the pins embedded in the vulcanite, and there is a tight joint betwen the vulcanite and the teeth: *Held*, that a corresponding plate of celluloid instead of vulcanite does not infringe the patent.

[Cited in Goodyear Dental Vulcanite Co. v. Preterre, Case No. 5,596.]

[See note at end of case.]

3. To infringe the patent there must be an equivalent of the plate of hard rubber made and manipulated by a process equivalent to the described process of compounding a gum with sulphur, and applying it, and moulding it, and incorporating it with the teeth and gums when in a soft state, and then subjecting it to heat to harden and vulcanize it.

4. The court prefers to adopt that construction which, although limiting the scope of the claim, secures to the inventor all that he actually invented and no more, rather than to adopt one which would render the patent invalid, or one which, being broader than the invention, would be a barrier in the way if future progress and invention.

[This was a bill in equity by the Goodyear Dental Vulcanite Company against Charles G. Davis and 67 other defendants for alleged infringement of certain patents.]

Edward N. Dickerson and Benjamin F. Lee, for complainants.

William D. Shipman, Henry Baldwin, Jr., and E. Luther Hamilton, for defendants.

SHEPLEY, Circuit Judge. The patent and its reissues granted for the invention of John A. Cummings of "an improvement in artificial gums and palates," or, as described in the claim, "the plate of hard rubber or vulcanite, or its equivalent, for holding artificial teeth or teeth and gums, substantially as described," have been the subject of extensive and prolonged litigation. Since the affirmance by the supreme court of the United States in Smith v. Goodyear Dental Vulcanite Co. [93 U. S.] 486, of the decree of the circuit court in the test case of Goodyear Dental Vulcanite Co. v. Smith [Case No. 5,598], the validity of the reissued patent has been fully established. The decision of the supreme court in that case must be considered as final, not only as to the validity, but as to the construction of the patent, which was carefully considered in that case, both in the circuit and the appellate court, as it had previously been in the Wetherbee and the Gardiner Cases [Cases Nos. 3,810 and 5,591].

In the case of Goodyear Dental Vulcanite Co. v. Smith [supra], in the First circuit, this court decided that the patent was not for a process or art, but for the new product resulting from the manipulation by the described new process, and for one of those products in which the process so inheres that the described product can only be made by the described process, and that the invention was one in which the process by which it is made is a part of the substance, the thing made, the manufacture. What the new product was, and wherein the novelty consisted in the process, we shall hereafter have occasion to consider. In the opinion (by Mr. Justice Strong) in the supreme court in the same case the invention patented is thus described: "The invention, then, is a product or manufacture made in a defined manner. It is not a product alone separated from the process by which it is created. The claim refers in terms to the antecedent description, without which it cannot be understood. The process detailed is thereby made as much a part of the invention as are the materials of which the product is composed."

If the defendants, by practising the process described by Cummings, using the materials described by him, or such materials as are equivalents and were known equivalents at the date of his invention, in the described process, or such as, in the process, are mere substitutes of one material for another without any change in the process or in the effect, have produced a product the equivalent of his in the described properties and for the described functions, then, and only then, have they infringed.

The product, the new article of manufacture patented, was a set of artificial teeth, consisting of a plate of hard rubber or vulcanite, with teeth or teeth and gums, secured thereto in the manner described in the patent, by embedding the teeth and pins in the vulcanizable compound, so that it should surround the teeth and pins while the compound is in a soft state before it is vulcanized, so that when the compound is vulcanized the teeth are firmly secured by the pins embedded in the vulcanite, and there is a tight joint between the vulcanite and the teeth. This product was a new product, not alone because it substituted one material for another, the material, vulcanite, rigid enough for purposes of mastication, yet pliable enough to yield a little to the mouth, and at the same time light and inexpensive, in place of the hard, unyielding, expensive and heavy metals previously

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

[2] [Affirmed in 102 U. S. 222.]

used, but also in the additional fact that it was made by a process which, taken as a whole, was a new process, by the use of which process "the teeth can easily be baked into the gums, which form one piece with the plate."

The next question to be considered is, what was there new in the described process. The whole process of forming and making a set or case of teeth, including the plate, gums and teeth, is fully described in the Cummings patent, and this process is so fully described in the case of Goodyear Dental Vulcanite Co. v. Smith [supra] that it becomes unnecessary to repeat it here. It is sufficient to state that in view of the state of the art there was nothing substantially new in that process until we reach this part of the description: "The teeth are provided with pins projecting therefrom in such manner that the rubber which is to constitute the plate will close around them, and by means of them hold or secure the teeth permanently in position. The plaster-mould, with the teeth adhering therein, as just described, is now filled with soft rubber, a little at a time, pressed in with the finger, or in any other convenient way; and care is to be taken that the rubber is made to completely fit into the cavities and around the protuberances, including the pins, and is filled in to the thickness or depth desired to form the plate. I then lock the rubber plate in position by shutting the other half of the plaster-mould over it to insure its retaining its exact form while warming, and then heat or bake it in an oven, or in any other suitable way. The soft rubber or gum, so inserted in the mould, is to be compounded with sulphur, rubber, etc., in the manner prescribed in the patent of Nelson Goodyear, dated May 6th, 1851 [No. 8,075], for making hard rubber, and is to be subjected to sufficient heat to vulcanize or harden it, substantially as directed in that patent. It is also to be colored in imitation of the natural gums, by mixing it with vermilion, or other suitable coloring matter, while in the soft state. After the plate has been heated sufficiently to harden it or convert it into hard rubber or 'vulcanite,' so called, the mould is removed and the plate is polished ready for use."

It will thus be seen that an essential element of the described product is "a plate of hard rubber or vulcanite," in which the teeth are embedded; and an essential ingredient in the described process is the soft rubber or gum, compounded with sulphur, rubber, etc., in the manner prescribed in the patent of Nelson Goodyear for making hard rubber, and that an essential step in the described process is the subjecting the compound of soft rubber or gum with sulphur "to sufficient heat to vulcanize or harden it, substantially as described in that patent," (i. e. the patent of Nelson Goodyear, of May 6, 1851.)

The equivalent of that product thus made by that process must, therefore, contain the equivalent of the plate of hard rubber, made and manipulated by a process equivalent to the described process of compounding a gum of sulphur, and applying it, and moulding it, and incorporating it with the teeth and gums when in a soft state, and then subjecting it to heat, to harden and vulcanize it, in the manner described in the Goodyear patent, or in some equivalent manner, or by some equivalent process.

The defendants use, in making their set of artificial teeth, a plate made of "celluloid," substantially a new material, discovered and patented since the date of the Cummings invention. This substance is compounded of cellulose, or vegetable fibre, and camphor. No rubber or other equivalent gum, and no sulphur or equivalent for sulphur in the process, enter into its ingredients. It is not a vulcanizable compound, and contains no vulcanizing agents in its composition. The camphor in its composition, instead of being a vulcanizing agent, causes the composition to soften instead of harden under the influence of heat. The product when compounded, and before being subjected to heat, is not soft, like soft rubber under like conditions, but hard. In the manipulation of this material, the process of making a set of teeth, composed of the plate and teeth and gums, is an entirely different process from the process described in the Cummings patent, when compared with that part of the Cummings process which was new in the state of art, and the novelty of which part gave to the Cummings process, when considered as a whole, the ingredient of novelty and patentability. It is not placed in the mould in a soft, plastic condition, "a little at a time, pressed in with the finger, or in any other convenient way," but in a hard, rigid condition, like horn, or bone or ivory. It is then subjected to heat, not to vulcanize or harden, but to soften it. It afterward, on being cooled or restored to its original temperature, returns to its original condition as a hard substance, as when first placed in the mould. No vulcanizing process, or even process of hardening by heat, and no equivalent for any such process, is practised. In the light of these comparisons it appears evident to the court that the use of celluloid in the manufacture of sets of artificial teeth, as practised by the defendants, and the manufacture itself, the set or plate of teeth, differ as much, both as to process and product, from the process and product described and claimed in the Cummings patent, as that process and that product differed from those previous manufactures which existed before the Cummings invention, and were unsuccessfully relied upon as anticipating it.

It is true that this construction of the dental vulcanite patent narrows the scope of the patent. It is urged, with much force, that if this be the true construction, it would follow that if an inventor invented at the

same time a new process and a new product, he would, by such a construction of his patent, lose the benefit of it, unless the infringer used his process or an equivalent one, to produce his product or an equivalent one. One answer to this objection is that in the case supposed the inventor might patent both the new process and the new product, and thus fully protect himself. In its application to this case it is believed that the objection is without force, for the reason that such a construction of the claim of this patent is the only one which makes the claim a valid claim. To abandon the construction which makes the product patented the new manufacture, when made by the described process, is to abandon that which gives it its vitality. It is better to adopt that construction which, although limiting the scope of the claim, secures to the inventor all that he actually invented and no more, than to adopt one which would render the patent invalid, or one which, being broader than the invention of the patentee, would be a barrier in the way of future progress in discovery and invention.

[NOTE. Upon the dismissal of the bill an appeal was taken to the supreme court by the complainant, and the judgment was affirmed in an opinion by Mr. Justice Strong, who said that a plate made out of celluloid is not an infringement of this patent, as the latter contemplates a plate of hard rubber or vulcanite, and celluloid is not vulcanizable. 102 U. S. 222.

[Patent No. 43,009 was granted to J. A. Cummings, June 7, 1864; reissued January 10, 1865 (No. 1,848); again reissued March 21, 1865 (No. 1,904). For other cases involving this patent, see note to Dental Vulcanite Co. v. Wetherbee, Case No. 3 810; also Celluloid Manuf'g Co. v. Goodyear Dental Vulcanite Co., Id. 2,543.]

GOODYEAR DENTAL VULCANITE CO. v. DICKINSON. See Case No. 5,594.

Case No. 5,590.

GOODYEAR DENTAL VULCANITE CO. et al. v. FLAGG.

[9 O. G. 153.]

Circuit Court, S. D. New York. 1876.

PATENTS—VULCANIZED RUBBER—WHAT IS AN INFRINGEMENT THEREOF.

1. The courts have determined that the construction to be given plaintiff's patent was India rubber "and the compounds commonly employed therewith reduced to a soft plastic state, capable of vulcanization, and subsequently vulcanized."

2. In the process described by defendant, he does not use India-rubber, or any substance capable of vulcanization. The substance used by him is rendered plastic, and not hardened by heat.

[This was a bill in equity by the Goodyear Dental Vulcanite Company and others against Eben M. Flagg.]

E. N. Dickerson and B. F. Lee, for plaintiffs.

W. D. Shipman, C. A. Seward, and E. Luther Hamilton, for defendant.

BLATCHFORD, District Judge. I do not find that any decision has been made in regard to the plaintiff's patent, which gives to it such a construction as necessarily includes the process and substance used by the defendant. In the Gardiner Case the defendant did not compound India-rubber with sulphur, but he compounded India-rubber with iodine, and he employed heat to harden the rubber. Goodyear Dental Vulcanite Co. v. Gardiner [Case No. 5,591]. In the Smith Case the view of the court was that the material to be used under the plaintiff's patent in carrying out the invention patented was to be India-rubber, "and the compounds commonly employed therewith reduced to a soft plastic condition, capable of vulcanization and subsequently vulcanized." Goodyear Dental Vulcanite Co. v. Smith [Id. 5,598]. It appears from the description of the process used by the defendant in this suit that he does not use India-rubber or any substance capable of vulcanization; that the substance he uses is one which is rendered plastic by heat, and is not hardened by heat; that heat is used in the process to soften the substance and render it plastic, and not to harden it, and that the substance, after being molded, is hardened by being cooled. It is not sufficiently clear that this process is embraced in the claim of the plaintiff's patent to warrant the granting of an injunction until one is awarded as the result of a decree for the plaintiffs on final hearing.

Case No. 5,591.

GOODYEAR DENTAL VULCANITE CO. v. GARDINER.

[3 Cliff. 408; 4 Fish. Pat. Cas. 224.] [1]

Circuit Court, D. Rhode Island. June Term, 1871.[2]

LETTERS PATENT—PRIMA FACIE EVIDENCE—ABANDONMENT—VULCANITE—INFRINGEMENT—CORRESPONDENCE WITH PATENT OFFICE AS EVIDENCE—HOW PATENTS CONSTRUED.

1. When the complainant in a patent suit has introduced his letters patent in evidence, it affords a prima facie presumption that the alleged inventor was the original and first inventor of what is therein described as his invention. This is the case where the respondent is a patentee under letters patent subsequent in date which are also introduced in evidence.

[Cited in Page Woven Wire Fence Co. v. Land, 49 Fed. 937.]

[Cited in Burke v. Partridge, 58 N. H. 352.]

2. The patentee filed his caveat in 1853. During the period intermediate between the

[1] [Reported by William Henry Clifford, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 3 Cliff. 408, and the statement is from 4 Fish. Pat. Cas. 224.]

[2] [For disposition of case by supreme court, see note at end of case.]

filing of his caveat and his application for a patent the inventor was employed in making experiments and in perfecting his invention. The court *held*, that the evidence did not show that any invention was completed by an alleged prior inventor before the caveat was filed, and that whatever was done by him was done while in the employ of the patentee.

3. The question of abandonment by the patentee having been fully examined in a former suit under the same patent, further discussion of it in this case was deemed unnecessary.

4. The claim of the patent was for the "plate of hard rubber or vulcanite, or its equivalent, for holding artificial teeth." The respondent used hard rubber, as he found it combined or prepared by others, as a substitute for gold or other substance in forming the plate and for holding the teeth. *Held*, it was not necessary, in order to show infringement, to prove that the respondent used the hard rubber described in the hard rubber patent referred to in the complainants' specifications.

[Cited in Goodyear Dental Vulcanite Co. v. Smith, Case No. 5,598; Same v. Willis, Id. 5,603; Colgate v. Western Union Tel. Co., Id. 2,995.]

5. The respondent used rubber for the plates as a substitute for metallic plates; he employed the same mechanical means in forming the plates, and for setting and adjusting the teeth, and heat to harden the rubber, and fit the product for practical use. *Held*, that infringement of the complainants' patent was shown, although he used a rubber compounded with iodine and not with sulphur (as did the complainants), and under a different patent.

6. The invention described in the specifications of this patent is not merely a discovery of a chemical process for preparing a described substance for use in forming plates to be used for holding the teeth, and one may be an infringer if he does not use every one of the ingredients of that process.

[Cited in Goodyear Dental Vulcanite Co. v. Smith, Case No. 5,598.]

7. Neither the correspondence between the commissioner of patents and the applicant nor the proceedings in the patent office, pending an application, are admissible as evidence to enlarge, diminish, or vary the language of the claim of a patent.

8. Patents for inventions are, if practicable, to be so construed as to uphold and not to destroy the right of the inventors.

This was a bill in equity filed to restrain the defendant [Benoni E. Gardiner] from infringing letters patent [No. 43,009] for "improvement in artificial gums and palates," granted to John A. Cummings, June 7, 1854, and subsequently reissued and assigned to complainants [March 21, 1865, No. 1,904]. The nature of the invention, and the claims of the original and reissued patents, are set forth in the report of the case of Dental Vulcanite Co. v. Wetherbee [Case No. 3,810].

Causten Browne and B. R. Curtis, for complainants.

S. J. Glassey and John A. Foster, for defendants.

CLIFFORD, Circuit Justice. Most of the questions involved in the pleadings in this case were presented in the case of the Dental Vulcanite Co. v. Wetherbee [Case No. 3,810], and were at that time carefully examined and decided. Leave, however, to reargue those questions was granted to the respondent at the hearing in this case; but the court is still of the opinion that all of the questions presented in the former case were correctly decided on the evidence then exhibited, and refers to the opinion given on that occasion for the reasons upon which that conclusion rests. Some points are made by the present respondent, and some new evidence is introduced on the issue of novelty, which renders it necessary to re-examine the case in those particulars.

He contends that the complainants are not a manufacturing corporation within the meaning of the state statute, because their rubber plates are made to order, and because they are not made by the company. Due consideration was given to that objection on the former occasion, and therefore it will be sufficient to refer to that part of the opinion as reported in the second volume of Clifford's reports. Nothing new is presented in that part of the argument.

Objections of more importance are taken to the validity of the patent, which will be separately considered. They are as follows: That the alleged invention is not new and was not patentable. That the original patentee, John A. Cummings, was not the original and first inventor of the improvement.

Construed as the patent was by the court in the former case, it is hardly denied that the described improvement was patentable; but the argument now is, that the letters patent do not cover the process for making "the plate for holding artificial teeth, or teeth and gums"; that it covers "nothing but the use of hard rubber in making plates for artificial teeth," which, it is insisted, is not patentable, as the qualities of the material were known to all the world, and that the suggestion that it could be applied to such a purpose was not a discovery or invention within the meaning of the patent law. Had the claim of the patent been such as is supposed in the proposition, there would perhaps be some foundation for the argument; but the proposition is founded on a mistaken view of what is claimed by the patentee in the second reissue.

The claim of the patent is "the plate of hard rubber or vulcanite, or its equivalent, for holding artificial teeth, or teeth and gums, substantially as described." As designated in the patent, the invention is a new and useful improvement in artificial gums; but it is described in the beginning of the specification as a new and useful improvement in plates for artificial teeth, which, perhaps, is the better general description.

Taken literally, the claim is for the product as manufactured; but when the introductory words are considered in connection with the words "substantially as described," it is clear that it includes not only the plate of hard rubber for holding artificial teeth, or

teeth and gums, but the process or mode by which they are constructed. Unsupported, as the theory of the respondent is, by any phrase or word contained in the claim or specification, it does not seem to require any argument to refute it except to say that the meaning of letters patent, like other grants or written instruments, must be ascertained by the language employed, as applied to the subject matter. Much aid may be derived in construing the claim of a patent by referring to the descriptive part of the specification, and reference may also be made, if need be, to the drawings and patent-office model; but neither the correspondence between the commissioner and the applicant nor the proceedings in the patent-office are admissible to enlarge, diminish, or vary the language of the claim.

Evidence to prove the state of the art is admissible, and expert testimony to aid in expounding and defining technical words and phrases may be received, but in all other respects the rules for the construction of letters patent are the same as those applied in construing other grants and written instruments. Patents for inventions are to receive a liberal interpretation, and are, if practicable, to be so construed as to uphold and not to destroy the right of the inventors. Turrill v. Michigan S. & N. R. Co., 1 Wall. [68 U. S.] 491; Ames v. Howard [Case No. 326]. Reference in this case must be made to the descriptive part of the specification as well as to the claim, and when that is done it becomes apparent that the views of the respondent cannot be sustained.

Special reference is made by the inventor, in the first place, to the objections and inconveniences observable in the old mode of attaching artificial teeth to a metallic plate, and fitting the same to the roof of the mouth. They were, as stated in the specification, that the metal was expensive, and that the plate being hard and unyielding was apt to injure the mouth, and that its tendency was to impede mastication and obstruct articulation. He then describes the hard rubber which he uses for that purpose, characterizing it as an elastic material, possessing and retaining, when used for that purpose, sufficient rigidity for the purpose of mastication, and yet being pliable enough to yield a little to the motion of the mouth.

His invention, as he states, consists in forming the plate, to which the teeth or teeth and gums are attached, of hard rubber or vulcanite; but he proceeds at once to give a description of the manner of making the hard rubber plates, from which it appears that impressions are taken of the mouth or that part of it which the plate is to fit, of wax or plaster, in the same manner as is usually practised in the construction of gold plates for artificial teeth. Superadded to that is also a description of the means employed in setting and securing the teeth, as also of the kinds of teeth which may be employed. They are provided with pins projecting in such a manner that the rubber will close around them and hold them securely in position. Minute description is also given of the manner in which they are set in place and adjusted to the proper distance and fulness; and when completed, the statement is that the plaster mould, with the teeth set as described, is carefully filled with soft rubber, and the same is made secure in its position by placing another plaster mould over it, and while in that condition it is heated and baked in an oven, or in some other suitable way.

Other analogous considerations might be deduced from the description of the invention as given in the specification, to negative the theory of the respondent as to the construction of the patent, but it does not seem to be necessary to pursue the subject, as those already referred to are amply sufficient to show that the views of the respondent find no substantial support from the language employed in any part of the specification.

Want of novelty is the next objection taken by the respondent to the right of the complainant to a decree, and he has introduced some new proofs under that issue in the pleadings, but they do not appear to be of a character to require any extended examination. He admits in his answer that letters patent were granted to the original patentee, as alleged in the bill of complaint, and the court adheres to the opinion that the letters patent having been introduced in evidence by the complainants afford a prima facie presumption that the patentee was the original and first inventor of what is therein described as his invention. Agawam Woolen Co. v. Jordan, 7 Wall. [74 U. S.] 596; Blanchard v. Putnam, 8 Wall. [75 U. S.] 428.

Attempt is made to show that that rule does not apply in this case because letters patent have also been granted to the respondent, but it is clear that the introduction of the respondent's patent does not change the burden of proof on the question of novelty. He must still prove the allegation of his answer that the original patentee was not the original and first inventor of his improvement. Serious doubts were formerly entertained whether the letters patent of the respondent were admissible in any view of the case, and it is still the settled rule that the question of infringement cannot be controlled or materially affected by such consideration. Blanchard v. Putnam, 8 Wall. [75 U. S.] 425; Corning v. Burden, 15 How. [56 U. S.] 271.

Since the decision in the case last named, the letters patent of the defendant are admitted in evidence on the question of novelty as entitled to some weight, where the evidence is nicely balanced, but it is quite incorrect to suppose that a patent subsequent in date can have the effect as evidence to overcome the prima facie presumption otherwise afforded by the introduction of one of prior date, that the patentee was the original and

first inventor of what is therein described as his improvement. Such a conclusion is without any foundation in principle, and finds no support in any analogy of the law or in any decided case.

Remarks upon the evidence in the former case are unnecessary, as the court is satisfied that the decree in that case was correct. Such being the fact, nothing remains to be done except to refer to the new proofs offered to show that the original patentee was not the original and first inventor of the improvement described in his letters patent. In the former case the respondent contended that the invention was made by a person in the employment of the patentee, and not by the patentee, as alleged in the bill of complaint. Instead of that the present respondent insists that it was made at an earlier date by one Robert Haering, but the court is unable to give credence to the witnesses examined to prove that defence.

Cummings's caveat was filed May 14, 1852, and it satisfactorily appears that the period between the filing of the caveat and the date of the application for the patent, was occupied, either by the inventor or his employee, in making experiments and in perfecting the invention, and the proofs do not satisfy the court that anything amounting to an invention was made by Haering before the caveat was filed. His testimony was contradictory and unreliable, and the testimony of the witnesses to confirm his statements is not of a character to add much to their probative force. Examined carefully, the better opinion from the proofs is that Haering made no such work as he describes in his testimony, prior to the time when the caveat was filed by the original patentee, and that what he accomplished was made while he was at work for an employee of the original patentee. Further discussion of the question of abandonment is unnecessary, as that defence was fully examined and overruled in the former case.

Much discussion took place at the hearing on the question of infringement, but in the view of the court it is not necessary to determine whether the material used by the respondent is the same or different from that described in the hard rubber patent to which reference is made in the specification of the complainant's patent, as it is clear that the difference, if any, as applied in making the patented product in the case, is one of form and not of substance.

Neither party necessarily manufactures the hard rubber of which the plate is composed and in which the teeth are set any more than they do the artificial teeth. Both use artificial teeth, but they take such as they find for sale, and it makes no difference whether the artificial teeth they use are alike or different, and they both use hard rubber as they find it combined and prepared or partially prepared by third persons, and they use it as a substitute for gold or other substances in forming the plate and for holding the teeth in position as adjusted in the mould.

Hard rubber, before it is heated or baked, is an elastic compound capable of being moulded like plaster or wax, and it is used in that state to fill the plaster mould in which the teeth are set and adjusted to hold the teeth in position. Before the teeth are set and adjusted to the plate, they are provided with pins, so that the soft rubber used to fill the mould will close around them and hold them securely, and while in that condition the rubber is heated or baked and becomes hard, as seen in practical use. Heat thus applied, if sufficiently intense, vulcanizes or hardens the material and converts the compound into hard rubber. Unless the soft rubber was colored before it was purchased of the manufacturer, it is colored in imitation of the natural gums by intermixing vermilion or other suitable coloring matter while in the soft state and before it is used to fill the mould. When the plate has been heated or baked sufficiently to convert the material into hard rubber the mould is removed and the plate is then polished for use.

Antecedent to the application of rubber a cast made of wax is taken of that part of the mouth which the plate is intended to fit, and from that cast the reverse plaster mould is made, and from that reverse mould the mould is made in which the teeth are set and adjusted, before the mould is filled with the rubber, as before described.

Rubber, such as the complainants use, is compounded with sulphur, etc., in the manner described in the hard rubber patent, but the rubber used by the respondent is compounded, as he contends, with iodine without sulphur and under a different patent. Suppose the fact to be as he contends, still it appears that he uses rubber for plates as a substitute for metallic plates and that he employs the same mechanical means in forming the plate and for setting and adjusting the teeth and for securing them in position as the complainants do, and he also employs heat to harden the rubber and fit the product for practical use as a substitute for natural teeth.

Two theories appear to be set up by the respondent, and they are not entirely consistent:—

1. That the invention used by the complainants is merely a discovery that hard rubber, as manufactured under the hard rubber patent, may be applied as a substitute for metallic substances in forming plates for artificial teeth and for securing the teeth in position.

2. That the invention is merely a discovery of a chemical process for preparing a described substance for use in forming plates to be used for the before-mentioned purpose, and that no one can be regarded as an infringer unless he uses every one of the ingredients of that process.

But neither of the theories is correct. Sufficient has already been remarked to refute the first suggestion, and it is quite obvious

that the second is equally fallacious and unsupported by anything to be found in the specification. Decree for the complainants.

[For other cases involving this patent, see note to Dental Vulcanite Co. v. Wetherbee, Case No. 3,810.

[NOTE. On appeal to the supreme court the judgment was affirmed, but before any opinion had been read a motion to dismiss the appeal, and also to vacate the decree of affirmance, was made. This was granted in an opinion by Mr. Chief Justice Chase, who said that, the suit having been compromised, with the understanding, however, that both parties should go on to a final hearing, and the counsel on both sides having been paid by one of the parties, the suit was collusive, and the appeal must be dismissed, the decree of affirmance vacated, and an order made to recall the mandate, which had been issued to the circuit court. 21 U. S. (Lawy. Ed.) 141.]

Case No. 5,592.

GOODYEAR DENTAL VULCANITE CO. v. GARDNER.

[Cited in Goodyear Dental Vulcanite Co. v. Willis, Case No. 5,603. Nowhere reported. For opinion on reargument, see Id. 5,591.

GOODYEAR DENTAL VULCANITE CO. GARDNER v.). See Case No. 5,228.

Case No. 5,593.

GOODYEAR DENTAL VULCANITE CO. v. GATES.

[Cited in Goodyear Dental Vulcanite Co. v. Willis, Case No. 5,603. Nowhere reported; opinion not now accessible.]

GOODYEAR DENTAL VULCANITE CO. v. IRELAND. See Case No. 5,597.

GOODYEAR DENTAL VULCANITE CO. v. LOWE. See Case No. 5,594.

Case No. 5,594.

GOODYEAR DENTAL VULCANITE CO. v. OSGOOD. SAME v. DICKINSON. SAME v. LOWE.

[2 Ban. & A. 529;[1] 13 O. G. 325.]

Circuit Court, D. Massachusetts. Feb. 11, 1877.

DOCKET FEE—TEST CASE—COSTS—FINAL HEARING.

1. It is proper to tax a docket fee, where the case is one of a number stipulated to be heard together, the decree in one case to stand as the decree in all.

2. Whenever a final decree is entered by the court, in an equity cause, after replication filed, for the purpose of taxation of a docket fee, this is to be considered as the "final hearing" referred to in Rev. St. § 824.

[Cited in Coy v. Perkins, 13 Fed. 112; Goodyear v. Sawyer, 17 Fed. 13.]

3. The docket fee is not to be taxed for an attorney, unless his name has been entered on the docket before the filing of the general replication, and he has been admitted to the bar of some circuit court of the United States, or to the bar of the supreme court.

[Cited in Gorse v. Parker, 36 Fed. 841; Louisville & N. R. Co. v. Merchants' Compress & Storage Co., 50 Fed. 452.]

4. In the taxation of costs, "final hearing" is to be considered as the submission of a cause in equity for the determination of the court after it is at issue, so that the case may be finally disposed of.

[Cited in Wooster v. Handy, 23 Fed. 54.]

[This was a bill in equity by the Goodyear Dental Vulcanite Company against Charles H. Osgood, Denison D. Dickinson, and George A. Lowe.]

B. F. Lee and Brown & Holmes, for complainant.

A. D. Chandler and E. Luther Hamilton, for defendants.

SHEPLEY, Circuit Judge. The record shows in each of the above cases that a bill, answer and replication were filed. The case against Osgood was heard by the court with many other cases, under a stipulation embracing a large number of cases to be heard together. The decree in one case was to stand as the decree in all. There can be no doubt of the right to tax the docket fee in this case. In the other two cases, after issue, an interlocutory decree was entered by the court, which substantially decided the merits of the controversy. The cases were finally dismissed by the court, upon a final decree, on motion of complainants. The docket fee is to be taxed in these cases also. Wherever a final decree is entered by the court, in an equity cause, after replication filed, for the purpose of taxation of the docket fee, this is to considered as the "final hearing" referred to in Rev. St. § 824.

This docket fee is not to be taxed for an attorney, unless the name of the attorney taxing the fee has been entered on the docket before the filing of the general replication, and such attorney has been admitted to the bar of the circuit court of the United States in this or some other circuit, or to the bar of the supreme court of the United States.

In the taxation of costs, "final hearing" is to be considered as the submission of a cause in equity for the determination of the court, so that the case may be finally disposed of upon bill and answer, or bill, answer and replication, or upon pleadings and proofs, or otherwise after the case is at issue. The taxation of the clerk, in these three cases, is affirmed, and the costs are allowed as taxed.

GOODYEAR DENTAL VULCANITE CO. v. PERRY. See Case No. 5,597.

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

Case No. 5,595.

GOODYEAR DENTAL VULCANITE CO. v. PRETERRE.

[Cited in Celluloid Manuf'g Co. v. Goodyear Dental Vulcanite Co., Case No. 2,543. Nowhere reported; opinion not now accessible.]

[See Case No. 5,596.]

Case No. 5,596.

GOODYEAR DENTAL VULCANITE CO et al. v. PRETERRE.

[15 Blatchf. 274; 3 Ban. & A. 471; 14 O. G. 346.] [1]

Circuit Court, S. D. New York. Sept. 19, 1878.

PATENTS—IMPROVEMENT IN ARTIFICIAL GUMS AND PALATES—INFRINGEMENT.

1. The reissued letters patent granted to the Goodyear Dental Vulcanite Company, March 21st, 1865, originally issued to John A. Cummings, June 7th, 1864, for an "improvement in artificial gums and palates," the validity of which was settled in Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, are infringed when parts of hard rubber plates of teeth are replaced by new parts, made of the materials and according to the mode described in the patent.

[Cited in Banker v. Bostwick, 3 Fed. 518.]

2. The patent is also infringed, when the hard rubber plate formed and holding teeth in the manner prescribed in the patent is made, although it is mounted on a gold plate, which goes between it and the mouth, so that it does not touch the surface of the mouth.

3. The use of celluloid and rose pearl, in making plates in the manner described in the patent instead of hard rubber, *held* to be an infringement, although, in a prior case, in another circuit, such use was held to be not an infringement, but on different evidence.

[See Case No. 5,589.]

[This was a bill in equity by the Goodyear Dental Vulcanite Company against Adolph P. Preterre, for the alleged infringement of a patent.]

Edward N. Dickerson and Benjamin F. Lee, for plaintiffs.

Henry Baldwin, for defendant.

WHEELER, District Judge. This bill is brought for relief against alleged infringements of reissued patent No. 1,904, granted March 21st, 1865, to the Goodyear Dental Vulcanite Company, originally issued to one John A. Cummings, June 7th, 1864 [No. 43,009], and now owned by the orators, for an "improvement in artificial gums and palates." The cause has been heard upon the bill, answer, replication, proofs, and argument of counsel. The validity of the patent has been settled, as against another party in Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, and, on this argument, it is not denied by the defendant's counsel but that it is valid here. It appears that the defendant operated under a license from the patentees up to January 1st, 1871. The only questions made are as to whether he is shown to have infringed since that date. It is claimed by the orators that he is shown to have done so, by making hard rubber plates of teeth, of the materials and according to the mode described in the patent; by replacing parts of such plates of teeth in like manner; by making such plates mounted upon gold plate; and by making plates according to that mode, of celluloid and rose pearl. The defendant denies making any new sets of hard rubber and claims that the other matters charged are not infringements.

I. Upon the evidence, it sufficiently appears that he has made a few plates of hard rubber within the time in dispute, but not many; perhaps, four, five, or six. The exact number must be settled by the master. All the testimony may be true, if he has; if he has not, some of it must be corruptly false. His conduct about directing the employees to call the material composition, when it is not known by that name, and in not appearing to testify himself in explanation, is more consistent with a use by him of the material known to be unlawful than the contrary. On the whole, this finding, after placing the burden of the proof of infringement upon the orators, is the most satisfactory.

II. The patent seems to be for a plate or set of teeth, formed in a particularly specified mode, of material having certain qualities. The extent of the plate in the mouth of the wearer, either as to surface of the mouth covered, or the number of teeth in the plate, is not made important. It covers one tooth with plate sufficient for it, or more teeth with plate enough for them, according to the requirements of each particular case. It is for so much plate as is needed to hold as many teeth as are wanted. If any plate, formed and holding any teeth according to the patent, is made, the patent is infringed. The defendant's witness Fisk describes the mode of making the repairs complained of. By his description, which is not disputed or varied, it appears that a part of the plate to be repaired is cut away and replaced by new, holding teeth imbedded in it, made exactly as the patented plate is. So much of the plate as is formed in that way is an infringement. It is said that the presumption is that the wearer of the plate has a right to have it repaired, and that it is no infringement to repair it. But, whether that is so or not, this replacing is not strictly a repair, like replacing a part of a machine, expected to be worn out and intended to be replaced, in the same machine. It is a new manufacture of itself, of the kind patented, embracing in itself all parts of the patented combination. The part added includes the patented product as much as if it were used alone to the same extent, and as much as the part added to would, if unauthorized. It would

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, reprinted in 3 Ban. & A. 471, and here republished by permission.]

be as correct to say that a new plate is made out of the old and new materials, as to say that the old plate is repaired with the new materials. More new may be added than remains of the old, or less. The proportion is not important. To the extent of the new, when new plate holding teeth is made, it is new manufacture, covered by the patent, and an infringement.

III. The object of the invention seems to be to fit and attach artificial teeth to the mouth. The defendant's gold plate, mounted with the rubber one holding teeth, is for the same purpose. It appears from the unqualified testimony of the defendant's witness Fisk, as well as from the appearance of the exhibit, that, so far as the rubber plate and the teeth are concerned, it is made precisely as rubber plates not to be so used in mounting gold plates are, that is, exactly according to the patent, except that the rubber may not be made to extend so far into the mouth as it would be if there was to be no gold plate. But, as before mentioned, the extent of the plate is not material to the patent. It is the plate formed and holding teeth in the prescribed manner that is its distinctive feature, extending so far as necessary in each particular case. With the gold plate is the same rubber plate, formed and holding teeth in the same prescribed manner, extending so far as is necessary under those circumstances. The rubber plate is used to attach the teeth to the mouth and hold them in place, by being attached to the gold plate which goes between it and the mouth, instead of touching the surface of the mouth itself. It attaches the teeth to the mouth in the same manner, although not so directly, as without the gold. The patented product is used for the purposes of the patent, so far as it is used at all. In that use the defendant employs the whole of the patented invention, by taking it to add his gold plate to. He may have improved it, or may not, by that addition. But, whether he has or not, when he so uses it he infringes the orators' rights.

IV. The defendant is shown to use celluloid and rose pearl in the manner described by the witnesses, in making dental plates. He relies largely upon the decision in Goodyear Dental Vulcanite Co. v. Davis [Case No. 5,589], by the late learned Circuit Judge Shepley, in the district of Massachusetts, in support of the position, that the use shown in this case is not an infringement. If that case was exactly like this it should and would have great and controlling weight in the decision of this, both on account of the eminent learning and ability of the court making the decision, and because the same rule ought to prevail throughout the country, in respect to infringement of the same patent by the same means, as well as upon other questions in respect to other subjects, as was so well expressed by the late learned Circuit Judge Emmons, in Goodyear Dental Vulcanite Co. v. Willis [Id. 5,603]. But, this case, upon the evidence here, is not like that before Judge Shepley, as the facts are stated in his opinion to have appeared there. The patent may well be considered to be established as valid everywhere, but, whether parties have infringed it in particular cases must depend upon the proof in each case. The owners of the patent may be able to prove infringement in one case and not in others; but, proving it infringed in one case will not show that all others charged to be infringers are so, nor will failure show that none others charged are so. It is only when the facts of the cases are alike, that one ought to control another.

In that case, the question was, whether the patent for a plate of teeth made of rubber compounded with sulphur, and subjected to heat to harden it, would be infringed by plates of teeth made of celluloid, shown to be "a new material discovered and patented since the date of Cummings' invention," in the manipulation of which, "the process of making a set of teeth composed of the plate, and teeth, and gums, is an entirely different process from that described in the Cummings patent, when compared with that part of the Cummings process which was new in the state of the art, and the novelty of which part gave to the Cummings process, when considered as a whole, the ingredient of novelty and patentability;" when it was "not placed in the mould in a soft, plastic condition, 'a little at a time pressed in with the finger, or in any other convenient way,' but in a hard, rigid condition, like horn, or bone, or ivory," and "then subjected to heat, not to vulcanize or harden, but to soften it;" and which, "afterwards, on being cooled or restored to its original temperature, returns to its original condition as a hard substance, as when first placed in the mould;" from which it appeared "evident to the court that the use of" the celluloid, in the manufacture of sets of artificial teeth, as practised by those defendants, and the manufacture itself, differed "as much, both as to process and product, from the process and product described and claimed in the Cummings patent, as that process and that product differed from the previous manufactures which existed before the Cummings invention, and were unsuccessfully relied upon as anticipating it."

In this case, it appears, from the evidence, that the celluloid and rose pearl in use by the defendant, whether actually the same as that material in that case or not, were well known at the date of that invention; and, from the testimony of the defendant's witness Fisk, that, in use, it is softened in boiling water, and made plastic before it is put into the moulds; and, from defendant's witness Parmelee, that vulcanized rubber is soft when hot, and becomes hard by cooling; and also, from the witness Fisk, that the means employed for fastening the teeth to the plate are the same in respect to each substance, and

that, when the celluloid plate is completed, "its structure is precisely the same as that of a vulcanite dental plate, except that the base of one is made of celluloid, and the other of vulcanite," and that they are so much alike that any one might mistake one for the other, and patients seldom notice the difference.

It is obvious, from this statement, that this case, upon its facts, is radically different from that, and should not be controlled by the decision there, further than the same principles are applicable to both. That decision does not seem to proceed exactly upon the ground that there could be no equivalent for vulcanite, but rather upon the ground that what was claimed to be an equivalent was not in fact so.

The invention seems to be, of a combination, in a dental plate, of the plate proper, holding the teeth imbedded into it, and made fast in the mode described, with the teeth themselves. The material of the plate is of chemical formation, but the operation of the plate, when formed, is mechanical. The teeth are the main object. The plate is for the purpose of holding them in the right position in respect to the mouth. It is held in place itself principally by atmospheric pressure, and holds the teeth in place by its mechanical strength. The rubber plate is very useful for this purpose, on account of its lightness, slightly yielding rigidity, and capability of the material for being fitted into the mould when soft, and becoming hard in exactly the shape of the mouth, without shrinking. The celluloid shown here appears to have the same qualities and capability in these respects. The mode of taking the impression of the mouth, and making moulds for the plate and teeth, of plaster, by using wax, was old. Rubber, the mode of vulcanizing it, and vulcanite itself, were old. Moulding vulcanite into shapes wanted was old. Cummings invented combining it, when hot and plastic, with artificial teeth, by moulding it about them in their proper position, so that the whole would be in the required shape and relative position, in one solid piece, when the rubber should become hard, Celluloid was old. The defendant, with moulds made by the same method as Cummings', combines that with artificial teeth, by moulding it about them, when hot and plastic, so that the whole will be in one piece, in the required shape, with the teeth in their proper position, when it becomes hard; and, when the products of these processes are done, they are so near alike, that persons using them do not distinguish one from the other. The celluloid is, for this purpose, clearly the mechanical equivalent of the vulcanite. Chemically, they are, in some respects, different, but, in all that are of any importance, for the purposes they are here wanted for, they are the same. They burn differently, but they are not wanted for burning. They come to the plastic state, in which they can be put into the moulds, by chemical and widely different processes. The process by which they are converted, from masses in that state, into finished dental plates, so inheres in the product, that it is said to give distinctive character to it. That process begins with the moulding. The point is not, whether the substances were ever equivalents for these, or any other, purposes before, but whether they are equivalents for this purpose then, and it seems that they are.

It is said, by Mr. Justice Clifford, in Gould v. Rees, 15 Wall. [82 U. S.] 187, 194, and in Gill v. Wells, 22 Wall. [89 U. S.] 1, that inventors of a combination are as much entitled to equivalents as the inventors of other patentable improvements, if the equivalents were known to be such at the date of the patent. Judge Shepley, in Goodyear Dental Vulcanite Co. v. Davis, before mentioned, either intentionally or inadvertently, said, in respect to the same thing, "the date of the invention." Some question has been made about which date controls, if either does absolutely. Perhaps it is the date of the patent, because the patent is a grant, and, as such, must speak from its date. But, whichever date should control, or whether either should, is not material in this case, for the evidence is full that celluloid and rose pearl, with their moulding and other qualities useful to this manufacture, were well known at both dates.

Under the reasoning of the court in Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, in which the validity of the patent was held, if Hawes, there mentioned, had been shown to have used celluloid or rose pearl, as the defendant now uses them, instead of tin, as he was shown to have used that, in making dental plates, the patent could not have been maintained. He would have been entitled to the patent instead of Cummings. Celluloid itself may be patentable and patented, but the use of it in this manner, in the formation of dental plates, could not be, in the light of Cummings' invention; and, whether the invention of this use of them would be patentable, in the view of the other patent, is one accurate test of whether it is an infringement of that patent. Curt. Pat. §§ 321–323; Walton v. Potter, 4 Scott, N. R. 91.

Let a decree be entered for an injunction and an account in respect to these infringements, with costs, according to the prayer of the bill.

[For other cases involving this patent, see note to Dental Vulcanite Co. v. Wetherbee, Case No. 3,810.]

Case No. 5,597.

GOODYEAR DENTAL VULCANITE CO. et al. v. ROOT. SAME v. PERRY. SAME v. SCHEMERHORN et al. SAME v. BENJAMIN. SAME v. IRELAND.

[1 Ban. & A. 384;[1] 6 O. G. 154.]

Circuit Court, N. D. New York. July 21, 1874.

PATENTS—IMPROVEMENT IN ARTIFICIAL GUMS AND PALATES—ABANDONMENT TO PUBLIC.

1. The validity of Cummings' patent, reissue No. 1,904, for "improvement in artificial gums and palates," sustained. Dental Vulcanite Co. v. Wetherbee [Case No. 3,810] and Goodyear Dental Vulcanite Co. v. Smith [Id. 5,598], cited and followed.

[Cited in Goodyear Dental Vulcanite Co. v. Willis, Case No. 5,603.]

2. Cummings applied for a patent in April, 1855, and was finally rejected by the commissioner, February, 1856. In 1859, he unsuccessfully moved for a rehearing. In March, 1864, he renewed his application; whereupon the patent office reversed its former decision and the patent was granted June 7, 1864. The invention went into public use about 1860: *Held*, that the invention was not thereby abandoned, or relinquished to the public.

[Cited in Goodyear Vulcanite Co. v. Willis, Case No. 5,603; Colgate v. Western Union Tel. Co., Id. 2,995.]

These were bills in equity, filed against the defendants [Albert E. Root, Perry, Schemerhorn, Benjamin, Ireland, and others], who are dentists, for infringement of reissued letters patent No. 1,904, granted to the Dental Vulcanite Company, assignee of John A. Cummings, for "improvement in artificial gums and palates." The claim in the patent is for: "The plate of hard rubber or vulcanite, or its equivalent, for holding artificial teeth, or teeth and gums, substantially as described." The nature of the invention, and construction of the patent, is fully set forth in the cases of Dental Vulcanite Co. v. Wetherbee [Case No. 3,810] and Goodyear Dental Vulcanite Co. v. Smith [Id. 5,598]. Cummings filed his caveat, May 14, 1852. Applied for a patent, April 12, 1855. This application was rejected, May 19, 1855, and again rejected, August 14, 1855, and again rejected, February 6, 1856. In 1859, a motion was made before the commissioner, for a rehearing, or for an appeal to the board of examiners, which motion was denied. On March 25, 1864, a renewed application was filed. On April 7, 1864, the patent office wrote to Cummings, acknowledging that injustice had been done in the former rejection, and the patent was thereupon allowed, and was issued on June 7, 1864 [No. 43,009.] There was evidence, that tended to show poverty on the part of the inventor, and efforts by him to raise money to prosecute his application, during these periods. The invention went into public use, about 1860.

E. N. Dickerson and B. F. Lee, for complainants.

Wm. H. Bright, for defendants.

HUNT, Circuit Justice. The court decides, on the authority of the cases of Dental Vulcanite Co. v. Wetherbee [Case No. 3,810] and Goodyear Dental Vulcanite Co. v. Smith [Id. 5,598], that the reissued letters patent No. 1,904, dated March 21, 1865, reissued to the Dental Vulcanite Company, assignee of John A. Cummings, are valid; that the invention covered thereby, is patentable; that it was not abandoned, or relinquished to the public, and, that it was not in public use, or on sale, for more than two years prior to said Cummings' application for a patent, with his consent or allowance. Decree ordered for complainants.

[For other cases involving this patent, see note to Dental Vulcanite Co. v. Wetherbee, Case No. 3,810.]

GOODYEAR DENTAL VULCANITE CO. v. SCHEMERHORN. See Case No. 5,597.

Case No. 5,598.

GOODYEAR DENTAL VULCANITE CO. et al. v. SMITH.

[1 Ban. & A. 201; Holmes, 354; 5 O. G. 585.][1]

Circuit Court, D. Massachusetts. May, 1874.[2]

PATENTS—IMPROVEMENT IN ARTIFICIAL GUMS AND PALATES—ABANDONMENT TO PUBLIC.

1. The claim of the patent, for improvement in artificial gums and palates, was for "the plate of hard rubber or vulcanite or its equivalent, for holding artificial teeth, or teeth and gums, substantially as described." The specification described the method whereby the plate is formed, and the teeth, gums, etc., embedded in it: *Held*, following Dental Vulcanite Co. v. Wetherbee [Case No. 3,810], and Goodyear Dental Vulcanite Co. v. Gardiner [Id. 5,591], that the invention patented, was the described product and manufacture, by the means described in the specification.

[Cited in Goodyear Dental Vulcanite Co. v. Root, Case No. 5,597; Same v. Flagg, Id. 5,590.]

2. In 1856, an application for a patent was improperly rejected. The inventor did not withdraw his application, or in any manner acquiesce in the rejection, nor did he appeal from the commissioner, but he pressed his claim for a patent, from time to time, as his circumstances allowed, until 1864, when he made a new application: *Held*, that the patentee, neither lost, nor did the public acquire against him, any rights by their unauthorized use of his invention during the time between the two applications.

3. The reissued patent, for an improvement in artificial gums and palates, granted to the Dental Vulcanite Company, assignee of John A. Cummings, March 21st, 1865, held valid.

[Followed in Goodyear Dental Vulcanite Co. v. Root, Case No. 5,597. Cited in Goodyear Dental Vulcanite Co. v. Willis, Id. 5,603;

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

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

[2] [Affirmed in 93 U. S. 486.]

Goodyear Dental Vulcanite Co. v. Davis, Id. 5,589; Colgate v. Western Union Tel. Co., Id. 2,995; Dederick v. Cassell, 9 Fed. 308; Schultz Belting Co. v. Willemsen Belting Co., 40 Fed. 157.]

[This was a bill in equity by the Goodyear Dental Vulcanite Company against Daniel H. Smith for an injunction and account.]

Edward N. Dickerson and Benjamin F. Lee, for complainants.

Jeremiah S. Black and Henry Baldwin, Jr., for defendant.

SHEPLEY, Circuit Judge. Letters patent of the United States [No. 43,009], issued June 7, 1864, to John A. Cummings, for improvement in artificial gums and palates. The bill in equity in this case is filed against the defendant, alleging infringement of the letters patent which, upon a surrender of that patent in accordance with law, were reissued to the Dental Vulcanite Company, the assignees of the title in and to the letters patent, upon the 21st of March, 1865 [No. 1,904]. While the patent describes the invention as "an improvement in artificial gums and palates," the patentee gives a better description of his invention in his specification in his original patent, in which he claims to have invented certain new and useful improvements in the manner of forming artificial palates and gums used for inserting artificial teeth. The claim in the patent is for "the plate of hard rubber or vulcanite, or its equivalent, for holding artificial teeth, or teeth and gums, substantially as described." This claim of the patent has been construed in this circuit, in the cases of Dental Vulcanite Co. v. Wetherbee [Case No. 3,810], and Goodyear Dental Vulcanite Co. v. Gardiner [Id. 5,591]. The substance and effect of the determination of the court in those cases is, that the invention claimed was the described product and manufacture by the means described in the specification. Adopting the construction given in those cases to the claim in the patent, I know no better description to be given of the invention patented to John A. Cummings, and reissued to the complainant than this, that it is for a new article of manufacture, consisting of a plate of hard rubber or vulcanite, with teeth, or teeth and gums, secured thereto in the manner described in the patent. The patent is not for a process or art, but for the new product resulting from the manipulation by the described new process. It is one of those products, as will be seen by examination of the specifications describing the process of manufacture, in which the process so inheres that the described product can only be made by the described process. The patent is not for a dental plate of vulcanite or hard rubber alone; it is not the substitution of the old material, vulcanite, in place of the gold and other materials which have been before used in the same way; it is not, as claimed by defendant, for a dental plate of hard rubber vulcanized in moulds in the manner described in the patent: but it is for a set of artificial teeth as a new article of manufacture, consisting of a plate of hard rubber or vulcanite, with teeth, or teeth and gums, secured thereto in the manner described in the patent, by embedding the teeth and pins in the vulcanizable compound so that it shall surround the teeth and pins while the compound is in a soft state before it is vulcanized, so that when the compound is vulcanized the teeth are firmly secured by the pins embedded in the vulcanite, and there is a tight joint between the vulcanite and the teeth. This manufacture was a new manufacture, new as to the thing made, new as to the process of making it, considering that process as a whole. The invention is not like that of a machine, but is one in which the process by which it is made is a part of the substance of the thing made, the manufacture, and a characteristic feature of its construction. It is evident, from an examination of the very brief and imperfect description of the invention given by Cummings in his caveat, filed as early as May 14, 1852, that he fully appreciated the fact that the importance of his invention consisted not merely in the substitution of a material "rigid enough for the purposes of mastication, and pliable enough to yield a little to the mouth," in place of the "hard, unyielding" metals previously used, and not merely in the substitution of a material light and inexpensive in place of the expensive and heavy materials before used for the plate, but also in the additional fact, which he states, that "by his improvement the teeth can be easily baked into the gums, which form one piece with the plate." This statement at that early period sufficiently suggests that he fully appreciated the advantages of the material which he used, and which was capable of being so used in the process as to insure the cleanliness and purity resulting from the absolutely perfect joint formed between the teeth and the plate, and the consequent absence of any crevices for the retention of food.

In the specifications of the reissued patent, after adverting to the fact that the method previously in use of attaching artificial teeth to a metallic plate fitting to the roof of the mouth was attended with many objections and inconveniences, he states his invention to consist "in forming the plate to which the teeth, or teeth and gums, are attached, of hard rubber or 'vulcanite,' so called, an elastic material possessing and retaining in use sufficient rigidity for the purpose of mastication, and at the same time being pliable enough to yield a little to the motions of the mouth." He then describes what he calls his "manner of making and using said hard rubber plates," but which would be more appropriately described as his mode of forming and making a set or case of teeth, including the plate, gums, and teeth. A wax or

plaster impression of that part of the mouth which the plate is to fit is first taken, and from that impression a plaster cast is made which will exactly resemble that part of the mouth from which the first impression was taken. A plate of wax of the general form of the intended rubber plate is then made from this plaster cast, and around the front of this wax plate a vertical ridge of wax is fixed, about in the same position which the teeth are to occupy, in the same manner as is generally practised in the construction of gold plates for artificial teeth. A plaster mould is then made from this wax plate, fitting it both on the upper and under side, which plaster mould is known, generally, as the articulator, and is constructed so as to hold the wax plate securely and conveniently for manipulation, leaving the front edge, where the teeth are to be applied, exposed and accessible. The specification then describes the kind of teeth which may be employed, and says, the mode of operation is the same whether the teeth have porcelain gums formed in one piece with the teeth, and properly colored, or teeth without porcelain gums, in which case the palate and gums are formed of one piece of hard rubber; the mode of operation is the same whether gum-teeth, or teeth alone, are used, either singly or in groups. The teeth are set in place in the wax plate, and adjusted to the proper distance and fulness in the same manner as is generally practised in setting teeth in gold plates. The wax plate and gums, with the teeth adhering thereto, are now set upon the original plaster cast of the corresponding part of the mouth, and plaster is poured all around up to about the lower edge (as it lies) of the wax plate. The margin, or outlying surface of plaster, is oiled or varnished, and plaster poured over the whole, forming a complete mould of the plate and teeth. Upon the opening of this mould, the wax is warmed and removed so as to leave the teeth adhering in the plaster mould in exactly the relative position they are to occupy in the hard rubber plate. The teeth are provided with pins projecting therefrom in such manner that the rubber, which is to constitute the plate, will close around them, and by means of them hold or secure the teeth permanently in position. The plaster mould with the teeth adhering therein, as just described, is now filled with soft rubber, a little at a time, pressed in with the finger, or any other convenient way; and care is to be taken that the rubber is made to completely fit into the cavities, and around the protuberances, including the pins, and is filled to the thickness or depth desired to form the plate. The rubber plate is then locked in position by shutting the other half of the plaster mould over it to insure its retaining its exact form, and it is then subjected to sufficient heat to harden or vulcanize the compound.

While defendant admits that this process or mode of constructing the plate or case of teeth, which is included in the claim of the reissue, constitutes a substantial and material part of the thing patented therein, yet he insists that it was not described or suggested or indicated in the original patent of June 7, 1864, but was interpolated in the reissue, which is therefore invalid, having been granted contrary to law.

Since the exhaustive exposition of this branch of the law of patents, in the case of Seymour v. Osborne, 11 Wall. [78 U. S.] 516, the principles of law applicable to the consideration of this question are too well settled to admit of any doubt. Where the commissioner accepts a surrender of an original patent, and grants a new patent, his decision on the premises in a suit for infringement is final and conclusive, and is not re-examinable in such suit in the circuit court, unless it is apparent upon the face of the patent that he has exceeded his authority, and that there is such a repugnancy between the old and the new patent, that it must be held as matter of legal construction that the new patent is not for the same invention as that embraced and secured in the original patent. Reissued letters-patent must, by the express provisions of the statute authorizing them, be for the same invention; and, consequently, when it appears on a comparison of the two instruments, as matter of legal construction, that the reissued patent is not for the same invention as that embraced and secured in the original patent, the reissued patent is invalid, as that state of facts shows that the commissioner in granting the new patent exceeded his jurisdiction. The patentee may amend what is defective or insufficient in the description of his invention, but he cannot make any material additions to the invention claimed in the original, by interpolating in the reissue any thing not described, suggested, or substantially indicated in the original specifications, drawings, or patent office model. The claim of the defendant is, that, in the reissue No. 1,904, a new process of forming the plate is substituted for the one described in the original patent; and that the new process described was not suggested or indicated in the original patent. To properly determine this question, we must carefully examine the two specifications, to ascertain what steps in the described process are claimed as new, as distinguished from those steps in the process which were old. The plaster moulds, or the manner of using them, or of the wax in connection with them, are not described or claimed as new. What is described and claimed as new in the process is, in substance, the making of a vulcanite dental plate out of a vulcanizable rubber compound, into which the teeth were embedded in its plastic condition, and the rubber compound, with the teeth thus embedded in it, afterwards vulcanized by heat so that the teeth, gums, and plate should be perfectly joined without any intervening crevices, and the plate should possess the qualities of hard

rubber or vulcanite. All that is involved in this statement is clearly indicated in the original patent. It is true that the patentee does not describe in detail precisely how the teeth were to be embedded in the plastic compound, before vulcanization, as fully as he states it in the reissue, but he does substantially indicate and describe the new manufacture, and all that is claimed in the reissue. Upon a comparison of the two patents, and an examination of the specifications and of the drawings, the court cannot arrive at the conclusion, as a matter of legal construction of the instruments, that the reissued patent is for any different invention from the one substantially indicated in the original. It is insisted in argument that Cummings did not, in his original application, describe a vulcanizable compound, because he says, "the teeth, gums, and plate are then baked until the rubber or other elastic material becomes sufficiently vulcanized." This description, it is contended, does not apply to vulcanite, because the soft rubber is not elastic before vulcanization. But when we take the whole description, it is plain that he does not intend by the expression, "or other elastic material," to apply it to the rubber in its soft, plastic, or putty-like condition, but to a material which may be an elastic material, either before its reduction to the soft condition, or after its vulcanization. This meaning, however imperfectly expressed, is easily gathered from the whole description, which plainly designates the material to be used as rubber, and the compounds commonly employed therewith, reduced to a soft plastic condition capable of vulcanization, and subsequently vulcanized.

The defendant also seems to have misapprehended the language of the court in Goodyear Dental Vulcanite Co. v. Gardiner [Case No. 5,591], where it is said, speaking of the claim, that "it includes not only the plate of hard rubber for holding artificial teeth, or teeth and gums, but the process or mode by which they are constructed." It is contended that this construction makes the use of the moulds "the process or mode by which they are constructed;" and that inasmuch as the moulds were not described in the original, the reissue is broader than the original; and inasmuch as the use of such moulds for this purpose was not new, the patent is void. But, upon reading the opinion in that case, it is clear that no such construction as is contended for was given to the claim. The process of forming a plate by the use of plaster moulds was well known; the process of retaining and confining the vulcanizable compound in the mould, until it was converted by heat into hard rubber or vulcanite, was well known to those skilled in that art, and for that reason perhaps Cummings considered it unnecessary to describe minutely those details of the process in his original application. But, upon the suggestion that these steps in the process were not known to those skilled in the art of dentistry, a reissue was taken, which more at length described all the steps of the process. In view of the construction heretofore given to the claim, and in view of the evidence in this record, which shows that the use of such moulds in the described mode, and for the described purpose, was known to those skilled in the art, it is at least doubtful if there was any necessity for a surrender and reissue. Such a use of moulds was not "the process or mode by which they are constructed," referred to by the court in the sentence above quoted from Goodyear Dental Vulcanite Co. v. Gardiner [supra]. What the true construction is, as given by the court in that case, we have before stated, and need not repeat.

It is again, in this case, most strenuously contended that Cummings was not the original and first inventor of the thing claimed by him, or a material and substantial part thereof. Considering the importance of this question, the great pecuniary interest involved, the public interest as well as the interests of the many thousand licensees under this patent in the dental profession, and the thousands who are alleged to be using the patented invention without license; and in view of the fact that this has been made a test case, and carefully prepared and presented to the court with all the light that can be thrown upon the history of the art, by careful and scientific research; I have carefully considered the evidence in the record upon the question of novelty, as if this were the first case in which this issue was presented. The first step in the solution of this question is to fix the date of the invention of Dr. Cummings. The caveat filed by him on the 14th of May, 1852, substantially describes his invention; and if there can exist any doubt that it was perfected at that time, there can be no question that it was perfected and reduced to practice in the latter part of 1854, or early in 1855, and before he filed his application for a patent on the 12th of April, 1855.

It is insisted, on the part of the defendant, that Cummings allowed his invention to be used freely and fully by the public before his application for a patent, and acquiesced in and permitted and assented to such use without asserting any claim or right thereto, and thereby waived and abandoned the same and dedicated it to public use, and thereby forfeited any right he might have had to letters-patent for his invention. Support to this theory of the defence is sought in the fact of the long space of time suffered to intervene between Feb. 6, 1856, when his first application was rejected by the commissioner, and his subsequent application in 1864. He did not after this rejection exercise his statute right to withdraw his application and receive back

his fee of twenty dollars; and although he did not appeal from the commissioner, he persisted in his claim for a patent. In the case of Godfrey v. Eames, 1 Wall. [68 U. S.] 317, the supreme court decided that if a party choose to withdraw his application for a patent, intending at the time of such withdrawal to file a new petition, and he accordingly do so, the two petitions are to be considered as parts of the same transaction, and both as constituting one continuous application within the meaning of the law. But Cummings did not withdraw his application, nor in any manner acquiesce in the rejection. On Jan. 17, 1859, his solicitor applied to the commissioner for the specification and drawing. When the commissioner declined to return the specification, additional counsel was employed in Washington to make an examination and endeavor to secure a patent. The counsel discovered, in the reasons which had been given for the rejection, that a palpable error had been committed, and applied for a rehearing, or for an appeal to the board of examiners. This application was also refused. Cummings was then poor, too poor to pay the expenses necessary to a persistent and successful prosecution of his application. Constantly persisting in the assertion of the importance and great value of his invention, he wearied his friends with his importunities for the means necessary to prosecute his claim and secure his patent, even offering, in vain, one-half of his patent for the means necessary to secure it. He finally prevailed upon Flagg and Osgood to assist him with means; and on the 1st of March, 1864, he made a new application, which was filed March 25, 1864. On the 7th of April, 1864, the office replied to him: "Your present claim is embraced in an application filed by you in 1855, and rejected for want of novelty." The commissioner admits, that, although three times rejected, his former claim and specification, as amended before such rejection, so as to confine it to hard rubber or vulcanite, was improperly rejected, "the case of Stearn's vulcanized rubber palate and vellum, to which you were then referred, having no bearing whatever upon your invention." After the new application was amended at the suggestion of the commissioner, so as to limit the claim and specification to make it conform to the original application as amended, the patent was issued on the 7th of June, 1864, which the commissioner thus decided he was entitled to have received on his application of April 12, 1855. That under such circumstances he neither lost, nor did the public acquire against him, any rights by their unauthorized use of his invention during the time after his application was made, when he was doing all in his power to secure a patent, is clear on principle, and well settled by the authorities. It is only necessary in this connection to refer to the very able opinion of Judge McKennan upon a similar state of facts in the case of McMillan v. Barclay [Case No. 8,902], which leaves nothing more to be said upon this branch of the case, and if further authority be needed it will be found in the opinion of Mr. Justice Clifford, in Jones v. Sewall [Id. 7,495].

Upon the question of novelty, the construction which has been given to the claim renders it unnecessary that any particular allusion should be made to the foreign patents or publications, or to the great mass of the evidence in the record exhibiting the state of the art prior to the patented invention. For it is not even claimed in argument that before the date we have ascribed to Cummings's invention any other person had successfully made what we have defined as his new manufacture; namely, a set of artificial teeth, consisting of a plate of vulcanite with teeth, or teeth and gums, secured thereto in the mode described in the patent, by so embedding the teeth, with the pins which help to secure them, in the vulcanizable compound in its soft and unvulcanized state as to make a perfect joint after vulcanization. It is, however, claimed that, with gutta-percha, tin, platinum, and porcelain, sets of teeth had been made by a process substantially like that of Cummings, differing in substance from it only in the material used for the base. It is claimed that this is the mere substitution of one known material for another, and therefore not patentable. It is first to be remarked that the process which is new in the Cummings invention, by which the new patented manufacture is made, is not, as defendant supposes, the process of making the moulds, but the process of moulding, forming, and making the united plate and teeth, or set or case of teeth. Without, therefore, considering in this connection the question whether the same process had ever before been used in the manufacture of a plate with teeth, or teeth and gums, embedded in it so as to make a tight joint, and in effect, so to speak, a perfect union, using for a base a material other than vulcanite, it may be well to consider, upon the hypothesis assumed by the defendant, under what conditions such a substitution of an old material would or would not be patentable. This is not in any proper sense a case of double use. It is claimed that the case at bar falls within the class of cases like Hotchkiss v. Greenwood, 11 How. [52 U. S.] 248. In that case a knob of porcelain or clay, such as were in common use for doorknobs, was attached to a metallic shank or spindle, by making the cavity in the knob, in which the shank or screw is inserted, largest at the bottom of its depth, in form of a dovetail, and a screw formed therein by pouring in metal in a fused state. The knob was not new, nor the metallic shank or spindle, nor the means by which the metallic shank was securely fastened therein. The only new thing was the substitution of a knob of clay in that form, in that combination, in place of a knob of

wood or metal. The jury were instructed in the circuit court, that, if no more ingenuity or skill was required to make this change and construct the knob in this way than that possessed by an ordinary mechanic acquainted with the business, the patent was invalid. The supreme court, in sustaining the instructions given in the circuit court, which were the subject of exception, say (Mr. Justice Nelson delivering the opinion): "The difference is formal, and destitute of ingenuity or invention. It may afford evidence of judgment and skill in the selection and adaptation of materials in the manufacture of the instrument for the purpose intended, but nothing more." The case, when carefully examined, decides only that "a machine made in whole or in part of materials better adapted to the purpose for which it is used than the materials of which the old one is constructed, and, for that reason, better and cheaper, cannot be distinguished from the old one, and, in the sense of the patent law, cannot entitle the manufacturer to a patent." The case of Hotchkiss v. Greenwood [supra], as the facts had been found by the jury, and as they were assumed in the opinion of the court, presented nothing more than the naked substitution in the same combination of one material for another, without any attending difference in function or effect. It was precisely as if a patent had been claimed for substituting in the same contrivance a silver knob in place of a brass one, or one plated with gold instead of one plated with silver, or one plated with gold or silver on a base metal, instead of the base metal knob. The mere exercise of taste or judgment, without invention, in the selection and substitution of materials, is not considered by the court, in that case, sufficient foundation for a patent. But it is not to be lost sight of, in considering the case of Hotchkiss v. Greenwood [supra], that when the counsel contended that the mode of fastening the shank to the clay knob produced a new and peculiar effect upon the article, beyond that produced when applied to the metallic knob, inasmuch as the fused metal by which the shank was fastened to the knob prevented the shank from acting immediately upon the knob, it being enclosed and firmly held by the metal; and that for this reason the clay or porcelain knob was not so liable to crack or be broken, and was made firm and strong and more durable; the court disposed of this point, not by deciding that such difference of effect would not be patentable if new, but by saying that this peculiar effect on the clay knob, as compared with the old metal knob, was not distinguishable from that which would exist in the case of the wood knob, or one of bone or ivory, or of other materials that might be mentioned, which were old. In effect, the court decided that the peculiar effect claimed was not new, and therefore not patentable, and not that the combination might not have been patentable had any effect been shown which was new, peculiar, and useful. If the knobs of porcelain or clay used by the complainants in that case had been new, or if, being old, the complainants by a novel use of them in the old combination had accomplished a new and useful result, differing not merely in degree, but in kind, from the result of the old combination, the patent would clearly have been valid; and the case cited is certainly not an authority to the contrary. Strictly speaking, no new manufacture is any thing more than a new combination and arrangement of old materials; and whenever such new combination and arrangement produces a new and useful result, there being diversity of method and diversity of result, the invention is patentable.

The utility of this invention is shown by the vast number of persons making use of it, both as licensees and infringers. To overcome the presumption that it is a new manufacture arising from the grant of the letters-patent, the defendant has not introduced the opinion of any expert who is willing, in view of the state of the art as known to him and proved in the case, to testify that this was not, at the date of the original application, a new manufacture. Reliance is placed upon the evidence introduced in the case by the defendant, to convince the court of the fact, upon which defendant's experts were not convinced, that the manufacture patented, as distinguished from those which had preceded it, was not a new manufacture. The nearest approximation to the process of manufacture used by Dr. Cummings is, perhaps, to be found in the experiments of William A. Royce and George E. Hawes in casting a base of pure tin in a mould in the same manner substantially in which the vulcanite base is moulded. If these had been successful instead of abandoned experiments, they would not have furnished any obstacle to the granting of letters-patent to Cummings, for reasons clearly apparent. Hawes cast rude sets of teeth in this way for the lower jaw only, the weight of the tin, when made of sufficient strength out of this soft metal, rendering them impracticable for upper jaws. The shrinkage of the metal, when cooling, rendered it impossible to fit the plate accurately to the mouth, and rendered difficult, if not impossible, a tight joint between the base and teeth, to prevent the set from becoming offensive by the deposit in the crevices of food and fluids from the mouth. The extreme heat of the molten tin was communicated to the metal pins, causing them to expand, and resulting in a consequent liability by their expansion to crack the porcelain teeth. The tin, also, was subject to corrosion by the chemical actions of the fluids of the mouth. Royce had also made three cast-tin plates prior to 1850. He abandoned the experiment, making no more after that time. Yet Hawes testifies that

the use of vulcanite for dental purposes is the greatest improvement in the profession known to him for twenty-five years, and the testimony of Hawes and Royce alone, given as it is by very intelligent and practical members of the dental profession, would be sufficient to prove the utility of the invention, and to distinguish it as a new manufacture, as compared with any thing known in the prior history of the art. Without going into a detailed examination of the Wildman plates, made by casting tin around the roots of the teeth upon gold or silver plates, and the unsuccessful attempts to use gutta-percha, the experiments of Dr. Hill with a secret compound of gutta-percha and some metallic salt, it is sufficient to state that none of these, much less any of the printed publications of which notice is given in the answer, suggest or describe an article of manufacture substantially like that described and claimed in the reissued patent on which this suit in equity is based.

Upon a careful review of all the evidence in the record, I have no hesitation in coming to the conclusion that the invention of Dr. Cummings was a new and useful manufacture; that nothing appears in evidence to show that he was not the original and first inventor of the thing claimed by him; that the reissued patent in suit is a good and valid patent; and that the defendant has infringed the same, as alleged in the bill.

Decree for injunction and account.

[Affirmed in 93 U. S. 486. Mr. Justice Bradley, Mr. Justice Miller, and Mr. Justice Field dissenting.]

[For other cases involving this patent, see note to Dental Vulcanite Co. v. Wetherbee, Case No. 3,810.]

Case No. 5,599.

GOODYEAR DENTAL VULCANITE CO. v. STOCKTON.

[Cited in Goodyear Dental Vulcanite Co. v. Willis, Case No. 5,603. Nowhere reported; opinion not now accessible.]

Case No. 5,600.

GOODYEAR DENTAL VULCANITE CO. v. VAN ANTWERP.

[2 Ban. & A. 252;[1] 9 O. G. 497.]

Circuit Court, D. New Jersey. March, 1876.

PATENTS — INFRINGEMENT — AWARD OF DAMAGES — HOW COMPUTED — NO PROFIT BY DEFENDANT AS A DEFENSE.

1. The principle on which damages are to be awarded for violation of patent rights, considered.

2. In applying the provision of the statute, that, in a suit in equity, the court may award, "in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby," it is pertinent to inquire how the owner of the patent has seen fit to use his invention. He may retain a close monopoly of it, and then the damages are computed by investigating the defendant's profits, which are reckoned a fair criterion of the complainant's loss. Or he may grant license fees, allowing the benefits of his invention to every one who will pay a stipulated price for its use, in which case the amount of the license fee fixed by the complainant is usually considered a proper compensation in damages, except in those cases where the evidence warrants an allowance of exemplary or punitive damages by reason of a wanton infringement.

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

3. In a suit for infringing a patent it is no answer to a claim of damages that the defendant made no profits by his infringement.

[This was a bill in equity by the Goodyear Dental Vulcanite Company against Charles L. Van Antwerp.]

B. F. Lee, for complainant.

P. Van Antwerp, for defendant.

NIXON, District Judge. The bill of complaint in this case was filed June 17, 1873. It prays that the defendant may be decreed to account for, and pay over to the complainant, all such gains and profits as have accrued to him from his infringement of certain letters patent of complainant, and also, in addition thereto, the damages which have been sustained by the complainant by reason of the said infringement. A decree pro con. was entered against the defendant December 2, 1873, and an order of reference to the master to take an account of the gains and profits, and also of the damages sustained by the complainant. The master has reported no gains and profits, and that one hundred and twenty dollars have been proved as damages.

Four exceptions have been filed to the confirmation of the report: 1. Because the master erred in not stating any facts, as the basis of his report, from which an opinion could be formed as to the matters in question. 2. Because the master erred in not reporting the evidence taken before him, or upon which his report is founded. 3. Because there is no evidence of any damages whatever, and the master should have found nominal damages only. 4. Because there was not sufficient evidence to justify the finding of one hundred and twenty dollars damages.

It will not be necessary to consider these objections seriatim. The only witnesses produced for examination before the master were the defendant and Josiah Bacon, the treasurer and general agent of the complainant. The former testified that he first used rubber on his own account about the latter part of 1870, or the early part of 1871, and that he made his last plate of rubber the 9th of October, 1873. He also exhibited a written statement of rubber dental work, and receipts, charges, and expenses, from June, 1872, to October 10, 1873, and deposed that he had used none other except the three pieces of rubber work made about the beginning of 1871. Mr. Bacon was sworn to

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

prove the rates of license charged by the complainant for the use of their patents in constructing dental plates; and testified that sixty dollars per annum was their minimum price in all cases, unless the license was taken and paid for in advance. This testimony is annexed to the report of the master. He found that no gains and profits were shown to have been received, and that one hundred and twenty dollars damages have been proved.

The exceptions filed, suggest for consideration the principle on which damages are to be awarded for violation of patent rights. By section 4921 of the Revised Statutes, which is substantially a re-enactment of the 55th section of the act of July 8, 1870 [16 Stat. 206], courts of equity are authorized, upon a decree being entered in any case for an infringement, to award to the complainant, "in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby." Before such jurisdiction was vested in the equity courts, damages could only be recovered by suits at law. It is supposed that this somewhat anomalous and confusing authority was given in equitable proceedings to prevent multiplicity of suits. However that may be, the power exists, and it is for the court to determine in all cases how it should be exercised.

The terms "profits" and "damages" as used in the act are hardly convertible. They seem to mean different things. The latter are to be awarded "in addition" to the former. Profits, doubtless, refer to what the defendant has gained by the unlawful use of the patented invention, and damages, to what the complainant has lost. Before the act of 1870 it was incumbent on the patentee to make his election of remedies, and to proceed at law for the damages which he could show had been sustained from the infringement, or in equity for the gains and profits that the defendant had realized for the unauthorized use of his property. Now no such election is necessary, because he is entitled to pray in one action for the relief both in regard to profits and damages. In order to ascertain these, it is generally pertinent to inquire how the owner of the patent has seen fit to use his invention. He may retain a close monopoly in it, and then the damages are computed by investigating the defendant's profits, which are reckoned a fair criterion of the complainant's loss. Or he may grant license fees allowing the benefits of his invention to every one who will pay a stipulated price for its use, in which case the amount of the license fee fixed by the complainant is usually considered a proper compensation in damages, except in those cases where the evidence warrants an allowance of exemplary or punitive damages by reason of a wanton infringement. This was the rule of compensation adopted or sanctioned by the supreme court in Seymour v. McCormick, 16 How. [57 U. S.] 490; in the Second circuit, in the cases of Sickels v. Borden [Case No. 12,832] and Goodyear v. Bishop [Id. 5,559]; in the Ninth circuit, in Spaulding v. Page [Id. 13,219]; and in this court in Emerson v. Simm [Id. 4,443].

In the case under consideration the master reported that there was no proof of any gains or profits, and he allowed none. He took testimony showing that the complainant sold licenses to dentists to make or use its inventions; that the minimum price when payment was not made in advance was sixty dollars per annum; that the defendant began to use the rubber plates about the beginning of the year 1871, and continued the use, with intervals, until the month of October, 1873; and from the evidence found one hundred and twenty dollars damages, being the amount of a license for two years. The defendant's counsel, on the argument, did not seem to comprehend how there could be any damages to the complainant when there were no profits to the defendant. He strongly intimated that because his client made no profits by his infringement he ought to pay no damages. But that is a question which the defendant should have considered when he began to use the complainant's property without authority, and is no answer to a claim of damages. It is as if one went to a livery stable and took a horse without the keeper's permission for a contemplated journey, and when sued for the trespass should attempt to show that he ought to pay nothing, because the use of the animal had not resulted in any pecuniary benefit to him, or because the objects for which the journey was undertaken had not been accomplished. In such a case it would not seem unreasonable that the keeper should at least recover the amount that he was in the habit of receiving from other parties for a similar service or use of his property.

The objections to the master's report are all overruled.

Case No. 5,601.

GOODYEAR DENTAL VULCANITE CO. v. WHITE.

[17 Blatchf. 5; 4 Ban. & A. 437; 8 Reporter, 423.] [1]

Circuit Court, S. D. New York. Aug. 7, 1879.

LIBEL—ANSWER—LEAVE TO AMEND—INADVERTENCY.

In an action for damages for publishing a libel, the answer omitted to deny statements in the complaint as to the manner in which the plaintiff was damaged and as to the amount of the damages sustained. The defendant was allowed to amend the answer, by denying such statements, on the ground that the omission to deny them ought to have been regarded by the plaintiff as inadvertent.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 437; and here republished by permission.]

[This was an action at law by the Goodyear Dental Vulcanite Company against Samuel S. White.]

William A. Beach and William Tracy, for the motion.

Benjamin F. Lee, opposed.

WALLACE, District Judge. The defendant moves for leave to amend his answer so far as to deny certain allegations of the complaint, which, not being denied in the answer, stand as admitted. The action was commenced in May, 1875, and the complaint alleges that the defendant published certain libelous matter concerning a patent of the plaintiff, "knowing that the plaintiff was then offering for sale, and was about offering for sale, licenses or office rights to use said invention under said letters patents, and maliciously contriving to cause it to be believed that the plaintiff was not the lawful owner of the exclusive rights secured by said letters patent, and could not lawfully sell licenses to use said invention, and could not lawfully compel the payment of royalties for the use of the invention, and to prevent the plaintiff from effecting sales of licenses, as aforesaid, to dentists." The complaint further alleges, "that, by reason of the said several false and defamatory publications, great numbers of the dentists, and particularly the persons mentioned in Schedule A, hereto annexed, were dissuaded from purchasing said licenses, and refused, and still refuse, to purchase the same, in consequence thereof," and that the plaintiff has sustained damages in the sum of $75,000. Schedule A sets forth the names and residences of over fourteen hundred dentists, residing in all parts of the United States. To this complaint the defendant interposed a pleading which combined demurrers to each count in the complaint, with pleas of the statute of limitations, and matter in defence which could only be urged in mitigation of damages. The demurrers were noticed for argument from time to time, but the hearing upon the demurrers was delayed, and the decision was not had until October, 1878, at which time the demurrers were overruled, and the pleading permitted to stand as an answer, upon the payment of the costs of the demurrers. The defendant then moved to amend the answer, and the motion was granted, but, upon the hearing of that motion, it was first discovered that the answer, as amended, did not contain a denial of the allegation in the complaint which states, that, by reason of the publications of the defendant, the dentists mentioned in Schedule A were dissuaded from purchasing licenses of the plaintiff, or of the allegation that the plaintiff has sustained damages in the sum of $75,000; and, thereupon, leave was obtained to move for the further amendment now asked for.

It is palpable, that the defendant did not intend to admit the truth of these averments, and that, upon the issue as it now stands, the defendant will be precluded from disputing his liability for very heavy damages. It is urged, in opposition to the motion, that the plaintiff has relied upon the implied admission in the answer, and, resting upon this from 1875 until this motion was made, it has not issued commissions and taken testimony de bene esse, as it otherwise would have done, and, in consequence, by the death, or removal, or forgetfulness of many of the dentists mentioned in Schedule A, it will be unable to produce proof, as to a large number of these dentists, that they were influenced by the defendant's publications, and were thereby dissuaded from taking licenses from the plaintiff; and it is further stated, in the plaintiff's affidavit, that the additional expense of obtaining its testimony at the present time, owing to peculiar circumstances, will be very onerous.

It would be a great hardship upon the defendant to preclude him from controverting so important an issue in the case, in consequence of a slip of his counsel in framing the answer; and the court will struggle against the result, and, in furtherance of justice, give him an opportunity to present the truth of the matter, unless constrained to the contrary because of the countervailing hardship which such action would impose upon the plaintiff.

Was the plaintiff justified in relying upon the implied admission in the answer? Had he a right to suppose that the issue which would eventually be tried was that which was tendered by the answer? Here was a pleading containing demurrers which went to the whole complaint, and also matter by way of defence. By the demurrers the defendant admitted all the facts in the complaint, while, by another part of the pleading, he sought to deny the plaintiff's right to recover. What was the legal effect of such a pleading? A defendant may demur to part of a complaint and answer as to the residue, when the complaint joins several causes of action, but he cannot demur and answer to the same cause of action. He must either demur or answer. Old Code Proc. §§ 143–148, 151. There can be no doubt that the plaintiff could have stricken out either the matter in defence or the demurrers, upon a motion for that purpose. Instead of adopting this course, he preferred to notice the demurrers for hearing. By doing this, he elected to treat the demurrers as the regular pleading on the part of the defendant. Upon the decision overruling the demurrers, unless leave had been given to the defendant to answer, there would have been no answer in the case. This motion, then, is to be considered as though there had never been an answer in the case until leave was given, upon the decision of the demurrers, by which the defendant's pleading was allowed to stand as an answer; and the position of the plaintiff is the same as

though the defendant had then, for the first time, served the answer which he now moves to amend. It is true, the error in the pleading was the fault of the defendant, but the plaintiff has no just cause to complain that he has been prejudiced by relying upon an admission in an answer, when he should have known that, as matter of law, there was no answer in the case.

But, I prefer to place the decision of this motion upon broader grounds, and consider it as though the answer sought to be amended had been the only pleading served, when issue was originally joined in the action. I think the plaintiff's counsel were not justified in the belief that the defendant intended to admit such an important allegation of the complaint, and should have regarded it as inadvertent and a slip in pleading. Defendants who contest the plaintiff's right to recover in an action for a wrong, are not accustomed to accept the plaintiff's own statement of his damages; and, to concede, as was, apparently, done here, that the plaintiff sustained seventy-five thousand dollars damages by reason of a libel, would be such a startling departure from the line of action usually adopted by a defendant, as to suggest, almost necessarily, mistake or igorance. If there had been an express admission in the answer to this effect, it would have excited surprise and incredulity.

Aside from the extraordinary character of the admission, the rest of the answer indicated that the defendant intended to contest the amount of the plaintiff's damages, because, the last defence pleaded in the answer, while inartificially pleaded, was, in substance, a defence by way of mitigation of damages. Under the circumstances, the plaintiff's counsel should have anticipated that a motion to amend the answer would be made at the trial, if not before, and should, also, have assumed that the motion would appeal so strongly to the equitable consideration of the court, that it could hardly be refused. The motion to amend is granted.

[See Case No. 5,602.]

Case No. 5,602.

GOODYEAR DENTAL VULCANITE CO. v. WHITE.

[2 N. J. Law J. (1879) 150.]

Circuit Court S. D. New York.

MAINTENANCE.

Where a person not interested in defending suits brought upon a patent assisted infringers to defend such suits with money and otherwise, *held*, that he was liable to an action for damages at the suit of the patentee. At common law, an action for maintenance lies in such case, and neither the statutes nor judicial decisions of the state of New York have deprived a plaintiff suing in that state of such common-law remedy.

This was an action at law in the nature of trespass on the case for maintenance. The declaration alleged the granting of letters patent [No. 43,009], dated June 7, 1864, to John A. Cummings, for an improvement in artificial gums and palates, and two reissues of the patent, and assignments vesting in the plaintiff the title to the last reissue, dated March 21, 1865 (No. 1,904). It also alleged exclusive possession of the invention from the grant of the reissue until the wrongful acts of the defendants; and also that more than six thousand dentists had submitted to the claims of the plaintiff under said patent, and taken licenses from the plaintiff to use the improvement under the same, said licenses being annual licenses expiring by limitation on the 31st day of December of each and every year, and paid for annually. It also alleged that the validity of said reissue, No. 1,904, had been established by judicial decrees, and that the plaintiff obtained a great number of decrees for accountings and perpetual injunctions against infringers of said patent. It also alleged that the plaintiff was in possession of a great revenue from the payment to it of the license fees, as hereinbefore set forth, before and at the time of the wrongful acts of the defendant. The first count of the declaration alleged that the defendant, well knowing the premises, and maliciously contriving to injure the plaintiff, and well knowing that a large number of dentists, particularly named, were infringing said patent, and that the plaintiff was about to commence or had commenced suits in equity against each of said infringers, the defendant having no interest whatever in said letters patent, either adversely or otherwise, and having no lawful interest in any suit, controversy, or proceeding relating to the same, and having, actuated by malice, unlawfully maintained the suits particularly mentioned, brought by the plaintiff against said dentists for infringement of said patent, by assisting the defendants in said suits, both before and after their commencement, with money and otherwise, to defend said suits, and by retaining counsel at his own charge to defend and assist in the defence of said suits, and that the suits named were actually begun by the plaintiff against the defendants therein for infringement of said patent prior to the commencement of this action, and were so maintained by the defendant. The second count averred the maintenance of the same suits by the defendant, by preparing at his own expense an answer to the bills in equity which it was well known to the defendant that the plaintiff would be obliged to file in the several circuit courts of the United States, in order to enforce its rights under said patent, said answer containing a great number of false and pretended defences to said letters patent, and by causing said answer to be printed with blanks so as to enable it to be readily used by infringers in all parts of the United States, and by mailing said answers to every dentist in the United States, to the number

of seven thousand and upwards, including the persons named as defendants in said suits, thereby inducing them to resist the plaintiff's rights, and that the said suits so maintained were actually begun prior to the commencement of this action. The third count alleged the maintenance of the same suits by the defendant by the preparation and printing, at his own expense, of said answers containing blanks, and also by the preparation and printing, at his own expense, of printed instructions to enable infringers to use the answers according to the course and practice of courts of equity of the United States, and by the mailing by the defendant, at his own expense, of said answers and instructions to seven thousand dentists including the persons named as defendants in said suits, whereby they were enabled to file, and did file, said answers in said suits, and were assisted to resist the lawful rights of the plaintiff, and that the said suits so maintained were actually begun prior to the commencement of this suit. The plaintiff demanded judgment for one hundred thousand dollars damages. To each of these counts the defendant interposed a general demurrer.

William Tracy, in support of the demurrer.

The doctrine of maintenance existed in the state of New York only by re-enactment of the English statutes. 2 Greenl. Laws N. Y. 38; 1 Rev. Laws, p. 172, c. 87; 4 Kent, Comm. 449; St. Westm. I. 2, c. 49; St. 28 Edw. I. c. 11; St. Westm. I. 25, 28; 28 Edw. I. 3, 11; 33 Edw. I. 2, 3; 2 Rich. II. 32; Hen. VIII. 9. The New York Revised Statutes of 1830 repeal these acts, and abolish the law of maintenance. 3 Rev. St. (2d Ed. 1828), p. 151, § 62; Thallhimer v. Brinckerhoff, 3 Cow. 644; Campbell v. Jones, 4 Wend. 306; Mott v. Small, 20 Wend. 212, 22 Wend. 403; Peck v. Briggs, 3 Denio, 107; Hoyt v. Thompson, 5 N. Y. 326, 347; Sedgwick v. Stanton, 14 N. Y. 289, 295. The doctrine of maintenance did not exist at common law, but was created by statutes. Lord Coke's statement to the contrary is not supported by his references. Hale, Com. Law; 3 Co. Litt.; 2 Inst. 207, 208; Y. B. 11 Hen. VI. 11; 30 Edw. I.; 1 Edw. III. c. 14; 4 Edw. III.; 18 Edw. III. cc. 5, 6; 1 Rich. II. c. 4; Fleta, lib. 1, cc. 20, 30; Brittin (Kelham's translation) 122, 125; Regristrum Brevium, 182, 183; Fitzherbert, tit. "Maintenance"; Brooke, Abr.; Shep. Grand, Abr. 406; 2 Rolle, Abr. 114d; Hughes, Abr. tit. "Maintenance"; Woods, Inst. 412; Vin. Abr. tit. "Maintenance"; 4 Bl. Comm. 135, § 12; 1 Hawk. P. C. c. 83, p. 249; Bac. Abr. tit. "Maintenance." The law of other states is presumed to be the same as that in which this suit is brought. Hoyt v. Thompson, 5 N. Y. 347; Story, Confl. Laws, §§ 556, 557. The action of maintenance was only at the suit of the king. Rolle, 114d; Coke, lib. 3, §§ 701, 368a; Inst. 208, 212; Mic. in 7 Jac. in star chamber; Wood, Inst. 412; 4 Bl. Comm. 135, § 12; 1 Hawk. P. C. c. 83, p. 249.

B. F. Lee, for plaintiff.

An action for maintenance, at the suit of the party aggrieved, lies at common law. 4 Bl. Comm. 134; 4 Bac. Abr. 492; 1 Co. Inst. 369a; 2 Hawk. P. C. 393, 394, § 4; Id. 403, § 38; Id. 395, § 12; 4 Jac. Law. Dict. 216, 217; Wallis v. Duke of Portland, 3 Ves. 502 (Sumner's Ed., note, pp. 494, 495); Fletcher v. Ellis, Hemp. 300; 4 Kent, Comm. (3d Ed.) 449, note 6; Dane, Abr. 741, § 41; 4 Kent, Comm. (11th Ed.) Holmes' note a, p. 450; Pechell v. Watson, 8 Mees. & W. 691; Flight v. Leinan, 4 Q. B. 883; Fischer v. Naicher, 8 Moore, Indian App. 170; 8 Wkly. Rep. 655. In respect to the civil action for maintenance, no change from the common law has ever been made in the state of New York, either by statute or by the course of judicial decisions. 1 Rev. Laws, 172; 2 Rev. St. 691; Small v. Mott, 22 Wend. 403; Sedgwick v. Stanton, 14 N. Y. 300. If such decisions existed, they would not bind this court. Gregerson v. Inlay [Case No. 5,795]; Swift v. Tyson, 16 Pet. [41 U. S.] 18; Story, Confl. Laws, § 558.

E. N. Dickerson, for plaintiff, in reply to Mr. Tracy.

The important question in this case is whether the maintenance existed at common law. If it did not, it is surprising that the judges of England have not as yet found out that fact, as is shown by the modern English cases cited. In Pechell v. Watson [supra], the exact question arose.

BLATCHFORD, Circuit Judge. I think the decided weight of authority is that such causes of action as are set forth in the first and second counts of the declaration in this case were actionable at common law. And I do not think there is any enactment of the state of New York, or any decision of any court of the state of New York, which deprives the plaintiff of such common-law remedy by action, on such causes of action.

The defendant objects that each of the three counts is defective in not stating that the supposed maintenance was committed in relation to suits actually pending when the maintenance took place. The fact is otherwise as to the first and third counts. The first count avers assistance with money after the commencement of the suits. The third count avers the filing of the answer in the suits. The second count is insufficient because it does not aver that the answers were ever used or filed in the suits. The demurrers to the first and third counts are overruled, with costs to the plaintiffs. The demurrer to the second count is sustained, with leave to the plaintiffs to amend on payment of costs.

[See Case No. 5,601.]

Case No. 5,603.

GOODYEAR DENTAL VULCANITE CO. v. WILLIS.

[1 Ban. & A. 568; 1 Flip. 388; 7 O. G. 41.][1]

Circuit Court, E. D. Michigan. Nov., 1874.

PATENT LAW—DECISIONS OF CO-ORDINATE COURTS—WHEN BINDING — CASES ALREADY DECIDED EXAMINED AND DISCUSSED IN THEIR BEARINGS.

1. The principles upon which the several circuit courts of the United States are bound by the decisions of each other, examined and discussed.

2. The adherence to decisions is by no means confined to those which precede the case in question in the same tribunal. Those of co-ordinate courts are equally authoritative.

3. The circuit courts of the United States, although divided in jurisdiction geographically, constitute a single system; and, where one of those courts has fully considered and deliberately decided a question, every suggestion of propriety demands, that it should be followed, until modified or reversed by the appellate court.

[Approved in Searls v. Worden, 11 Fed. 502. Cited in Reed v. Atlantic & P. R. Co., 21 Fed. 284; Eastern Paper-Bag Co. v. Nixon, 35 Fed. 753.]

4. The circumstances of the appeal to the supreme court, in the case of Gardner v. Goodyear Dental Vulcanite Co. [21 Lawy. Ed. 141], considered.

5. The rule that the use of one material, instead of another, in constructing a known machine, is, in most cases, so obviously a matter of mere mechanical construction, that it cannot be called an invention, is not applicable where the substituted material produces a new and useful result, or an increase of efficiency, or a decided saving in the operations of the machine, and cases may exist where the degree of superiority may be such as to amount, within the law of patents, to a difference in kind. Hotchkiss v. Greenwood, 11 How. [52 U. S.] 248, and Hicks v. Kelsey, 18 Wall. [85 U. S.] 670, cited and examined.

[Cited in Goodyear Dental Vulcanite Co. v. Preterre, Case No. 5,596; Phillips v. Detroit, Id. 11,100; Hancock Inspirator Co. v. Regester, 35 Fed. 63.]

[6. Cummings applied for a patent in April, 1855, and was rejected in 1856. He filed a new application in 1864, and the patent was then granted. The invention went into public use in 1859: *Held*, that where successive applications are made for a patent, and there is no proof of actual abandonment, the subsequent application will be deemed a continuation of the first.]

[Cited in Pelton v. Waters, Case No. 10,913; Colgate v. Western Union Tel. Co., Id. 2,995.]

In equity. This was a bill filed against the defendant [George Willis], a dentist, for infringement of re-issued letters patent No. 1,904, granted to the Dental Vulcanite Company, assignee of John A. Cummings, for "improvement in artificial gums and palates." The claim in the patent is for "the plate of hard rubber or vulcanite, or its equivalent, for holding artificial teeth, or teeth and gums, substantially as described." Cummings filed his caveat May 14, 1852. Applied for a patent April 12, 1855. This application was rejected May 19, 1855, and again rejected August 14, 1855, and again rejected by the commissioner of patents February 6, 1856. On March 25, 1864, a renewed application was filed. On April 7, 1864, the patent office wrote to Cummings acknowledging that injustice had been done in the former rejection, and the patent was thereupon allowed, and was issued on June 7, 1864 [No. 43,009]. There was evidence that tended to show poverty on the part of the inventor and efforts by him to raise money to prosecute his application during these periods. The invention went into public use about 1859.

Benjamin F. Lee, for complainants.

John F. Follett and Calvin C. Burt, for defendant.

EMMONS, Circuit Judge. In ordinary circumstances, the condition of judicial opinion in reference to all the points involved in the record would render unnecessary their discussion upon principle, and in a case where such rulings have been so numerous, and directly upon the points, and so elaborate in argument, it is unusual to do more than refer to them generally, as settling the points in issue. Such, however, is the exceptional feeling and excitement existing in the minds of the numerous defendants in suits brought on this patent in this and adjoining districts, resulting, we believe, from the want of knowledge on their part of the real history of previous litigations, and the character and number of opinions which have been already pronounced, that it is deemed a duty by my brethren and myself to reproduce that which we are well aware is already familiar to the bench and bar. It will attract the attention here of all those interested in these litigations, while the sources from which such information is to be obtained are inaccessible to, or at least are not examined by, them. It was asserted with much earnestness and confidence by defendant's counsel that a careful review of the judgments already pronounced sustaining the complainants' patent, and contrasting the record before us with those upon which such opinions were based, would result in our taking up the questions before us and deciding them upon principle, wholly unembarrassed by judicial action elsewhere. We have listened for three days to an argument of great ability and research, and with much confidence retain the opinion we entertained at the outset, that in all the subordinate federal jurisdictions these questions should be deemed at rest until the court of last resort should reverse some of the judgments already rendered. We think the learned counsel for the defendant much underrated the effect which it is our duty to give to judgments pronounced by co-ordinate courts, where precisely the same points are brought

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and by William Searcy Flippin, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 1 Ban. & A. 568, and the statement is from 1 Flip. 388.]

in litigation before us. The learning upon this subject is familiar, but the motives with which we discuss these matters at all will be subserved by referring to a few of the leading judgments upon this subject here. Those to which we refer have applied the principle in patent cases, but it is by no means peculiar to them. It is a principle of general jurisprudence, a disregard of which would produce a conflict of opinion in the federal judiciary, alike unseemly and impolitic.

In Washburn v. Gould [Case No. 17,214], Justice Story, sitting in the Massachusetts circuit, said: "The rule of comity always observed by the justices of the supreme court in cases which admitted of being carried before the whole court was to conform to the opinions of each other, if any had been given." Justice McLean had previously given a ruling upon the same point in the Ohio circuit in Brooks v. Bicknell [Id. 1,944], and Justice Story therefore said, "although his mind was not without much difficulty on this point, he should rule for the plaintiffs, in accordance with the opinion of Mr. Justice McLean." In American Wood Paper Co. v. Fiber Disintegrating Co. [Id. 320], before Benedict, J., Eastern district of New York, there had been previous suits on the same five patents in other districts, and especially a suit in the Eastern district of Pennsylvania, which decided the points in issue as to two of the patents. Judge Benedict said, as to these two patents, "The determination of the court in the case referred to furnishes an authority from which I should not feel at liberty, had I the inclination, to dissent." In Goodyear v. Berry [Id. 5,556], Leavitt, J., Southern district of Ohio, a patent had been sustained in several other circuits. Judge Leavitt says: "In so far as principles involving the validity of these patents have been settled by these decisions, they will be regarded as final and authoritative on this court." In Tighlman v. Mitchell [Id. 14,042], Southern district of New York, Blatchford, J., quotes with approbation our remarks in Tighlman v. Werk [Id. 14,046], Southern district of Ohio, 1868, in which it is said, "Although the record in this case in reference to some views which a superior court may possibly take contains some material additional proofs, still they are not such as to authorize the same court to overrule its former deliberate adjudications, and to disregard the judgments of a co-ordinate one in a case in all respects substantially like it." In Goodyear Dental Vulcanite Co. v. Root [Id. 5,597], Justice Hunt, sitting in the Northern district of New York, considers as authoritative the previous decisions in Massachusetts on the same patent. To the support of the generality sustained by these judgments it is unnecessary to say that numerous citations might be added, all showing that, in the opinion of the most enlightened jurists, we should be guilty of grossly violating well-established judicial usage and propriety should we disregard the adjudications already made in reference to the validity of the patent before us.

The principle which inclines a court to adhere to its own decision of a similar point, although subsequently convinced it was erroneous, though not in all respects applicable here, furnishes a strong analogy, and a reason on which our own actions should be based. See Ram, Leg. Judgm. 203 et seq. It there abundantly appears that the adherence to decisions is by no means confined to those which precede it in the same tribunal. Those of coördinate courts are equally influential. The queen's bench, common pleas, and the exchequer, where there is a common appellate court to review the decisions of each, follow with the utmost respect each other's adjudications.

Upon reasons having much influence here, appellate courts often follow a series of adjudications made by subordinate tribunals where they have been acquiesced in, and have become, in some sense, a rule of property. It is not because they are obligatory but from the unfitness of shifting rules. This is by no means closely applicable here, where judgments are recent and refer to the individual rights of the complainant. But many of the evils, it is quite apparent, which this class of judgment seeks to avoid would be produced should we disregard the rule. In the elaborate treatment of this general subject in the book to which we have referred, both by the English and American authors, it is significant that they make no distinction between prior decisions of the same and coördinate tribunals. It is enough to call for the application of the principle that the courts have the same jurisdiction under the same government to decide the same points that there is a common appellate court finally to adjust the difference between them.

If one system of coördinate courts more than another calls for the application of this general principle it is that of the circuit courts of the United States. They all have similar special jurisdiction, and are all, in an eminent degree, looked to for all those rules of right and property created under the federal statutes, and in reference to the subjects coming within the federal constitution. Although divided in jurisdiction geographically, they constitute a single system; and when one court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action demand it should be followed until modified by the appellate court.

The comment at the bar upon this subject assumed that the final decrees and elaborately-reasoned decisions of circuit judges, with full citations and criticisms of authorities, often involving the entire history of the law upon the subject discussed, are to be ranked with what are termed "nisi prius decisions." They are in all respects judgments in banc. They not only have the deliberation and care

of judgments in the high courts of chancery in England and this country, but the court of itself bears the same relation to the whole judicial system that such courts do to those in which they exist. There is but one appellate court above them. A superior tribunal also reviews the judgments of the English chancery, and so of nearly all the like state tribunals.

Although we would by no means confine our acquiescence in the decisions of our brother judges to cases where the particular patent has been adjudged to be valid, or that a particular device infringes upon it, still we think that eminently beyond other cases is the rule applicable to them. The right of the complainant is a special franchise granted by the political power. A special organism is created for the purpose of ascertaining his right to the grant. When issued, the several federal courts are authorized to review the rectitude of this action, and from their determination an appeal lies to the court of last resort. It is an indivisible system for ascertaining the rightfulness and the limits of the patent, and when, in any coördinate department of it, judgment has been pronounced, that duty should be deemed performed until reversed by an appellate tribunal. It would present an unseemly spectacle for the same governmental grant to receive half a dozen different constructions in as many coördinate courts, all authorized to define it and inform the citizens what it means, and all having the force of law cotemporaneously under the same government. We cannot speak with great certainty, but do affirm with much confidence, that the expenses paid in our country for patent litigations are rapidly approximating the entire sum demanded for royalties. Until some special tribunal is instituted for the determination of these questions, and some general mode of reviewing these public grants, which shall test definitely the rightfulness of the grants, it will result in a large saving of money to the great masses of our citizens who are using these improvements, to let them and their advisers of the profession understand that a fair and full examination in one court, followed by a judgment, will, in the other coördinate tribunals, be acquiesced in as law, if there is no appeal and reversal.

It is said a present party defendant before the court could not have appealed from the former judgment. The court, as this one has repeatedly done, will carefully guard against any such hardship as to conclude the citizen by a proceeding to which he was not a party, of which he had no notice, and where, in fact, no appeal has been taken. If a desire by a defendant is expressed to test in a superior court the rectitude of what has been already adjudicated, and a complainant should refuse to stipulate that the proofs taken in another cause might be filed in the one pending, the rule would not be followed in the granting of preliminary injunction. Nor is there any hardship upon the complainant. If he insist that the record upon which a former judgment is rendered is full and fair, it is but just that he should suffer it to be imported into a present proceeding before he could ask a preliminary injunction. The defendant can then examine, and if he desires to add to it before the final hearing he can do so; if not, he can appeal to the supreme court upon the record as it is, and test the validity of what has been decided. Such a practice we believe far more beneficent and inexpensive to the defendant as it is economical of the time of the court.

The following decisions, noticed, we think, in the order in which they were made, every one of them upon records precisely like that before us, or less favorable to the complainants, decide (most of them with much fullness of argument) every point necessary to authorize a decree for complainants. In Dental Vulcanite Co. v. Wetherbee [Case No. 3,810], before Justice Clifford, in 1868, the bill was filed to restrain an infringement of the patent now before us. The defendant, there as here, insisted that the patent was invalid because it did not embrace that which was the subject of a patent; that if it did, it was void for want of novelty, and that Cummings was not the inventor; that if he invented, he abandoned it; that there was a forfeiture of his rights, if any he had, under the statute, because he suffered it to go into use more than two years before he applied for his patent; that the reissue was void, because not warranted by the original patent. The cause was argued by counsel as eminent as any in the nation. Justice Clifford, after taking much time for deliberation in a painstaking judgment, overruled every objection taken by the defense. Goodyear Dental Vulcanite Co. v. Gardner [Id. 5,592] was a similar case before the learned justice, in 1868, and the same defense, among others, was substantially taken. The application for a preliminary injunction was argued by B. R. Curtis and Causten Browne, for complainants, and B. F. Thurston and S. D. Law and John A. Foster, for defendants. It is seldom that more professional ability is brought to the discussion of a similar application. Justice Clifford again, in his judgment, sustained the patent and overruled all the objections to it. See Pamph. Rep. of Case. This cause was subsequently brought to final hearing on pleadings and proofs; and in Goodyear Dental Vulcanite Co. v. Gardiner [Id. 5,591] will be found the opinion of Justice Clifford, rendered in favor of complainants after much deliberation, leave having been expressly given the respondents to re-argue the questions of law and fact presented in the Wetherbee Case. We will note, in connection with this case in the supreme court, the imputations cast upon it by the defense, observing here only that there is no accusation of impropriety in the case, before or at the time of the motion for interlocutory injunction.

In Goodyear Dental Vulcanite Co. v. Smith

[Id. 5,598] the same defenses were in evidence as in the case now before us, the records being identical with the exception of a small amount of additional testimony on the part of the defense in this case, of so little importance that it was not noticed at the bar by either side. The cause was argued at great length by able counsel before Judge Shepley, who rendered an elaborate judgment in favor of complainants. In Goodyear Dental Vulcanite Co. v. Root [supra] the same questions were presented to Justice Hunt, sitting in the Northern district of New York, who, after argument, again sustained the patent. Subsequently, in suits by the same complainants against Charles S. Stockton and Frank A. Cummings, argument was had by the same counsel on the same record as in the Smith Case, before Judge Nixon, in the district of New Jersey, who again sustained the patent at September term, 1874. A decree in favor of complainants against William H. Gates was granted at October term, 1874, on the same record as in the Smith Case, before Judges McKennan and Cadwalader, in the Eastern district of Pennsylvania.

The case of Goodyear Dental Vulcanite Co. v. Gardner [supra] was appealed to the supreme court, and every ruling necessary for the support of the judgment in the court below affirmed by that tribunal. The effect of this judgment as an authority here is earnestly assailed, because the court, before the opinion was actually delivered, although judgment had been rendered, dismissed the appeal. We do not see, in the reasons for this dismissal, anything which decreases the obligation on our part to follow the rule of law necessarily involved in the judgment. The complainants, in the court below, for the purpose of securing an argument and a hearing, had advanced money for the fees of the defendant's counsel. For this reason the appeal in the supreme court was dismissed; but before this fact was brought to the attention of the court, the cause had been fully argued and judgment rendered as in other cases. The circumstances under which the defense was prosecuted insured more than ordinary diligence on the part of counsel. The record before us shows that they were retained by the associated dentists, in convention at New York. They received a retainer in hand, with the promise of a large conditional fee of between $15,000 and $20,000, in case they succeeded in reversing the decision of the court below. The fact that money had been advanced by these complainants was fully stated to this association, and, after much deliberation and advice of their counsel, they elected to test the questions at issue upon the record as it then remained in the supreme court, because they were advised that no better one could be made for their interests. Gardner, at that time, was well understood by all parties in interest to be but a nominal defendant. The real parties in interest, who alone were prosecuting the defense, were fully advised of every fact, and in circumstances as well calculated to insure a favorable result as any which by any possibility could be presented upon the known facts, the case was decided against them. This judgment, as evidence of the law, and of what the court of last resort must evidently decide in like case, is obligatory upon us here. No such counter imputation has been made of the bar, and there may be facts outside of this record which would render such a suggestion extremely unjust to the real parties in interest, and who alone promoted the defense in the supreme court; but if all the conditions are before us, it would seem that a case of much ill faith on their part is presented. They were fully apprised of the facts. The complainants knew that they were so apprised of them. Both sides were equally cognizant of the just and necessary rule upon which the appeal after decree was dismissed. We are constrained to say that we do not see how, with anything like honor, they could refuse to abide by a judgment fairly obtained, with full argument, in circumstances to which they, after much consideration, assented.

This series of decisions, without one in conflict with them, presents conditions in which it is our undoubted duty to apply the principle which makes the judgments of coördinate courts obligatory where they have been upon the same points and the same subject matter. As we have already intimated, ordinarily we should terminate our consideration of the case here. A matter so often and so authoritatively decided would not be discussed upon principle did we not believe that a brief reference to the reasons upon which these adjudications rest would be locally beneficial.

Defendant's counsel, in the first place, insist that the subject-matter, as they construe the claim, is not patentable; that, in view of the state of the art—of what had been done before—the production of this plate did not involve invention, and that it had been in use by the dental profession. Our consideration of this head will be very brief—little more than a reference to a few of the reasons given in the adjudications which we have already cited. We know of no better statement of the claim than that given in the very able opinion of Judge Shepley, in the case of these complainants against Daniel H. Smith. [Case No. 5,598.] He says:

"It is for a set of artificial teeth, as a new article of manufacture, consisting of a plate of hard rubber, or vulcanite, with teeth, or teeth and gums, secured thereto in the manner described in the patent, by embedding the teeth and pins in the vulcanizable compound, so that it shall surround the teeth and pins while the compound is in a soft state before it is vulcanized, so that when the compound is vulcanized the teeth are firmly secured by the pins embedded in the vul-

canite, and there is a tight joint between the vulcanite and the teeth."

This definition includes alike the process of producing and the thing produced. Defendant's counsel earnestly contended that this case comes within the cases of Hotchkiss v. Greenwood, 11 How. [52 U. S.] 248, and Hicks v. Kelsey, 18 Wall. [85 U. S.] 670, which they insist hold that where one material is substituted for another in the production of a manufacture substantially like what already existed, a mere increase in efficiency would not sustain a patent. To apply that principle here would be an undue extension of the doctrine held by those cases. We approve, substantially, what was said by Judge Shepley of the case of Hotchkiss v. Greenwood [supra], that, "in effect, the court decided that the peculiar effect claimed was not new, and therefore not patentable, and not that the combination might not have been patentable, had any effect been shown which was new, peculiar, and useful. If the knobs of porcelain or clay used by the complainants in that case had been new, or if, being old, the complainants, by a novel use of them in the old combination, had accomplished a new and useful result, differing not merely in degree but in kind from the result of the old combination, the patent would clearly have been valid, and the case cited is certainly not an authority to the contrary." In Hicks v. Kelsey [supra] the court say: "The use of one material instead of another in constructing a known machine is, in most cases, so obviously a matter of mere mechanical judgment, and not of invention, that it cannot be called an invention, unless some new and useful result, an increase of efficiency, or a decided saving in the operation, is clearly attained." This recent case fully concedes what otherwise we should attempt to show from the adjudications. We think, as it clearly intimates, that cases may exist where the degree of superiority may be such as to amount, within the law of patents, to a difference in kind. It is a mere matter of phraseology, and describing it either way should work no difference in principle. Here the dental profession had for many years striven to produce joints between the artificial teeth and plate that should be permanently impervious to the fluids of the mouth. Treating this as the specific object of effort anterior to the patentee's production, it had never been done at all. His manufacture is wholly new, and, if necessary to the support of his highly meritorious claim, we would, in this regard, thus treat it. In view of this feature, and of the greatly added strength, its far greater adaptability to the surfaces of the mouth, in some uses its lightness, its elasticity, its resistance to chemical action, its vastly diminished cost, and several other important features detailed by the experts, the whole constitutes a product so substantially different from everything that preceded it as to bring it within the true spirit of the law which protects property in useful inventions.

We cannot take time to review the testimony of the experts. What Judge Shepley said of the record before him is literally applicable to that before us. He says: "To overcome the presumption that it is a new manufacture arising from the grant of the letters patent, the respondent has not introduced the opinion of any expert who is willing, in view of the state of the art as known to him and proved in the case, to testify that this was not, at the date of the original application, a new manufacture. Reliance is placed upon the evidence introduced in the case by the respondent to convince the court of the fact, upon which respondent's experts were not convinced, that the manufacture patented, as distinguished from those which had preceded it, was not a new manufacture."

In connection with what we have already said as to differences created by increased efficiency in degree only, and that which, according to existing technical distinctions, is a difference in kind, we were much impressed with the answer of Edward S. Renwick, one of the leading experts for the defendant. A question called upon him to say distinctly whether the use of vulcanite in the mode described did not involve invention. He concedes, assuming Cummings did not invent vulcanite, that if the change of material introduced a property which was different in kind from those before known in dental plates, and was valuable, it would impart a useful property they did not before possess, and that would constitute a new manufacture. A consideration of his entire testimony, and that of the great body of experts in this case, will show, we think, manifestly, that they deemed that a difference in kind, which is as wide in fact and practical utility as that which characterizes this dental plate. Vulcanite was well known and its properties familiar. Gutta-percha was also well known, and had been actually manipulated in the dental art. The whole profession had been earnestly directing its attention specifically to the object so successfully accomplished by this invention, yet no one, until Cummings suggested it, approximated the results he obtained, nor was this great improvement rapidly adopted after its mention in journals peculiarly accessible to the profession. It made its way slowly, and only with the aid of much urgency and industry, and against persistent opposition, to nearly universal adoption. The proof develops no one instance of its use not traceable directly to knowledge derived from Cummings. However plausible may be the argument that because the properties of vulcanite were well known, and the mere forms of these plates and teeth familiar [there was no novelty in the invention], the history of this

invention demonstrates that, as a matter of fact, the highest skill of a learned profession, with all its elements for years before them, not only failed to discover it originally, but required years of argument and experiment before they would adopt it. As we should naturally expect in such conditions, there is an absence in the record of expert testimony, showing that this claim, as judicially construed, did not involve invention. No case ever before us more eminently called for the application of the rule so frequently relied on to uphold the novelty of inventions, which deduces the fact of novelty from the extent of the revolution immediately resulting in that department of the arts in which they are employed.

Formally, the objection was taken that the reissue was not warranted by the original patent. The present claim, as construed by the court, is so undeniably indicated in the original patent that, although we did not understand the counsel for the defense as by any means waiving the point, we did understand by what passed at the bar, and explanations that were made in answer to interrogatories from the bench, that little reliance was placed upon this position. No useful purpose would be subserved in noticing it further. We have no doubt whatever the reissue was warranted by the original patent.

It is also insisted that the complainants' manufacture was anticipated by several pre-existing dental plates. It is not deemed necessary to contrast any of these devices with that before us. It has been frequently done by other tribunals before which they have also been proved, and in every instance judicially pronounced to be wholly unlike that described in complainants' claim. There is not sufficient similarity to demand at our hands a comparison. We quote again from the opinion of Judge Shepley, already noticed, the conclusion at which he arrives after a careful and minute discussion of a part, and a general reference to the residue, of the exhibits here claimed as anticipating the patent. After discussing the cast-tin plates made by Hawes and Royce, he says: "Without going into a detailed examination of the Wildman plates, made by casting tin around the roots of the teeth upon gold or silver plates, the unsuccessful attempts to use gutta-percha, the experiments of Dr. Hill with a secret compound of gutta-percha and some metallic salt, it is sufficient to state that none of these, much less any of the printed publications of which notice is given in the answer, suggest or describe an article of manufacture substantially like that described and claimed in the reissued patent on which this suit in equity is based."

It was also urged on the argument here, as it has been in the other cases referred to, that the rights of the complainants had been forfeited under section 7 of the act of 1836 [5 Stat. 119], as amended by the act of 1839 [5 Stat. 353], which provides that if the claimant shall suffer his invention to go into public use with his consent and allowance for more than two years prior to his application for a patent, it shall be deemed abandoned; and that it was also forfeited under section 8 of the act of 1836, and the additional act of 1839, providing that if the invention shall be patented in a foreign country more than six months prior, and be introduced into public and common use in the United States before the application for a patent, it shall be deemed void. Defendant's counsel concede that if the application for this patent was made in 1855 instead of 1864, then these objections have no application, because no use whatever was proven in this country, nor was the patent issued in England before that date. If the application made in 1864 was but a continuation of the proceeding launched in 1855, so that we may consider the application then made as that upon which the patent rests, neither the two years' period under the one section nor the six months under the other would apply. That within the meaning of these provisions, where successive applications are made in the procuration of a patent, where there is no proof of actual abandonment, the subsequent application will be deemed a continuation of the first, is fully sustained by the following adjudications. Bell v. Daniels [Case No. 1,247], Leavitt, J., S. D. Ohio, 1858. The application filed January, 1838, was then rejected. There was no withdrawal. In March, 1840, a new application was filed, and a patent granted 1840. The court say: "This question is decided by section 7 of the act of 1836. That section provides that when a patent is refused the application shall still be in force, unless the applicant, in a manner pointed out, elects to withdraw it." Blandy v. Griffith [Id. 1,529], S. D. Ohio, Swayne, J., 1869. The application filed May 3, 1856; June 15, 1857, rejected on appeal; May 26, 1858, last application filed; patent granted August 3, 1858. Sales by inventor continuous from summer of 1855. The applicant never exercised his right of withdrawal. Justice Swayne says, "The application of May 26, 1858, was in itself too late; but we think it may be properly held to have been in the nature of a petition for the review of the previous rulings, and to have related back to the prior application, and that the final action of the commissioner was not original and independent action, but a renewal and elongation of the former proceedings, and a reversal of the previous rejections." In Godfrey v. Eames, 1 Wall. [68 U. S.] 317, application January, 1855; rejected May, 1855; withdrawal and new application, 1857; sales in fall of 1854; patent granted March 2, 1858. Justice Swayne, delivering the opinion of the court, said: "In our judgment, if a party choose to withdraw his application for a patent and pay the forfeit, intending at the time of such withdrawal to file a new petition, and he accordingly

do so, the two petitions are to be considered as parts of the same transaction, and both as constituting one continuous application within the meaning of the law." Pages 325, 326. All the following judgments sustain and apply the same principle. The last application is deemed an indivisible part of the proceeding commenced by the first. They all hold that the original application is that upon which the law considers the patent depends. Clark v. Scott [Case No. 2,833], Blatchford, J.; Singer v. Braunsdorf [Id. 12,897], Blatchford, J.; McMillin v. Barclay [Id. 8,902], McKennan, J.; Johnsen v. Fassman [Id. 7,365], Woods, J.; Jones v. Sewell [Id. 7,495], Clifford, J.; Adams v. Edwards [Id. 53], Woodbury, J.; Adams v. Jones [Id. 57], Grier and McCandless, JJ.; Sayles v. Chicago & N. W. R. Co. [Id. 12,414], Drummond, J. These decisions dispose of the objection that the rights of the patentee were forfeited because the application was not made in time. This disposition of the objection of forfeiture renders unnecessary what we should otherwise deem it proper to show, that in order to support that part of it resting upon the issuance of a foreign patent, proof should be given connecting the complainant with its procuration.

No objection was more strenuously urged than that predicated upon Godfrey v. Eames, 1 Wall. [68 U. S.] 317, which the defendant claims intimates that there may be an abandonment in fact, intermediate the first and succeeding applications, which will so sever the proceeding as to make the patent rest in legal contemplation upon the last, and, if two years before it the thing has gone into public use with the consent or allowance of the patentee, it shall be deemed abandoned. To answer this objection, and negative the idea that Cummings, by his delay in the prosecution of his claim, intended to abandon it, the complainants have put into the record voluminous proofs, showing a continuous and persistent assertion of his right and intention to maintain it. The testimony shows numerous and fruitless attempts to procure assistance to defray the expenses of his application by offering shares of the patent, if obtained, and otherwise, and in the later periods of his delay such a degree of ill health, poverty, and general depression on his part, as shows good reason why he did not prosecute more vigorously his application. The facts do not warrant, nor was the argument pressed, that there was fatal delay prior to 1859. At that time, Cummings had become insolvent, and his health seriously impaired by chronic diseases, which ultimately terminated his life. The testimony leaves no room for doubt that after this period he wholly ceased to furnish any considerable part of the support of his family. His wife's small separate property was first mortgaged and then sold, to procure what is proved to be the small and sometimes too scanty expenditure upon which they lived. The praiseworthy efforts of his wife as the keeper of a boarding-house, the pawning of her few personal ornaments, and her general care and support of a diseased and dispirited husband, present a picture as affecting as it is demonstrative of Cummings' inability, from sheer poverty, to prosecute his application. The only diligence of which, in his physical and pecuniary condition, he was capable, he manifested by such a constant reiteration of his rights as showed that the idea, in the words of some of the witnesses, "had taken complete possession of his mind," and incapacitated him for all other business. His offer of portions of the future patent were frequently repeated during the whole period till 1864, when, after its partial use by the profession had demonstrated its utility, for the first time his proposition was accepted, the means obtained, and the patent procured. His history and condition during this entire time exclude the idea that he intended to abandon his claim. The prima facie evidence of a contrary intention springing from the fact that he did make the last application is not overcome by the evidence aliunde, but is proven to be consonant with the real intention of the inventor.

There is one most remarkable feature in several of the discussions of this subject before other tribunals, and which with great emphasis presented itself in this. We do not refer to it to censure counsel in the present cause, as those of equal eminence have elsewhere, in the presence of excited defendants, made similar denunciations. That Goodyear should have a patent for vulcanite, and compel dentists to pay a royalty for using it, and that Cummings should procure a patent for a dental plate made of that same substance, and compel them also to pay a tribute for its use, is treated as an astounding novelty and an atrocious fraud. The accident that subsequent transfers have lodged the present patent in the same hands which held that of Goodyear, presents to the unprofessional mind, unacquainted with the wholly distinct character of the two rights, plausible grounds for this unfounded criticism. A large share of the strong feeling and the strong conviction that injustice has been done the dental profession has sprung from what seems to us a wholly unjustifiable perversion of the most familiar truisms in patent law. It is but the simple—the every day recurring—case where one patentee employs the invention of a prior one. In such instances, it must be true that he who uses the manufacture or article which involves both, must pay a royalty to each inventor. Cummings' invention neither authorized him nor any one else to use the invention of Goodyear, nor could the latter make these dental plates with his material without the consent of Cummings or his grantees. When Goodyear's patent expired he and his associates had just as much right to become the assignees of Cummings as any other citizen. The accidental circumstance that the same

man issued licenses first under one patent and then under the other is unimportant and even trivial. Such instances in this department of business are very frequent, and the union of such interests, instead of being injurious, is beneficial to the public, not only from the economy but the convenience of procuring licenses. Self-evident as all this is to the legal profession and to those dealing in this species of property, an impolitic and much-to-be-regretted impression has been created in the minds of the dental profession, that they have been wronged and actually oppressed by what has been termed "the mercenary marriage or illicit connection of these two rights." It would seem too evident to require additional illustration that the rights under this patent, and the obligations of those who use it, are in no way changed in the slightest degree by the immaterial fact that Goodyear once had a patent for vulcanite that has now expired. Its use is free alike to the dentists and these complainants. The one charges and the other pays neither more nor less than if vulcanite was a natural substance common as ordinary clay. It is the real valve of Cummings' invention alone which is sold, and which they purchase or not, as they please, being free to use vulcanite without any royalty whatever, for any purpose not involving his invention.

Our purpose in thus referring to a few of the reasons which induce us to decide this case in favor of the complainants upon principle, irrespective of the prior adjudications, has been to suggest to the numerous other defendants having like cases pending what we believe to be the uselessness of additional argument before subordinate tribunals. If this patent is to be held invalid after so many judgments sustaining its validity, we are clearly of the opinion that it should be done by the court of last resort. The interests of the numerous defendants now litigating in the circuits would be far better promoted by an early appeal to the supreme court than in wasting so much time and money by the creation of numerous similar records, and paying for repeated arguments before coördinate courts. We do not think they can be effective there without a violation of the well-established and necessary principle to which we referred in the outset, which renders authoritative upon us the long list of adjudications elsewhere rendered.

Decree for complainants.

See 102 U. S. 222, and Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, wherein the principles of this opinion were affirmed.

[For other cases involving this patent, see note to Dental Vulcanite Co. v. Wetherbee, Case No. 3,810.]

GOODYEAR RUBBER CO. (GUTTA PERCHA & RUBBER MANUF'G CO. v.). See Case No. 5,879.

GOODY FRIENDS, The (WESTERN INS. CO. v.). See Case No. 17,436.

Case No. 5,604.

In re GOOLD.

[2 Hask. 34.] [1]

District Court, D. Maine. Feb., 1876.

PARTNERSHIP—CONDUCT AS ESTOPPEL—VERBAL ADMISSIONS.

1. A partnership does not exist from an agreement to form one in the future.

2. An advance of money by one to another in contemplation of their becoming co-partners at a future time does not work a copartnership.

3. The conduct of parties alleged to be partners is competent evidence to show the copartnership.

4. Conduct to estop one from denying that he was a partner in a business firm at the time of its bankruptcy, and liable for its debts, must have been so open and notorious that all the creditors believed him to be a partner in the firm, and were thereby induced to become its creditors.

5. Verbal admissions, from the inability to correctly hear, understand, remember and communicate the precise conversation, are usually unreliable and unsatisfactory testimony.

In bankruptcy. Petition by the assignee of a bankrupt to expunge and disallow the claim of a creditor, proved, and allowed against the bankrupt estate by the register, upon the ground that the bankrupt and creditor were copartners and not debtor and creditor. The creditor by answer denied the copartnership, and proofs were taken. The matter was heard by the court, all right of appeal being waived.

Moses M. Butler, for petitioner.

Thos. H. Haskell and William L. Putnam, for respondent.

FOX, District Judge. Wm. N. Goold commenced business in this place as a banker on the 24th day of June, 1872, in the banking rooms of the late Second National Bank, of which institution he had been the cashier for nearly three years immediately preceding. He continued in the banking business until the 4th of May, 1875, when he failed. At the June term of this court he was adjudged a bankrupt on the petition of his creditors, and Franklin J. Rollins was chosen his assignee. The business was carried on by him in the name of the Bank of Portland, with an alleged capital at its inception of $10,000. Goold had numerous depositors, and among others Moses B. Clements, formerly a member of the firm of E. Churchill & Co. His first deposit was on the 29th of December, 1873, and deposits were continued by him from time to time until December 30, 1874, at which date the total to the credit of Clements on this account was $32,984.47, nothing having at any time been drawn therefrom.

In April, 1874, Clements commenced another deposit account with the Bank of Portland, which was designated on the books as special. This account was kept along until the failure

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

of the bank, large deposits being made and checks drawn thereon, with a balance due to Clements at the failure of the bank, upon this special account, of $2,968.45. Both these sums Clements has proved against the estate of Goold, and the assignee has petitioned this court to disallow these claims on two grounds: I. That Clements was a partner with Goold in the business transacted under the name of the Bank of Portland. II. That Clements was not a creditor by reason of his withdrawal from the concern of more than $42,000, for which he was indebted to the Bank of Portland, and which should be allowed in offset of the claims so proved by him.

The parties have entered into a written stipulation that my decision shall be final and conclusive between them, the right of appeal being waived. By this agreement it becomes my duty not only to pass upon the right of Clements to this large sum of money, but I am compelled to determine which of these parties, Clements or Goold, is, in my opinion, unworthy of confidence, as their sworn statements in respect to the points in controversy are wholly irreconcilable. Before this case was brought before me, I was entirely unacquainted with these parties; but it is conceded on both sides that up to the time of the failure, each of them sustained in this community the reputation of upright, honest, truthful citizens, neither whom had ever been suspected of dishonesty of any description. The responsibility of deciding between them now devolves upon me, and however much my opinion shall reflect upon one of them, I have endeavored to ascertain the truth by as careful and complete an examination of their statements and of the evidence relating thereto as is in my power, and will now, as briefly as possible, declare my conclusions and the reason therefor.

Clements and Goold were examined at great length before the register respecting these transactions, and their examinations have been read in evidence. Clements has also been recalled at the hearing. In relation to the copartnership between them, Goold states that in December, 1873, he and Clements had an interview on the subject. He showed him his books and accounts, explained them to him as fully as he could, and Clements promised to take the matter into consideration. At the second interview he says: "I told Clements that as I needed more funds to carry on the business. I thought the best I could do would be to take a partner. Clements asked how much capital I should expect to offset my business and capital in general copartnership, and I told him $40,000 would be a fair equivalent to offset my business in an equal copartnership. Clements at first demurred, but finally agreed to that sum. He stated that his funds were so invested that he could not put it all in at once, but that he could within six months, by realizing his investments, get in about $30,000 as he thought, and that if he could make satisfactory arrangements he would get in the balance as soon as possible, but that it would have to come from the firm with which he was formerly connected. I then told him that I had always dreaded having a partner, that I would not go into business with any live man until he had been in and out my place of business, had become familiar with the business and my ways of transacting it, and I had become thoroughly acquainted with his ideas and methods of doing business. I told him that I was short of funds, and that if he wished to go into the business, he could, as he could realize on his securities, put the money into the business of the bank, and I could give him collateral security therefor in the shape of notes of my discounted loans, and he should come into my place of busines, make his headquarters for business purposes there, to enable us to become familiar with each other and our methods of transacting business, and then at the end of one, two or three months, as I expressed it, if we liked one another and could agree upon terms of copartnership, we would enter into a copartnership in the business. He agreed to my proposition, came in and made my place of business his headquarters for business purposes, commenced putting in money the last of December, 1873, and continued putting in money until May, 1874. He had deposited over $30,000 in the business for which I had given him collaterals as agreed. About the last of May, 1874, I told him that I thought it was time that we came to some conclusion in regard to our copartnership; and in talking the matter over, he expressed himself as entirely satisfied, both with the business and my method of conducting it; and we talked over the matter of copartnership and made the following agreements: First, that Clements should offset my business with $40,000 additional capital, my division to be considered as $40,000 in any division of profits, making it an equal copartnership; that all profits and losses were to be equally divided; that neither of us should endorse commercial paper, sign bonds or otherwise render ourselves financially liable outside of the concern; that when any division of the profits was made, it should be at the rate of seven per cent. About this time, he gave up and returned to me, to be replaced as a part of the loan of the bank, all the collaterals which he had received from me that were then in his possession, and he also spoke of giving up his bank book containing the credit entries of the money he had already contributed towards his proportion of the capital. I told him, he had better wait until our copartnership papers were drawn; and a short time after this, I spoke in regard to making copartnership papers, and he wished to delay it, saying that he wanted to defer it a short time; that Mr. John Lynch wished him to take an interest in a scheme at Washington. After that, he gave numerous excuses for delaying the execution of the papers, and finally as an excuse, that his name was on outside

paper as an endorser; that he was obliged by circumstances to continue it to keep his business matters along and for his good. This was his excuse up to the time of the failure, and the articles of copartnership were never executed."

Clements in his examination states, "At the time I began my deposits in December, 1873, there was a talk between Goold and myself about going into partnership. I was to put in $20,000 to $30,000 and have collaterals, with the privilege of trying three months or more to see how I liked the business, and to have interest at seven per cent. on my money deposited in case I did not like it. I was to draw out my money at any time. In case I stayed and liked the business, I was to have a percentage of the profits. The percentage was not agreed upon. He required $30,000 as an equivalent for his business and capital. I was not willing to give so much. The question as to the percentage I was to have, if I went in, was never settled. I received collaterals from Goold which were kept by me in my trunk in Goold's vault. When I went to Boston I left some of the notes outside, so that he could take them in my absence and make them good. He complained that he could not get at the notes as they were coming due in my absence, and I took them out of my trunk and left them in the vault, Goold agreeing to make them good at any time. I was absent a good deal of the time. Goold gradually used up all the collaterals, and they melted away in August and September, 1874; were all gone by the last of September, or 1st of October. I had the privilege of the small room at the bank as my office, which opens out of the bank. It was definitely settled January 1875, about the third week, that I should not be a partner. Goold showed me the result of his business for the year on a half sheet of paper. I told him that was no business for two, but that it was good for him; that I would not withdraw my money to injure him until I found some business where I wanted to use it. He replied I could have it any time. There was no settlement made in February. I spoke to him about making good my collaterals, and he replied, he was using a good many notes at the Everett just then, but would make it good soon. I had the utmost confidence in Goold's honesty, and had heard of no losses and felt safe." Clements testified that he never did agree to become a copartner with Goold, and that he informed him in January that it was his determination not to form a copartnership under the option which he claims to have had until that date.

Goold and Clements substantially agree in these particulars; that the deposits made by Clements were so made by him originally, with a privilege on his part to become a partner in the concern on his contributing a fixed sum as capital, the precise amount of which sum, however, is in dispute between them, and that if Clements did not elect to form the copartnership, he was to receive back his money with interest at seven per cent.; that he occupied for his own purposes the small office connected with the banking-room, and deposited from time to time his money in the bank amounting on the 1st of June, 1874, to $25,784.

At this point, the conflict between them arises; Goold swearing that previous to that date, in May, they entered into a definite and complete agreement to become copartners together in this business; that Clements then exercised the option which up to that date he had, whether he would or not become a partner with him; that he made his election and agreed so to do, and that from that time forward to all intents and purposes he was an actual partner with Goold in the business there transacted under the style of the Bank of Portland.

Clements stoutly denies that any such arrangement was then completed and determined upon; but on the contrary, he avers that everything between them continued in the same uncertain, indefinite condition, as it had originally been; that there was no change whatever in their relations, and that he did not then, or at any time thereafter, agree to become absolutely a copartner with Goold; that the right of election so to do still remained to him, as it had been from the first, until the latter part of the following January, when he notified Goold of his determination not to become a partner in the concern. The difference in the sworn statements of these parties is manifestly utterly irreconcilable, and one of them has testified falsely in relation to this matter; these were matters personal to themselves, their own personal contracts and agreements, within their own personal knowledge, and in regard to which there can be no question from failure of memory or by reason of mistake.

According to Goold's statement, this copartnership was agreed upon between them the last of May, 1874, and continued in full force until the failure of the bank the May following. We may with great propriety, and probably with great profit, in determining whether these parties were copartners, examine with care their actions and conduct and their connection with the business of this concern during this year, and what each of them did in relation thereto. The old maxim that "actions speak louder than words" is not without much truth; and whether these parties did or not thus sustain the relation of copartners, we certainly ought to be able to find out, if we can ascertain and scrutinize their conduct during this long space of time.

And first, let us examine Goold's transactions and conduct, and from them learn whether a copartnership existed between him and Clements. According to his state-

ment, the capital, after the formation of the copartnership, was to be $50,000. He had contributed $10,000 and Clements $25,000 or $26,000, and was bound by his agreement to make good the balance. Previous to that time, Goold's return under oath to the collector of internal revenue set. forth his capital at $10,000. On the 31st of May and the 30th of November, 1874, he made his returns for the preceding six months as required by law, in each of which he stated his capital, as before, as being only $10,000; and he included as part of his deposits the amount standing on his books to the credit of Clements. In October after the failure of the bank, his return was that his capital was wholly lost. Each of these returns was after the alleged copartnership was formed, and after Clements' deposit had become a part of the capital of the bank as Goold now swears. But these returns by him under oath do not indicate any increase of capital from any source; and it is certainly extraordinary that he would deliberately commit wilful perjury in this matter, by thus misrepresenting the amount of his capital, when by thus doing, he could not possibly derive any advantage therefrom, as it would not in the least affect the amount of tax to be paid by him, whether this sum was included in capital or in his deposits, as it was liable to be taxed at a like rate under either head.

Again, the business was carried on under the style of the Bank of Portland; but so far as it appears, Goold was the sole party held forth to the world by his advertisements, letters and other documents, both before and after the alleged partnership was agreed upon, as beneficially interested in this business. There is no satisfactory evidence that on any occasion after May, 1874, did Goold represent that Clements was his partner; but so far as is shown, he, and he alone claimed to be the party in interest in the business which he carried on in the name of the Bank of Portland. Subsequently to May, this business was wholly managed and controlled by Goold, the same as it had previously been. His clerk was not aware of any change in the relation of these parties. No entry anywhere appears upon the books, nor was any memorandum of any kind made, to indicate that Clements after May had become jointly interested in this business. In every respect, so far as I can discover, everything was in statu quo, and Goold controlled the whole business without consulting or advising with Clements relative to the business of the bank, as it would have been expected he would have done if Goold's statement is true. If Clements or any other person was interested jointly in this business with Goold, we should suppose that Goold would have kept an account of the expenses of the bank, and of the profit and loss which accrued; but nothing of the kind was done by him, and no entries are anywhere to be found which give any information of the profits or expenses attending the business after the date of the alleged copartnership.

Certainly this is not the usual course adopted between parties when such relations exist, as there would be no means of determining the profits which each would be entitled to at the close of the business. In some instances, bills against Goold have been found amongst the papers which have been paid by him, and which contain charges, some of which were personal to himself, while others were on account of the business of the bank and a proper charge in its expenses; but Goold is not shown by any entry whatever to have apportioned them or charged the copartnership in any way therefor.

Goold swears that the capital which Clements was to contribute to the concern was to be $40,000. On the 1st of June, 1874, only $26,000 had been paid in by Clements; this amount he increased by a deposit of $1,000 in June, $3,000 in July, $1,600 in November, and $1,500 in December, making in all about $33,000. It is shown that, during all the time after the 1st of June, the bank was in very great need of assistance. Goold was very frequently compelled to obtain in Boston, a re-discount at 8, 10, or 12 per cent., with sometimes a commission of one-fourth of one per cent., notes which he had discounted at 7 3/10; and his necessities were so great that, during this time, he remitted hundreds of thousands of dollars through the express company, depositing the amount at the office in this city, and thereupon, notice was sent to the office of the company in Boston by telegraph, who would on the same day, by check or cash, pay this amount on Goold's account into the Everett National Bank. All this was attended with the exorbitant express charges, of one-fourth of one per cent. for doing the business in this way, and frequently with the loss of one day's interest charged by the Everett Bank. The money thus paid by Goold, was frequently obtained by him from other banks in Portland on sight drafts on Boston, drawn by him on the Everett, which had to be provided for by him in a similar manner the day succeeding. Would Goold have incurred such heavy losses by the large discounts which he had to allow, and by such express charges, if he then had the right to require Clements to contribute to the capital of the bank the amount he had agreed, a considerable portion of which was never paid by him? Would he not rather have fully advised Clements of the manner in which he was conducting the business, and of the heavy losses and expenses to which they were thus subjected, a large portion of which would have been avoided, if Clements had paid into the concern the balance of the amount which he had agreed to contribute as capital, and which at any moment he was able to make good if re-

quired so to do by the terms of a copartnership?

M. C. Patten, a very skilful and intelligent accountant, has, with great labor, examined the books and vouchers of the Bank of Portland from the time of its beginning business, and carefully compared them with the accounts rendered by the Everett National Bank; and he states that "from the day the Bank of Portland commenced business until the day of its failure, there was not a day in which its books were correct." The very first day, a false entry was made of $5,000 remitted to the Everett National Bank; and from that time onward, the books are a complete tissue of false entries, as for instance, Mr. Patten says "the books of the Bank of Portland showed to its credit as due from the Everett Bank on an average about $20,000 more than the Bank of Portland was entitled to." On July 23, 1874, there is charged on the books of the Bank of Portland to the Everett Bank $33,000, not one dollar of which was ever remitted. This was done by Goold to reduce his "cash items," which had been accumulating and carried along for some time; but on what account they originated does not anywhere appear; nor is it shown that the bank ever derived the least advantage therefrom. It is hardly to be believed, that if such wholesale frauds were thus perpetrated by Goold in the management of the business of the bank, they could have been entirely concealed from Clements, if he was a general partner, taking that interest in the management of the affairs of the bank which a partner having so large a sum at stake in its welfare would ordinarily be likely to do, especially when it appears that he is a merchant of extensive experience, was in and about the bank much of the time, and if a partner, would have had access to the books, correspondence, and all other papers. The risk of discovery of his frauds was so great and constant, that I cannot believe Goold would have so conducted, if he was liable to detection by a partner at any moment.

From the day of the commencement of its business until its close, the ledger of the bank purports to show its daily condition; and it there appears that from day to day the capital of the concern was daily entered by Goold as $10,000. No change was made by him in this entry after May, 1874, when as he says Clements' deposit had become a portion of the capital; but this deposit of $32,000 from day to day is carried forward to Clements' credit until the failure of the bank, as a deposit by him, and the capital remains but for the original amount. Would this have been so, if during all that time the condition of things was entirely the reverse, and Clements was no longer a depositor of this sum, but a copartner who had increased the capital fourfold by his additions thereto? A daily falsehood of this kind, it is hardly to be believed Goold would have so persistently and daily reiterated.

Goold's personal expenses during this year were quite large, probably more than $2,500, all of which were paid from the bank; but there is nothing whatever entered on any book of the bank to show what amount was withdrawn by him on his account, or for his own personal use. This, certainly, is not the usual manner in which copartners deal with the copartnership estate; and such proceedings would render it impossible to adjust between them any settlement of their affairs; and if it may be said that these sums were probably entered elsewhere by Goold, the objection in that case would be equally cogent, for where a copartnership exists, the books of the copartnership should exhibit the true state of the accounts with the individual members; and whenever a party has so kept the books of a concern as nowhere to indicate therein that any other person than himself has any interest in the business, we may well infer from his silence that he is the only party interested.

On May 25th, 1875, Goold made an assignment of all the assets of the bank to J. H. Drummond, to secure him for procuring bail for Goold. This instrument was carefully drawn by counsel. There is a full schedule of all the unpaid notes which had been discounted at the Bank of Portland, and which were pledged to the Everett Bank, as is set forth in the assignment, but subject to that pledge; they are assigned by Goold as his own private individual property, and for his own individual benefit and advantage, and to be accounted for to him when the purposes of the assignment were accomplished. Surely, this was not the action of a copartner, dealing with the copartnership effects; and if Clements as a copartner was a joint owner in this property, Goold would never have undertaken to transfer these notes, as if they were his sole property. Such an act by him is a most direct and positive assertion that the property was his alone, to deal with as he chose, for his own use and advantage, and that no one, either partner or any one else had any right whatever to forbid his so dealing with it.

On the 22d of June, 1875, Goold, in obedience to the order of this court, made his return under oath of a list of his creditors, and upon that list he has entered the name of Clements as a creditor for both of these claims now presented by him. If Clements was a copartner with him in the business of the bank, Goold has committed perjury in returning him as a creditor for these large sums, while if he was not a partner with him, this statement of Goold is absolute verity. Clements joined in the petition with the other creditors praying to have Goold adjudged a bankrupt. If he was a partner, he would hardly have aided as a promoter of such a movement; nor would Goold have sanctioned it by his silence, as

for this cause he could have defeated the petition against him, and it is within the knowledge of the court, that he was not willingly decreed a bankrupt, but delayed and protracted the adjudication as long as possible, demanding a jury trial, and compelling the petitioners to be present at Bangor prepared for trial. In his conversation with Edward Gould in July, 1874, when informed by him that he understood that Clements had gone in as a partner, and that if he expected any credit he must advertise and make it known, William N. Goold stated, that he and Clements had not got the matters fixed, and that Clements was not ready to complete the partnership so as to advertise.

On Feb. 2, 1875, in reply to a letter from Edward Russell's agency in Boston, Clements wrote denying his liability for any of the transactions of the bank. Upon receipt of this letter, the bank was disrated at this agency, and thereby its standing materially impaired. Goold was informed of Clements' reply; but did nothing to contradict this statement of Clements. In no way or manner did he proclaim that Clements was his copartner; but he continued the business in all respects as before, holding forth that his capital was only $10,000, and that he was the party solely interested in the business. Every check, draft and endorsement after that date, so far as it appears, were executed by him in his individual name, without the least intimation that any other party thereby incurred any liability. If Clements were then really his partner, we cannot but believe that Goold would have been highly indignant at Clements' false statement and denial of his connection with the bank, and that the mercantile agency with the public at large would have soon been advised by him of the real condition of affairs.

Goold's first disclosure of a copartnership between himself and Clements was made in his affidavit of Aug. 2, 1875, in which he swore that "on or about the 1st day of January, 1874, having before that time loaned me money for use in the Bank of Portland for which Clements held collateral security in part, he surrendered said security and agreed to go into said business with me, furnishing the money then in said Bank of Portland as part of the capital, and agreed to divide equally with me the profits and loss of said business." But in his examination, Goold states the copartnership was agreed upon the last of May, 1874, and that the amount of capital which Clements agreed to put in was $40,000, thus contradicting his former affidavit in two material particulars; to wit: the date of the formation of the copartnership, and the amount of capital to be furnished by Clements, thereby demonstrating that no reliance can be placed on his statements in relation thereto.

Did the conduct of Clements after May, 1874, denote that he had become a partner in this concern? On an examination of all the testimony, I find nothing to have been done by him, which authorizes me to infer that there was any change in his relations to the bank from the commencement to the termination of his deposits. If he became a copartner in May, 1874, we certainly should expect, after that date, to find that in some way he would make manifest his new position; that he would assume some duty in its management and direction, and would not permit the whole charge and control to remain with Goold as if he were solely interested. It must be remembered that if Clements had become a partner, his interest was fourfold that of Goold, and for an amount, which considering his means, we may well suppose would induce him to give his own personal supervision, to some extent at least, to the business; yet so far as appears, his conduct was in all respects the same as when it is admitted he was a simple depositor, having placed his funds in the bank with the expectancy of becoming interested as a partner at some future day, if experience should satisfy him that it would prove to his advantage. We do not find that he kept any of the accounts of the bank, or ever received or paid out any of the money; and on but one or two occasions at the most, and in the absence of Goold, did he ever advise or direct about any loans or discounts, although he was ordinarily in the office adjacent to the banking room, which he used for his private purposes.

If he were a partner, we cannot but suppose he had access to the bank books and all the correspondence; and if so, as a merchant, he must very soon have discovered Goold's method of obtaining re-discounts of his loans at a heavy loss, and almost daily remitting funds by telegraph at a cost perfectly ruinous, all which Clements by his means and credit could have at once prevented, and which he certainly would have done to save his proportion of the capital, to say nothing of any profits which were more than consumed by Goold's proceedings. If he was not aware of these proceedings, it is, to my mind, strong proof that he was not Goold's partner, as any one of reasonable business sagacity could have ascertained without much difficulty the method in which Goold was conducting his business. Almost every week the correspondence between the Everett Bank and Goold, on file in the bank, would have disclosed to him Goold's management.

Again, if he were a partner, his curiosity would have prompted him at some time to compare the monthly statements rendered by the Everett with the accounts with that bank as standing on the books of the Bank of Portland; and he would at once have found a very great discrepancy, as Patten says; generally of more than $20,000, which must have put him on inquiry, and would have disclosed to him Goold's necessities and the straits to which he was reduced to carry

on the bank. So long as Clements was merely a depositor, he might well rely on Goold's exhibit presented on a small piece of paper, or on the daily balance as set down in the cash book. But partners, with so large an amount involved, would not for a whole year restrain their investigations within such narrow limits, but would become conversant with the real condition of things which ordinary inquiry would make manifest; for it must be remembered, that during this time Clements was not personally engaged in extensive business, but was comparatively a man of leisure, who, it must be believed, would frequently avail himself of the opportunity to ascertain for himself, whether the copartnership was or not well managed, and likely to prove advantageous to him.

It is not denied that Clements had for a long time been a prosperous merchant and a member of a firm doing a large and extensive West India business in this place; and he must have become well acquainted with the methods generally adopted by skilful merchants and accountants in transacting and carrying on their business; and he cannot but have known that expense accounts, accounts with profit and loss, and individual personal accounts with each member of the firm were requisite for a proper adjustment between them of the affairs of a copartnership. His investigations as a copartner would have shown him that not a single one of such accounts were to be found on the books of the Bank of Portland, which though they were not absolutely necessary, if Goold was the sole party in interest in the business, were indispensable, if Clements were interested with Goold in the profits, and which he would, under such circumstances, have insisted upon.

If Clements was a partner, he could not but be aware that his name added greatly to the credit and strength of the bank, and that the institution must have derived great advantage from its publicity. For the common benefit, therefore, he would have done all in his power to disclose his connection with the bank; but instead of so doing, on Feb. 2, 1875, when applied to by Russell's agency at Boston to state whether he was "personally liable for the obligations incurred in the course of business of the bank," he replied on the same day, "I don't know that I am at this time liable for any of its transactions, although I have $30,000 deposited in the bank, in the expectation of joining Mr. Goold in its business." This reply was perfectly suicidal to the bank, if he was a partner, as he could not but know that its credit would be much impaired thereby; and we cannot believe that one really a partner in a concern would adopt a course so manifestly detrimental; especially as he must have known that it was for Goold's interest forthwith to deny its correctness and insist on their joint liability as copartners.

The learned counsel for the assignee has very properly called the attention of the court to the conduct of Clements in three particulars, as bearing upon the matter of partnership; first, that his deposit of $11,750, February 10, 1873, was not in cash, but was the net proceeds of certain notes discounted for him at the bank and passed to his credit, Clements thereby losing the amount of the discount. Two answers may be given to this objection; one, that the discounts were had in February, at which time Goold does not claim that the partnership had been fully agreed upon; and secondly, that from the time of the deposit, this amount drew interest at seven per cent. with a right, if Clements should prefer, to share in the profits then accruing; so that in any event the difference of interest would be slight, while his profit as a copartner might be far in excess of the interest. Another suggestion is, that there was no settlement and credit to Clements of interest at seven per cent. in January, 1875, at which time Clements says he informed Goold that he had decided not to go into business, as there in all probability would have been, if Clements' statement is correct. But in reply to that, it may be said, if Goold's version is true, the copartnership had continued from December, 1873, and at the close of the year, there should have been an adjustment of the profits and a credit to Clements of his share, which it is not pretended was ever done. Clements says he was only to let his money remain there until he found some business in which to employ it; and it might well be, that the computation of interest might be delayed until principal and interest were called for.

There is another suggestion of much greater significance, and that is the surrender by Clements of all his collaterals received from Goold, and which Goold, in his affidavit of August 2d, says were surrendered by him in January. But in his examination before the register, he fixes it at shortly after the latter part of May, and which, as he says, were then surrendered on account of Clements having become a copartner in the business If that relation existed, he would have no occasion to longer withhold the collaterals, and it would be natural that Clements should do as Goold swears he did. Clements says "that at the commencement of his deposits, he received collaterals therefor, and held them till the next summer, allowing Goold to collect them as they fell due, being the loan of the bank under his promise to make them good; that when he was about to be absent from the city, he put them in the vault where Goold could have access to them; that this was done at Goold's request, he promising to replace them, and they all melted away, being finally closed out in September or October." Such conduct on Clements, part was certainly inconsistent with his previous conduct in requiring this security

for his deposits and is hardly to be expected from prudent and cautious business men. But Clements swears he did this for Goold's accommodation; that he had entire confidence in him, had no reason to distrust his statements and exhibits to him, relied on his assurance that the collaterals should be made good, and finding that many other depositors, cautious business men in this place, were manifesting their confidence in him by making very large deposits in the bank without exacting security, he was induced to do likewise and not insist on further collaterals in place of those which had been paid. This is not the first instance within the knowledge of the court, in which one having security for very large amounts has surrendered it all to his debtor, relying on his assurances to make it good, and has at last been deceived; and it may be, that Clements' statement respecting the collaterals supported by his oath is correct; but this transaction certainly affords some support to Goold's statement of this matter; and if it had been corroborated in other particulars, might have exerted great influence upon the decision of the cause. It is, however, only one of many circumstances, all of which must be weighed by the court, before arriving at a conclusion upon the question at issue.

The assignee has examined a large number of witnesses as to the acts and declarations of Clements, in the nature of admissions on his part, to satisfy the court that an actual partnership existed between Goold and himself. Before we proceed to examine this testimony, it may be well to refer to the authorities, as to the reliance which courts of justice should place on evidence of this description. Prof. Greenleaf says: "With respect to all verbal admissions, it may be observed that they ought to be received with great caution; the evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake, the party himself, either being misinformed, or not clearly expressing his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say. But where the admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory nature." 1 Greenl. Ev. § 200.

From my own experience, I have for many years been of the opinion that statements of verbal admissions of a party are the most unreliable and unsatisfactory of all human testimony. In re Moore [Case No. 9,751]. It is hardly ever the case, that a witness will repeat the conversation twice alike, and yet, in most instances, we find them swearing with positiveness, that they give the precise language used by the party. The fact really is, that not one time in ten does a witness testify directly from positive remembrance of the language as spoken; but he clothes in his own words the idea which he then has of what he heard. It is but seldom that a casual conversation is fixed so indelibly in our memory, that we can repeat it verbatim months or years afterward; and I confess, my suspicions are excited, when I so frequently hear witnesses pretend so to do. If any one will undertake the experiment and test his own memory as to a casual conversation with a friend six months since, he will find that in most instances he will be wholly unable to speak with certainty the precise language employed, while there may remain, impressed with distinctness upon his memory, a general idea of the nature and effect of the conversation. The memory of the most honest and intelligent person is liable to mingle with the transaction subsequent facts and occurrences, and statements of other parties, and, as Judge Redfield remarks, "from the impossibility of recollecting the precise words used by the party, or of translating them by exact equivalents, we must conclude there is no substantial reliance upon this class of testimony."

The most important witness as to admissions of Clements is T. F. Jones, the Portland manager of Russell's Mercantile Agency. He testifies: "Somewhere between the 15th and 20th of May, 1874, I went to the Bank of Portland, in consequence of an inquiry made of me, to know if Clements was a general partner in the concern. I saw Mr. Clements, and in answer to my inquiry if he was a general partner, he replied that he was, and that he was considered holden for the liabilities of the concern. On his statement, the rating of the Bank of Portland was raised from $10,000 to over $50,000. Clements promised that an advertisement should appear by July; and in November he gave an explanation, that the reason why he did not advertise was, that he was connected with some operations of Twitchell, Champlin & Co., and that his name was loaned considerably on the street, so that it would not lend a great deal of strength to the concern, if he did then become a partner. He then promised that it should appear by the first of January; but it did not appear. I notified them that unless there was some advertisement by which I could be fully satisfied that Clements was a partner, the rating would be reduced or suspended. February almost expired and nothing was done, and I wrote to Russell, and thereupon the correspondence took place between Russell and Clements, an abstract of which is before given."

The most important portion of this testimony is the positive unqualified declaration of Clements made between the 15th and 20th of May, 1874, that he was a general partner, holden for the liabilities of the concern. Mr. Jones seems to have followed this matter

with a good deal of persistency on his part, and to such an extent, judging from other testimony, as to have produced some ill feeling between the parties; but admitting that Jones intended to state the exact truth in relation to this conversation, I am entirely satisfied that he is somewhat mistaken, and has represented it much more strongly against Clements than his language really warranted. He has testified, not from his memory, but from his inferences after a process of reasoning on his part upon his own subsequent actions. His own report which he made in relation to this interview satisfies me that the partnership between these parties was not fully and definitely agreed upon, but that Clements then expected to become a partner, and that such expectation was then communicated by him to Jones, the precise language employed by him not being within Jones' recollection, but which he now chooses to declare was a direct affirmation that a general partnership then existed between these persons.

On the 20th of May, 1874, Jones wrote to E. Russell, in Boston, as follows: "Bank of Portland, May 20, 1874. Moses B. Clements, late of E. Churchill & Co. has already put $27,000 into this concern, and intends to put in more as soon as he can realize, and will be advertised as general partner; is so now virtually. This will put the bank in good standing and credit. Clements is worth $50,000 to $75,000." This statement, in its bearing on the question of an existing partnership, is certainly not an affirmation on Jones' part that at that time it had already been created and was in full force, but only that it was to be in the hereafter; that a large sum of Clements' money was in the concern, which he was to increase, and that "he will be advertised as a general partner." Then comes the significant expression; not that he is actually then a partner, but that he is so now "virtually." This word "virtually," Worcester defines "as in effect, though not actually." Jones, therefore, must be understood by employing this word, in speaking of the copartnership, as intending to convey the idea, not that the copartnership was then an actually fixed and completed thing, but that it would take place, and that what had already been done was in his opinion equivalent to the formation of a copartnership, although something more remained to be done before it would become absolute and obligatory. If Clements had absolutely and squarely said to Jones that he was then a partner, we should never have found Jones in his correspondence with Russell using any ambiguous phrases; but he would have stated directly, that the partnership did in fact then exist, and that Clements had so declared to him. He would never have employed language to convey the idea that the partnership did not then actually exist, which is the real signification of his report.

But there is other evidence which is conclusive in this matter. This conversation between Clements and Jones, whatever it may have been, must have taken place prior to the 20th of May, as that was the date of Jones' letter to Russell in relation to this matter. Goold in his examination in relation to the precise date when the copartnership was agreed upon between him and Clements in various places, says it was "the last of May," or "about the last of May." From the 15th to the 20th of a month cannot be considered as the last of the month, or about the last of it; and therefore, according to Goold's testimony, there was no copartnership in existence between Clements and himself at the time Jones says Clements admitted he was a partner. Some reliance is placed upon the statement of Clements as given by Jones, that he agreed to advertise the partnership. That great caution is requisite in the consideration of Jones' testimony is, I think, demonstrated; and to my mind, it seems quite clear, that as Clements had not then abandoned the idea of forming a copartnership, he might well speak of his advertising it, and that he expected so to do when the arrangement was concluded between them; and this is all, as I believe, that he ever intended to signify to Jones in any of his conversations. His language at one time as given by Jones, if his statement of the conversation could be depended upon as strictly accurate, would clearly indicate that the matter was not completed at that time, as Jones says Clements told him in November, "it would not lend a great deal of strength to the concern if he did then become a partner;" manifesting, most clearly, that he was not already a partner.

Edward S. Hamlin testified that he was a member of the firm of F. A. Hamlin & Son, who had on deposit in the Bank of Portland at its failure $3,396; that before becoming depositor he had a conversation with Clements on Exchange street; "told him I thought of changing our bank. He said, he should be glad to have us come in there, and that he would use us as well as he could, gave me the names of some of their depositors; said everything should be satisfactory, the paper should be discounted at 7 3/10, and if everything was not satisfactory to let him know. Had notes discounted, but never did the business with him when I got discounts, but with Goold. Once, on Cross street, I asked him if we could be accommodated with a short discount. He said 'Yes,' he thought I could, but I had better see Goold. I did, and he said 'Yes.' On cross examination he says, 'Clements never told me he was a partner.' On Cross street Clements said I could have the short loan, but I had better see Goold."

The testimony of this witness illustrates how little reliance can be placed on absolute accuracy in evidence of this description; as in one instance he stated that in the conver-

sation on Cross street with Clements, his reply was, "Yes, he thought I could be accommodated," &c.; while in but a few minutes afterward he says Clements' reply was that "I could have the loan, but I had better see Goold." In the latter case a positive consent to the proposition; an absolute disposal by him of the funds of the bank, which would be evidence of a right on his part to their control; while the reply, as first given, was a mere expression of opinion on his part, with a reference to the manager of the bank.

It is impossible to say, therefore, just what did take place on that occasion, although there can be but little doubt that there was some conversation about a loan, with a statement of some kind from Clements of more or less assistance from him in obtaining it. Some allowance must be made on account of the deafness of this witness, which was so great at the trial, that he was examined with difficulty by counsel standing near to him; but conceding that we have the substance of what passed between the partners, all that can be fairly deduced from it is, that Clements was desirous of obtaining depositors in the bank, and was ready to assure them of such accommodations as they might require, all of which he might well do, relying on his influence with Goold, and his expectation of afterwards becoming a partner in the business, the profits of which he was to share from the time of his deposits. The great interest which he had in the concern at the time, as its largest depositor and prospectively as a partner, might well induce and authorize all that he said to Hamlin, although he had not then actually become a partner; and for the same reason, he might well have assured Levi F. Hoyt that a note of Foss', which Clements was willing to endorse, would be discounted at the bank, and would also account for his discounting from the funds of the bank during Goold's absence a note for Hoyt of $200 or $300, which was good beyond dispute. By such accommodations he was befriending the customers of the bank, the profits of whose business he expected afterwards to share with Goold.

The testimony of Wright, Willard, Sanborn and Witham, for the same reason, is entirely reconcilable with a condition of affairs in accordance with Clements' testimony; and when that is taken into consideration, the testimony of these witnesses, as to Clements' declarations, is satisfactorily explained, without necessarily requiring that an actual partnership existed.

Albion T. Sawyer was examined orally, and Simon F. Tufts by deposition. They were copartners in trade on Commercial street, and were both present at a conversation with Clements on the 23d of April, 1875, at their store. Sawyer says he asked Clements if he was interested in the Bank of Portland, and he replied that he had more money there than any other man, and that it was all right; that Goold had not been in any speculations to lose anything, and was an honest man, and that we should be safe; that he had access to the books any time that he chose. Tufts says: "After Clements said he had more in there than any other man, one of us asked him to tell us whether the bank was safe or not. Clements said he believed it was, as he believed Goold was an honest man, and that he believed Goold was right and straight." He then adds what Sawyer did not state, that "Clements said his business was on the wharf, took most of his time there, so he did not spare much time in the bank and left it with Goold to manage. He said that the books were open to his inspection at any time, and he believed everything was right and straight. If he didn't he shouldn't leave his money with Goold."

Admitting that we have the substance of this conversation, I find nothing in it but what so large a depositor in any banking institution might say although he was not a partner. The whole idea from beginning to end to be drawn from this conversation is, that his money was with Goold on deposit, and not that he and Goold were jointly interested in the business there transacted, and that at that time he had confidence in Goold, and intended to express that confidence to Tufts and Sawyer; and his language throughout the conversation certainly implies that he was a creditor of Goold and not a partner, and that his money was in the bank the same as other depositors, although to a much larger amount; but there is another fact of very great importance to be remembered in connection with this testimony, and that is, that prior to the conversation with these two witnesses, Clements on the 2d of February had publicly and in the most notorious manner, almost as open as by a public advertisement, by his own letter assured the mercantile agency that he was not a partner; and this statement had been communicated to Russell's subscribers, and had become so generally known as to occasion great distrust of the credit of the institution. After that, it can hardly be supposed that Clements said or did anything, in contradiction of his written denial, which should be deemed an admission by him of his being Goold's partner.

George Humphrey says that between February and April 1875, Clements, in reply to his inquiry if he was in the importing business, said that he was not; asked him what business he was in; he said "In the banking business—a private bank." This conversation took place after Clements' denial to Russell; and while perhaps he may have spoken of his place of business being at a private bank, or that he was transacting business at such a bank, it is not necessarily to be understood that he intended to declare that he was a partner in such an institution.

The testimony of Clements, that he was never a partner with Goold in the Bank of Portland, was sustained on all points by every act and declaration of Goold while carrying on the business, by his repeated admissions to numerous witnesses before and after his failure, and by his solemn oath. Clements' conduct and behavior, during the time in which Goold says the partnership was in existence, is in almost every instance in conflict with that we would naturally expect to find if a copartnership existed. The evidence of Clements' declarations does not support the theory of his being a copartner to such a degree as to cause me to doubt Clements' sworn statements and denial of it; and I am of the opinion, that the petitioner has failed to establish the partnership as alleged.

So long as a mere agreement for a partnership exists between the parties, the actual partnership has not commenced and does not exist. Gabriel v. Evill, 9 Mees. & W. 297, clearly establishes the proposition that a mere advance of money on a prospective partnership, or in contemplation of a partnership not finally agreed upon, does not make a partner of the person who advanced the money; Lord Abinger saying, "the defendant clearly was not a partner until he had exercised the option given him of declaring himself such." One not a partner may incur all the liability of a partner by allowing himself to be held out to the world as a partner, or by so conducting himself as to induce all the creditors of the concern to believe that he is really a partner, and for that reason to give credit to the business. By so doing, he may be rendered responsible to the same extent as an ordinary partner; but his conduct must have been so open and notorious, that all the creditors must have fairly believed that he was a partner; and having induced them to act on that belief, although it may be proved that it was expressly stipulated that a partnership should not exist, he is nevertheless, in such a case, estopped from disputing it. For the purposes of this decision, it is sufficient to say that there is not found in the testimony the requisite evidence to render Clements thus accountable, by estoppel, for the debts of the Bank of Portland.

It is possible that some of the depositors might in an action at law against Clements establish a special liability to them on this ground; but as at present advised, on the evidence before me, I should hesitate, before I could hold him accountable to any one of them. If such liability had been already fixed in a judgment at law against Clements, it would not control the present proceedings, as it would be a matter merely personal between him and his judgment creditor, which might well exist in that particular instance by reason of Clements' conduct with such creditor, but which would not affect the right of any other depositor.

Goold swears that Clements has withdrawn from the concern $42,070; and it is therefore claimed that his proof of debt should be rejected, as the amount so withdrawn was more than sufficient for the payment of both of his deposits. The burden of proof to establish this objection rests with the assignee. If the deposits have been paid, he must establish the fact; and the only testimony he presents is Goold's examination, in which he does state that this amount was withdrawn by Clements. This statement, Clements absolutely denies. The court might rest, therefore, upon this denial, by oath against oath, and simply say that the assignee has not by the uncorroborated statement of Goold overcome the denial of Clements. But after this protracted investigation, and the serious nature of the charges against Clements, I feel fully warranted in saying that Clements has proved most conclusively the falsity of this statement of Goold's and that it is clearly demonstrated that Clements did not receive the amount thus claimed by Goold to have been paid to him.

In June, 1874, Goold made oath that these deposits were all justly due from him to Clements; but in August he swore directly to the contrary, and in his examination before the register, he produced a list of amounts, as he said, paid out by him on checks of Clements, commencing May 2, 1874, with one for $4,895, the next payment being Sept. 15th for $2,100, and continuing till March 26th, the whole amounting to over $42,000, about $7,000 in excess of all Clements' deposits. Goold produced the check of Clements for the first payment. The others, he says, were surrendered up to Clements after the failure, the check produced having been accidentally mislaid and not given up as was intended; but he says he retained an accurate list of the checks, which is the same produced.

This check of May 2d for $4,895 is signed by Clements and payable to Twitchell, Champlin & Co., and notwithstanding Goold's testimony, it is established beyond question that it was drawn for the amount of a note of Twitchell, Champlin & Co., for $5,000, payable to Clements and discounted on that day at the Bank of Portland, and for which Clements drew this check in favor of Twitchell, Champlin & Co., it being for the precise amount of this note less the discount.

The books of the Bank of Portland do not show any entry of this note, or that Clements was ever credited with this sum. The check came through the clearing house, and it is plain that it grew out of the discount of this note, and that if Clements is chargeable with the check he is entitled to the credit of the note, less discount, which was paid by Twitchell, Champlin & Co., when it fell due. The next check was paid, as Goold says, on the 15th of September. In all there were twenty-three in number, of various dates and for various sums.

The attention of Mr. Patten was called to these statements of Mr. Goold, and to the dates and amounts of these checks which Goold swore were paid by him in bills to Clements, and Mr. Patten testifies, that, from the books of the Bank of Portland and the accounts rendered by the Everett Bank, he has opened an account between Goold individually and the Bank of Portland from the commencement to the close of the bank, and that after making Goold every allowance which from any source he can find that Goold should be entitled to, there existed a deficiency and indebtedness of Goold to the bank at its failure of $62,000; that about $50,000 of this existed prior to Sept. 15th, 1874, and that only $13,000 of deficiency occurred after that date; and as Goold's statement is that Clements, after September 15th, received over $37,000 from the bank, the falsity of his statement is apparent.

A deficiency of $50,000 already existed prior to the time when Goold charges Clements with receiving from him this large amount; and it is certain that $37,000 could not have been drawn out after September 15th, as the books show but $13,000 was subsequently abstracted. Mr. Patten also says that he has examined into and ascertained the actual condition of the Bank of Portland at the several dates at which Goold swears these checks were paid by him in bills to Clements, and he finds that on not one of those days did the Bank of Portland have on hand bills enough to meet the check which Goold avers was on that day paid to Clements, and that they could not have been covered up under "cash items," as there was not the necessary variation in these items to correspond with the dates and amounts. Goold's testimony before the register as to the giving up by him of these checks is as follows: "Clements agreed to use all his influence to obtain a favorable settlement of the affairs of the bank if I, on my part, would shield him from being a partner in the concern as far as I was able. He said that if I gave these checks up to him, he should destroy them at once, and then there would be no evidence that any such amounts had been drawn; that his deposit books and the books of the bank would agree, and that we could both swear they were correct, and that he would prove his claim with the other creditors and induce them to accept a settlement. He also took a solemn oath to me, at the time of the surrender of the checks, that "he would not wrong, cheat or defraud the creditors of one cent of the amount represented by these checks."

Goold admits that no one ever saw or heard of one of these checks before the failure; that no entry of them or their payment was anywhere made, and that his clerk was ignorant of their existence or payment. I am compelled to declare that the court places not the least reliance in this statement of Goold, as it derives no support whatever from any source, and the falsity of his testimony is established in various matters beyond all question. I am clearly of opinion that these sums were not received by Clements as Gould testified, and I therefore dismiss this petition with the closing remark, that the assignee, after the disclosure of Goold, was required to present the claims of Clements to the court for its revision; that he has faithfully and diligently performed his duty in this matter, producing all the evidence which might tend to defeat the claim, at the same time allowing the adverse party free access to all books and papers and the results of their examination by the expert accountant, and acting with the fairness and impartiality becoming an officer of the court, actuated only by the purpose that the court should be fully informed as to the matters in controversy; and the result is, that in my opinion, nothing has appeared in this investigation in any degree to reflect on the honesty and integrity of Moses B. Clements; but he has a right to expect and demand from this community the same confidence and respect which, it is admitted, he enjoyed before he became in any way involved in the affairs of the Bank of Portland. Petition denied. Claims of Moses B. Clements established to the full amount thereof.

GOOSELEY (UNITED STATES v.). See Case No. 15,230.

GORDEN (CARSON v.). See Case No. 2,463.

Case No. 5,605.

GORDON v. ANTHONY et al.

[16 Blatchf. 234; 4 Ban. & A. 248; 16 O. G. 1135.] [1]

Circuit Court, S. D. New York. May 3, 1879.

PATENTS—PHOTOGRAPHIC SHIELD—INFRINGEMENT—BILL BROUGHT AFTER EXPIRATION OF PATENT—ACCOUNT OF PROFITS—BILL OF DISCOVERY—ASSIGNMENT OF PATENT BY RECEIVER.

1. The letters patent granted to Ebenezer Gordon, October 19th, 1858, for "a photographic shield," are valid.

2. Although a suit in equity for the infringement of a patent is brought after the patent has expired, and no injunction can be granted, and the bill is not a bill of discovery, the court has jurisdiction to award an account of profits, and can take cognizance of the suit.

[Cited in Atwood v. Portland Co., 10 Fed. 284; Consolidated Oil Well Packer Co. v. Eaton, Cole & Burnham Co., 12 Fed. 870.]

[Cited in Carver v. Peck, 131 Mass. 294.]

3. A bill without interrogatories, under the amendment to rule 40 in equity, made at the December term, 1850, and which prays only for a disclosure of gains and profits from infringement, is not a bill of discovery.

4. The case of Stevens v. Gladding, 17 How. [58 U. S.] 455, examined and explained.

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[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 248; and here republished by permission.]

5. An assignment of an interest in a patent, made by a receiver, appointed by a state court, of the property of the owner of the patent, conveys no title to the assignee, because the assignment is not a written instrument, signed by the owner of the patent.

[Cited in Secombe v. Campbell, 5 Fed. 806; Ager v. Murray, 105 U. S. 131; Adams v. Howard, 22 Fed. 658.]

[Disapproved in Wilson v. Martin-Wilson Automatic Fire Alarm Co., 151 Mass. 520, 24 N. E. 786.]

[Bill by Ebenezer Gordon against Edward Anthony and others for the alleged infringement of a patent.]

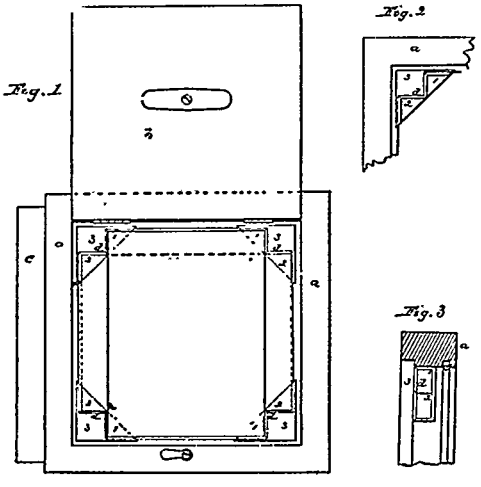
Starr & Ruggles, for plaintiff.

Charles F. Blake, for defendants.

BLATCHFORD, Circuit Judge. This is a bill in equity founded on letters patent [No. 21,829] granted to the plaintiff, October 19th, 1858, for 14 years from that day, for a "photographic shield." The bill was filed in 1873, after the patent had expired. The patent had, in fact, been extended, but the bill does not allege any extension, as the right for the extended term had been assigned by the plaintiff. The bill alleges the unlawful manufacture and sale by the defendants, ever since January 1st, 1864, of photographic apparatus containing the patented improvement. It alleges that the defendants had derived and received therefrom gains and profits to about the sum of $20,000, and prays that the defendants be required "to make a disclosure of all such gains and profits." It also prays that the defendants be compelled to account for and pay over to the plaintiff all such gains and profits, and, in addition, to pay damages, and for an injunction to restrain the infringement of the patent by the defendants. There are no interrogatories to the bill.

The specification of the patent sets forth that the invention is an "improvement in frames or shields for photographic cameras."

[Drawings of Patent No. 21,829, Published from the Records of the United States Patent Office.]



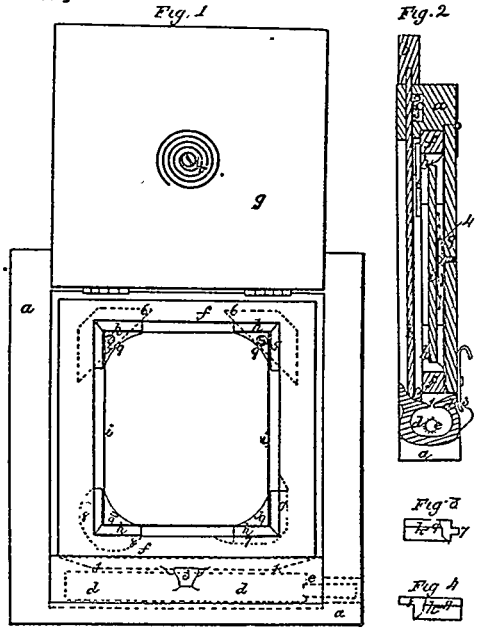
Drawings are annexed. It says: "Fig. 1 is a view of the frame or shield with the back open, to show my improvements; Fig. 2 is a view of one corner; and Fig. 3 is a section through the frame, representing one of my improved corner pieces in place. Similar marks of reference denote the same parts. In taking landscape views, groups and similar pictures, the plate is used in a horizontal position, while in taking likenesses of one person, and similar views, the longest side of the plate receiving the same stands vertical in the camera. To accommodate these two positions in photographic and similar pictures, separate frames have been constructed to receive and shield the plate while being conveyed to and from the camera, or else the camera has to be turned upon its side, greatly to the inconvenience of the operator, and the loss of time in adapting the plate and camera to take the particular picture. My said invention obviates all the foregoing inconveniences, and consists in what may be termed a 'turn shield,' the same being a frame a, adapted to the camera, with the back b, and slide c, in the usual manner. The interior of this frame forms a square opening, of a little more than the longest length of the plate to be used therein; d, d, are my improved corners, that are formed of suitable material, and each corner piece has two recesses for receiving the glass or other plate, the recesses 1, 1, sustaining the same when the longest sides of the plate are vertical, and the recesses 2, 2, receiving the plate when in position for a landscape or similar picture. Between the recesses 1 and 2, in each corner there is, therefore, a square block or support, 3, measuring along its side, one-half the difference between the vertical and horizontal sides of the glass or other plate, which, with the present sizes of plates, will be ½ an inch, one inch, or one and a half inches, for the square of the said block, 3. The frames carrying smaller sizes of plates, adapted to the main frame or shield in the usual manner, can be placed into the corners aforesaid, in either a vertical or horizontal position, and the plate will occupy a corresponding position within said frames." The claim is: "The corners, d, d, formed with two recesses, and applied at the angles of a square frame, to receive the photographic plate, or its equivalent, in a horizontal or vertical position, as set forth."

The record contains the following admission: "Counsel for defendants admits that the defendants, before the filing of the bill and since the date of the letters patent herein, have made and sold corner pieces of which Exhibit A is a sample; and, also, that they have sold, within the said period of time, corner pieces of which Exhibit B is a sample; and that such corners were used and applied at the angles of square frames, used to receive and hold photographic plates in photographic cameras, which frames containing said corners were also made and sold

by the defendants, as aforesaid; and that the frame of which Exhibit C is a sample is a frame of the kind made and sold by them containing corner pieces like said Exhibits A and B." It is not claimed that what was so done by the defendants was not a practicing of the invention claimed in the patent, although no witness testifies that it was. There is no admission, however, that what was so done by the defendants was done before the 19th of October, 1872, when the patent expired. It may have been done after that date and yet have been done "before the filing of the bill and since the date of the patent." Both parties, however, have proceeded on the view that it was done before the patent expired.

The defendants attack the plaintiff's patent for want of novelty, and several prior inventions are adduced. One is a patent granted to M. J. Drummond, assignee of William Lewis and William H. Lewis, the inventors, October 7th, 1856 [No. 15,854], for a "plate holder for photographic cameras." The specification of that patent points out two matters as requiring remedy in taking photographs—one, that, immediately after the plate is taken out of the nitrate of silver bath, it is placed in the frame for the camera, and the liquid drops off into the frame, and, in handling, runs on to clothes, or carpet, or floor, and stains; the other, that the moist collodion and chemical substances on the corners of the plate adhere to the edges of the frame and rebate and prevent the plate coming properly into focus, while such dirt and chemical matter also stains the chemicals on the plate, being often absorbed so as to become a blemish on the background. The specification states, that the nature of the invention consists in "the use of glass or similar vitrified corners in the frame that receives the corner of the glass or other plate, the said corners each being formed of one solid piece of vitrified material, so that there is no chance for the chemicals to come in contact with any material that will cause discoloration." It further says: "We also introduce a receptacle into the bottom of the frame or holder, that catches any drippings from the plate and retains the same, even if the holder is laid down on its side." The receptacle is not material. The glass corners are thus described: "h, h are solid corners of glass or other vitrified material, secured into the angles of the frame f, and, as these corners may be attached by different means, we have shown at 5, 5, small screws passing through holes in said corner pieces, into diagonal pieces, 6, 6, attached to the frame, and, over the head of said screws suitable cement is placed, but the same must be below the surface of the glass corners. At 8, 8, we have shown a flanch formed on the back of the glass corner, receiving screws that pass into the frame f. * * * We are aware that pieces of glass have been inserted in the corners of plate frames, to take the face of the glass or other plate, but said pieces of glass are very apt to become loose. The cementing made use of comes in contact with the corners and edges of the glass or other plate, and discolors the same, and there is no chance for keeping the corners clean. In view of the foregoing, the nature and utility of our invention will be apparent, for, the solid glass or vitrified corner can always be kept clean, and there is nothing that comes in contact with either the surface or the edges of the glass or other plate, but the said vitrified corners. At 9, 9, small projections are shown on these vitrified corners, which, being slightly elevated, always take the plate, and are wiped off with greater ease, so as to ensure a proper focal position for the plate." The patent claims: "Forming the glass or vitrified corners, h, with a flanch or rim, in one solid piece, the said flanch or rim taking the edges of the photographic glass or other plate, substantially as and for the purposes specified, and irrespective of the manner in which the said vitrified corners are attached to the frame." The testimony of William Lewis, one of said inventors, shows that he made and sold as early as 1856 square plate holders with the glass corners of the Drummond patent. Mr. Hicks, the defendants' expert, states that he considers the substance of the invention set forth in the plaintiff's patent to be "a photographic frame, having corners in the corners of the photographic frame, provided with recesses, and the whole, when complete, enabling the operator to reverse from a vertical to a horizontal position an oblong photographic plate, so that it shall be held, whether reversed or vertical, in three

[Drawings of Patent No. 15,854, Published from the Records of the United States Patent Office.]



directions—endwise, both up and down; facewise, which prevents it from passing through the frame; and sidewise, which prevents it from moving laterally." He further says: "I find in the invention of Lewis, referring to his testimony, and taking it in connection with his patent, substantially a photographic frame provided with glass corners, the frame being made square, so that the plate may be reversed from a vertical to a horizontal position, and provided with elevations on the face of the glass corners, so located in reference to the frame, that a photographic plate could be placed in said frame and held vertically between said elevations, which would prevent the plate from moving sidewise, the face of the plate preventing it from pushing through, or, in other words, supporting the face of the plate, and the flanges of the corners preventing endwise movement of the plate. When the plate is turned in a horizontal position, the same stops operate upon the photographic plate in the same manner as before described as to the vertical position of the plate. I, therefore, find in the invention of Lewis, the substance of the invention set forth in the Gordon patent. The difference which I wish to notice between these two inventions is, that, in the Lewis invention referred to, as set forth in his testimony, a square plate may be used, resting upon the glass studs to which I have referred before in this answer, and which are marked 9 in the Lewis patent, and probably were intended to act against the face of a square plate, to locate its focal distance, instead of the face of the corner, which would thus act, if the plate were placed between the studs." Professor Charles A. Seeley, the plaintiff's expert, testifies as follows: "The Lewis invention consists of solid glass corners for a camera shield. Previous to the Lewis invention the corners were usually made of pieces of glass cemented together. For such corners Lewis substitutes single pieces of solid glass. The Lewis corners were not intended to perform any new office. They were of the ordinary form, and the shield was used in the ordinary way. Gordon's invention consists in corners of a peculiar form, and performing a new purpose. The novelty of Lewis' corners is the material of which they are made. Gordon's corners may be made of a variety of substances, but it is required that they shall be of a peculiar form. Lewis' corners are suitable for the photographic plate frame as ordinarily used. Gordon's corners require the frame to be made especially for them. The outline of the opening of the ordinary plate frame is that of a photographic plate, viz., oblong, whereas Gordon's corners are only useful in a frame with a square opening. The purpose of Gordon's invention is to permit the changing of the plate from a vertical to a horizontal presentation, or vice versa, without a special adjustment or the plate holder. Lewis' invention has no such purpose in view, and cannot be made to effect it. I find no points of agreement between the two inventions, in their nature, or construction, or purpose." On cross-examination, being shown a fac-simile of the model of the patent for the Lewis invention, and being asked whether he does not find in the corners "studs or projections which would enable the operator to change a plate from a horizontal to a perpendicular position, assuming that such studs were on all four corners, he replies: "I do not." "21 Cross-Q. Why not? A. The studs do not project enough to make a sufficiently firm support, and they are not in the position which the change of plate requires. The studs in this exhibit were not intended for any such purpose, cannot be used for it, and do not suggest it. To make studs suitable for such a purpose, the frame must have a square opening, whereas, in this case, it is oblong, and the distances between the studs must be very accurately adjusted. When these conditions are complied with, the device becomes substantially Gordon's. 22 Cross-Q. If this opening were square, and the studs more projecting, would it not then be Gordon's? A. Not necessarily. The studs of the exhibit are intended to be supports of the plate on which it is laid. If the conditions of Gordon's device were complied with, the adjacent studs would be placed at a distance from each other precisely the width of the plate, and the plate, when used in the frame, would not rest on the tops of the studs, as is evidently intended in the Exhibit No. 4. 23 Cross-Q. Assuming the opening to be square, and lines to be drawn from the inner side of the bottom stud to the inner side of the top stud, would not these lines, together with the the top and bottom of the frame, form an oblong parallelogram? A. Yes. 24 Cross-Q. And, if similar lines were drawn across the opening from stud to stud, would not these lines, with the side of the frame, constitute an oblong parallelogram? A. They would. 25 Cross-Q. And, if the opening were square, would not these two oblong parallelograms be equal? A. They would, provided the studs were symmetrically placed, and placed in the diagonals of the square. But Lewis' patent does not require any such accurate placing of the studs. Lewis' invention requires only that they shall be so placed that the plate may rest on them." On his re-direct examination, he testified thus: "26 Re-D. Q. In your answer to the 23d Cross-Q., have you not assumed, also, that the distances between the sides of the studs upon each side of the frame were equal? A. Yes; I assumed that. 27 Re-D. Q. Please state the differences between the Gordon and the Lewis invention, so far as the arrangement or adjustment of the studs or projections in the corners is concerned? A. The office of the stud, in the Lewis invention, is to form a support for the frame. The plate rests upon the studs, and keeps the face away from contact with any other part of the frame. It is required that

the studs shall have precisely the same height, but the amount of this height is not very material. It would ordinarily be made some fraction of the thickness of the plate. The precise location of these studs in reference to each other is, also, not material. It is only required that they shall be placed within the boundary of the plate. The figure which would be formed by the lines joining the adjacent ones might be a parallelogram, or a figure in which no two sides or angles were equal. The opening of the plate frame of the Lewis invention is of the form of the plate, and, of course, is generally an oblong parallelogram. Now, to prepare studs in accordance with the Gordon invention, the frame opening is, of necessity, square, and the side of this square is the length of the plate. The studs must be so placed that the edges of adjacent studs shall be distant from each other the width of the plate. The height of the stud should be somewhat more than the thickness of the plate, but it is not at all necessary. The studs should have the same height. In both inventions, the plate is kept from sliding in the focusing frame by the edges of the corners. In use, in the Lewis invention, the plate rests on the tops of the studs, while, in Gordon's, the plate rests on the bottoms of the corners. In the Lewis invention, it is not necessary that the bottom surfaces of the corners shall be in the same plane, whereas, in Gordon's, it is absolutely essential. In the Lewis invention, the plate rests on the tops of the studs, while, in the Gordon, the plate rests against the edges of the studs. The Lewis studs prevent a movement in a direction perpendicular to the plane of the plate, while, in the Gordon, they prevent movement in the plane of the plate. I do not think it possible that the Lewis invention could be constructed by any chance so as to comply with the conditions of Gordon's invention, nor do I think it likely in any way to suggest Gordon's invention to any person unacquainted with the latter." The contention on the part of the defendants is, that, while there is nothing in the Lewis patent which suggests the use of the studs for the purpose of Gordon's invention, yet a plate could be supported by those studs in such a manner that oblong pictures could be taken, either vertically or horizontally; that, if so, it makes no difference whether Lewis thought of doing it or not; and that, if the Lewis structure is capable of the use to which the plaintiff's structure is put, it is the same thing. The complete answer to the Lewis structure is, that there is nothing in the patent which requires that the studs should be located, with reference to each other, in such manner that the figure formed by the lines joining the adjacent studs shall be a parallelogram, which is an absolute necessity in the Gordon invention, as described. The matter is clearly explained by Professor Seeley, and there is nothing in the opposing evidence that meets his view.

The patent to John Stock, of December 1st, 1857, for a "photographic plate holder," is introduced by the defendants. But no witness testifies that the plaintiff's invention is found in it and the contrary is shown by Professor Seeley. The burden of proof is on the defendants to establish, by satisfactory evidence, the prior existence of the corners in Stock No. 1 and Stock No. 2. They have failed to do so, in my judgment. The unreliable nature of John Stock's testimony, the denial of his sales of the corners by the persons to whom he says they were sold, the unconvincing character of the testimony of Boch, Loehr and Jacob Stock, on the whole evidence, and the fact that, after the alleged making by John Stock of Stock No. 1 and Stock No. 2 he took out his patent of December, 1857, and described nothing of the kind, lead to the conclusion that this branch of the defence is not established. The nature of the invention set forth in that patent was making a plate holder fitted with sliding pieces, capable of being moved in or out to accommodate any sized glass or plate, said pieces being provided with suitable recesses and flanches to receive and support the glass or plate. The existence of the Exhibit Anthony No. 1 in the United States is not carried back to a date earlier than August 1st, 1858. The testimony is satisfactory to show that Gordon made his invention before that date.

It is urged for the defendants, that, as the patent had expired when this suit was brought, and no injunction could then be granted in it, and the bill is not a bill of discovery, the court has no jurisdiction to award an account, and, therefore, cannot take cognizance of the suit, as a suit in equity. Perhaps the bill is not to be regarded as a bill to obtain a discovery by answer to the bill, because the defendants are not, under the rule promulgated at the December term, 1850, amending rule 40 in equity, specially and particularly interrogated upon any statement in the bill. The bill states that the defendants' gains and profits from the manufacture and sale of the invention, in infringement of the plaintiff's rights, have been about $20,000, and prays "that the defendants may be required to make a disclosure of all such gains and profits." It does not allege that the plaintiff cannot ascertain, without such disclosure, what such gains and profits are. On the other hand, no disclosure of gains and profits is necessary to establish the plaintiff's right to a decree for an accounting, such as is usually given on an adjudication in favor of the plaintiff on a final hearing, on pleadings and proofs, in a suit in equity on a patent. Such disclosure is an incident of the accounting, and, in a decree for an accounting a provision is inserted that the defendants attend before the master and produce their books and papers and submit to an examination respecting their gains and profits. Such examination of an accounting party is provided for by rule 79 in equity. The disclosure or dis-

covery prayed for in the present bill is such a disclosure on an accounting. No discovery is prayed to establish the plaintiff's right of action to a decree for an accounting. That is established otherwise. Therefore, in no proper sense is the bill a bill of discovery or a bill praying a discovery.

In Nevins v. Johnson [Case No. 10,136], in this court, in 1853, before Mr. Justice Nelson and Judge Betts, the bill was filed after the patent had expired. It charged that the defendants had infringed, and "had realized great profits therefrom, and prayed a discovery of the particulars and extent of the use of the improvement, and that an account might be taken of the profits." It was, in substance, like the present bill. It was demurred to, for want of equity, on the ground assigned, that there was a complete and adequate remedy at law in the case, and that a court of equity had no jurisdiction of it, because the term of the patent had expired before the suit was commenced and no injunction could be granted. But the court held, that, under the statute then existing (Act July 4, 1836; 5 Stat. 124, § 17), jurisdiction in equity was conferred upon the court, irrespective of the right of the patentee to an injunction. The present bill was filed in 1873, when section 55 of the act of July 8, 1870 (16 Stat. 206), was in force, the language of which, in respect to the subject in hand, was, in substance, the same as that of section 17 of the act of 1836, and the provisions of which are now found in sections 629, 711, and 4921 of the Revised Statutes. The cases of Sickels v Gloucester Manuf'g Co. [Case No. 12,841]; Imlay v. Norwich & W. R. Co. [Id. 7,012]; Smith v. Baker [Id. 13,010]; Jordan v. Dobson [Id. 7,519]; and Howes v. Nute [Id. 6,790],—recognize the rule as laid down in Nevins v. Johnson [supra]. In some of those cases the bill was filed before the patent expired and the decree was made after it expired.

In Draper v. Hudson [Case No. 4,069], before Judge Shepley, in 1873, the bill was for an injunction and an account, on a patent. The defendant died pending the suit and his executor was made defendant. No discovery was prayed against the executor, and there was no proof of infringement by him. The case is a difficult one to understand. There were two claims in the patent, which was a reissued patent. The court held that no infringement of the first claim, after the reissue, was shown, and that the second claim was void. A dismissal of the bill would seem, therefore, to have been necessary. Yet the court went on to say, that, as there could be no injunction against the original defendant, who was dead, and none against the executor, because he had not infringed, the right to an account failed, because the right to an injunction and a discovery failed. English cases were cited and the court added: "Although the jurisdiction of the circuit court in equity, in patent causes, rests upon statute provisions, it is to be exercised according to the course and principles of courts of equity; and, the supreme court of the United States having decided, in Stevens v. Gladding, 17 How. [58 U. S.] 455, that 'the right to an account of profits is incident to a right to an injunction, in copy and patent-right cases,' it would seem to follow, that, in a case like the present, where the title to equitable relief fails, the general rule of equity applies, that the incidental relief fails also." The bill was dismissed, without costs. The views of Judge Shepley appear to have been based on what he understood to have been decided in Stevens v. Gladding [supra]. That was a bill in equity founded on the infringement of a copyright. The supreme court held that there had been an infringement. The bill prayed for an injunction and for general relief, but did not pray for an account, nor was an account stated in the answer. The question raised was, whether there ought to be a decree for an account. Of course, the plaintiff was entitled to a decree for an injunction. The point considered was, whether the plaintiff could have a decree for an account, when he had not prayed for it. The court held that, as he was entitled to an injunction, he could have an account of profits, as an incident, and, also, that, as the bill stated a proper case for an account, one could be ordered under the prayer for general relief. The case does not decide, nor does it follow from it, that where, as here, the plaintiff states a case for an account, and prays for an account, and the defences are overruled, he cannot have an account, even though not entitled to an injunction. The weight of authority in this country is in favor of the right to an accounting, in a case like the present.

The record shows that the defendants put in evidence the record of certain proceedings in a suit brought by them in the supreme court of New York, against the plaintiff. Such evidence was put in in November, 1874. No objection was taken to it at the time, as not put in in season, or as not set up in the answer, or for any other cause. The record states that it was put in evidence, and that the seven papers constituting such proceedings were marked as exhibits for the defendants. On the 30th of June, 1875, and not before, the record states that the "complainant's counsel gives notice that he will move, before the hearing, to strike from the record" the said seven exhibits. The record states no reason as a ground for the notice or for the motion. At the hearing such motion was made, on the ground that no defence based on such proceedings is set up in the answer.

The proceedings show that the defendants brought a suit against the plaintiff, in the state court, in 1864, to recover a debt. Judgment was had in May, 1866. On the 12th of October, 1866, in proceedings supplementary to execution on said judgment, one Beamish was appointed by said court receiver "of all and singular the debts, property, equitable interests, rights and things in action of

Ebenezer Gordon," the plaintiff, and he was ordered to execute and deliver an assignment of the same to said receiver. It does not appear that any such assignment was ever executed. On the 4th of August, 1874, the receiver presented a petition to the state court, alleging, that, by virtue of his appointment and of his having given the requisite bond, he "became vested with all the estate, property and interests of the said Ebenezer Gordon, and, among others, the invention, patent, letters patent and patent-rights;" that Gordon, on the 12th of October, 1866, owned the said patent of October 19th, 1858, and the invention, patent and patent-right for which it was issued; that it was for the interest of the trust, "that all the right, title and interest of the said Ebenezer Gordon in and to the said invention, patent, letters patent and patent-rights," at the time of the appointment of said receiver, and all the right and title and interest of said Gordon therein at any time since such appointment, and all the said Gordon's "right, title and interest in and to all and any claims under the said invention, patent, letters patent and patent-right," should be sold at auction to the highest bidder. It prayed for an order authorizing such sale. On the same day, an order was made by said court, authorizing the sale at public auction by said receiver, for cash, on a specified notice, of everything which the receiver had so petitioned for leave to sell, and ordering that, on such sale being made, the receiver execute to the purchaser an assignment to vest the said property and interest in said purchaser. The record shows that the specified notice was given, and that the receiver sold at public auction, for $200, to the defendants in this suit, who were the highest bidders, the property and interests mentioned in said order of sale; that he reported such sale to said court; that said court made an order, on the 21st of August, 1874, that the report be confirmed and that he execute to the purchasers an assignment to vest the property and interests so sold in them; that on the same day he executed and delivered to said purchasers an assignment of said property and interests, which assignment specifies, as among the assigned property, "all the said Ebenezer Gordon's right, title and interest in and to all and any claims under the said invention, patent, letters patent and patent-right;" that he reported to the court, on the same day, that he had done so, and had received from the purchasers the $200 purchase-money, and how he had disposed of part of it; that the court, on the next day, made an order confirming said report as to said assignment; that, on the latter day, the receiver reported to the court how he had disposed of the rest of the purchase-money; and that the court, on that day, confirmed said report.

The defendants contend, that, by virtue of said proceedings and said assignment, any right which the plaintiff had to recover against them for an infringement of the patent sued on has become vested in the defendants. Under sections 11, 14, and 17 of the act of July 4, 1836 (5 Stat. 121, 123, 124), it was always held, that no one could bring a suit, either at law or in equity, for the infringement of a patent, in his own name alone, unless he were the patentee, or such an assignee or grantee as is mentioned in the 11th and 14th sections of that act. The provision in section 36 of the act of July 8, 1870 (16 Stat. 203), in regard to the assignments of patents and of interests therein, now embodied in section 4898 of the Revised Statutes, is not different from that found in section 11 of the act of 1836. The provisions in sections 55 and 59 of the act of 1870, in regard to suits in equity and at law for the infringement of a patent, now embodied in sections 629, 711, 4919, and 4921 of the Revised Statutes, are not different from those found in sections 14 and 17 of the act of 1836. These provisions were considered by this court in the case of Nelson v. McMann [Case No. 10,109]. Under them no person can bring a suit for profits or damages for infringement, who is not the patentee or such an assignee or grantee as the statute points out. A claim to recover profits or damages for past infringement cannot be severed from the title by assignment or grant, so as to give a right of action for such claim, in disregard of the statute. The profits or damages for infringement cannot be sued for except on the basis of title as patentee, or as such assignee or grantee, to the whole or a part of the patent, and not on the basis merely of the assignment of a right to a claim for profits and damages, severed from such title. Therefore, if, in the present case, no such assignment or grant has been made to the defendants as the statute contemplates, they could not bring suit, in their own names, under the assignment made to them, to recover any claims, profits or damages for infringement, which belonged to Gordon, nor can they use the assignment as a defence against any such claims existing against themselves in favor of Gordon. In this case there has been no assignment executed by Gordon. The right claimed by the defendants rests, therefore, wholly on a transfer by operation of law. In Stephens v. Cady, 14 How. [55 U. S.] 528, it was strongly intimated by the supreme court, that an assignment of a copyright by operation of law, unaccompanied by an assignment made by the owner, vests no title. In Stevens v. Gladding, 17 How. [58 U. S.] 447, the same court suggests that there would be great difficulty in assenting to the proposition that patent-rights and copyrights are subject to sale under the process of state courts. In Ashcroft v. Walworth [Case No. 580], it was held, that the title of an insolvent debtor to, or his interest in, a patent, does not pass to his assignee in insolvency, by an assignment of his property made by a

judge under the insolvency law of Massachusetts. This decision was made on the ground that the assignee in insolvency acquired no title, because the conveyance was not such an one as was contemplated by section 11 of the act of 1836, namely, a written instrument signed by the owner of the patent and duly recorded. This seems to be a correct view, and it follows that the defendants acquired no right to anything which they can set up as a defence to the plaintiff's claim.

It is held (Moore v. Marsh, 7 Wall. [74 U. S.] 522), that the assignment of a patent does not carry with it a transfer of the right to damages for an infringement committed before such assignment. It is not at all clear that the transfer of the "claims" which the assignment in the present case transfers, can be construed to cover claims for past infringements. Dibble v. Augur [Case No. 3,879].

If the defence under the receivership were held to be available in respect to the whole or any part of the claim of the plaintiff, the defendants would, probably, on the facts in regard to the putting in evidence of the proceedings in the state court, be held to be entitled now to file a supplemental answer setting up such proceedings; but that question does not now arise. There must be a decree for the plaintiff, for an account of profits and damages.

GORDON (BROWNELL v.). See Case No. 2,039.

Case No. 5,606.

GORDON et al. v. COOLIDGE et al.

[1 Sumn. 537.] [1]

Circuit Court, D. Maine. May Term, 1833.

ASSIGNMENT FOR BENEFIT OF CREDITORS—ASSENT OF ASSIGNEE—ATTORNEY AND CLIENT—AUTHORITY—ASSENT OF CREDITORS — BY MAIL—WHEN COMPLETE (*Quære*).

1. An assignment was made by a debtor for the benefit of his creditors to two attorneys at law, who were partners in their business, as trustees; one of them assented to the assignment at the time, the other being absent. It was *held*, that the latter must be presumed to assent also, unless upon notice he refused to accept the trust, and notified it to the debtor; and especially if he and his partner proceeded to act under the assignment by a private conditional agreement between them, as to giving a priority to certain attachments made by them in favor of certain creditors, which agreement was unknown to the debtor. And it seems, that even if, under such circumstances, the priority could be held valid, the assignment would be an operative trust as to all other assenting creditors.

2. Attorneys at law, having confided to them by creditors a discretionary power to collect a debt, may in the exercise of their discretion assent to an assignment for the benefit of creditors, and bind their clients thereto, as within the scope of the authority thus confided to them.

[Cited in Clark v. Randall, 9 Wis. 138; Lockhart v. Wyatt, 10 Ala. 231.]

3. Where an assignment is made to two persons, one of whom accepts the trust, and the other repudiates it, the assignment is operative as to the assenting trustee, unless there is some condition in it, that it shall be void, unless assented to by both trustees.

4. It is not generally true, that persons sued as trustees under the foreign attachment act of Maine, are to be charged as such, unless they clearly discharge themselves upon their examination. On the contrary, the court can adjudge them trustees only, when upon the examination there is clear and determinate evidence, free from reasonable doubt, that they have property in their hands, of which they ought to be adjudged the trustees of the debtor.

5. When an assignment is made for the benefit of the creditors, and some of the creditors live at a distance, and signify their assent by letter through the post-office; Quaere, when is the assent complete? whether at the time, when the letter is put into the post-office, or when it reaches the assignees?

[This was a suit by George W. Gordon and his administrator against George S. Coolidge and his trustees.]

This case came before the court upon a disclosure of the trustees, McGaw and Hatch. The facts upon which it turns are as follows: McGaw and Hatch are attorneys at law and partners in business at Bangor. Previous to the month of October, 1831, Loring and Kupfer, of Boston, sent to McGaw and Hatch a note of the defendant, Coolidge, for $358.56 and interest, for collection. At the same time an account was forwarded to them by Bradley and Sigourney against Coolidge, for $460.30, for collection. McGaw and Hatch on the 4th of October caused writs to be made out on these demands, and delivered them to a deputy sheriff to be served whenever necessary. On the 5th of December, 1831, Rufus Dwinal, of Bangor, came to the office of McGaw and Hatch with a copy of a note of Coolidge, owing to Gilman and Pritchard of Boston, for $1271.25, and requested them, in behalf of Gilman, Pritchard, & Co., either to obtain security therefor, or its amount in goods. McGaw then told Hatch, that they must instantly secure the demands of Loring and Kupfer, and Bradley and Sigourney, to which Hatch assented. Hatch then went with Dwinal from the office, and called on Coolidge, who declined at first to pay the demand, or to give security; but afterwards, on the same day, he agreed to assign the whole of his stock of goods to McGaw and Hatch, to be disposed of by auction, and the proceeds to be applied in the order named in the assignment, provided Hatch would take the assignment. To this proposal Hatch agreed, with the consent of Dwinal; and an assignment was executed accordingly. McGaw was not present at these transactions. On the 6th of December McGaw was informed by Hatch of what he had done; and he then told Hatch, that their clients, Loring and Kupfer, and Bradley and Sigourney, must be provided for by attachments, and that they must not rely upon the assignment, unless they should be willing thereafterwards so to do; and then,

[1] [Reported by Charles Sumner, Esq.]

on notice, the attachments could be dissolved. The deputy sheriff made attachments accordingly on the 6th of December. McGaw further stated in his disclosure, that he did not consider the firm of McGaw and Hatch as embracing powers to become assignees, nor did it embrace such powers or objects; but he was willing, that the firm should be assignees of Coolidge, so far as might be done consistently with the existence of the attachments in favor of Loring and Kupfer, and Bradley and Sigourney, but not otherwise; and so he informed Hatch. Pursuant to the arrangements made on the assignment, the stock assigned was sold by an auctioneer, with the exception of the goods attached; and the proceeds (about $3864.80) were paid over to McGaw and Hatch. The suits on the attachments regularly proceeded to judgment and execution; and the deputy sheriff, after selling the goods attached, and satisfying the amount due on the executions, returned the surplus ($269.80) to McGaw and Hatch, who thus obtained in the whole about the sum of $4134.60, applicable to the purposes of the assignment.

A copy of the assignment is in the case, bearing date the 5th of December, 1831. After reciting, that Coolidge was indebted to Grant and Stone of Philadelphia, Loring and Kupfer, Bradley and Sigourney, Gilman, Pritchard, & Co., Copeland and Lovering, Gordon and Stoddard, Silas Pierce & Co., &c. &c., it proceeds to assign to McGaw and Hatch all his stock in goods at his store, &c., to be sold by Head and Pilsbury, (auctioneers,) on such terms as McGaw and Hatch shall direct; and the net proceeds of the goods are to be paid over to the creditors in the following order; and the transfer is made on that express condition; first, to pay Grant and Stone; secondly, to pay Loring and Kupfer; thirdly, to pay Bradley and Sigourney; fourthly, to pay Gilman, Pritchard, & Co.; and fifthly, if sufficient remains, to pay Copeland and Lovering; and the balance of the proceeds to be paid over to the remaining creditors in equal proportions, and if any thing afterwards remains, that is to be for the use of Coolidge. On the same paper under the same date is an acknowledgment of the delivery of the goods to sell and dispose of the same, agreeably to the intention of the above transfer; and it is signed by Hatch as follows, "McGaw and Hatch, attorneys for the creditors herein named." The explanation given by Hatch of this form of signature is, that at the time he considered McGaw and Hatch as attorneys of Loring and Kupfer, Bradley and Sigourney, and Gilman, Pritchard, & Co., and as attorneys to as many of the other creditors named in the assignment, as saw fit to become parties thereto, after notice of the same. None of the creditors by name signed or assented to the assignment, except Copeland and Lovering, who did so on the 12th of December, 1831, at 12 o'clock at noon, by a writing on the assignment, and Gilman, Pritchard, & Co., who did so by letter. The letter was dated at Boston on the 12th of December, 1831, and post-marked on that day, (in answer to a letter of McGaw and Hatch, sent on the 8th of the same month,) and was received by the latter in due course of mail, but not until after the attachment of the plaintiffs, which was on the 12th of December, at half past one o'clock at noon. There is no evidence to show at what time the letter was put into the post-office at Boston. McGaw and Hatch considered themselves as authorized to adjust Gilman, Pritchard, & Co.'s demand in any way they thought proper. The letter of the 12th of December says: "Your favor of the 8th is at hand. We accept of the assignment of George E. Coolidge, made in favor of his creditors. Yours, &c." In a subsequent letter of the 25th of December they fully confirm the proceedings of McGaw and Hatch.

The case was argued upon the point, whether the parties were trustees or not, by Deblois and Fessenden, for the plaintiffs, and by Sprague and Longfellow, for the trustees. For the plaintiffs were cited 5 Mass. 141; 6 Pick. 358; 11 Pick. 298; 6 Greenl. 381. For the trustees were cited Halsey v. Fairbanks [Case No. 5,964]; 8 Pick. 113. The points relied upon at the argument will be found fully stated in the opinion of the court.

Before STORY, Circuit Justice, and WARE, District Judge.

STORY, Circuit Justice (after stating the facts). Such are the material facts apparent upon the disclosures of McGaw and Hatch. If the debts of Copeland and Lovering, and Gilman, Pritchard, & Co., can take effect under the assignment, the balance in the hands of the trustees is about $163.07; and this is subject to the claims for services of the assignees, McGaw and Hatch. If both of these debts are unpreferred, the plaintiffs have an ample security for their own debts; and if either of them is unpreferred, there will be a considerable balance in the hands of the trustees. Under these circumstances two points have been strenuously argued at the bar on behalf of the plaintiffs. The first is, that the assignment itself is utterly void, as to both the creditors. Secondly, that if good as to Copeland and Lovering, still the assent of Gilman, Pritchard, & Co., was not given, until after the attachment was made by the plaintiffs; and so they are cut off from any priority; and their claim must yield to the attachment.

Upon the first point the argument is, that the assignment was made to McGaw and Hatch for the benefit and payment of all the creditors named therein, in the order of preference stated, and upon that express condition; that McGaw never assented to the assignment absolutely, but only sub modo, excepting Loring and Kupfer, and Bradley

and Sigourney therefrom; that Coolidge never assented to this modification; and that without McGaw's assent to it the assignment could not take effect, as it was not within the scope of the business of the firm of McGaw and Hatch. And, then the argument proceeds upon the known principle, that a contract, to which both parties have not assented, is binding upon neither; and a modification, not assented to, leaves the original proposition a nullity, if the latter be not accepted.

There is no doubt, that it was not competent for McGaw and Hatch, without the assent of Coolidge, to accept the assignment in part, and reject it in part. If adopted by them at all, it must be deemed to be adopted in toto. They could not affirm it as to all the debts, except those of Loring and Kupfer, and Bradley and Sigourney, and disaffirm it as to the latter. And the real question is, whether the transaction has assumed this positive form, or is susceptible of and justifies another interpretation. In the first place, the assignment was actually executed, and assented to by Hatch on the 5th of December; and delivery was made to him under the assignment on the same day; and accepted by him on behalf of the creditors, for whom the firm, (as he says,) had been authorized to act, that is, for Loring and Kupfer, for Bradley and Sigourney, and for Gilman, Pritchard, & Co. It will, by and by, be considered, whether the firm had any such authority. Now, the assignment, having been accepted by Hatch on behalf of the firm, bound him at all events personally; and bound the firm also, unless, upon notice to McGaw, the latter dissented from the trust, and refused to accept it. It is said, that he did dissent, because he refused to accept the trust, unless the debts of Loring and Kupfer, and Bradley and Sigourney, were provided for under the attachments. But in point of fact. McGaw never notified such dissent to any one, except Hatch. There is not the slightest proof, that he ever communicated the fact to Coolidge. But the firm, with McGaw's express assent and acquiescence, went on to sell the stock, and to act under the assignment; and they have received the proceeds of the sale. Under such circumstances no private reservation of this sort can possibly prevail over the facts of direct co-operation and action in the purposes of the assignment. If the ordering of the attachments was an act inconsistent with the nature and objects of the trust, that was a mere private act, not superseding the assignment, but simply in violation of its provisions; and as such, McGaw and Hatch might be liable for the breach of the trust in an action brought by Coolidge against them. But the creditors of Coolidge have no right or authority to avail themselves of it to overthrow the assignment. The assignment must stand, as valid, until McGaw had done some overt act, known to Coolidge, by which he has repudiated it. But in truth, McGaw's dissent was not to acting as an assignee under the trust; but his objection was to binding Loring and Kupfer, and Bradley and Sigourney, as creditors, to their remedy under the assignment. There is not a syllable in the assignment, which declares it void, unless all the creditors shall assent to it. On the contrary, the irresistible conclusion is, that it was to be held good pro tanto, as to all the creditors, who should assent, and void as to those who should not. Nor is there the slightest proof in the case, that Coolidge made it a condition of the assignment, that Loring and Kupfer, and Bradley and Sigourney, or either of them, should withdraw their intended attachments, or that McGaw and Hatch should assent on their behalf to the assignment, otherwise it should be void. How can the court infer such a condition without a scintilla of evidence to support it? And yet the basis of the argument of the plaintiffs rests here; for if these creditors were at liberty to adopt or reject the assignment at their pleasure, the act of their attorneys in rejecting it as to them, left the assignment in full force and vigor as to all other creditors, who should assent to it and take under it. It does not appear to me, therefore, that, upon the evidence, the court can judicially say, that McGaw ever intended to renounce the character of assignee, whatever may have been his intention, as to binding the creditors, who were his clients, by the assignment.

There are other intrinsic difficulties in this part of the plaintiffs' case. McGaw and Hatch insist, that they had full authority to bind all their clients by the assignment, if in their discretion they chose to exercise it. Nor do I perceive, how, upon the facts, this power can well be denied to them. The debts were confided to them for collection according to their discretion. And if they chose to take security, instead of enforcing an immediate collection by suits, it seems to me clear that they were at liberty so to do. And they might elect the security of a general assignment, if in the exercise of a sound discretion, that appeared to them to be the best course for their clients. There is no pretence to say, that any limitation was intended by the creditors upon their discretion. They were left with an implied general liberty to act in the premises, as they might deem best for the interests of their clients. Now, in the present case, they either undertook to bind their clients to the assignment, or they left them at liberty to accept or reject it. If the latter was the predicament, in which the assignment was understood by the parties to leave the creditors, then there is no pretence to say, that the subsequent attachment was incompatible with, or a breach of, the contract of assignment. If the former was the predicament, then the signature of Hatch, in the name of McGaw and Hatch, being given at the time

of the execution of the assignment, bound the creditors, who were their clients; and that consent so given became obligatory, and could not be afterwards retracted. There is no ground to say, that Hatch was not competent to bind the firm for such a purpose. It was clearly within the scope of the agency of partners authorized to collect and secure debts. And, I confess, the strong inclination of my opinion is, that the written acceptance and assent to the assignment by Hatch in the name of McGaw and Hatch, as attorneys of the creditors, admits of no other interpretation. It was an act binding on the creditors, who were their clients. It has never been repudiated by any of them. And I exceedingly doubt, if, in point of law, it was capable of being repudiated. If, then, the creditors were bound by it, the subsequent acts of McGaw and Hatch in proceeding on the attachments were unjustifiable, and irregular. These acts did not avoid the assignment. They simply gave a right of action to Coolidge, but not to any of his creditors, for redress for any injury he had sustained thereby. He seems not, as far as the evidence goes, to have made any complaint; and it is quite probable, that he has acquiesced in the attachments, as matter either of prior or subsequent arrangement, not injurious to his own interests.

There is yet another view of this point important in itself, and which might, under one aspect of the case, have a great influence upon the decision. The argument is, that, unless McGaw and Hatch both assented to the assignment, and to act as assignees, it was utterly void. But the argument is built on no fact in the case. It stands merely as a presumption from the absence of a contrary provision. Now, I cannot clearly see my way to adopt the argument. The assignment was made to a firm, as assignees, for the benefit of creditors. Hatch assented to it, and so bound himself, whether McGaw was bound or not. And, as Coolidge has not made it a condition, that both the assignees should accept, my judgment is, that the assignment, in the absence of all countervailing presumptions, vested the property in such assignee as should and did accept the trust. If a grant is made to two persons for their own benefit, I have never understood that it is void as to both, if not accepted by both. And where the grant is a mere trust for the benefit of third persons, there is still less reason to indulge in such a presumption. It is true, that if the intention of the parties is, that the assignment shall not be operative, unless all the assignees shall accept it, that intention ought to govern the case. But such an intention must clearly appear. It is not to be inferred from equivocal and doubtful circumstances, admitting of different interpretations. I see nothing in this case, which will enable the court to say, that Coolidge did not intend that the assignment should take effect, unless McGaw, as well as Hatch, consented to act as assignee. In every view of the matter, my judgment is, that the assignment was not a void instrument; but that it took effect from the time of its delivery, as to all creditors, who assented to it before the attachment of the present plaintiff was made.

The other question is one of more nicety and difficulty. It is said, that where parties, summoned as trustees, fail to discharge themselves by any ambiguity in their disclosures, they are to be adjudged trustees. That proposition requires many qualifications, and may be true or not, according to circumstances. If upon the disclosure it is clear, that there are goods, effects, and credits of the debtor in the hands of a trustee; but it is left uncertain by the disclosure, whether the goods, effects, or credits are affected by interests, liens, or claims of third persons or not, and the trustee has knowledge of all the facts and withholds them, or evades a full examination; that may furnish a good ground to presume every thing against him, so far as there are ambiguities. But if he fully and clearly discloses all he knows; and upon the whole evidence it is left in reasonable doubt, whether, under all the circumstances, he be trustee or not; in such a case, I apprehend, he is entitled to be discharged. A different doctrine would be most perilous to the supposed trustee; because he possesses no power to compel disclosures from third persons relative to the property; and no extraneous or collateral evidence of third persons is admissible in the suit, to establish or discharge his liability. It is to be decided solely and exclusively by his answers. He might, upon any other doctrine, be innocently compelled to pay over the same property twice to different persons, holding adverse rights, because he might be without any adequate means of self-protection. The law, therefore, will not adjudge him a trustee, except upon clear and determinate evidence drawn from his own answers. I am aware, that there are cases, which seem to inculcate a more rigid and severe doctrine; such as Sebor v. Armstrong, 4 Mass. 206, and Cleveland v. Clap, 5 Mass. 201; U. S. v. Langton [Case No. 15,560]. But they are perhaps explicable upon other grounds; and at all events, they do not, to my judgment, present such a direct authority as ought to overcome the doctrine already stated.

There are two points of view, under which the facts, in regard to the assent of Gilman, Pritchard, & Co., are presented by the argument. The first is, that there was an original assent at the time of the execution of the assignment by their agent, Dwinal, and by Hatch, as their attorney. The second is, that the assent of Gilman, Pritchard, & Co. is to be deemed complete and perfect from the moment the latter was put into the post-office at Boston; and as the letter was put into the post-office on the same day that the

attachment was made; and as the trustees have no means of ascertaining and stating with certainty, whether it was on that day before or after the time of the attachment; and as evidence aliunde is not admissible to establish it; the court ought not to adjudge the parties trustees, as they may thus be rendered twice responsible, if it shall hereafter be established, that the letter was in fact put into the post-office before the attachment.

This latter point involves questions of a good deal of nicety, upon which the authorities are not entirely agreed, and upon which much juridical astuteness of argument and opinion has been employed. Whether, then, the assent is to take effect from the moment when the letter is placed in the post-office; or from the time when the notice reaches the trustees, if the assent is not in the intermediate time withdrawn; whether, if not withdrawn, it relates back after notice to the period when first placed in the post-office; and whether, if the assent is once given, it can be withdrawn at any time before the letter reaches the trustees, by any intermediate though uncommunicated act;—these are questions admitting of no small scope of argument and observation. Merlin, in his Répertoire (title "Vente," § 1, art. 3, note 11, vol. 36, pp. 42, 50–54), to which I have been referred by my brother, the district judge, has given an elaborate pleading or argument on the subject, in which he has cited many of the continental authorities. It will well reward a diligent perusal. Then, there are the cases of Adams v. Lindsell, 1 Barn. & Ald. 681, and McCulloch v. Eagle Ins. Co., 1 Pick. 278, pressing on the same points. I am studious of avoiding any decision on these controverted matters, unless they are absolutely indispensable upon the present occasion. And it does appear to me, that we may dispose of the present case upon the first point already stated; that is, that Dwinal and Hatch had an original authority to assent to the assignment in virtue of the general implied power from Gilman, Pritchard, & Co. to Dwinal, "to obtain security for the note due to them, or its amount in goods," It is said, that there is no proof, that Dwinal had any such authority. But it appears to me, that under the circumstances the fair presumption is, that he had the authority. He acted as upon authority, and gave directions to the attorneys, and assented to the assignment; and the attorneys understood him to have full power, and governed themselves accordingly. There is no pretence to say, that Gilman, Pritchard, & Co. have ever repudiated his acts, or denied his powers, or treated him as a tortious interloper in their affairs. That he was an agent to collect their debt, or to secure it, does not seem susceptible of any doubt; and if an agent, we can not presume a limitation upon his agency inconsistent with his acts. There must be proof to establish that he has exceeded it. The letter of Gilman, Pritchard, & Co. of the 12th of December, in reply to the statement of the proceedings in regard to the assignment, contains no expressions controlling the presumption of authority. They simply express their acceptance of the assignment, without a single intimation that Dwinal, or McGaw and Hatch, had acted against their instructions. And in a subsequent letter (of the 23d of December), written, indeed, after the attachment of the plaintiffs was known to them, but still evidence in the case, they say to McGaw and Hatch: "We consider, that we agreed to the assignment the moment it was made through yourselves, our agents." Now, the court are called upon to draw the conclusion from the mere deficiency of positive proof of an antecedent authority, that there was in fact none; and this conclusion is to be drawn against the direct statement of Hatch, that he supposed the firm of McGaw and Hatch fully authorized through Dwinal, and without any corroborative circumstances to fortify it. I cannot persuade myself, that, in a process of this nature, the court are to indulge in any such latitude of inference and conjecture. We ought to see clearly, that there was no such antecedent authority, in order to defeat the title under the assignment. If the disclosures leave the weight of presumption the other way, the court are bound to abstain from declaring the parties trustees in the suit, as to the sum retained for this particular debt. And this, upon the most mature reflection, is the judgment to which my mind has arrived.

The remaining consideration is, what deductions are to be allowed to the trustees from the small balance in their hands, for which they are liable to be adjudged trustees? That will require further interrogatories to be put to them on this point; and for this purpose, and for this only, should I be disposed to allow any further interrogatories. The district judge concurs in this opinion, and the cause will be disposed of accordingly.

GORDON (COOPER v.). See Case No. 3,195.

Case No. 5,607.

GORDON v. DOOLEY.

[3 Hughes, 182.] [1]

Circuit Court, E. D. Virginia. May, 1879.

RENT CHARGE—USURIOUS CONTRACT.

Where a rent-charge of $1000 per annum is purchased for $12,500 in a state where six per cent. is the lawful rate of interest, and there is no intention or contract, direct or indirect, that it shall be considered a loan, and no provision in the deeds of assurance by which in the event of default the original purchase-money can be returned, nor any law in existence on the statute-book under which after default the pur-

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

chase-money can be recovered back: *Held*, that the contract is not usurious, but valid, binding, and to be enforced in equity.

The bill sets out in substance the facts hereinafter detailed relating to a ground-rent sold by Snyder to Gordon. It avers that Asa Snyder became bankrupt on the petition of his creditors in 1877; that [James H.] Dooley was appointed his trustee in bankruptcy; that the ground-rent hereinafter mentioned was duly paid from July, 1866, to July, 1876, but that no part of the same has been paid since the latter date; that the trustee is receiving an annual rental from the property hereafter mentioned of $2700; that one Thomas Wilson is the beneficiary of a deed of trust from Snyder upon the same property, executed in October, 1876, and has filed his petition in this court, claiming to be paid out of said rents the arrearages of interest due to him upon a loan of $10,000 secured by said deed of trust. The bill maintains that the claims of all creditors of Snyder, and especially Wilson, are subordinate to the claim of the complainant. It therefore prays that a receiver may be appointed to take possession of the property and rent out the same; that the present trustee be directed to render an account of the rents he has received; and, amongst many other things, that the complainant may be paid the rent due him in arrear, and the rents to accrue as they fall due, in priority over all creditors and Wilson. The defendant, Dooley, and the petitioner, Wilson, resist the prayer of Gordon on the ground that his transaction with Snyder was usurious and void. Two deeds were received for record in the office of the hustings court of Richmond on the 7th day of September, 1866. One of them had been acknowledged on the 27th day of August, in that year, but bore date on the 1st day of July, by which Asa Snyder and wife, of Richmond, Virginia, conveyed to Douglass H. Gordon, of Baltimore, Maryland, in fee for $12,500, certain real estate on the corner of Cary and Tenth streets, in Richmond, described in the deed. The other deed had been acknowledged on the 29th and 31st of August and 4th of September, 1866; bore date the 2d day of July, 1866; and was a conveyance by the said Douglass H. Gordon and wife of the same property to the said Snyder, to have and to hold to Snyder, his heirs and assigns, etc., but subject to a perpetual annual ground-rent or rent-charge at the rate of one thousand dollars per annum, payable semi-annually, to be paid forever, with a covenant for entry for the purpose of distress if there should be default in making any payment of rent for six months; with further covenant nine months after default in paying any semi-annual rent, for re-entry to take issue and profits for the satisfaction of rents in default; and with final covenant that if the rent shall be in arrear for five years then that the grantor, Gordon, shall have power of re-entry and to hold in absolute fee. The deed contains no other covenant. By the laws of Virginia then in force (see Code 1860, c. 138, §§ 16, 20) it was provided that on a person bringing ejectment upon such a covenant as the last one mentioned in this deed, if the party in default shall tender to the party entitled to rent, or pay into court, all the rent and arrears at any time due, with interest and costs, all further proceedings in ejectment shall cease; or in case of a bill being filed in equity for relief against forfeiture of the land by the claimant, and of his being relieved in equity, he shall hold the land as he did before the proceedings began, without a new lease or conveyance. The property which was the subject of these deeds was a foundry, supposed at the time to be worth $50,000. Six or eight months before this transaction with Snyder, R. A. Lancaster, head of the firm of Lancaster & Co., bankers and brokers, of Richmond, had negotiated for Gordon a purchase of a ground-rent of $1000 a year on the Belle Isle property of Richmond for $12,500. Some six months before this transaction with Snyder, Gordon had requested Lancaster to negotiate the purchase for him of two other ground-rents of $1000 each, at the price paid for the Belle Isle purchase, and on the 6th of July, 1866, in a postscript to a letter of that date, Gordon had repeated that request to Lancaster.

Snyder says in his testimony that late in the summer or early in the fall of that year (it was in fact in July) he called on Lancaster's firm for the purpose of negotiating a loan. It seems they first proposed to sell him stocks or bonds on which he might raise money. Sundry propositions of the sort he declined. Afterwards they sent for him and told him they had $25,000 to invest in ground-rents. After taking some days for reflection he concluded to sell a ground-rent, and take $12,500 of the money the firm had for that form of investment. In due time deeds were drawn. The first deeds proposed to him were not satisfactory. Finally, the deeds which have been described were prepared, and were duly executed and recorded by the proper parties. There were no direct negotiations between Snyder and Gordon. All that transpired between Lancaster and Snyder in the negotiation was oral. All that transpired between Lancaster and Gordon on this subject was by letter—Gordon being in Baltimore. There is nothing in the correspondence of Lancaster with Gordon, showing that in this transaction Gordon had any other object or aim than to purchase a ground-rent; nothing to show that he himself sought to place a loan, or considered the transaction with Snyder as directly or indirectly a loan of money. Lancaster testifies that he never at any time submitted to Gordon a proposition from Snyder to borrow money. He had been informed by Gordon that he wanted the ground-rents for some special legacies. Lancaster testifies positively that the purchase of the ground-rent from Snyder was not intended by any one to be a shift, or device, or contrivance to

cover a loan of money, at a greater rate of interest than six per cent. per annum; that he had no authority to enter into such a transaction; that Gordon never had in the hands of his firm any sum whatever for investment at their discretion; that when proceeds of sales made by them for Gordon came into their hands and were left there, they had no authority whatever to invest them without Gordon's previous direction; that he never informed Snyder that his firm had any amount of Gordon's money for investment, and never offered to Snyder any sum of money or loan in behalf of Gordon. Lancaster repeats positively that the object of the deeds which were executed between Gordon and Snyder was to carry out in good faith the purchase of the ground-rent. Several letters from Gordon to Lancaster, written in the summer of 1866, were put in evidence voluntarily by Gordon, very few of which refer to the transaction with Snyder. They contain nothing to show that Gordon intended that transaction as a device to cover a loan, or himself regarded or treated the transaction as a loan. The letters are full of statements and inquiries, showing that Gordon was in the habit of buying negotiable paper, put by others into the hands of Lancaster for sale, at rates of discount greater than six per cent.; but they disclose no transaction usurious in the meaning of the law. These letters do not show that it was "the known practice" of Gordon to lend money on usury, under cover of devices in the form of sale, within the meaning of the ruling of the court in Douglass v. McChesney, 2 Rand. [Va.] 109. They prove no more than that he bought negotiable paper at rates of discount greater than six per cent.; and show that in one case he refused to buy such a note made directly to himself as payee, or made payable to the maker's own order, without an intermediate indorser.

Snyder testifies that he always regarded the transaction as a loan upon the property, similar to a mortgage; and he avers that Lancaster, from the character of his conferences with him, "must have understood thereby that I regarded it in the light of a loan; of course I can't tell what he felt." Lancaster testifies that he acted in the transaction as the agent of Snyder; that he did not act as the agent of Gordon; that his firm received a commission of $125 from Snyder; that Gordon paid the $12,500 in Baltimore on a draft of Lancaster & Co., and that the proceeds were placed to Snyder's credit in the banking house of Lancaster & Co., in Richmond, and were drawn thence by Snyder. Lancaster testifies that he took commissions on sales in all cases only from the seller, and never took them from the purchaser.

John A. Meredith and James Pleasants, for complainant.

W. W. Gordon, for defendant, and Isaac H. Carrington, for Thomas Wilson, who intervenes by petition.

HUGHES, District Judge. I think the foregoing statement embraces all the evidence in the case that can at all affect the decision of the question at issue, which is whether the two deeds, by which a rent-charge was nominally secured by Gordon upon the foundry property of Snyder, were really designed to cover, and did cover, a loan of $12,500 from Gordon to Snyder at the usurious interest of $1000, or eight per cent. per annum. If the intention of the parties to the transaction was in fact to cover up a usurious loan, or if the deeds are such as, carried by any practical means into operation according to their legal effect, do virtually provide for a loan, then the transaction is usurious and void under the law of Virginia as it stood at the date of the deeds. We have nothing to do here with the technical term "usury"; we have to do only with the terms of a specific law. Section 5, c. 141, of the Code of 1860, in force in 1866, provided that "all assurances made directly or indirectly for the loan of money at a greater rate than six per cent." shall be void. This is the law which rules the transaction between Gordon and Snyder. The deeds which then were executed are assurances. They do not provide directly for a loan of money. They in terms provide for the sale by Snyder to Gordon of a rent-charge of $1000 per annum, to be paid to Gordon in consideration of the sum of $12,500 paid down by Gordon to Snyder. If this transaction was in good faith the sale of a rent-charge, it is not usurious, though in effect the deeds provide for an annuity of $1000 to be collected on the original payment of $12,500 by Gordon to Snyder. "If the parties intended to make a usurious loan in the form of a sale, then, of course, the transaction will be illegal and void; but if it appear that a sale was really intended, then it is equally clear that the transaction is legal and valid. The difference between the two cases is, that the law allows the one and condemns the other; and though you cannot do what the law condemns, yet you may do what the law allows, even though the effect be precisely the same. Brockenbrough v. Spindle, 17 Grat. 36. A man may purchase bonds or negotiable paper in the market at any discount, whether they were manufactured for sale or not, and not be guilty of usury: Hansbrough v. Baylor, 2 Munf. 36; Taylor v. Bruce, Gilmer, 42; Whitworth v. Adams, 5 Rand. 333; and the same is held in many other cases. Nay, more, he may sell property greatly above its market value, knowing that the purchaser intends selling it again at its market value for the purpose of raising money, and the sale will not be usurious if it is a sale. Selby v. Morgan, 3 Leigh, 577; and Brockenbrough v. Spindle, 17 Grat. 21. But if such sale is accompanied by a loan of money as part of the transaction, the whole is usurious. Bank v. Stribling, 7 Leigh, 26." If the deeds between Gordon and Snyder, though not in form and legal effect providing for a loan, were accom-

panied by a contract or understanding in any form, oral or written, agreed to by both parties, that the amount of $12,500 paid for the rent-charge was to be treated as a loan at an annual interest of $1000, such side-contract would vitiate the main transaction, though it should not appear on the face of the deeds; or, though no such outside contract or understanding should be proved, yet, if the deeds themselves contain any clause or provision, or if they make an omission by virtue of which, under the laws of the country, a return of the principal money originally paid could be secured, then a loan would be thereby indirectly and substantially provided for, and the contract would be usurious.

It is clear from the evidence, that whatever idea Snyder may have had to the effect that he was negotiating a loan from Gordon, yet neither Gordon nor Lancaster entertained it. It is clear that the minds of Snyder and Gordon did not meet in mutual agreement on a contract for a loan in fact, through the sale of a rent-charge in form. These two men did not see each other. There was no direct communication between them. The whole business was transacted through Lancaster. Nor did Lancaster and Gordon meet personally in the course of the negotiation. It was carried on wholly by letters between them, and these letters do not show that a loan was either actually or impliedly the subject of their correspondence. In short, the evidence shows to demonstration that there was no mutual understanding between Snyder and Gordon to the effect that their transaction was to be in form the sale of a ground-rent, but in fact a loan. Such a contract or understanding not having been mutually agreed upon by the parties, by a common intention not expressed in the deeds, the only question left is, whether the deeds themselves by their tenor, provisions, and covenants, directly or indirectly, expressly or impliedly, by their actual provisions or by the omission of provisions, provide for or admit of a return or recovery of the $12,500 paid by Gordon for the rent-charge, through any means or method or possibility known to the law.

The counsel of Wilson, and of Dooley, the trustee in bankruptcy, contend that these deeds show a usurious transaction, and claim that this case is entirely similar to that of Scott v. Lloyd, first reported in 4 Pet. [29 U. S.] 205, and again reported 9 Pet. [34 U. S.] 418. Except in one particular this case is identical in the nature of its facts with that of Scott v. Lloyd, where a rent-charge of $500 per annum, purchased for $5000 paid down, was held usurious. In that case, as it is reported in 9 Peters, Chief Justice Marshall reviewed every case, American and English, which had then been reported, in which contracts not usurious in form, but claimed to have been usurious in fact, had been passed upon by the courts. The whole learning of this important and interesting subject is there given in the lucid and conclusive manner usual with that judge. I refer for a citation and review of all cases in point to that exhaustive opinion, which leaves me nothing to do but to inquire what it decides, and compare that case of Scott v. Lloyd, with the one at bar.

The chief justice summed up the law as to annuities and ground-rents in the following language: "The ingenuity of lenders of money has devised many contrivances by which, under forms sanctioned by law, the statute of usury may be evaded. Among the earliest and most common of them is the purchase of annuities secured upon real estate. The statute does not reach them, not only because the principle may be put at hazard, but because it was not the intention of the legislature to interfere with individuals in their ordinary transactions of buying and selling, or other arrangements made with a view to convenience or profit. The purchase of an annuity or rent-charge, if a bona fide sale, has never been considered as usurious, though more than six per cent. profit be secured. Yet it is apparent, that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. Courts, therefore, perceived the necessity of disregarding form, and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it."

After thus explaining the law affecting the case, the chief justice proceeded to examine into the "real nature" of the transaction before him. As I have before said, the facts of the transaction in that case were identical in their character with those in this case. But there was one provision of the deed there which is not to be found in the deeds in this case. In addition to clauses similar to corresponding clauses in the deeds here, the deed there contained the following clause, Scholfield being in the relation of Snyder and Moore of Gordon to that transaction: Moore covenanted that if Scholfield, his heirs or assigns, "should at any time after the expiration of five years from the date of the deed, pay to said Moore, his heirs and assigns, the sum of five thousand dollars, together with all arrears of rent, he, the said Moore, his heirs and assigns, would execute and deliver any deeds or instruments which may be necessary for releasing and extinguishing the rent hereby created, which, on such payments being made, should forever cease to be payable." 4 Pet. [29 U. S.] 208. It is useless to show that this clause did provide for a return of the $5000 advanced in the beginning by Moore. The clause ex vi termini converted the sale and purchase of a rent-charge into a loan. In terms the transaction was to stand as the sale and purchase of a rent-charge for five years, and after that was to assume the character of a mortgage to secure a loan of $5000 at an

annual rent of $500. It is useless to say that on the principles heretofore stated in the foregoing pages, this provision of the deed brought the transaction between Scholfield and Moore into the category of usurious loans, and made what was in form the sale of a rent-charge in fact a loan secured by mortgage. Nor is it necessary to state how the supreme court decided the case, for, as a matter of course, it held the transaction to be usurious and gave order accordingly. It was not the fact that the rent of $500 reserved on ground purchased for $5000 was equivalent to an interest of ten per cent. per annum that was held to vitiate the transaction, but the fatal circumstance was the additional fact that a provision was made for a return of the purchase-money after a period, during which it was to carry ten per cent. in the form of rent.

In the case of Tyson v. Rickard, 3 Har. & J. 109, the subject was a rent-charge reserved at the rate of fifteen per cent. upon the sum paid for the purchase of it, where the contract embodied a provision allowing the vendor within five years to redeem the property on returning the sum borrowed with all arrearages of rent due, a case all fours with Scott v. Lloyd [supra]. Are these cases all fours with the one at bar? Plainly they are not. There is no such fatal clause in the deed of Gordon to Snyder reserving the rent as that which I have quoted from the deeds in the other cases. There is no provision whatever securing, looking to, or permitting the return of the $12,500 paid by Gordon for the rent-charge. Now I admit that, though no such provision actually appears in the deeds which passed between Snyder and Gordon, yet if there was an outside understanding or contract, oral or written, equivalent to it, by which they mutually agreed that the transaction should in fact be a loan, then the case would be the same as if such a stipulation were actually in the deed. But no such outside agreement is proved, and none such was made at all. I will go farther and admit that, if under the terms of the deeds between Snyder and Gordon, especially of the clause relating to a forfeiture of the fee, after five years of default, Gordon could, under the laws of Virginia, secure a return of the money paid for the purchase of the rent-charge, that legal power of recovery would have to be construed in connection with the deeds, and be treated as a part of the contract. But a court of equity in relieving against the forfeiture of the fee would not provide for a return of the purchase-money paid for the ground-rent. It would treat the 20th section of the 138th chapter of the Code of 1860 as part of the contract, and give relief against the forfeiture in accordance with its provisions. It could not, on any known principle of law or equity, return to Gordon his purchase-money of $12,500. This being so, and the deeds between Snyder and Gordon making no provision for the return of the $12,500 to Gordon, and the law giving him no power to recover it back, it follows that Gordon, by the transaction, parted with that purchase-money forever, and absolutely, and that the transaction was not directly or indirectly, actually or intentionally, by express provision or through any means known to the law, a loan within the terms of the 5th section of chapter 141 of the Code of 1860, making the taking of more than six per cent. on loans usurious, and is not void, but is valid and must be enforced in this case as against Wilson and other creditors of Snyder.

GORDON (HARDEN v.). See Case No. 6,047.

Case No. 5,608.

GORDON v. HOBART et al.

[2 Story, 243.] [1]

Circuit Court, D. Maine. May Term, 1842.

BILL IN EQUITY—MASTER IN CHANCERY—REPORT—MATTER NOT INCLUDED IN REFERENCE—USURY—DEBTOR AND CREDITOR—APPLICATION OF MONEY TO PAYMENT OF DEBTS.

1. Where a bill in equity was brought by A. as assignee of B., no waste being charged therein, and the subject-matter was referred to a master to report thereon, who was not authorised to report upon the question of waste, but who nevertheless did, with the consent of the parties, report thereupon; it was *held*, that waste committed before the assignment could not be inquired into by an assignee; that all of the report pertaining to waste should be stricken out; that, even if such matter had been charged in the bill, the master, not being directly authorised thereto, could not acquire any authority beyond his commission by the consent of parties.

[Cited in Seaver v. Durant, 39 Vt. 106; Waterman v. Buck, 58 Vt. 520, 3 Atl. 506.]

2. Where A. mortgaged certain property to B. to secure a loan of $3,000, no rate of interest being therein fixed, upon the agreement, that A. should take from B. a lease thereof at the yearly rent of $270, which rent was paid until the mortgagee took possession; it was *held*, that the lease was a mode of securing usurious interest, and was, therefore, not valid; but that legal interest should be allowed in equity, upon the $3,000, for the whole period.

[Cited in Lathrop v. Cheney, 29 Neb. 454, 45 N. W. 617.]

3. There having been various business transactions between A. and B., and various notes received from A. by B., no specific application of which by the mortgagor was shown; it was *held*, under the circumstances, that the notes were not to be applied to the payment of the $3000.

4. Where money is paid by, or received for a debtor by his creditor, the debtor may appropriate it to the payment of whatever debt he pleases; if he omit to appropriate it, the creditor may apply it to the satisfaction of whatever demand he pleases; if neither party apply it, and various debts be due, the court will make the appropriation thereof, according to the equity of the case.

5. This right of appropriation exists only between the original parties; and, therefore, it

[1] [Reported by William W. Story, Esq.]

was *held*, in this case, that the assignee of A. could not insist, that money in the hands of B. belonging to A., should be applied in discharge of the mortgage.

[Cited in Mack v. Adler, 22 Fed. 573; Case v. Fant, 3 C. C. A. 418, 53 Fed. 44.]

[Cited in Robie v. Briggs, 59 Vt. 444, 9 Atl. 595.]

Bill in equity [by Charles Gordon against Polly Hobart and another]. The bill in substance stated as follows: That John Gordon, on the 25th of November, 1814, mortgaged to John Hobart three lots of land, namely, two in Westbrook, and one in Cape Elizabeth, for the payment of three thousand dollars, loaned to the said Gordon by the said Hobart. That no rate of interest on the said sum was fixed by the form of the said mortgage security; but that the said Hobart exacted an usurious interest of nine per cent. by requiring, as a part of the transaction aforesaid, an indenture of lease of the mortgaged premises, to the said Gordon, at the yearly rent of two hundred and seventy dollars; and that the said Hobart did actually demand and take from the said Gordon the aforesaid usurious interest, under the form of a stipulation for rent. That the said mortgage deed being an usurious security for money loaned contrary to the statute, and, therefore, void in law, can only be sustained in equity for what may be due in equity and good conscience. That John Gordon, on the 27th of November, 1815, in order to secure the said Hobart against a liability as indorser of his note for $1,600, being a loan from the Cumberland Bank, made over to him, the said Hobart, two promissory notes of Josiah Pierce, bearing date Nov. 24th, 1815; and also, as a further security, mortgaged to him certain wharves and flats in Westbrook, then considered amply sufficient to secure the said Hobart, as indorser of the said note. That the said note, having been made to meet a liability of the said Gordon at the Cumberland Bank, was continued and renewed from time to time, and indorsed at each renewal by the said Hobart; and that the said Gordon, for the further security of said Hobart, on the 9th of December, 1817, caused to be made and delivered to him the promissory note of John Warren and Nathaniel Warren, of that date, for $876, due from the said Warrens to the said Gordon. That it was expected, that payment of the said Warrens' note should not be required immediately, but that it should simply lie in Hobart's hands, while he was contented with its security; as had been the case with Pierce's notes above-mentioned. That as the amount of the said Pierce's and Warrens' notes was more than sufficient to pay the bank note for $1,600, it was intended, that the surplus, whenever received by Hobart, should be applied in part payment of his (Hobart's) claim for the $3,000 aforesaid. That on Sept. 10th, 1816, the said Gordon had given a further sum of $344.27, which, unless required for the indemnity of said Hobart, was to be applied to the satisfaction of his demand against said Gordon. That John Gordon, on the 9th of December, 1817, John Warren and Nathaniel Warren aforesaid, being indebted to him $3,000, caused their note to be made to the said Hobart for $2,124. That the said Pierce's and Warrens' notes remaining, as Gordon supposed, unpaid, and it being uncertain how far Hobart was secured, as indorser of said $1,600 note, by the prior mortgage, the said Gordon, on the 30th of December, 1817, mortgaged two other parcels of land in Cape Elizabeth to the said Hobart as collateral security for the indorsement of the said $1,600 note. That the said Gordon paid the $270, under the name of rent, as aforesaid, for two years, making the sum of $540, the excess of which above legal interest ought to have gone towards the satisfaction of the said Gordon's debts to the said Hobart. That the said Hobart never demanded the $3,000 above-mentioned; but in the spring of 1820, he took possession, with the consent of Gordon, of all the premises mortgaged, both for the $1,600 note and for the $3,000. That the said Gordon, on the 7th of March, 1818, delivered to the said Hobart the promissory note of Barnabas Sawyer and Joshua Webb, for $1,000; on which note said Hobart received about $600, which ought to have been applied as aforesaid. That the said Gordon, on the 4th of March, 1819, delivered to the said Hobart the promissory note of Samuel A. Proctor for $625, the whole of which the said Hobart afterwards received.

The bill admits, that the said Hobart had a right to hold the aforesaid securities, and to apply the same for his indemnity; but insists, that he was bound, after being indemnified for the indorsed bank note, to appropriate the surplus towards the extinguishment of his just demands against the said Gordon. It also admits, that the said Gordon became embarrassed in his circumstances, and unable to pay the demand of the said Hobart, otherwise than as aforesaid; and supposes, that the $1,600 note was paid by means of a renewed note at the Warrens, aforesaid, on the 19th of January, 1818, in part payment of the $2,124 note above-mentioned. It also alleges, that the said Hobart received in his lifetime payment of the whole or of considerable parts of the said Pierce's and of the said Warrens' notes, and of the demand against Proctor, and $600 of the demand against Sawyer; that the said Hobart received the full amount, paid by him, on the $1,600 note, and all damages therefor, and ought to have discharged the before-mentioned mortgagee for his security as indorser, and to have applied the balance to the payment of his other demands against the said Gordon; but that the said Hobart did not do so, but died without rendering any account in the premises. That the said Gor-

don, on the 18th of September, 1819, transferred his interest in the mortgaged premises to Joseph Welsh and Hezekiah Ayer; that the said Welsh and Ayer, on the 5th of September, 1820, transferred this interest to William W. Thackard; that the said Thackard, on the 9th of January, 1832, transferred his said interest to your orator; and that the plaintiff has become seised of the equity of redemption, and acquired all the rights of John Gordon, aforesaid, in the premises. That after the death of the said John Hobart, Polly Hobart, his widow and devisee, the 3d of April, 1830, quitclaimed to Leavitt Hobart all the interest of the said John in the premises; the said Polly having received the rents and profits thereof, from the decease of said John to the time of said conveyance to said Leavitt Hobart.

The bill then states, that the plaintiff (the orator) being desirous of redeeming the mortgaged premises, had requested of the said Polly and the said Leavitt, an account of what was justly due on the said mortgages, and also of the rents and profits of the said premises, received by the said Polly, and by the said Leavitt, and by the said John, during his lifetime; and upon receiving the balance, requested them to deliver up the premises. The bill then charges, that the defendants, admitting a right of redemption as to the mortgage for the security of the $1,600 note, deny, that the said John Hobart was indemnified by the above-mentioned notes of the Warrens, Pierce, &c.; and that the defendants assert, that the said John Hobart had other large demands against the said Gordon, to the payment of which he might justly apply any surplus received as above-mentioned; all which the orator denies, and says, that all accounts between them, excepting those stated as subsisting in this petition, were settled to the 9th of December, 1817; and whereas the said Polly pretends to hold, as executrix, a note of said Gordon for $400, the plaintiff says, that the same was fully paid; and that the said John Hobart received of the said Gordon a bill of sale of a store-house in Stroudwater, of the value of $300, for the rent and worth of which the said Hobart ought to account. And it further charges, that whereas the said Polly and Leavitt set up that the $270, undertaken to be reserved as rent of the premises mortgaged for the $3,000, was in reality so reserved, and on no other account, the orator charges the contrary; that it was, in fact, an exaction of usurious interest; that any pretended agreement for the payment of it is void; and that neither the said Gordon nor his assigns ought to be held to the fulfillment of it. The bill then prays, that the defendants may be holden to answer, and to produce books and accounts, and for repossession of the premises, and for further and general relief.

The condition of the bond of defeasance (by which the conveyance of the 25th of November, 1814, being absolute in its terms, became a mortgage) was in the following terms: "The condition of the above obligation is such, that, whereas the above-named John Gordon has conveyed to the said John Hobart certain real estate, viz., a certain lot of land situated in the town of Westbrook, and containing about forty-five acres, be it the same, more or less, as will more fully appear by said Gordon's deed to said Hobart, which deed bears even date with the presents; which real estate is conveyed to said Hobart to secure the payment of three thousand dollars. Now, be it known, that if the said John Gordon, his heirs, executors, administrators, or assigns, shall pay unto the said John Hobart, his heirs, executors, administrators, or assigns, the sum of three thousand dollars, in three months after having due notice, and the same being demanded by the said Hobart, his heirs, executors, administrators, or assigns, the same to be paid in gold or silver, then I, the said John Hobart, do by these presents bind myself, my heirs, executors, administrators, or assigns, in the penal sum aforesaid, to give to the said John Gordon, his heirs, executors, administrators or assigns, a good and sufficient deed of conveyance of the within named premises, which if well and truly executed and delivered to the said Gordon, his heirs, executors, administrators or assigns, then the within written obligation to be void and of no effect; otherwise to remain in full force and virtue. John Hobart."

The lease referred to in the bill, was in the form of an ordinary lease, for the term of one year from Nov. 25th, 1814, yielding and paying rent of 270 dollars for the said year; and the same sum for each and every year the said Gordon should occupy or improve the same; and the lessee promised to pay the rent in two equal half-yearly payments, one on May 25th, and one on November 25th. The plaintiff having died, a bill of revivor was filed in October, 1835, on behalf of his heirs; and to that is added, at the May term, 1836, an express waiver of any objection to the $3,000 mortgage, on the score of usury: with an offer to fulfil the conditions, so far as they have not been performed, as the court may direct. The answer having been put in, and evidence taken, the cause came on for a hearing at the October term, 1836, and the proceedings had thereon are fully stated in Gordon v. Hobart [Case No. 5,609]. The cause now came on at this term to be heard upon the master's report, and the exceptions taken thereto by the parties.

The master's report was as follows:

In Chancery.—Charles Gordon and Others, Plaintiffs; Leavitt Hobart and Sally Hobart, Defendants. In pursuance of the order of this honorable court made in the above cause, October term, A. D. 1836, and a commission issued thereupon, bearing date April 1st, 1839, by which it was referred to me, as a master in chancery, according to the bill of

complaint of the said plaintiffs, and the respective answers thereto of the said defendants, in relation to the use and improvement of certain real estate therein set forth, to take an account of the rents and profits thereof, and to report what is due upon the footing of all and each of the mortgages set forth in the said bill of complaint, making all due charges against, and all due allowances to, the defendants, I have caused the parties aforesaid to appear before me on several set days by their respective solicitors, and have examined their several accounts and evidence, and do thereon report as follows:

1. On the mortgage made by John Gordon to John Hobart, dated November 25th, 1814, I find to be due as follows:

Principal,		$3,000	
Interest, 1 year, 47 days,		203.50	
		$3,203.50	
Deduct indorsement on Hobart's lease to Gordon, January 11th, 1816,		270	
		$2,933.50	
Add interest, 1 year, 47 days,		199.33	
		$3,132.83	
Deduct indorsement on the lease, February 27th, 1817,		270	
		$2,862.83	
Add interest to October 1st, 1838, 22 years, 7 months, 4 days,		3,881.02	
			$6,743.85
Also add for repairs.			
1819. Fencing stuff, as per leger, p. 79,		$33.20	
1821 & 1822. Daniel Lombard, labor.	$54.75		
Materials shingling and other repairs, as per leger,	73.36	$128.11	
1831. Tristram C. Stevens, labor,	2.25		
Materials.	15.54	17.79	
Parker & Stevens.	$10		
Chapman & Chesley,	13.13	23.13	202.23
			$6,946.08
Deduct produce and sundries, delivered, as per order, on Charles Gordon, Nov. 3d, 1819.	$159		
Less	31 70	$127.30	
Rent of mortgaged premises, exclusive of taxes, paid by Hobart from April 1st, 1821, when possession was taken by John Hobart,			
House and garden,	$ 75		
15 acre lot at Stroudwater,	100		
45 acre lot at Cape Elizabeth,	10		
	$185		
per annum, amounting in 18 years, to April 1st, 1839,		$3,330.00	
And from April 1st, 1839, to October 1st, same year, 6 months,			
House and garden,	$ 37.50		
15 acre lot,	100		
45 acre lot,	7.50	$145.00	
Waste on the Stroudwater property, viz., garden wall and fences,	$50.00		
Waste on the 45 acre lot at C. E.	$310		
Cutting wood, and for trees cut for mill logs, estimated at	50 $360.00	$410.00	4,012.30
			$2,933.78

The reservation of $270 rent of the premises having been stated in the bill to be in lieu of interest, and at the rate of 9 per cent. on the principal, I have thought it correct to allow interest from the date of the mortgage at 6 per cent. per annum, as above stated; though the payment of interest was not stated in the bond of defeasance. The lease is of the same date with the deed and defeasance, and assumed by me to be part of the same transaction, and to have been given with the intent mentioned in the plainuff's bill; and it appears to me to be more equitable to calculate the interest at 6 per cent. than to charge the plaintiffs with the whole rent expressed in the case. Should I be incorrect in this assumption, and it should become necessary or proper for me to report as to the time when the first evidence of an actual demand appears, I would further state, that I infer from the other evidence, that a demand was made November 3d, 1819, the debt being then partly paid, as above stated, which inference is grounded upon the exhibit No. 18. Also that possession was taken in April, 1821, on all the mortgages in the case, as stated in the answer of Leavitt Hobart. I have made no rests since February 17th, 1817, because I have not found that the rents and profits have at any time been equal to the amount of interest accrued at the time they were received.

2. It appears from the first deposition of Levi Cutter, that the note of $1,600, dated November 24th, 1817, was applied as payment of the debt secured by the deed and defeasance, conditioned for the payment of $1,600, dated November 27th, 1815; and from this I infer, that both securities were for the same debt. This result is confirmed by the fact, that the plaintiffs produce in their own custody the series of notes for the same amount, from the note dated November 27th, 1815, to a note discounted as for the renewal of a note in the same series June 9th, 1817, inclusive. The admission of this series of notes is objected to by the defendants, because the notes were not among the papers previously exhibited to the court. If the admission of them is irregular, it may be proper for me to add, that I view them as having operated as cumulative evidence, and am not aware, that the result would have been different, if they had been entirely excluded. I have, therefore, inferred, that the second mortgage, or the deed and defeasance, dated November 27th, 1815, is fully satisfied; and it appears by the admission of the parties, that no rents and profits have ever been received from this source by the defendants, for which they should be accountable in this action, the premises having been covered by a prior unredeemed mortgage to a third person.

3. It also appears from the deposition of Levi Cutter, that the note of John and Nathaniel Warren for $1,600, dated January 19th, 1818, discounted at the Cumberland

Bank, was received by the bank in payment of the debt secured by the note of $1,600, given by John Gordon to John Hobart, dated November 24th, 1817, after several renewals of the same; and from the deposition of Nathaniel Warren, taken in connection with the memorandum under seal, dated February 17th, 1817, given by John Hobart to John Gordon, and the note for three thousand dollars from the said Gordon to the said Hobart, and the said Gordon's deed to the said Hobart of the Conant mill and privilege, the two last papers also bearing the same date of February 17th, 1817, I infer that the note for $1,600, dated November 24th, 1817, purporting to be secured by the mortgage of that date, was in fact paid to the Cumberland Bank from the funds of the said John Gordon, held in trust for him by the said John Hobart.

From these facts the conclusion is drawn that the third mortgage was fully paid on the 19th of January, 1818, by the note of John and Nathaniel Warren, and that all the rents and profits of the real estate included in the said third mortgage should have belonged to the said John Gordon. I might have found more difficulty, notwithstanding the direct evidence in the case, in arriving at a result at first view somewhat questionable, did it not appear probable from the transactions here alluded to, as well as other circumstances of the case, that there was a species of trust and confidence between the parties, leading to anomalies in the apparent transaction of their mutual business, which, whilst it may have been prejudicial to the legal rights of creditors of the mortgagor, was at the same time not altogether safe for the parties directly concerned. If the plaintiffs may recover in this action for the rents and profits of the estate covered by the third mortgage after the debt has been paid, I consider the fair occupation rent of the seventy-five acre lot at Cape Elizabeth to be twenty-five dollars a year, and of the twenty acre lot, five dollars a year, exclusive of taxes; that is to say,—

18 years from April 1st, 1821, at $30	$540	
From April 1st, 1839, to Oct. 1st, 1839	20	
		$ 560
To this amount is to be added for trees cut, and other injury to the premises in the nature of waste on the 75 acre lot, at sundry times	$525	
Amount received for damages for a road over the same in 1834	60	
Waste on the 20 acre lot	30	
		615
		$1,175

It was admitted at the hearing before me, that Jesse Gordon, the late plaintiff in this action, filed a complaint in the district court of the United States for an injunction against Leavitt Hobart, one of the defendants, on account of waste alleged to be committed and continued by the said Leavitt on the real estate included in this mortgage, and that a citation was thereupon issued by the Hon. Ashur Ware, judge of said court, on the 10th day of December, 1834, returnable on the 13th day of the same December, and served upon the said Leavitt; that there was a hearing of the parties pursuant thereto; and that the process was afterwards discontinued in pursuance of an arrangement between the parties; but that no record of the proceedings exists. It is also proved that some of the waste above mentioned was committed after the discontinuance of the said proceedings, but not to any very considerable extent.

4. On the whole view of the case, I cannot come to the result, that the avails of the two notes, signed by Josiah Pierce, dated November 24th, 1815, amounting to $900 besides interest, nor of the note of J. and N. Warren for $876, dated December 9th, 1817, all of which notes were pledged for the security of John Hobart, on account of a note or notes for $1,600, though it is in evidence, that the said sums were paid to the said John Hobart, being securities received by him of the said John Gordon, and that it does not appear, that they were applied to the above mentioned debt of $1,600, are therefore to be presumed to be applicable to the mortgage for three thousand dollars, dated November 25th, 1814. The second deposition of Levi Cutter, and other evidence in the case, disclose other pecuniary transactions between the parties, leaving such an inference quite uncertain, and such as, considering the plaintiffs also merely in the place of assignees of the mortgagor, and after the decease of the original mortgagee, has induced me to leave these notes out of the case, so far as they are urged as proving part payment of the first mortgage of $3,000. It would even be easier to suppose, that the two mortgages for $1,600 were independent of each other, and both in full force at the same time, and that all the above payments should be directly applied to one or the other of them.

5. For the like reasons, the sums referred to in the note of September 10th, 1816, given by the said John Hobart to the said John Gordon, being $344.27 cents,—the sum of $500 appearing by the deposition of Levi Whitman to have been collected of Sawyer and Webb, the balance of J. and N. Warrens' notes, being $524, and the $556 collected on S. A. Proctor's mortgage, are left out of the calculation, not being specified as applicable to any particular debt or debts. If the court find me wrong, the error can be easily corrected in the statements, as the sums are already ascertained, and they are proved to have been paid to the said John Hobart from securities or funds received by him of the said John Gordon.

6. The parties agreed, before me at the hearing, that I should consider the subject

of waste as affecting all or any of these mortgages, so far as I legally might do, if the same had been expressly mentioned in my commission. Having been requested by the solicitor for the defendants to report, to whom the waste is chargeable as between the defendants, I find that all the waste which has been proved in the case, was committed by or under the defendant Leavitt Hobart. What proportion of the same was committed by him before he became the assignee of the mortgages, is not distinguishable by the proof; and it was not particularly inquired into, it being understood by me, as admitted by the parties, that such inquiry would not be material in this suit.

7. In the above results nothing is allowed to the mortgagees for repairs on the fences inclosing any of the premises, except one item, amounting to $33.20 cents, which was charged on John Hobart's leger, exhibited in the case, in 1819, inasmuch as the same have been suffered to go to decay, and in some instances have been removed by the tenant. The occupation rent, as charged, is predicated upon the profit, which might have accrued under ordinary attention to the forms and the common usages of husbandry, without requiring outlays for new materials on the part of the tenant, and the mortgagee has the benefit of the calculation without charging the tenant with the fences, the decay of which in the main is attributable to time. If the fences had been kept in repair, a corresponding deduction would have been made from the occupation rent for the new materials necessary in making such repairs. I have, therefore, thought, that justice would be done to the parties by omitting the subject on both sides of the account, the state of the evidence not authorizing precise statements upon this point.

8. The estimates have also been made upon the supposition, that the taxes were paid by the tenant in possession. The evidence of the taxes was exhibited in the gross, and in one instance, that of the property in Cape Elizabeth, property belonging to the separate mortgages was included in the same tax; and, as in the matter of fences, by expressing any estimated amount as paid for taxes, I must have also made a corresponding addition to the amount of rents and profits on the other side of the account.

9. John Hobart's leger, No. 2, previously exhibited in court, having been mislaid, or rather overlooked, was not present at the hearing before me, but was afterwards found and placed in my hands by the consent of parties. I have made no allowance to either party from the same that are not found under the head of "Gordon Estate," folio 79. My attention was also directed by the solicitor of the plaintiffs to the account of "Joshua Webb," folio 4. I accordingly examined the account last mentioned, but with no result affecting either party in this cause. There being no evidence at all connecting the entries there contained with the case before me, I thought the dates of the entries alone sufficient to show their irrelevancy.

10. The solicitors for the plaintiffs having requested me to report, whether there was any proof of a demand of $3,000, according to the terms of the bond for the payment of that sum, I further add, that the only evidence of a demand, except what arises from the receipt of the rents and the other offsets stated in the foregoing account relating to the mortgage first mentioned for the said sum of $3,000, is, that Jonathan Tucker, a witness for the defendants, testifies, that in the spring of 1818 or 1819, he went with John Hobart, deceased, to demand money of John Gordon at Stroudwater; that the said Hobart did then demand money of the said Gordon. The said testimony of the said Tucker is credited by me, and is made part of my report of the case.

(Signed) Eben Everett.

The plaintiffs filed the following exceptions:

First Exception.—For that it appears in and by the said report, that the said master, in taking an account of what was due upon the footing of the mortgage made by John Gordon to John Hobart, dated November 25th, 1814, to secure the payment of the sum of 3,000 dollars, according to the terms and conditions of the bond of defeasance therewith made, has charged and allowed interest thereon, as appears by the statement of said account: whereas, by the terms and conditions of the said bond, such interest should not have been charged or allowed: or, at most, the said master should have only made an equitable allowance of simple interest against the allowance made in favor of the plaintiffs, for rent received upon and according to the terms of the lease of the same premises, mentioned in the bill, and for the same period of time only; and that only in case the said contract of lease should be taken and deemed as a cover for usurious interest therein contained.

Second Exception.—For that it appears, that the avails of three notes, viz. two signed by Josiah Pierce, dated November 24, 1815, one for $500 and one for $400, making $900, and another of J. & N. Warren, for $876, dated December 9, 1817, with interest, which notes were made and pledged for the security of the said John Hobart, on account of the sum secured by the mortgage, to secure the payment of the sum of 1,600 dollars; and the amount thereof, with interest, was actually paid to the said John Hobart, and not allowed by the master, in payment of the said $1,600 mortgage; nor in any manner for the benefit of the plaintiffs. In which respects, the said plaintiffs except to the said master's report, and humbly appeal therefrom to the judgment of this honorable court thereon.

The defendants filed the following exceptions:

The defendants except to the master's report, as erroneous in the following particulars, viz: 1st. The rents and profits allowed by the master are much greater than they ought to have been. 2d. No allowance ought to have been made by the master for waste; and if the defendants were chargeable for any thing on that account, the amount allowed by the master is much greater than it should have been. 3d. The master has allowed $60 for damages recovered for the laying and making a road through the seventy-five acre lot, in Cape Elizabeth, but has allowed the defendant nothing for making the fences on the said road, which were proved to have cost $45. 4th. The master has allowed nothing for taxes paid by the defendants on the mortgaged premises, which were proved to amount to a large sum, viz., $500.65. 5th. The master has predicated his report on the ground that the mortgage of November 27, 1815, and that of November 24, 1817, are for the same debt, and not separate and distinct, whereas they are, in fact, for different and distinct debts, and ought to be allowed by the master in his report. 6th. The master does not state the facts, on which he makes some allowances in his reports, and refuses to make others. 7th. The master has erroneously allowed the note of November 24, 1817, as paid out of the funds of said Gordon, when the same was paid by the said Hobart out of his own funds, as clearly appears by the evidence in the case, and ought to be allowed to the defendants with the interest thereon. 8th. The amount allowed for repairs on fences is far short of the amount which ought to have been allowed. For the foregoing reasons, the defendants object, and except to said master's report, and appeal therefrom to the judgment of the honorable court thereon

Charles S. Daveis (with whom were Willis & Fessenden), for plaintiffs.

S. Longfellow and S. Longfellow, Jr., for defendants.

STORY, Circuit Justice. The first point naturally suggested for consideration in the case, is, whether the question of the supposed waste was properly entertained, or could be entertained, by the master, even with the consent of the parties. I am clearly of opinion, that it was not properly cognizable by the master, nor, indeed, in the cause. In the first place, there is no charge in the bill of any waste, and, consequently, no answer to it; and, therefore, the matter was in no sense in issue between the parties; and the court have no authority, by consent, to entertain questions, which are not properly brought before it for consideration by any fit judicial proceedings. In the next place, the reference to the master conferred no authority upon him to institute any such inquiry, even if the matter had been charged in the bill; and, consequently, he had no authority to act in the premises, or to make any report thereon. The consent of the parties could not confer upon him any authority to examine into matters dehors his commission; and the whole proceedings, as to the waste, were, therefore, irregular, and coram non judice. If the matter had been properly before the court, and a more enlarged authority in the master was required, it should have been sought by a proper application to the court in the first instance. In the next place, it is perfectly clear, that, as the original plaintiff, Jesse Gordon, sought relief as assignee of the mortgagor (John Gordon), no waste, which took place antecedently to the assignment to him, could properly, under any circumstances, be inquired into, in any suit brought by him. That waste, if there was any, was no wrong done to him; and the mortgagee (Hobart) was not accountable therefor to him. Now, it is apparent from the evidence in the cause, that the asserted waste in a great measure took place before the assignment to Jesse Gordon. For these reasons, all allowances on account of waste must be struck out of the report.

Let us, then, proceed to the consideration of the exceptions taken by the plaintiff to the master's report. They are two. (1) The allowance of the interest to the mortgagee upon the $3,000 mortgage. (2) The appropriation of the money received by the mortgagee upon the two notes of Pierce, one for $500 and one for $400; and upon the note of J. & N. Warren for $876. My opinion is, that the master has properly made the allowance of the interest. The argument against it mainly rests on this ground: that interest is not stipulated for in the contract, and, therefore, until a demand was made of the principal, and a default of payment thereof, no interest could accrue due. But the argument is not sustained by the facts or by the structure of the bill. The latter insists, that the original contract was upon an usurious consideration, and that thereby an interest of nine per cent. was intended to be reserved; and that the lease to the mortgagor at the stipulated rent of $270 per annum, was but a collusive arrangement to accomplish the purpose. Now, if this be correct, then it establishes beyond controversy, that the $3,000 was originally agreed to be a loan on interest, and, therefore, the plaintiff, who seeks relief against that usury, is entitled to it only upon doing equity; in other words, the only relief, to which the original mortgagor would have been entitled under such circumstances, would be to have the rate of interest cut down to the legal rate of six per cent., which is precisely what the master has allowed. The plaintiff, as assignee, is certainly not entitled to be placed

in a better situation that the original mortgagor. If he is entitled, as assignee, to any relief against the usury (a point, upon which I give no opinion,) it must be upon his placing the mortgagee in precisely the same predicament, as to interest, as if he were the original mortgagor. The question of usury is now waived by the plaintiffs; but that does not, in the slightest manner, vary the rights of the parties, as to lawful interest.

But it is plain, that the original parties did contemplate the payment of interest upon the loan ab origine. I agree with the master in thinking, that the lease was but a mode of securing an illegal interest, that of nine per cent.; and that the lease and the mortgage are to be treated not only as contemporaneous acts, but as a part of one and the same transaction. As long as the lease continued and the rent was paid, it was an usurious interest, which this court would not sanction. But when that ceased, and the mortgagee took possession, it was manifest, that interest, according to the original contract, was to be allowed; and the most that can be said, is, that the interest in equity ought to be cut down to the legal interest during the whole period, which has been actually done by the master. Besides; if it were material (which, in the view, which I take of the case, it is not), the entry of the mortgagee into possession must be deemed an entry after a demand of the payment of the principal, and a default on the part of the mortgagor, with a view, perhaps, to a foreclosure; but, if not, at all events to secure his interest and other rights under the loan. There is also the positive evidence of Jonathan Tucker, stated and credited by the master, that the mortgagee, in the spring of 1818 or 1819, went to the mortgagor and demanded the payment of money from him; and this may well enough be deemed to be a demand of the mortgage debt, then due, if it were necessary to sustain the claim of interest. I place no stress upon it, because the other circumstances are sufficient, in my judgment, to establish the claim. Upon the whole, for the other reasons already stated, I am of opinion, that the right to lawful interest attached; and the master has, therefore, properly allowed it; and the exception on this point is over-ruled.

As to the other exception, there is no doubt, that the money was actually received upon the Pierce notes and the Warren note by the mortgagee. But, how the money received thereon was actually applied, we have no means, after so great a lapse of time, of ascertaining. The money was originally intended to be applied to the discharge of the $1,600 mortgage. It was not so applied. But there were other transactions between the parties of a secret and confidential nature, to which it might have been applied, and to which, in the opinion of the master, formed after sifting all the circumstances, it was probably applied. There is enough disclosed in the case to show, that there was a designed obscurity and concealment of the parties of the business transactions and arrangements between them. And there is strong, if not vehement, reason to presume, that the real object was to cover up the property of the mortgagor, so that it should not be reached by his creditors; and, therefore, a cloud was thrown over every transaction, and money, apparently intended for one object, might have been studiously held out as actually applied to another. At least, there is enough in the case to lead one to doubt, whether the money received on those notes was not actually applied, by the consent both of the mortgagor and mortgagee, to other of their private transactions.

It is sufficient, however, to say, that no appropriation was ever made by either party of the proceeds of either of these notes, to the payment of the $3,000 mortgage. What, under such circumstances, is the rule promulgated by both courts of law and courts of equity? It is, that, where money is paid by, or received for, a debtor, by his creditor, the debtor has a right to make the appropriation to what purpose he pleases. If the debtor makes no appropriation, then the creditor may apply it to the satisfaction of any demand, which he has against his debtor, at his own pleasure. If neither party make any such application, then, if there are various debts due to the creditor, the court will make the application according to its own view of the law and equity of the case, under all the circumstances.

But this right of appropriation is one strictly existing between the original parties; and no third person has any authority to insist upon an appropriation of such money in his own favor, where neither the debtor nor the creditor have made or required any such appropriation. What claim can an assignee of the mortgagor have, to insist that money in the hands of the mortgagee, belonging to the mortgagor, shall be applied in discharge of the mortgage, unless such application of it was clearly contemplated by the original parties, and the assignee has made the purchase with the understanding, that the money should pro tanto go to the extinguishment of the mortgage? The maxim in such a case ought to prevail, "Res inter alios acta, alteri nocere non debet;" and, I may add, that, in such a case, "nec prodesse potest." It would be inequitable to allow an assignee of the mortgagor to make a profit by an appropriation of the money of the mortgagor in the hands of the mortgagee, which neither of them ever contemplated appropriating to the extinguishment pro tanto of the mortgage.

But it is sufficient to say, that, in the present case, there is no evidence, that the money was not actually appropriated at or after the time, when it was received, by the orig-

inal parties, to other purposes; and, considering the great lapse of time, and the obscurities hanging over all the transactions, it would be unsafe for the court not to presume, that the money was applied to other purposes; especially, as there were no subsequent proceedings between the parties, which could lead the court to any other conclusion. The master's judgment upon this point seems to me to be entirely correct, and founded upon just reasons.

Then, as to the exceptions on the part of the defendants. The first is to the sum allowed for the rents and profits, which, it is asserted, is too large. But the master has stated all the circumstances, and it seems to me, that they sufficiently establish the propriety of the allowance. The second, respecting the allowance for waste, has been already disposed of. The third is for the non-allowance of the $45, expended for fences by Hobart. But that the master has fully explained. In fixing the occupation rent, the master took into consideration the subject of the fences, and made the rent less by what ought to be allowed the tenant for keeping the fences in proper repair. The like answer may be given to the fourth exception respecting taxes. A suitable deduction was made from the rent by the master, founded upon the supposition, that the tenant paid the taxes.

The fifth exception is founded upon the notion, that the two mortgages of $1,600 were given for distinct and independent debts; and not for one and the same debt. But upon the statements made by the master, it seems to me very clear, that they were both given as securities for one and the same debt. It appears from the statement of the master, that there was a prior unredeemed mortgage on the premises, which were originally mortgaged for the payment of the $1,600; and this fact alone, independent of the other very strong circumstances in the case, would lead one to the conclusion, that the second mortgage was taken to supply the defective security by the first. But, taken in connection with the other circumstances, the conclusion seems almost irresistible, that they were both for one and the same debt.

The other exceptions require no particular notice. The seventh is disposed of by the considerations already suggested under the preceding head. The sixth and eighth are too vague and general to be of any validity, and, therefore, must be dismissed from the view of the court.

Upon the whole, I am of opinion, that the exceptions filed by both parties ought to be overruled; and that the master's report ought to stand confirmed in all the particulars, excepting the allowance for the supposed waste, which is to be struck out; and, being thus reformed, the report is to stand confirmed accordingly. Decree accordingly.

Case No. 5,609.

GORDON et al. v. HOBART et al.

[2 Sumn. 401.] [1]

Circuit Court, D. Maine. Oct. Term, 1836.

MORTGAGE—TENDER—ACTS OF MAINE OF FEBRUARY 5 AND 20, 1821 — EQUITY JURISDICTION OF FEDERAL COURTS—ACKNOWLEDGMENT OF DEEDS — MAGISTRATES — STATE LAWS IN FEDERAL COURTS—ESTOPPEL—RIGHT TO REDEEM — EQUITABLE BAR.

1. The act of Maine of 5th February, 1821, c. 39, § 1 [1 Smith's Laws, p. 159], requiring a tender, in certain cases, to be made of money due upon a mortgage, respects suits in the state court only, and does not apply to the general equity jurisprudence of the courts of the United States. Quaere, as to the cases, to which this statute is applicable.

[Cited in Foster v. Ames, Case No. 4,965.]

2. The equity jurisdiction of the courts of the United States is independent of the local law of any state, and is the same in nature and extent, as the equity jurisdiction of England, from which it is derived. Therefore, it is no objection to this jurisdiction, that there is a remedy under the local law.

[Cited in Pierpont v. Fowle, Case No. 11,152; Allen v. Blunt, Id. 215; Dodge v. Woolsey, 18 How. (59 U. S.) 347; Burt v. Keyes, Case No. 2,212.]

3. The act of Maine of 20th February, 1821, c. 36 [1 Smith's Laws, p. 159], declares that all deeds shall be good, as against third persons, only when "acknowledged by the grantor before a justice of the peace, in this state (Maine,) or before a justice of the peace or magistrate in some other state, &c." *Held*, that an alderman of the city of Philadelphia, is a magistrate within the sense of the statute, and that an acknowledgment before him will be sufficient.

4. Quaere, if this statute will protect mere strangers, who claim no title under the grantor, such as a disseizor, or no title in conflict with that held by the grantee, such as a mortgagee against a grantee, claiming the estate or equity of redemption by an unacknowledged or unregistered deed.

5. A magistrate is a person entrusted with power, as a public civil officer.

6. The courts of the United States are bound to take judicial cognizance of the laws of the different states.

7. Quaere, if the purchasers of an equity of redemption can take the objection, that the mortgage was upon a usurious consideration, or, as plaintiffs, can have any relief in equity, without offering to pay the amount due.

[Cited in Stephens v. Muir, 8 Ind. 354.]

8. A judgment of foreclosure was recovered by the executrix of the mortgagee, in 1826, in a suit against the original mortgagor. Long before this judgment, viz., in 1819, the mortgagor had assigned all his title to redeem the premises to two other persons, under whom the plaintiffs derived their title. *Held*, that this judgment can operate as a bar or estoppel only between the particular parties to it and their privies, and is res inter alios acta and inoperative, as regards the plaintiffs, and that the possession under it is not subversive of their right to redeem.

[1] [Reported by Charles Sumner, Esq.]

9. The act of Maine of 5th February, 1821, c. 39, provides that the right of redemption of the mortgagor, and all claiming under him, may be foreclosed by the mortgagee's taking peaceable and open possession of the premises mortgaged for the condition broken in the presence of two witnesses. *Held*, that the possession under the writ of possession, in the presence of the sheriff delivering, and the agent receiving it, was not a possession in the presence of two witnesses, in the sense of the statute, by which the plaintiff's rights are foreclosed.

10. A mortgagee will not be permitted in a court of equity to set up an adverse possession to bar the right to redeem of his mortgagor, or of purchasers under him, unless the possession has been for twenty years, which constitutes equitable bar from lapse of time.

This was a bill in equity, brought [by Charles Gordon and others against Leavitt Hobart and Polly Hobart] to redeem certain parcels of land, which were separately mortgaged by three different and independent mortgages, by John Gordon (under whom the plaintiffs claimed by intermediate assignments), to John Hobart, since deceased, under whom the defendants claimed title. The plaintiff in the original bill (Jesse Gordon), having died during its pendency, a bill of revivor was brought by his heirs, the present plaintiffs; and the cause came on for argument upon the bill, answers, and evidence in the cause, since the revivor.

C. S. Daveis, for plaintiffs.
S. Longfellow, for defendants.

STORY, Circuit Justice. The principal question in the case is, whether the plaintiffs have a right to redeem either or both of the mortgages, or the same have been foreclosed, so as to cut off the right of redemption. But some other points have been incidentally stated, and relied on by the defendants, to which it is proper briefly to refer. One objection is, that the plaintiffs are not entitled to maintain their bill, because no tender has been made of the money due upon the mortgages, as is required by the act of Maine of the 5th of February, 1821 (chapter 39, § 1). To this, the true answer is, that the regulation respects suits in the state court only under that particular statute; and is wholly inapplicable to the general equity jurisdiction of the courts of the United States, which can, in no manner, be limited or controlled by state legislation. Whether the state statute can be applied, except to cases where a particular and certain debt or duty is admitted to be due and unperformed, we need not inquire, though it seems difficult to conceive, how it can be applied to cases, where the debt or duty is wholly uncertain and indeterminate, and cannot be ascertained, but by the judgment of the court, acting upon all the circumstances of the particular case.

Another objection is, that the deed of Thackara to Jesse Gordon (under which the plaintiffs claim) was acknowledged before an alderman of the city of Philadelphia; and that such an acknowledgment, though the deed has been recorded, is not good under the statute of Maine, of the 20th of February 1821, (chapter 36), to pass the property. That statute declares, that "all deeds and other conveyances of lands, &c. signed and sealed by the party granting the same, having good and lawful right and title thereto, and acknowledged by such grantor or grantors before a justice of the peace in this state, or before a justice of the peace or magistrate in some other of the United States of America, &c. and recorded, &c. shall be valid to pass the same without any other act or ceremony whatsoever. And no bargain, sale, mortgage, or other conveyance, &c. of any lands, &c. shall be good and effectual to hold such lands, &c. against any other person or persons, but the grantor or grantors and their heirs only, unless the deed or deeds thereof be acknowledged and recorded in manner aforesaid." So that the deed, if the acknowledgment has not been regularly made, is not utterly void, but is good to convey the land against the grantor and his heirs. The obvious policy of this enactment is to protect subsequent purchasers and claimants under the grantor, having no notice of the prior conveyance. Whether it extends to protect mere strangers, who claim no title at all under the grantor, such as a disseisor, or no title in conflict with that held by the grantee, such as a mere mortgagee against a grantee, claiming the estate or equity of redemption by an unacknowledged or unregistered deed, may perhaps be a matter of some difficulty, at least in a court of equity. But I pass by this point, for the purpose of considering, whether the acknowledgment in the present case is in conformity to the statute or not. And this resolves itself into the mere question, whether an alderman of the city of Philadelphia is a magistrate in the sense of the statute. In my judgment, he is; for I know of no other definition of the term "magistrate" than that he is a person clothed with power as a public civil officer. Mr. Justice Blackstone, in his Commentaries, says, that "the most universal public relation, by which men are connected together, is that of government, namely as governors or governed, or in other words, as magistrates and people." 1 Bl. Comm. 146. And, after speaking of the king as the supreme magistrate, he proceeds to speak of subordinate magistrates, and he enumerates several classes of persons, to whom the appellation is applicable, whose rights and duties he shall not investigate; and then adds; "Nor shall I enter into any minute disquisitions with regard to the rights and dignities of mayors, and aldermen, or other magistrates of particular corporations; because they are mere private and strictly municipal rights, depending entirely upon the domestic constitution of their respective franchises." Thus, he plainly

admits aldermen to be magistrates; and he afterwards enumerates others, whose rights and duties he shall consider; and among these are sheriffs, coroners, justices of the peace, constables, surveyors of highways and overseers of the poor. 1 Bl. Comm. 338, 339. So that it is clear, that the appellation is not confined to justices of the peace, and other persons ejusdem generis, who exercise general judicial powers; but it includes others, whose main duties are strictly executive. Dr. Johnson gives a definition of the term magistrate, not materially different from that inculcated by Blackstone; saying, that a magistrate is "a man publicly invested with authority, a governor, and executor of the laws." But it is not necessary to rest the present case on so general a doctrine. By the laws of Pennsylvania, of which this court, as a court of the United States, is bound to take judicial cognizance, the aldermen of the city of Philadelphia are invested with all the powers and authorities of justices of the peace, and of justices of oyer and terminer, and gaol-delivery of and for that city. See Act March 11, 1789 [2 Smith's Laws Pa. p. 462]; Act April 4, 1796 [3 Smith's Laws Pa. p. 272]. So that an alderman of that city is in the strictest sense a magistrate.

Another objection is, that if either or both of these mortgages have been fully paid, or the condition thereof never broken, a remedy lies at law for the plaintiffs under the local law. But this objection is utterly without any foundation in this court; for the equity jurisdiction of this court is wholly independent of the local laws of any state; and is the same in its nature and extent in all the states; that is, it is the same in its nature and extent, as the equity jurisdiction of England, from which ours is derived, and is governed by the same principles. Now, no one can doubt, that this equity jurisdiction applies to all cases of mortgages, not only to redeem the premises, upon payment of what is yet due, and unpaid, but also to compel a reconveyance of the estate, if the mortgage is virtually extinguished or paid.

Let us now proceed to the objections, which go to the very merits of the bill. And, in the first place, as to the mortgage of the 25th of November, 1814, made by John Gordon to John Hobart of three lots of land, two in Westbrook and one in Cape Elizabeth, for the payment of three thousand dollars. The original bill insisted, that this mortgage was upon an usurious consideration. But it is wholly unnecessary to consider that point, or another, which might also arise, and that is, if usurious, whether the plaintiffs, as purchasers of the equity of redemption of Gordon, could avail themselves of that objection; or whether the plaintiffs could have any relief in equity, without offering to pay the amount due;—I say, it is unnecessary to consider the one point or the other; because the plaintiffs have expressly, in the supplemental proceedings, waived all right to insist upon the usury. In respect to this mortgage, two questions arise; first, whether it has been discharged by any actual payment of the whole sum due; secondly, whether, if not paid, there has been any foreclosure of the mortgage, which extinguishes the rights of the plaintiffs. The former point need not be now considered, as it is more proper to be brought before the court upon a report to be made by a master, in case the latter point is against the defendants. It is admitted, that John Hobart, the mortgagee, took possession of all the mortgaged premises in the spring of 1820, and that the possession has ever since been in him, and those who claim under him. It is also admitted, that Polly Hobart (one of the defendants), in a suit brought against John Gordon upon mortgage, by her, as executor of John Hobart, recovered the usual conditional judgment in the supreme court for Cumberland county, at the November term, 1826, for the possession of the mortgaged premises, unless the sum of $3917.50, due on the mortgage, should be paid within two months; and that the sum not being so paid in March, 1827, a writ of possession issued, upon which possession was delivered to the executrix; and that the sum of $3917.50 has never since been paid. It is clear, that this judgment, and the subsequent possession, are, by the laws of Maine, a good foreclosure of the mortgage against John Gordon. But it appears, that long before this judgment, to wit, on the 18th of September, 1819, John Gordon assigned all his title to redeem the premises to Joseph Welsh and Hezekiah Ayer, under whom the plaintiffs derive title to the same. Unless, then, this judgment can operate as an estoppel or foreclosure against all persons claiming the equity so assigned, there is no ground to make it available against the plaintiffs. Now, it seems to me very clear upon principle, that the judgment can operate as a bar or foreclosure only between the parties to that judgment, and those, who claim subsequently under them. As to all other persons, it is res inter alios acta. It would be a most extraordinary doctrine, that third persons, not parties to the suit, and not entitled to make themselves parties, should be bound by such a judgment, a judgment which would compel them to pay a very large sum of money, without any opportunity or right on their part to contest the debt, or its amount. No case has been cited, which establishes any such doctrine; and it is certainly the last, which a court of equity would be inclined to adopt of its own mere motion. The judgment, then, is inoperative against the plaintiffs; and the subsequent possession under it is a possession of the mortgagee, not subversive of their right to redeem.

But, then, it is said, that the right of redemption of the mortgagor, and of all claiming under him, may, by the local laws (Act Feb. 5, 1821, c. 39), be extinguished and foreclosed, not merely by process of law, but by the mortgagee's taking peaceable and open possession of the premises mortgaged for the condition broken in the presence of two witnesses; and that the possession, under the writ of possession, may be treated as such a possession in the presence of two witnesses, the sheriff delivering possession, and the agent of the executrix receiving it. But this would be a most strained and unnatural construction of the statute; and, indeed, wholly repugnant to its objects, as well as to its terms. The statute puts an entry by process of law in contradistinction to an entry in the presence of witnesses.

As to the other mortgages, viz. that of the 27th of November, 1815, of a certain wharf and flats in Westbrook, and that of the 24th of November, 1817, of two other lots of land in Cape Elizabeth, for the security of the payment of $1600, it is necessary to say a few words only. No foreclosure or other extinguishment of the equity of redemption of any of those parcels is attempted to be set up or maintained. They are, therefore, clearly redeemable upon the payment of any sums, which may be now due on the same. The plaintiffs contend, that nothing is due; and the defendants deny, on the other hand, any payment. These are points to be disposed of by a reference to a master to take an account of what is due on the footing of these mortgages.

It may be proper, before closing this opinion, to notice another objection to the plaintiffs' right to redeem any of the mortgaged premises; and that is, that at the time of the deed of conveyance to Jesse Gordon, in 1832, by Thackara (which is the foundation of the plaintiffs' title), the defendants held the premises under an adverse possession, and consequently that that deed was inoperative. The only answer necessary to be made to this objection is, that the possession was that of a mortgagee; and that the latter can never be permitted, in a court of equity, to set up any adverse possession to bar the title of his mortgagor, or of purchasers under him, to redeem, unless that possession has been for twenty years, and thus has constituted an equitable bar from lapse of time. There must, therefore, be an interlocutory decree, referring the matter to a master, to report, what is due upon the footing of all and each of the mortgages, making all due charges against, and all due allowances to the defendants.

[The cause was heard upon the master's report, and upon exceptions filed thereto by both parties. The report was confirmed in all but one particular, and the exceptions overruled. See Case No. 5,608.]

Case No. 5,610.

GORDON v. HOLIDAY.

[1 Wash. C. C. 285.] [1]

Circuit Court, D. Pennsylvania. April Term, 1805.

MISNOMER—CONFISCATION.

1. Where two names have the same original derivation, or, where one is an abbreviation or corruption of the other, but both are taken promiscuously, and according to common use, to be the same, though differing in sound; the use of one for the other, is not a material misnomer.

[Cited in Gordon v. Kerr, Case No. 5,611; McClaskey v. Barr, 45 Fed. 153.]

[Cited in Wilkerson v. State, 13 Mo. 91.]

2. If the name be wholly mistaken, and repugnant to truth, the misnomer is fatal.

[Cited in McClaskey v. Barr, 45 Fed. 153.]

3. Query, if "Henry," for "Harry," is a misnomer.

4. Operation of the treaty of 1783, upon the exercise of legislative powers for the confiscation of the property of those who had been engaged in hostilities against the United States; or who neglected to surrender themselves, when called upon by law so to do.

Harry Gordon, being seized of the land in question in fee simple, on the 6th of March 1778, as well as on the 20th of March 1781; an act of the legislature of Pennsylvania was made, on the former day, attainting certain persons therein specially named, of high treason; and forfeiting their estates, unless they surrendered themselves by a certain day, and took their trial for high treason; and declaring that all persons, subjects or inhabitants of that state, or those who have real estates therein, who adhere to, and willingly assist the enemies thereof, or of the United States, and whom the supreme executive council of the state, by their proclamations, should name and require to render themselves by a certain day therein to be mentioned, to some one of the justices of the state, and abide their legal trial for such their treasons; and who should not render themselves accordingly, and abide their said trial; should, from and after the day fixed by such proclamation, stand, and be attainted of high treason; and should suffer such pains and penalties, and undergo all such forfeitures, as persons attainted of high treason ought to do. The law then proceeds to authorize the president of the executive council, to appoint agents to sell such forfeited estates, and to make conveyances to the purchasers. On the 20th of March 1781, a proclamation was issued, reciting the names of sundry persons, and among them Henry Gordon, now or late an inhabitant of the state of Pennsylvania, and required him by the name of Henry Gordon, now or late a military officer in the British army, now or late of Kennet township, in the county of Chester, who had been guilty

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

of aiding the enemy, and adhering to them; to render themselves to some magistrate, on or before the first of November following, to take and abide their trials for their treasons; which, if they fail to do, they shall be, and stand attainted of high treason, and stand the consequences thereof. Harry Gordon did not render himself, in compliance with this proclamation; in consequence of which, the lands in question, and other tracts, were, on the 18th of April 1782, sold by auction to John Woods, the highest bidder; who paid for the same on the first day of May, in the same year; and on the second of October 1783, a deed was made by the governor of Pennsylvania to Woods, under whom the defendant claims. On the 31st of January 1783, the legislature passed a law, entitled "An act for the attainder of Harry Gordon, unless he surrender himself, and for other purposes." [2 Laws Pa. p. 87.] It recites that Harry Gordon was seized of certain lands in this state, and it was alleged that he did adhere to the enemies of this state, and the governor did require Henry Gordon to render himself by a certain day to take and abide his trial, thereby intending to require the said Harry Gordon to surrender himself, &c. and that the said Harry Gordon did not surrender himself, pursuant to said proclamation; and the said executive council did dispose of his real estate, in this state, as if he had been legally attainted; &c. and that application had been made to the general assembly, to cure the said misnomer, and to confirm the rights of the purchasers of the said estates of the said Harry Gordon. It then proceeds to enact, that if the said Harry Gordon do not surrender himself, on or before the 24th of July following, and abide his legal trial for high treason, he shall, from and after that day, stand and be attainted of high treason; and shall suffer, and forfeit his estate to be disposed of, in the same manner, as if he had been legally and rightly called upon by the aforesaid proclamation: and then it proceeds, in the event of his not appearing, to confirm the rights of the purchasers. The law then, in another clause, declares; that the heir, devisee, or alienee, of persons whose estates had been forfeited, under and by virtue of proclamations, should not be permitted to recover against the commonwealth or purchaser, in consequence of any misnomers, where the court and jury, before whom the cause should be tried, should be satisfied that the person so attainted, was the person really intended to be called upon, by the proclamation. Harry Gordon did not surrender himself in consequence of this law. He died about the year 1787, and the lessor of the plaintiff, is the heir at law, of the oldest son of the said Harry Gordon, who died intestate, and without issue. Many depositions were taken in Scotland, which proved, that Harry Gordon, the father of the lessor of the plaintiff, was baptized by the name of Harry, and that he was always called by the name of Harry, and not Henry; that he came to America long before the Revolution, and left it in 1775; and held a military commission in the armies of the king of Great Britain. Whilst in America, he lived in the township and county mentioned in the proclamation.

The plaintiff's counsel contended, first: that Harry Gordon never was legally attainted, by the act of 1778, and the proclamation of 1781; that Harry, and Henry, are different names. They cited 1 Com. Dig. 19; Cro. Eliz. 57, 202; 2 Strange, 1214, where Harry, was called Henry; and the court directed an amendment, which would have been unnecessary, if they were the same. 2 Hale, P. C. 175–177; 2 Hawk. 185, c. 25, s. 69; 1 P. Wms. 613. Where, in an act of attainder, where Major-General Alexander Gordon, laird of Oquintool, was attainted by the name of Thomas, and deemed fatal. Fost. Cr. Law 79, the Case of Lord Pitzlego [Respublica v. Buffington], 1 Dall. [1 U. S.] 60, where Joseph Buffington was called in the proclamation, as of East Bradford township, whereas he was of West Bradford township, and deemed fatal. That he is recited to be of the state of Pennsylvania; whereas he left Pennsylvania before the Declaration of Independence, and therefore he was not truly described; as Pennsylvania at that time was not a state. 2d. That if he was not legally attainted by the first act and proclamation, he could not be so by the act of the 31st January 1783; because, the sixth article of the treaty of peace prevented all future confiscations. The provisional articles were signed the 30th of November 1782. They were to take effect so soon as peace should be agreed on between Great Britain and France. The preliminary articles were signed, on the 20th of January 1783; from which time, it was contended, the treaty took effect. That measures were taken in this country, for carrying the treaty into execution, in March and April 1783, by congress, so soon as they heard of the signing of the preliminary articles. They cited the Annual Register, 14; Cong. Journal, March 24, 1783, pp. 164, 178, 181, 265, 266; Mart. Law Nat. 332; [Bain v. The Speedwell] 2 Dall. [2 U. S.] 40; Grot. c. 4, § 12; [Respublica v. Gordan] 1 Dall. [1 U. S.] 233; Vatt. Law Nat. bk. 4, c. 3, l. 24. The president's message in 1793, and the correspondence therein stated, between Mr. Jefferson and Mr. Hammond. They relied, that the act of 31st of January 1783, did away the former forfeiture, and attainder, and that this act was arrested in its operation by the treaty.

The defendant's counsel insisted that "Harry" and "Henry" were the same; that the rule is, that if the names are in original derivation the same, or are the same in common use, there is no variance. As Peter and Piers, Joan and Jane, Saunders and Alexander, Franciscus and Francis, Garret, Gerard and Gerald, Gilb. Hist. Com. Pl. 219; 1 Leon, 146; Cro. Jac. 425, 534; Fost. 84;

Willes, 488. But where the misnomer is repugnant to truth; there it is fatal. 2 Wooddeson's Lectures, 627.

On the 2d point, that the treaty had no binding effect, until the definitive articles of peace were ratified, or at least made public; they were signed on the 3d of September 1783, and proclaimed in America on the 18th of October; and transmitted by congress to the several states, in the same month. They relied on the president's message, in 1793, to show that the act of the 31st of January 1783, was not an infraction of the treaty.

Third. However the case may be with Harry Gordon, if he were the plaintiff; still the plaintiff claiming as heir at law, cannot maintain this suit, if the jury should be satisfied that he was the person intended by the law; for as to his heirs and alienees, no future time of trial is fixed by the law; but their rights were barred, long before we had even notice of the signing of the preliminary articles of peace.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

PETERS, District Judge, delivered an opinion in favour of the plaintiff, on all the points.

WASHINGTON, Circuit Justice. The first question is, was Harry Gordon, the father of the lessor of the plaintiff, legally attainted of high treason, by virtue of the act of the 6th of March, 1778, and of the proclamation and consequent proceedings thereon? He was called on, by the supreme executive council, to appear and take his trial, by the name of Henry Gordon, now or late of Kennet township, in Chester county; and now or late a military officer in the British army. It appears that he was baptized, and always called and known, by the name of Harry. The other part of his description is true; and the single question on this point is, whether there is a misnomer, which will vitiate the attainder? The use of names is, to describe the individual of whom we speak, so as to distinguish him from some other person; the rule, therefore, as laid down in Gilbert's History, C. P. and other books, is a rational and sound one; that where two names have the same original derivation, or where one is an abbreviation or corruption of the other, but both are taken promiscuously, and according to common use, to be the same, though differing in sound; the use of one for the other is not a material misnomer. If, in common use, the names be the same, the person cannot be misnamed, if either be used. Griffith's Case is a strong one to illustrate the rule. Saunders and Alexander, which differ entirely in sounds, are stated not to be distinct names of baptism; because, usually Alexander is called Saunders; so Piers and Peter, Joan and Jane, Franciscus and Francis, Garret, Gerald and Gerard. But if the name be wholly mistaken; if it be repugnant to truth, as if Alexander be used instead of Thomas, the misnomer is fatal. The question therefore always is; are the names different, not in sound, but in derivation, or in common use. No cases directly in point, have been cited. By the case from Willes's Reports, it seems that two of the judges thought they might be used as being the same. But the judges certainly thought them different, in the case of The King v. Roberts, 2 Strange, 1214, or the amendment would have been unnecessary. That the legislature of this state thought the names different, is very clear.

The act of the 31st of January, 1783, after reciting the proclamation, and the proceedings under it, and that fears were entertained by the purchasers of the validity of the sales, on account of the misnomer, and praying to have them confirmed; proceeds to legislate upon the subject. Instead, however, of confirming the sales, which would have been proper, if the names had really been the same in the mind of the legislature, they do the very reverse. They pass the law, the title of which is "An act for the attainder of Harry Gordon," &c. They order him to appear, and take his trial, by a certain day; which, if he fails to do, he is from thence to stand attainted, and to forfeit his estate, to be disposed of in the same manner, as if he had been legally and rightly named in the proclamation. Here, then, we have a legislative declaration, that Gordon had not been legally and rightly named in the proclamation; and so entirely fatal did the legislature suppose the misnomer to be, that they afford him a new opportunity of saving his life and fortune, from the consequences of an attainder. If he had appeared, and shown himself never to have owed allegiance to the state of Pennsylvania, he certainly would have escaped those consequences. The former attainder is done away by this law, unless two attainders against the same person, can exist, and be in force, at the same time: for, by this law he is to stand attainted, and to forfeit his estate, from and after the 24th of July, if he then fail to appear. This, too, was the meaning of the legislature. For if it was intended to cure the misnomer, on the ground of its immateriality, what had the legislature to do, but to confirm the former attainder and sales. And, if in the Case of the King and Roberts, the court could cure the error, by an amendment; could not this legislature, in their omnipotence, do it, if they supposed the misnomer immaterial? By setting all aside, and directing proceedings de novo, they, in language most emphatic, pronounce their opinion, that the name by which he had been called upon, was repugnant to truth, and that common justice and humanity required the thing to be done over again. This, then, brings us to the consideration of this law; and to the operation of the treaty upon it. The sixth article declares, that there shall be no future confiscations, &c. The preliminary articles of peace were signed on the 20th of January; eleven days before the passing of

this law; and were recognised, and in fact ratified, by the government of the United States, some months before the day appointed for Harry Gordon to appear, and take his trial. Upon this state of the case, it is quite unnecessary to decide, whether the treaty took effect on the 20th of January, when it was signed, because it is not to be questioned, but that it did so, at the moment it was known in this country; and was ratified either formally, or impliedly. The effect of this treaty was, to do away so much of this law, as was calculated to produce a confiscation of Gordon's estate, on account of the part he had taken in the war; to subject him to the meditated prosecution, or to expose him to future loss or damages in his person or property. If he had appeared on the 24th of July, agreeable to the notice, he could not have been tried; neither could judgment pass against him, by default; the treaty, intervening between the law, and the completion of the confiscation, repealed the former, and prevented the latter; for it was not the law attainted his person, and confiscated his estate; but his conviction, if he had appeared and abided his trial, or his failing to appear. This settles also the last point; for the treaty not only prevented the confiscation of Harry Gordon's estate, during his life, but protected his interest and estate, in the land that was a fee simple, with all the privileges attending such an estate; so that, on his death, it might be willed or devised; or he might have alienated it. To say that his interest was protected during his life, but that it was to stand confiscated as against those claiming under him, would be a fraudulent construction of the treaty, which protected the whole. But I do not think that this clause extended to the case of persons claiming under Gordon, but to those who claimed, in consequence of misnomers in the proclamations. But Gordon was to be specially tried anew, by his right name, under the law. I am therefore of opinion, that the verdict should be in favour of the plaintiff. Verdict for plaintiff.

GORDON (JAMES v.). See Case No. 7,181.

Case No. 5,611.

GORDON v. KERR et al.

[1 Wash. C. C. 322.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.

ATTAINDER—TREATY—EJECTMENT—LACHES—SURVEY.

1. The attainder laws of Pennsylvania, and the authority of the legislature over cases which arose under them, in consequence of the stipulation in the treaty of peace with Great Britain, and the recommendation of congress, in conformity therewith, that the states should revise their confiscation laws.

2. The stipulations in a treaty between the United States and a foreign nation, are paramount to the provisions of the constitution of a particular state, of the confederacy.

3. The lessor of the plaintiff, who has a regular paper title, cannot be displaced, unless the defendant in the ejectment has a better title, either legal, or such an equitable one as a court of equity would sustain.

[Cited in Neill v. Keese, 5 Tex. 123.]

4. The laches of the defendant, in not executing a special warrant, from 1755 to 1765—his entire silence and acquiescence, from that time until still later, when an unauthorized surveyor was called upon to do it; is sufficient to defeat every pretence of equity, against a legal title in a fair bona fide purchaser, without notice.

5. The rule in Pennsylvania is, that if A, who has a warrant, do not use due diligence to have it surveyed, he loses his priority against another warrant holder, who has more vigilance, and who without notice obtains the first survey.

6. The prevalence of the Indian war, before the Revolution, is no excuse for a neglect by the holder to have a warrant executed, beyond the period when the war terminated.

7. A survey made by a deputy surveyor belonging to a different district from that in which the survey is made, although specially authorized to make it, by an order from the surveyor general, is not valid, and cannot be given in evidence, either as an execution of the warrant, or as evidence per se, to show the location of the warrant, being made on ex parte evidence. But the surveyor who made it, may use it as a memorandum, to show how the land might be located, from the calls of the warrant.

This was an ejectment [by the lessee of Harry Gordon against Kerr, Clossam and Lowry] to recover 299 acres of land. The plaintiff's title was as follows: On the 17th of March, 1762, a warrant for 2000 acres of land was granted to Richard Peters, in consideration of services rendered to the proprietaries; and it recited a prior warrant, dated in 1754, which had not been executed. On the 2d of May, 1762, this warrant was surveyed, so as to comprehend the land in question; and on the 13th September following, it was duly returned. On the 14th of April, 1770, Richard Peters, in consideration of 2000 acres of land, granted him by the proprietaries, in another place, released to them, as joint tenants, his right to the land thus surveyed for him. On the 17th of May, a grant was made to Harry Gordon, (to whom the lessor of the plaintiff is heir at law,) for the above land surveyed for Mr. Peters, in consideration of £900. Harry Gordon devised the land in question to his eldest son, who dying without issue, it descended to the lessor of the plaintiff. The same evidence in this as in the former cause,—see Gordon v. Holiday [Case No. 5,610],—to prove that the father of the lessor of the plaintiff was christened and known by the name of "Harry," and not "Henry." The defendant set up a title to the land in question, under a warrant to James Rankin, dated 3d February, 1755, for 300 acres, to include the White Hunter's Cabin, and to adjoin the land of James Lowry; who, on the

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

same day, took out a warrant for 300 acres, to include Frankstown. It did not appear, that any attempt was made by Rankin, to get his warrant executed, until the year 1765; when his agent Lowry, applied to a deputy surveyor to execute it. When on the ground, the surveyor was directed to lay the warrant on the land in question, which he refused to do, because it had been before surveyed for Mr. Peters. The agent refused to have it executed on a piece of land surveyed for a Mr. Lyons, lying between James Lowry's survey and that of Mr. Peters. Nothing therefore was done in the business; and it did not appear that Rankin, ever after, did any thing to complete his title. It appeared that Armstrong was the agent of Mr. Peters, and that Morris was his agent to survey other warrants; and that in 1761 he had notice that Rankin had a warrant for the land where the White Hunter's Cabin was; and which it was proved was within the survey made for Mr. Peters. The defendant offered a survey under Rankin's warrant, made by Harris, a deputy surveyor, for a different district from that in which this land lies, under a special authority from the surveyor general; who directed to lay it off according to the calls of the warrant, and such evidence as might be offered on the ground. This was objected to, as a survey; because made by a deputy out of his district, which is against the law of the state; and as a deputy constituted for this district, it was said to be equally ineffectual; since, no deputy could be appointed by the surveyor general, without the approbation of the governor. THE COURT declared that this was not a legal survey, and therefore could not be read as such; neither could it be used as evidence per se, to show the location of the warrant; because it was made on ex parte evidence. But that Mr. Harris, the surveyor, might use it as a memorandum, to show the jury how the land might be located, from the calls of the warrant itself.

On the part of the defendant, it was objected, that the plaintiff had no title to the estates of his father, having been confiscated. They argued as formerly, that "Harry" and "Henry" are the same name, and as an additional authority to those cited in the former case, relied upon 2 State Trials, 310, where Henry Martin, being excepted out of the act of oblivion, urged that his name was "Harry Marten," but not allowed. That if no misnomer, then his attainder was valid, and could not be, and was not, set aside by the act of the 31st January, 1783, as against the purchaser under the attainder. 2d. It was argued, that the defendant was prevented by the Indian war, which continued till the treaty of Paris, in November, 1762, and indeed afterwards, till 1764, when peace was concluded with the Senecas and some other tribes. That the refusal of the surveyor, in 1765, to execute this warrant, completed Rankin's title, as much as if he had obtained a survey; and at any rate, Gordon was bound by the notice to the agent of Mr. Peters. These points were all disputed by the plaintiff's counsel, who relied; that the equity set up by the defendant's counsel, was destroyed by the long forbearance on the part of Rankin, to get his tract surveyed.

WASHINGTON, Circuit Justice (charging jury). In the case of Gordon v. Holliday [Case No. 5,610], I entertained some doubts, whether "Harry" and "Henry" were the same name; my mind rather inclined to the opinion that they were. I thought myself however authorized, in laying hold of a legislative declaration, that they were not the same names, and that a misnomer had taken place, sufficient to invalidate the attainder. This opinion, in the present cause, has been combated by an argument not thought of, or used in the former, which is, that if there was in fact no misnomer, the attainder was complete, and the sale of Gordon's estate under it so entirely valid, that the legislature could not, in 1783, defeat it directly, or by the declaration of an opinion, which was solely of a judicial nature. This objection, I suppose, is founded upon the constitution of the state, though it was not read, nor referred to. But be this as it may, even that constitution must yield to the treaty of peace, which is supreme. The fifth article stipulates, that congress should earnestly recommend to the states, a revision of their confiscation laws, so as to render them consistent with justice and equity, &c. and should also recommend to them the restitution of confiscated estates. This was not considered as an idle provision, but was intended to be effectual; provided the different states, or any of them, felt disposed to comply with the recommendation. If the states thought proper to restore, their power to do it grew out of this treaty; and so far neutralized any article of their constitution, which prohibited, in other cases, the exercise of such right. The state would no doubt feel itself compelled to make compensation to the purchasers, but their power to restore could not, I think, be questioned. If they could restore absolutely, they could do any other act short of that, and tending to better the situation of those whose estates had been confiscated; and of course, to declare that in this case a misnomer had taken place. I think that this law amounts to the granting a new trial, and the setting aside a former attainder.

As to the rights of the parties in this cause, this will depend upon the facts, which have been already stated. Upon them, the lessor of the plaintiff, appears with a regular and unexceptionable legal title to the land in question. It will not do, after this, for the defendant to rely upon his possession; but he must show a better title, either legal or equitable. When I say equitable, I speak in reference to the laws and usages of this state. If he rely upon an equitable title, it must

be such as a court of equity would sustain. What is it? A special warrant, dated in 1755, kept in his pocket till 1765; and then an ineffectual attempt made to survey it; which failing, we hear nothing further of it, or of Rankin's pretensions, until the order given to Harris to survey it. The rule in this state, as it seemed agreed at the bar, is, that if a man, having a warrant, do not use due diligence to survey it, so as to afford notice to others, he loses his priority. We feel well disposed to adopt this rule, because it is highly reasonable. I presume, however, that if, during the suspension, a third person, with notice of the warrant and its location, should survey the land, he would lose the benefit of his vigilance, in consequence of that notice; and for this reason it was, I suppose, that the notice of Morris in 1761, was so much relied upon by the defendants' counsel. But there is nothing in that, even if the notice had been more precise, because notice to Mr. Peters, would not affect Gordon, who purchased without notice. 2 Fonb. 152. The delay of Rankin is attempted to be excused, on account of the Indian war. You have heard what was the degree of danger, in surveying in this part of the country, after 1758; and you can determine on the validity of the excuse. But, after the survey for Mr. Peters in 1762, what prevented Rankin from contesting his right to the land? This survey was returned in 1762. The agent of Rankin had express notice of it in 1765; yet no caveat was entered; no objections made; no complaint to the proper tribunal, of the supposed misconduct of the deputy surveyor, in not executing the warrant in 1765. The whole subject rests in profound quiet, and concealed from the light, until the year 1774, when an innocent man, not suspecting this or any other sleeping title to the land, pays £900, and obtains a grant. What kind of figure would this defendant make in a court of equity, with his dormant title, against a fair bona fide purchaser, without notice, and shielded by a legal title? If, then, I have stated the evidence in the cause truly, there can be no doubt that the title of the defendant, cannot prevail against that of the lessor of the plaintiff.

Verdict for plaintiff.

Case No. 5,612.

GORDON v. LEWIS et al.

[1 Sumn. 525.] [1]

Circuit Court, D. Maine. May Term, 1834.

MORTGAGE—FORECLOSURE.

1. In order to foreclose a mortgage under the statutes of Massachusetts of 1788, c. 22, and of 1798, c. 77, the mortgagee must not only enter into the mortgaged premises after the condition broken in the presence of two witnesses, but his entry must be made known to them to be for the condition broken, and to foreclose the mortgage.

2. Until the statute of Massachusetts of 1818, c. 15, there was no legal means of levying an execution on an undivided part of a mill and its appurtenances, where the execution debtor was the owner of the entirety of the mill, although a mill privilege is incapable of severance. The prior statutes did not reach the case.

This is a bill in equity to redeem certain mortgaged premises, brought by the plaintiff [Jesse Gordon], as assignee of the mortgagor of the mortgaged premises, against the defendants [Archelaus Lewis and the Portland Manufacturing Company], as assignees of the mortgagee. The bill charges, that Joshua Webb, on November 1st, 1808, mortgaged the premises to Mark Haskell; Haskell on the 31st of August, 1816, assigned the mortgage to the defendant, Lewis; and Lewis assigned the same to the Portland Manufacturing Company, on the 3d of August, 1831. It further charges, that the mortgagor, Webb, on the 14th of April, 1812, conveyed the mortgaged premises to John Gordon; and that John Gordon, on the 23d of January, 1832, conveyed the same to the plaintiff. It then alleges a tender, &c. &c., and prays an account and redemption. The answers of the defendants admit the mortgage of the premises, excepting an old grist-mill, which is said to have belonged to Jonathan Webb, and the assignment of the same mortgage, as charged in the bill. They require proof of the plaintiff's title; and then assert, as matter of defence, an entry into the premises after condition broken, for the purpose of foreclosure by Lewis, on or from and after the 16th of August, 1816, and open, and visible, and exclusive possession by him of the same for more than three years thereafter, and until his conveyance to the company, whereby he acquired an absolute title under such entry and foreclosure; and then denies the right to any account, &c. &c. At the hearing, two questions arose: (1) Whether there had been any entry for condition broken and foreclosure, as asserted in the answers; (2) whether the defendants had shown any title to the old mill, (called the Haskell Saw-Mill.)

Mr. Daveis, for plaintiff.

Mr. Longfellow and Mr. Greenleaf, for defendants.

Before STORY, Circuit Justice, and WARE, District Judge.

STORY, Circuit Justice. As to the first question, the court are clearly of opinion, that the proof does not establish any sufficient entry into the premises for condition broken, so as to create a statutable bar to the bill to redeem. The statute of Massachusetts of the 4th of November, 1788, c. 22 [Laws Mass. p. 199], declares, that all mortgaged premises shall be redeemable, "unless the mortgagee, or person claiming under him, hath by process of law, or by open and

[1] [Reported by Charles Sumner, Esq.]

peaceable entry made in the presence of two witnesses, taken actual possession thereof, and continued that possession peaceably three years." The statute of the 1st of March, 1798, c. 77 [Laws Mass. p. 577], declares, that where the mortgagee, &c. "have lawfully entered and obtained, or shall lawfully enter and obtain, the actual possession of such lands and tenements (the mortgaged premises) for the condition broken, the mortgagor, &c. shall have right to redeem the same at any time within three years after such possession obtained, and not afterwards." Taking these statutes together it is manifest, that an entry into the land by the mortgagee is not alone sufficient to make the time of foreclosure begin to run; but it must be after the condition broken, and for the condition broken. And as this is a statute operating as a bar to an equitable right, it is not to be extended by intendment. There must be a strict compliance with all the requisites to create the foreclosure. In our judgment, it is not sufficient, that the entry has been made after the condition broken; for that may well be by the mortgagee without any intent to foreclose. But the entry must be with the intent to foreclose, or, as the phrase in the statute is, "for the condition broken." Unless, then, the two witnesses, in whose presence the statute requires the entry to be made, can speak to the intent of the entry, as well as to the entry itself, that it was "for condition broken," it does not come within the purview of the statute. And in the present case, there is no proof, that it was with intent to foreclose the mortgage.

In the case of Taylor v. Weld, 5 Mass. 109, 119, it is explicitly admitted by the court, that it must be proved on the part of the mortgagee, that he did enter for condition broken. But it has been supposed, that that case establishes the doctrine, that an entry after condition broken is to be presumed to be for condition broken.[2] In our judgment, that case establishes no such doctrine. The court go into an elaborate examination of the facts of that case, and come to the conclusion, (with which we have nothing to do,) that, though in point of fact there was an entry after condition broken, that entry could not at that time be, under all the circumstances, deemed an entry for condition broken; but that the entry for the condition broken was at a later period. In our judgment, the mere proof of the fact of an entry after condition broken, is no proof of the purpose, for which it is made. The law requires the intent to be as notorious as the act. Equivocal acts, which admit of different interpretations, ought to be so construed as to preserve and not to defeat rights.

Then, as to the title to the Haskell Saw-Mill. It appears, that on the 5th of November, 1811, Archelaus Lewis and Stephen Thacher, as executors of Peter Thacher, brought an action against Joshua Webb, and attached the mill on the writ. At that time Webb's only title on record was a deed of one undivided half of the premises from John Quimby, dated the 27th of May, 1806. On the 1st of November, 1808, he bought the other half from Solomon and Mark Haskell, to the latter of whom he mortgaged it for the payment of certain notes. But his deed from the Haskells was not recorded until long after the attachment, namely, in March, 1817. Judgment was duly obtained in the action; and the execution was extended, in December, 1812, on three fifths of the mill in common and undivided.

Under these circumstances, it is contended on the part of the defendants, first, that if Webb is to be deemed a tenant in common of one undivided moiety of the saw-mill only, according to his title on record at the time of the levy, then that levy is good at least for that moiety; secondly, if he is to be deemed in possession of the whole mill, so that the execution creditors (the executors) are to be deemed to have notice of his title to the whole mill, still the levy on the three fifths of the mill is ex necessitate rei good. The plaintiff contends, on the other hand, that the levy is altogether void, because at the time of the levy the debtor was seised of the entirety of the mill, and not of an undivided moiety thereof. This necessarily leads us to the consideration of the nature and mode of levies of execution on real estate according to the laws of Massachusetts, by which the present extent must be governed, it being before the separation of Maine. By the provincial act of 1692, it was declared, "that all lands and tenements belonging to any person, in his own proper right in fee simple, shall stand charged with the payment of all just debts owing by such person, as well as his personal estate, and shall be liable to be taken in execution for satisfaction of the same." The same provision was re-enacted in 1696. But the mode of levying the execution thereon was not pointed out. This was supplied, first, by an act in 1716, and afterwards by another act in 1719, which required the extent to be by appraisement in the mode prescribed under our present laws. And the same acts further provided, that when it so happened, that the real estate extended upon could not be divided and set out by metes and bounds, then the execution should be extended upon the rents of such real estate, and the tenants thereof be caused to attorn to the creditor and pay their rents to him accordingly.[3] In this situation our laws remained until the revision by the statute of the 17th of March, 1784 (St. 1783, c. 57), when it was further provided, that "when real estate of the debtor or debtors shall be held in joint

[2] See S. P., 12 Mass. 519, arguendo.

[3] See Ancient Charters & Laws, pp. 216, 292, 401, 413, 423, and Colonial Act 1675, p. 143.

tenancy, in coparcenary, or tenancy in common, with the real estate of other persons, then the officer may extend execution on such debtor or debtor's real estate, held as aforesaid, or part thereof, describing the same with as much precision as the nature and situation thereof will admit, and give the creditor, &c., seisin or possession of such debtor or debtor's real estate held as aforesaid, or part thereof, to hold in common with the said other persons." So that this statute in effect provided for three classes of cases; first, levies on real estate in common cases, where the estate can be set off by metes and bounds; secondly, on rents, where the estate cannot be set off by metes and bounds, or other proper description, and there is a tenant in possession to attorn; and, thirdly, levies where the estate is held in an undivided share with others.

Now, the argument for the defendants is, that the act of 1696 still remains in full force, as to all cases of real estate, which cannot be set off in either of the modes thus prescribed, as is the case of a mill wholly owned by one person, where a part of it cannot be set off on one execution in severalty, as the privilege is incapable of a severance; and that the statute of Massachusetts of the 20th of February, 1819 (St. 1818–1820, c. 115), on this subject, is merely affirmative. But it seems to me, that the argument itself is difficult to be maintained. The act of 1696 merely declares in general terms the liability of real estate to be taken in execution. The act of 1719 expressly declares the manner in which the levy shall be made, when the creditor doth "think fit to levy upon the real estate of such debtor;" so that by necessary implication the extent cannot be in any other manner. And if this were even doubtful before the statute of 1783, c. 57, that statute being a revision of the whole subject, and in pari materiâ, operates as a virtual repeal of the antecedent laws. If, then, the levy of Lewis and Thacher on the Haskell Saw-Mill can be maintained at all, it must be maintained under the statute of 1783, c. 57. If, at the time of that levy, Joshua Webb had been seised of an undivided moiety only of the mill, notwithstanding the extent of a greater portion, namely, three fifths, it would have been good for the moiety. And so it was held in Atkins v. Bean, 14 Mass. 404. The difficulty is, that Webb was at that time owner of the whole mill under the purchase from the Haskells, though the moiety purchased of them was under mortgage. The question, then, is, whether by law an undivided part of a mill, of which the judgment debtor is sole owner, can be set off on execution. It is said, that it can, ex necessitate, because the privilege is incapable of severance, and a part of the mill cannot be set off by metes and bounds; and there is no inconvenience in setting off an undivided portion of the whole, describing the whole by metes and bounds. If the question had been wholly new, and untouched by legislation or decision, I must say, that I should have been greatly distressed by the argument. The statute certainly does contemplate the case of an extent of an undivided right or share of the debtor in real estate, or of part thereof; and there does not seem any very sound reason, why, if the debtor owns a moiety, one-quarter part may be set off on execution, and yet, if he owns the whole, one moiety cannot, where a separate portion of the whole is incapable of severance, and of being set off by metes and bounds. Nor does the language of the statute in its terms necessarily preclude such a construction. After declaring, that the creditor may, if he thinks proper, levy his execution upon the debtor's real estate, it proceeds to state, among other things, that the appraisers "shall set out such estate by metes and bounds," which words do not necessarily import, that the whole interest of the debtor in the lands shall be extended; but that the estate itself (that is, the land) shall be set out, that is, described by metes and bounds. And this interpretation derives strength from the succeeding clause, as to estates held in joint tenancy, &c. And the clause as to rents rather confirms than impugns it. It is: "And when it so happens, that the real estate extended upon cannot be divided and set out by metes and bounds, as before prescribed, or by the description before mentioned, then execution shall be extended upon the rents of such real estate." Now, an estate may as truly be said to be capable of a division and setting out by metes and bounds, by a division and set-off of an undivided interest in the whole, describing the metes and bounds of the whole, as by the division and set-off of an entirety of interest in a parcel of the whole, describing the parcel by metes and bounds. And even this is not required to be done in all cases; for undivided interests may be set off "by describing the same with as much precision as the nature and situation thereof will admit." And it by no means follows, that, because a levy may be on rents, there cannot be a levy by metes and bounds, at the election of the creditor; as the cases of Barber v. Root, 10 Mass. 260, and Roberts v. Whiting, 16 Mass. 186, show.

But the case is not left open to mere reasoning upon the intent and language of the statute. The very point arose in Partridge v. Gordon, 15 Mass. 486; and indeed it was, though (strangely enough) it does not appear in the report, the turning point of the cause. I have been favored with a record copy of the statement of facts, upon which the judgment of the court was given. From that statement it appears, that Joshua Webb was sole seised of the demanded premises, one portion of which was a saw-mill, which he mortgaged to the female plaintiff, but no entry had been made under the mortgage. Prior to this mortgage, the premises had been attached by certain creditors of Webb,

who afterwards levied their executions thereon, and the tenants claimed under the levies so made. On one of these executions a levy was made of seven eighths of the saw-mill; and on other executions levies were made on other parcels of the premises. The court decided, that the plaintiffs were entitled to recover the saw-mill, but not any other part of the demanded premises. So that the case must have turned upon the validity of an extent of an undivided part, where the debtor was owner of the entirety of a mill. This decision was made in May term, 1818. At the very next session of the legislature, by the act of February, 1819 (Act 1818, c. 15), it was provided, "that whenever a creditor shall think proper to extend and levy the same on any saw-mill, grist-mill, or other mill factory, mill privilege, or other real estate, which cannot be divided without prejudice to or spoiling the whole, and where the whole of such saw-mill, &c. is not necessary for the satisfying of such execution, the same may be extended, in manner prescribed by law, upon the same, or upon any undivided part thereof, which shall be sufficient to satisfy the same," &c. &c. It is impossible to entertain a doubt, that this almost contemporaneous legislation grew out of the decision in the case of Partridge v. Gordon [supra]. Under such circumstances it cannot be correctly deemed to be merely affirmative of the pre-existing law. Considering the decision, then, to be directly in point, it is a matter of local law conclusive upon this court, whatever doubts we might otherwise have been disposed to entertain.[4]

The circumstance, that there was at the time an existing mortgage upon one moiety, cannot vary the legal result; for Webb was, subject to that mortgage, owner of the entirety; and in point of law, the whole was capable of being set off on execution, as his property, although the creditors must have taken it subject to the mortgage. So is the doctrine in Warren v. Childs, 11 Mass. 222, and White v. Bond, 16 Mass. 400. Nor does it make any difference, that the deed to Webb was not recorded until long after the attachment and levy; for that was material only as to the rights of subsequent purchasers from the grantors; and completely vested the estate in Webb, as against the grantors themselves. So that the levy on the saw-mill, under which the defendants claim title, is wholly void; and it passed by the conveyance of Webb to John Gordon, and by that of the latter to the plaintiff.

Another objection was stated at the bar, that even if the levy of Lewis and Thacher, as executors, on the saw-mill was good, still they had no authority to convey the same, either under the will of their testator, or without a license of court under the general provisions of law, in cases of executions levied on real estate by executors and administrators. It is unnecessary to consider this point, because we have already decided the levy to be a nullity. I am authorized to say, that the district judge concurs in this opinion. There must, then, be a decree for a redemption of the mortgage, and for taking an account according to the prayer of the bill; and the cause must be referred to a master to take an account, and to make due report thereof to the court. Decree accordingly.

[For subsequent proceedings, see Cases Nos. 5,613 and 5,614.]

[4] The following is the statement of facts in Partridge v. Gordon:

Joshua Webb was sole seised of the demanded premises, at the times of the several attachments hereafter mentioned by his deed of mortgage, dated September 28th, 1812; being then so seised, conveyed the same to Susanna Webb, the tenor of which deed is as follows, namely: "I, Joshua Webb, &c., in consideration of ten thousand dollars paid by Susanna Webb, &c., hereby give, grant, bargain, sell, and convey unto the said Susanna, her heirs and assigns for ever, the following estate, to wit; the plot of ground, situate in said Falmouth, that Jonathan Webb in his life-time conveyed to the said Joshua, on which the said Joshua's brick house stands, with the said house and other buildings thereon. The following mills, and the privileges whereon they stand, situate in said Falmouth on the northeasterly side of Presumscot river, near the bridge over said river passing from Sacarappa to Windham: One saw-mill, and grist-mill within the same frame, standing on the shore of the river; the new single saw-mill, the new double saw-mill, and the old double saw-mill, all in a range, standing on the same falls with the saw and grist-mill first mentioned; to have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof to the said Susanna, her heirs and assigns, to their use and behoof for ever. And I do covenant with the said Susanna, her heirs and assigns, that I am lawfully seised in fee of the premises, that they are free of all incumbrances, that I have good right to sell and convey the same to the said Susanna, to hold as aforesaid, and that I will warrant and defend the same to the said Susanna, her heirs and assigns for ever, against the lawful claims and demands of all persons. Provided, nevertheless, that whereas the said Susanna and Joshua are administrators to the estate of Jonathan Webb, late of said Falmouth, deceased, intestate, and the said Joshua has taken into his hands most of the personal effects of said intestate; now if the said Joshua shall pay and dispose of said effects, according to law, by paying debts of said intestate, or distributing the same, as the judge of probate for said county of Cumberland may decree and order, and do and perform whatever pertains to his trust, as administrator as aforesaid, to keep the said Susanna harmless; then this deed shall be void, otherwise remain in full force." Acknowledged October 3d, 1812; recorded October 5th, 1812. But neither of the demandants ever entered under said mortgage, although the condition was broken before the commencement of this action. Prior to the execution of the deed from Joshua Webb to said Susanna, the demanded premises were legally attached at the suit of Eleazer Greeley v. Joshua Webb and Zacheus Hanniford, Samuel Torrey et al. v. Joshua Webb and Zacheus Hanniford, Ezekiel Walker v. Joshua Webb, Eleazer Greeley v. Joshua Webb, and Joseph Morse v. Joshua Webb, all bonâ fide creditors of said Joshua Webb; which suits were all entered at the proper courts, and such proceedings had thereon, that, at the circuit court of common pleas, holden at said Portland on the third Tuesday of November, A. D. 1812,

Case No. 5,613.

GORDON v. LEWIS et al.

[2 Sumn. 143.] [1]

Circuit Court, D. Maine. May Term, 1835.

MASTER IN CHANCERY—EXCEPTIONS TO REPORT—MORTGAGE—REDEMPTION—RECEIPT OF RENTS BY MORTGAGEE — SET-OFF IN EQUITY — SECOND MORTGAGEE.

1. Whatever has been insisted upon before the master, is considered as waived or abandoned, if it is not made matter of exception; unless it appears on the fact of the report, that the master has committed an error.

[Cited in Hatch v. Indianapolis & S. R. Co., 9 Fed. 858; Celluloid Manuf'g Co. v. Cellonite Manuf'g Co., 40 Fed. 477.]

[Cited in Barbour v. Tompkins, 31 W. Va. 410, 7 S. E. 5.]

2. Where the defendant recovered and occupied premises, as assignee of the original mortgagee, he must be deemed to have received the rents and profits under that title; and he cannot set up an adverse title against the mortgagor or his assignees, to protect himself from accountability therefor.

3. Where a mortgagee is in possession, and the annual rents and profits of the mortgaged premises exceed the interest of the debt due, it seems, that he should pay interest on the surplus rents and profits.

[Cited in Green v. Wescott, 13 Wis. 608; Moshier v. Norton, 100 Ill. 66.]

4. In ordinary cases, where the relation of mortgagor and mortgagee is uncontroverted, if a mortgagee receive the rents of a mortgaged estate, after his debt has been satisfied, and retain them to his own use, without paying them over to the mortgagor, he is chargeable with interest.

5. If, however, there are sufficient equitable circumstances in favor of the mortgagee, as if he retained the rents under a mistake, supposing the rights of the mortgagor extinguished, he would not be liable for interest, until after notice of the adverse claim.

[Cited in Barnett v. Nelson, 54 Iowa, 47, 6 N. W. 51.]

6. No allowance is made for expenditures on mortgaged premises, if the value of the premises is not enhanced thereby.

7. Where the answer of the defendants asserts a mortgage title in the whole of the premises, it is not competent for them to set up a different title, as for a moiety, before the master.

8. Courts of equity follow the law in matters of set-off, unless there is some equity attaching to the particular transactions between the parties.

[Cited in Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 58 Fed. 266.]

9. The surplus rents and profits, after the satisfaction of the mortgage debt, may be assigned as a chose in action, and the assignee maintain a suit in equity for an account.

10. In the view of a court of equity, the rents and profits are incidents de jure to the ownership of the equity of redemption.

[Cited in Jewett v. Cunard, Case No. 7,310.]

[Cited in Merriam v. Goss, 139 Mass. 82, 28 N. E. 450.]

11. A second mortgagee, after the satisfaction of the first mortgage, may claim from the first mortgagee, after notice, the rents and profits, which have not been accounted for to the mortgagor, so far as the same are necessary to the satisfaction of his mortgage.

[Cited in Mount Pleasant v. Beckwith, 100 U. S. 527.]

12. Webb mortgaged certain premises in 1808, to Haskell; Haskell in 1816 assigned his mortgage to the defendant Lewis; Lewis in 1831 assigned the same to the Portland Manufacturing Co. The mortgagor Webb in 1812. conveyed the mortgaged premises to John Gordon, who, in 1832, conveyed the same to the plaintiff. *Held*, that no decree can be made for the payment of the rents and profits to the plaintiff, until an opportunity has been given by supplemental proceedings for Webb and the other parties in interest to appear.

[1] [Reported by Charles Sumner, Esq.]

said Torrey and others recovered judgment against said Webb and Hanniford, for $3246.18 damages, and $21.64 costs; on which judgment execution was issued in due form of law on the second day of December, 1812, and was on the same day delivered to Richard Hunnewell, Esq., sheriff of said county, who within thirty days after the rendition of said judgment, by order of the creditors extended the same on said mill and privilege, in manner and form as appears by the appraisers' and sheriff's return on said execution, which are as follows, namely: "Cumberland, ss. Falmouth, December 22d, 1812. 1st. We, the above named Benjamin Willis, Joseph Cross, Jr., and Nathaniel Partridge, having been sworn as above, have appraised and do hereby appraise and set off seven eighths of the new double sawmill, on the north side of Presumscot river, and on the lower falls, with all the mill privileges belonging to the same at Sacarappa in Falmouth, as the property of Joshua Webb, of said place, with all the privileges and appurtenances thereto belonging, at the sum of thirty-three hundred and twenty-two dollars. The said premises having been shown to us by Nathan Kinsman, attorney to the creditors, as the estate of the within named Webb, to satisfy in full the within execution and charges. Benjamin Willis, Joseph Cross, Jr., Nathaniel Partridge. Falmouth, December 22d, 1812." (Next follows the return of the sheriff, which is omitted in this place.) The appraisers were all duly appointed and sworn, and the several creditors seasonably received seisin and possession of the lands set off on their respective executions; and all the executions were duly returned into the clerk's office, and were duly recorded in the registry of said deeds in said county, within three months after the same were levied. It is admitted, that said Gordon had, prior to the commencement of this action, purchased by legal conveyances all the right, title, interest, and estate, which the several creditors aforesaid acquired by virtue of the levy of the several executions aforesaid. And it is agreed, that the court shall enter up such judgment, as ought by law to be entered on the foregoing facts. Luther Fitch, for Plaintiff. S. Longfellow, for Defendant.

Suffolk, ss. Supreme Judicial Court. March Term, 1818. Nathaniel Partridge and Wife v. John Gordon. Continued Nisi from Cumberland, June Term, 1817. Ordered, that the clerk of this court, for said county of Cumberland, make the following entry under said action in his docket in that term, namely: "Upon the facts agreed by the parties, it is considered by the court, that the said Nathaniel Partridge and wife recover seisin and possession of the double saw-mill and privileges described in the declaration, but not of any other of the premises therein described, and that they also recover their costs."

13. A mortgagee shall not get any advantage out of the mortgage fund beyond principal and interest.

[Cited in Green v. Cross, 45 N. H. 586.]

14. Between mortgagor and mortgagee, the latter, when in possession, must account for the actual rents and profits, if they can be ascertained; if they cannot be, then resort may be had to a fair occupation rent.

[Cited in Upham v. Brooks, Case No. 16,797.]

This is a bill in equity to redeem certain mortgaged premises, brought by the plaintiff [Jesse Gordon], as assignee of the mortgagor of the mortgaged premises, against the defendants [Archelaus Lewis and the Portland Manufacturing Company], as assignees of the mortgagee. The bill charges, that Joshua Webb, on November 1st, 1808, mortgaged the premises to Mark Haskell; Haskell on the 31st of August, 1816, assigned the mortgage to the defendant, Lewis; and Lewis assigned the same to the Portland Manufacturing Company, on the 3d of August, 1831. It further charges that the mortgagor, Webb, on the 14th of April, 1812, conveyed the mortgaged premises to John Gordon; and that John Gordon, on the 23d of January, 1832, conveyed the same to the plaintiff. It then alleges a tender, &c. &c., and prays an account and redemption. The answers of the defendants admit the mortgage of the premises, excepting an old gristmill, which is said to have belonged to Jonathan Webb, and the assignment of the same mortgage, as charged in the bill. They require proof of the plaintiff's title; and then assert, as matter of defence, an entry into the premises after condition broken, for the purpose of foreclosure by Lewis on, or from and after the 16th of August, 1816, and open and visible, and exclusive possession by him of the same for more than three years thereafter, and until his conveyance to the company, whereby he acquired an absolute title under such entry and foreclosure; and then denies the right to any account, &c. &c. The cause was heard in May term, 1834, on the bill and answer, and a decree was awarded [Case No. 5,612] for a redemption of the mortgage, and for taking an account according to the prayer of the bill; and the cause was referred to a master to take an account, and to make due report thereof to the court. At this term, the cause came up again on exceptions taken by the defendants to the master's report. The nature of the report, and the exceptions thereto, will sufficiently appear in the opinion of the court.

C. S. Daveis, for plaintiff.

S. Greenleaf, for defendants.

Before STORY, Circuit Justice, and WARE, District Judge.

STORY, Circuit Justice. This cause has now come before us, upon the master's last report, made since the subject has been recommitted to him, in pursuance of the order of the court, on the 21st of January last; and upon the exceptions filed by the defendants to that report. I shall examine the exceptions in the order, in which they stand, and not in the order in which they have been brought before the court by the defendant's counsel, in the argument at the bar. Before, however, I proceed to that examination, it is proper to state, that nothing is properly before the court, except the matter of those exceptions; for whatever may have been insisted upon before the master, by way of argument or objection, is considered as waived or abandoned, if it is not made matter of exception, unless, indeed, it manifestly appears upon the face of the report itself, that the master has committed an error, which ought to be corrected. I mention this the more freely, because the argument of the defendant's counsel has insisted upon some matters, which were taken by way of objection or reasoning at the hearing before the master, and which are not directly within the scope of any of the exceptions to the report; and certainly, unless such objections appear now maintainable upon the very face of the facts contained in the report, they must be deemed to have been abandoned.

The first exception respects the allowance, made by the master, of the rents and profits of the Little Revenge Mill. The decision of the master on this point was perfectly correct. The defendant Lewis actually recovered and occupied that mill in virtue of his title as assignee of Haskell, the original mortgagee, and he must be deemed to have received the rents and profits under that title, and to be accountable accordingly. He cannot now be permitted to set up an adverse title against the mortgagor or his assignees, to protect himself from such accountability. The reasoning of the master on this point is entirely satisfactory.

The second exception in its actual form is equally unmaintainable. It is, that the master has not stated the evidence or mode of acquisition of Lewis's title to the said mill, although it was exhibited before him. Now, certainly, it was no part of the master's duty, under his commission, to ascertain or report such title. That title, so far as it was put in issue by the bill and answer, had been already passed upon by the court; and was not within the scope of his commission. There are no facts in the report, which bring this exception before the court, or justify it.

The third exception is to the allowance of interest on the rents and profits, and making annual rests, and charging interest on the value of the premises. The commission of the master expressly authorized him "to cast interest on the rents and profits, making proper rests." He has cast interest accordingly; and if any rests were proper, annual rests were undoubtedly to be made. There is no error, therefore, on these points in the master's report. The question is necessarily open upon the report, and is reserved for the court

to decide, whether such interest is allowable or not. The other part of the exception, (as to charging interest on the value of the premises), seems unfounded in fact, unless it refers to the interest allowed as an occupation rent, or such as might have been received by the Portland Manufacturing Company after their purchases. If it does so refer, then it is governed by the remarks already made. The proper construction of the master's report seems to be, that he allowed the interest as an occupation rent. The question, then, which alone is left for consideration under this head, is, whether interest ought, upon the whole circumstances of the case, to be charged upon the annual rests of rents and profits. It appears by the master's report, that the mortgage was in fact extinguished by payment from the rents and profits on the 23d of April, 1818. The question as to interest seems narrowed down, by the argument, to the period. which has since elapsed. It could scarcely admit of doubt, that as to the antecedent period the report of the master was as favorable to the defendants, as the principles of a court of equity would allow. Where a mortgagee is in possession, taking the rents and profits, and these annually exceed the annual interest of the debt on the mortgage, there is the strongest reason for directing interest to be paid upon the surplus rents and profits, to keep pace (pari passu) with the interest on the debt. The cases of Shephard v. Elliot, 4 Madd. 254; Gibson v. Crehore, 5 Pick. 160; Saunders v. Frost, Id. 259; and Reed v. Reed, 10 Pick. 398,—fully support such a charge. In point of fact, however, it does not appear by the report, that any interest was allowed on the rents and profits during the antecedent period.

There is great good sense in the doctrine held by Lord Gifford in Wilson v. Metcalfe, 1 Russ. 535, that if a mortgagee, receiving the rents of a mortgaged estate, after his debt has been satisfied, does not immediately pay them over to the mortgagor, but retains them to his own use, he is availing himself of another man's money, and ought to be charged with interest; and that it makes no difference, whether he is receiving such rents, or is charged with an occupation rent. The case of Quarrell v. Beckford, 1 Madd. 269, turned upon similar considerations. See, also, Davis v. May, Coop. 238, 19 Ves. 382; Archdeacon v. Bowes, 13 Price, 369. As a general rule it appears to me, that this doctrine ought, in the ordinary cases of persons standing in the admitted relation of mortgagor and mortgagee, to be adopted. But it is but a general rule. There must be some exceptions to it, where it would be inequitable to make such a charge. And I cannot but think, that the proper cases for such a charge are those only, where there is a present duty to pay over the rents and profits, arising from the uncontroverted relation of mortgagor and mortgagee. If the mortgagee has reason bonâ fide to treat the rights of the mortgagor as extinguished; or if he bonâ fide supposes himself, under circumstances, fairly authorizing such a belief, to be the absolute owner of the premises; it seems to me, that he is not to be affected with interest, if it turns out in the event, that he is under a mistake, as to his absolute title; for he has not knowingly deviated from his proper duty. In such a case, it seems to me, that the right to interest does not accrue, until some demand is made upon him, or some notice given of the claim; and then interest may properly be charged from that period. Now, it is very certain, in the present case, that no claim or notice was brought home to the defendant, Lewis, by John Gordon (the second mortgagee or assignee of the mortgagor), while he held the estate; nor by the plaintiff until the time when he brought the present suit, in March, 1832. The original mortgage by Webb to Haskell was in November, 1808, the assignment of it by Haskell to Lewis in August, 1816, and the conveyance by Lewis to the Portland Manufacturing Company in August, 1831. John Gordon's title, as second mortgagee, commenced in April, 1812; and the plaintiff's title, as his assignee, in January, 1832. No demand was ever made by John Gordon against Haskell or Lewis, or the manufacturing company, during a period of nearly twenty years after the commencement of his title. And taking the other facts in the case, as they appeared at the original hearing, the adverse title under certain levies by execution, and the entry for a foreclosure (though neither became effectual in point of law,) and the long and undisturbed possession by Lewis, ever since August, 1816, I am not satisfied, that Lewis had not a right to treat the equity of redemption as being abandoned, or at least as not worth reclaiming. I see no reason, therefore, for holding the plaintiff entitled to any interest, under all the circumstances of this case. Interest is not of course; and is allowable only, when the mortgagor or his assignee makes out a strong case in equity. The case of Archdeacon v. Bowes, 13 Price, 353, and Quarrell v. Beckford, 1 Madd. 269, establish, that interest is not of course from the period, when there is a surplus in the hands of the mortgagee; but where there are any equitable circumstances it will be confined to the period of notice. In this very case, the plaintiff himself does not in his bill set up an averment, that the mortgage has been paid, or that any surplus is in the hands of the mortgagee. On the contrary, he has tendered in court a sum as still due on the mortgage. My opinion, on the whole, is, that under all the circumstances of this case, interest ought not to be allowed.

The fourth exception is, that the defendants are not allowed for the improvements made by the Portland Manufacturing Company after their purchase; and that the master has not stated the evidence thereof. It does not appear by the report, that the master was requested to state the evidence on this point. The master does, however, state,

that the company have expended money on the privilege by the erection of a dam in a place different from that, where the old dam of the Haskell saw mill stood (principally from the materials of the old dam,) but, that he is not satisfied, that the value of the mortgaged premises has been increased thereby. Now under such circumstances, it is clear, that the company are entitled to no allowance for such expenditures; for they have made no lasting or beneficial improvements on the estate. See Moore v. Cable, 1 Johns. Ch. 387; Russell v. Blake, 2 Pick. 505; Saunders v. Frost, 5 Pick. 259, 270; Reed v. Reed, 10 Pick. 398. This exception ought, therefore, to be overruled.

The fifth exception is, that the defendants are charged with the rents and profits of the whole of the tracts described in the deed, whereas (as is said) one half only of the same was mortgaged, and the evidence thereof was before the master. The bill asserts, substantially, a title in the defendants to the whole tracts described in the mortgage deed; and the answer of the defendants admits a title to the whole tracts described in the same deed, as held by the defendants. And upon this state of facts the original decree proceeded to direct an ascertainment of the rents and profits, &c. before the master. When the matter came on before the master, upon the recommittal of the report, the defendants offered in evidence a deed, purporting to be the original mortgage deed of the 1st of November, 1808, from Webb to Haskell, in which the original words of conveyance included the whole tract; and there was an interlineation of words cutting it down to one moiety. The plaintiff objected before the master to the admission of the deed so offered, it never having been an exhibit or filed in the cause. The master admitted the deed, and his report contains an alternative view of the state of the case, as the court shall decide, whether the deed was admissible or not. My opinion is, that the deed was inadmissible as evidence to establish, that the mortgage was but of a moiety of the estate. I do not meddle with the case, as a matter of suspicion, or of question as to the genuineness or falsity of the interlineation. The true ground is, that the answers of the defendants assert a mortgage title in the whole of the premises; and it is not now competent for the defendants to set up a different or more limited title upon a collateral inquiry before the master. That would be to contradict the answers, and to try a very different case from that asserted in the pleadings. The cause has been heard upon the bill, answers and proofs; and an interlocutory decree had; and the defendants are now at liberty to substitute a new case for that formerly stated and already decided on. It may be their misfortune, or their fault; but it is irremediable in this stage of the cause. The exception, therefore, is unmaintainable, and the report of the master must stand as to the rents and profits of the whole of the premises.

The sixth exception is in substance an objection to the title of the plaintiff to recover or receive the surplus rents and profits accruing after the satisfaction of the first mortgage, and before the conveyance to him in January, 1832. And, in support of this objection it is asserted, that John Gordon is insolvent, and was, at the time of the accruing of these rents, largely indebted to Lewis, and that he had a right of set-off against such surplus of his debt so due. Now, it might be a sufficient answer to this suggestion, that the master reports, that the plaintiff denied any such indebtment, and no proof was offered before him to establish the fact clearly; therefore, the suggestion of indebtment and right of set-off must, under such circumstances, be treated as a new unfounded claim. But if there had been proofs of such an indebtment, still it would not follow, that the right of set-off would exist. There is no pretence to say, that such a set-off to the mortgagor's claim would be allowable at law. In matters of set-off courts of equity generally follow the law, unless there is some equity attaching to the particular transactions between the parties; such as mutual credits. Upon this I need do no more than to refer to the authorities, which were acted upon in Jackson v. Robinson [Case No. 7,144], and Greene v. Darling [Id. 5,765]. In the present case there is no pretence of any mutual credit; that is to say, of any credit given by Lewis to John Gordon, on account of the supposed debt due from Lewis to Gordon for rents. The whole structure of the answer disclaims any such intendment. It insists upon an adverse exclusive title to the mortgaged premises, and, of course, to the rents and profits.

The right of the plaintiff to the surplus rents and profits is, upon the structure of the bill, wholly dependent upon the point, whether it is an incident to the exclusive and absolute ownership of the equity of redemption. The bill does not assert any title to such rents and profits in virtue of any assignment thereof, in verbis, as rents and profits. Indeed (as has been already suggested), the bill not only does not suppose there to be any surplus rents and profits capable of assignment; but it supposes a balance to be due on the mortgage, and tenders a payment of it in order to a redemption. There is no question, that an assignment may be lawfully made of such surplus rents and profits, as a chose in action, and that the assignee may, in virtue thereof, maintain a suit in equity for an account and satisfaction under such a title by assignment. But, then, if such a title is relied on, it must be alleged in the bill, and put in issue; for the decree must be secundum allegata et probata, and not merely secundum probata. So that the present bill puts out of question all claim under any assignment of the rents and

profits as such; and if the rents and profits are recoverable at all by the plaintiff, they are so as incidents to the ownership of the equity of redemption. My opinion is, that they do attach to such ownership de jure, in the view of a court of equity.

The mortgage to Haskell was extinguished by satisfaction out of the rents and profits, on the 23d day of April, 1818. At that time, and from thence down to January, 1832, when John Gordon conveyed the mortgaged estate to the plaintiff, he continued the qualified owner thereof, under his original mortgage deed from Webb, in April, 1812; and as such, he was entitled to the whole surplus rents and profits in the hands of the mortgagees, under the first or Haskell mortgage, as far as his title extended; that is, as far as they were necessary to satisfy his (Gordon's) mortgage. See Archdeacon v. Bowes, 13 Price, 353, 362, 363, 365, 368, 373. Beyond this, the surplus rents and profits belonging to Webb, the mortgagor, unless his title to the equity of redemption has since been absolutely released or extinguished. Now, the plaintiff, at most, can take no more under the assignment of John Gordon, to him, than the title of the former under his mortgage. The bill does not in terms assert any absolute title to the equity of redemption to the premises, either in John Gordon or in the plaintiffs, or any release or extinguishment of Webb's equity of redemption. It asserts, indeed, that, in virtue of the deed of the 14th of April, 1812, John Gordon "became seized of all the right, interest and estate of the said Joshua Webb, whether in fee or in equity, to redeem the same;" and then proceeds to allege, that all the right, title, interest and estate, which he (John Gordon) had in virtue of the aforesaid conveyance in the premises, was assigned to the plaintiff by the deed of the 23d day of January, 1832. But in both instances, a profert is made of these deeds by the bill, and upon the production and proofs of them, it is apparent, that the title is nothing but a mortgage title. So that the bill asserts no absolute title in the plaintiffs; and the proofs establish no extinguishment of Webb's equity of redemption. There are then no allegations or proofs of any absolute title to the premises in the plaintiff. No account has been taken to show, what is the state of accounts between the plaintiff and Webb, or to show, what is due by Webb on the mortgage to John Gordon. Webb is not even made a party to the bill. So that it is clear, that his rights and interests cannot, and ought not to be disposed of in this suit, in its present form. Under these circumstances, a decree cannot be made, directing the amount due for rents and profits to be paid over to the plaintiff. The most that can be done, is to order this amount to be brought into court, subject to the order of the court; and to retain the fund until an opportunity is given for all the parties in interest to appear, by supplemental proceedings, to litigate and establish their just rights thereto. I had at first some hesitation, whether, under the actual posture of the case, we ought to go quite so far. But the case of Archdeacon v. Bowes, 13 Price, 353, 373, seems to me fully to justify this proceeding; as it also conclusively establishes the right of a second mortgagee, after the satisfaction of the first mortgage, to claim from the first mortgagee, after notice, all the rents and profits, which have not been paid over or accounted for, to the mortgagor, so far as they are necessary for the satisfaction of the second mortgage. See Parker v. Calcraft, 6 Madd. 11, 12; Berney v. Sewell, 1 Jac. & W. 647; Ex parte Wilson, 2 Ves. & B. 252. Indeed, I should have entertained no doubt upon this last point, if there had been no authority to support it, upon the general principles flowing from the relationship of the parties as mortgagees.

The seventh and last exception to the master's report is, that he has allowed nothing for the extra exertions of Lewis, in taking care of the mortgaged property, and obtaining the rents and profits. This exception does not require any elaborate consideration. There is nothing in that report, which establishes the right of Lewis to any compensation in taking care of the property and obtaining the rents and profits beyond what the master has allowed him.

I have not thought it necessary to go over the other grounds of objection to the report, suggested at the argument. So far as they have not been already answered, they were in effect disposed of by the former opinion of the court. For instance, the title under the levy in execution having been held void, it is impossible, in a court of equity, that the defendants can be permitted to avail themselves of that as an adverse title to hold possession of the premises, when they had a good title as mortgagees to the possession, which the mortgagor and his assignees could not impugn or disturb. But, in truth, the objection is not so properly addressed to the report itself, as it is to the former opinion of the court, and to the order, on which that report is founded. Then, again, as to the rents and profits, it is contended, that the actual rents and profits ought not to be charged against the defendants, but only what is to be deemed a fair rent, by which must be understood a fair occupation rent. I know of no rule of a court of equity, which could justify such a course of proceeding on the part of the court. No principle is better established than the principle, that a mortgagee shall not get any advantage out of the mortgage fund beyond his principal and interest. See Gubbins v. Creed, 2 Schoales & L. 218; 4 Kent, Comm. (2d Ed.) lect. 58, pp. 166, 167; 3 Pow. Mortg. (Coventry & Rand's Ed.) p. 949, note e, 2. Between mortgagor and mortgagee, the latter, when in possession, must account for the actual rents and profits received or made by him, if these rents and profits

can be actually ascertained. Where they cannot be, there must be a resort to a fair occupation rent. Here the master has ascertained the actual rents and profits. In both cases, the mortgagee may entitle himself, under circumstances, to compensation for all lasting improvements upon the premises. But in the present case, there is not the slightest proof, that the master would have disregarded any such claim, if properly substantiated. His report states no such fact; and justifies no such conclusion.

Upon the whole, my opinion is, that there ought to be a decree to bring the surplus rents and profits of the whole mortgaged premises into court, to abide the future orders of the court, upon the proper supplementary proceedings. The personal representatives of Lewis, are to bring into court, if they have assets, the surplus of the rents and profits, from the extinguishment of the mortgage on the 23d of April, 1818, to the time of the sale to the Portland Manufacturing Company, on the 3d of August, 1831. From that period the Portland Manufacturing Company are to bring into court the rents and profits. As to the possession of the premises, it is plain, that a decree must pass for an immediate possession, since the original mortgage to Haskell has been long since satisfied. A decree will be accordingly framed upon these principles, as the district judge concurs in this opinion.

[See Case No. 5,614.]

Case No. 5,614.

GORDON v. LEWIS et al.

[2 Sumn. 628.] [1]

Circuit Court, D. Maine. Oct. Term, 1837.

EQUITY—SET-OFF.

1. An interlocutory decree was made in equity, by which the executors of A. Lewis, were chargeable with the sum of $1891,05 on account of rents and profits due to the plaintiff, Jesse Gordon. A petition was now filed, praying that a certain sum, amounting to $1071,-25, due from John Gordon, to the executors, might be set-off against the foregoing sum; it being alleged that Jesse Gordon, the plaintiff, was a mere nominal party, and that John Gordon was the real party in interest, and was insolvent. It did not appear, that there was any mutual credit between A. Lewis and John Gordon, or any express or implied agreement of set-off. *Held*, that the proceedings had passed that stage, when the claim of set-off could be entertained; that the question, whether Jesse Gordon was a nominal party or not, cannot be investigated in a collateral proceeding, like the present; that the proper course would have been to file a cross bill at an earlier stage, or now to institute an original bill, in some competent court; and that the insolvency of John Gordon does not per se constitute a sufficient equity to induce a court of equity to sustain the set-off.

2. In matters of set-off, equity follows the law; and the fact of the existence of mutual demands without some intervening equity between the parties, would not justify a court of equity in allowing a set-off. Semble, that the mere insolvency of one of the parties, does not constitute such an equity.

[Cited in Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 58 Fed. 266.]

[This was a bill in equity brought by Jesse Gordon, as assignee, against Archelaus Lewis and the Portland Manufacturing Company, for the redemption of certain mortgaged premises. The court rendered a decree in favor of the plaintiff, and referred the cause to a master to take an account. Case No. 5,612.]

This case was formerly before the court upon exceptions to the master's report [Case No. 3,613]. The decree thereupon entered at May term, 1835, was as follows:

It is ordered, adjudged and decreed by the court, that the report of the master be, and do hereby stand confirmed, in all respects, in which it is not altered or varied by this present decree. And it is further ordered, adjudged and decreed, inasmuch as it appears in and by the report aforesaid, that the original mortgage to Mark Haskell in the proceedings mentioned, under which the defendants claim title by assignment thereof, has been long since satisfied and extinguished, that the said Portland Manfacturing Company, do forthwith and immediately, surrender and deliver up to the plaintiff, the possession of the premises: and, that unless the same be done, on or before the eighth day of September next, that a writ of possession, in the nature of a writ of habere facias possessionem, do issue from the clerk's office in due form of law, for the possession of the same premises; and that the plaintiff also do have execution against the defendants, for his costs in the premises up to the present time. And it is further ordered, adjudged and decreed, that the said Daniel Fox and Josiah Pierce, as executors of the said Archelaus Lewis, do from the assets of the said Lewis in their hands, if any such there be, pay into court the sum of eighteen hundred and ninety-one dollars and five cents, being the amount of the surplus rents and profits received by the said Lewis, from and after the satisfaction and extinguishment of the said Haskell mortgage, viz. from and after the twenty-third day of April, A. D. one thousand eight hundred and eighteen, to the time of the sale of the said mortgaged premises to the said Portland Manufacturing Company, viz. to the third day of August, A. D. one thousand eight hundred and thirty-one. And that the said Portland Manufacturing Company do pay into court the sum of eighty-six dollars and ninety cents, being the amount of interest allowed by the master, as and for an occupation rent, or what might have been received by them, as rents and profits of the said mortgaged premises, since their purchase thereof as aforesaid. And it is further ordered, adjudged and decreed, that the charge of interest upon such surplus rents and profits received by the said Lewis according to the annual rents made by the

[1] [Reported by Charles Sumner, Esq.]

master and contained in his report, be, and hereby is, under all the circumstances of the present case, disallowed. And it is further ordered, adjudged and decreed, that the said several sums of money so ordered to be paid into court, be so paid into court on or before the first day of October next, by the parties respectively; otherwise, process in the nature of an execution as for a specific performance, is to issue against the parties respectively for the same. But the said Fox and Pierce, executors as aforesaid, are to be at liberty at the term of this court, to be held on the first day of October next at Wiscasset, within and for this district of Maine; to show what assets they have in their hands, or whether they have any assets in their hands of the said Lewis to pay the said sum; and if they shall not appear at the said time and place, or shall not render a due account of the assets of said Lewis in their hands, as they shall be ordered and required by the court, then they shall be taken to have confessed that the assets in their hands, are sufficient to pay the sum aforesaid, and be held chargeable therewith accordingly. And all parties interested, or claiming an interest in the sums so to be paid into court, shall, when the same shall be so paid into court, be at liberty to apply by supplementary proceedings, to have their respective rights thereto ascertained and established. And all further orders and decrees are reserved for the consideration of the court.

At May term, 1836, the executors of Archelaus Lewis filed a petition to the court, in substance as follows:

Josiah Pierce, of Gorham, in said district, and Daniel Fox, of said Portland, executors of the last will and testament of Archelaus Lewis, late of Westbrook, in said district, respectfully represent, that at May term of this honorable court, A. D. 1835, in the suit in equity, in which Jesse Gordon was plaintiff against them and the Portland Manufacturing Company, they were ordered by the decree of said court, to pay into court $1,891.05, from the assets of said Lewis in their hands, if any such there be; with liberty for them to show to the court what assets they have in their hands, which they did at the last term of the court. That said sum of $1,896.05 was for rents, which accrued long before the conveyance was made by John Gordon to Jesse Gordon, as hereafter stated, and did not pass to said Jesse by said conveyance, but belonged to said John, and still belong to him, subject to the equitable claim, which they the said Pierce and Fox have against the same as executors of said Archelaus Lewis, as hereafter stated. And it was further ordered and decreed, that all parties interested, or claiming an interest, in the sum so to be paid into court shall, when the same is paid into court, be at liberty to apply by supplemental proceedings to have their respective rights thereto ascertained and established. And the said Pierce and Fox further represent, that although a deed was produced from John Gordon to said Jesse Gordon, under which said Jesse and his representatives pretend to claim said sum of $1,891.05, your petitioners have reason to believe, and do in fact believe, that said deed was given without consideration, and for the purpose of covering said property in the hands of said Jesse for the benefit of said John, he being in debt and insolvent. And, that whatever is paid under said decree, or the greater part of it, will go to the use and benefit of said John Gordon. That said John is largely indebted to them, the said Pierce and Fox, in their said capacity of executors of said Lewis, to wit, in the sum of $1,071 25, and was so indebted at and before the time he made said deed to said Jesse Gordon, and at the time the rents accrued, which they are required to pay into court as aforesaid. That there is no mode in which they can obtain payment of the debt so due from said John Gordon to said Lewis's estate, unless they can be permitted to deduct the same from the sum, which they are ordered to pay into court, or to receive the same out of said sum, by order and decree of this honorable court.

C. S. Daveis, for plaintiff.

S. Longfellow, for defendants.

Before STORY, Circuit Justice, and WARE, District Judge.

STORY, Circuit Justice. The object of the present petition is to have the benefit of a set-off of $1071 25, which it is now admitted is due and owing to the executors from John Gordon, to be allowed and deducted from the sum of $1891 05, the rents and profits, for which the executors are chargeable under the decree of the court already rendered. The ground, upon which this claim is asserted, is, that John Gordon is the real party in interest in the present case and is insolvent, and that Jesse Gordon is a mere nominal party. This very question came under the consideration of the court at the former hearing upon the master's report and an exception taken thereto, which presented it. The exception was then overruled upon the ground, that there were no facts establishing the claim. That ground is now removed; and it is admitted, that there is the sum of $1071 25 due from John Gordon to the executors. But on that occasion the court entertained great doubts, whether the claim could be sustained as a set-off in any form.

It is very clear, that the claim cannot be asserted in the present suit; and if it could have been at any stage of the suit asserted (which is denied,) the proceedings have passed that stage. The reservation in the decretal order, allowing all persons interested in the sums paid into court to come in and prosecute their claims thereto, is wholly inapplicable to the executors, who have no in-

terest whatsoever in those sums. It applied solely to those persons, who were entitled to Joshua Webb's equity of redemption. Indeed, the present petition asserts no right to any part of those sums; but only a right of set-off against them, to be recouped from the amount, as an adverse claim. Upon this petition it is impossible for the court in this suit, to go into any proofs of the material facts asserted in it, and which are vital to the relief sought. The question, whether Jesse Gordon is a nominal party, or not, cannot be investigated in such a collateral proceeding. The proper course would have been to have filed a cross bill at an earlier stage of the proceedings, or now to institute an original bill in some court competent to maintain it. But if a cross bill had been duly filed, or an original bill were now before this court, asserting the same facts, and they were all proved, my judgment is, that it is not a case, in which a court of equity could grant the relief. The jurisdiction of courts of equity in matters of set-off is very narrow, and closely follows that of the law. The mere fact of the existence of mutual demands constitutes no ground in equity for a set-off, however reasonable it might have been to have allowed it upon principles of natural justice. The authorities are the other way. I have had occasion to consider this doctrine in various cases, and need do no more than refer to the cases of Jackson v. Robinson [Case No. 7,144]; Green v. Darling [Id. 5,765]; Gordon v. Lewis [Id. 5,613]; and Howe v. Sheppard [Id. 6,773]. To justify a court of equity in allowing a set-off there must be some original or intervening equity between the parties beyond the mere fact of mutual debts. There must be a mutual credit, founded on a subsisting debt on the other side, or an express or implied agreement for a set-off of mutual debts. There is no pretence of any such mutual credit, or any such express or implied agreement of set-off in the present case. The petition asserts none. The whole facts of the present suit repudiate it. The sole equity now set up is the insolvency of John Gordon. But I am not satisfied, that mere insolvency alone constitutes a ground for the interference of the court. On the contrary it appeared to me in the case of Howe v. Sheppard [supra], that there was no sufficient authority to establish that doctrine. I am aware of the bearing of the case of Simson v. Hart, 14 Johns. 63, which, upon its own circumstances, may have been very properly decided. But if it meant to assert, as a general doctrine, that mere insolvency of one of the parties gives a right in equity to set off mutual unconnected debts, I am not prepared to say, that it can be sustained as a sufficient authority to bind this court to that extent, whatever may be my respect for the learned judges, who decided it.

It has been suggested, that the case might be treated as one within the equity of the statutes of set-off of Maine (St. 1820, c. 59, § 19; Id. 1823, c. 228). But it appears to me, that neither in their words, nor in their intent, can they be applied to cases like the present. The cases relied upon in the argument from the Massachusetts and Maine Reports were founded upon the laws of those states, applicable to the insolvent estates of deceased persons; and of course they turn upon very different considerations. See McDonald v. Webster, 2 Mass. 498; Sewall v. Sparrow, 16 Mass. 24; and Lyman v. Estes, 1 Greenl. 182.

There is another ingredient in this case, suggested in the plaintiff's argument, which, if well founded, as matter of fact (as it seems to be,) would dispose of the question upon stronger grounds. It is, that the mortgage was actually assigned by John Gordon to Leal & Porterfield, under whom the plaintiff asserts title, before the debt now insisted on as a set-off became due, or even existed. But I do not dwell on this fact, because it is not presented in such a direct form in the present aspect of this cause as to be deemed strictly in judgment. Upon the whole, my opinion is, that the prayer of the petition must be rejected; and the petition itself be dismissed. The district judge concurs in this opinion, and, therefore, let the petition be dismissed.

Case No. 5,615.

GORDON v. LINDO.

[See Case No. 5,231.]

Case No. 5,616.

GORDON v. LINDO.

[1 Cranch, C. C. 588.] [1]

Circuit Court, District of Columbia. Dec. Term, 1809.

BAIL—JUDGMENT OBTAINED IN ANOTHER COUNTY.

A resident of Alexandria may be held to special bail in Washington in an action of debt founded upon a judgment in an action of debt in Virginia, in which bail was given; although no previous writ had been issued against the defendant in Alexandria county.

Motion by Mr. Law for defendant, to appear without bail.

1st. Because the defendant is a resident of Alexandria county, and has never resided in this county; and by the law of Maryland (1791, c. 43, § 14) cannot be arrested here until a non est has been returned in Alexandria county.

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

2d. Because this is an action of debt upon a judgment in an action of debt in Virginia, in which bail was given. 1 Sell. Pr. 45; Collins v. Powell, 2 Term R. 757; Melan v. Fitzjames, 1 Bos. & P. 138. If this action had been brought in Virginia, he could not have been held to bail. Upon a foreign contract on which the defendant could not in that county be held to bail, no bail can be required here.

3d. Because these suits were brought while other suits for the same cause were pending in Alexandria. Sell. Pr. 50.

Mr. Porter, contra. If the first suit be in a different court, bail shall be given. Davies v. Leckie, Barnes, Notes Cas. 94; Kendal v. Carey, 2 W. Bl. 768. The defendant ought to be put to his plea of abatement on the ground of other actions depending in Alexandria.

THE COURT stopped Mr. Porter on the 1st point; saying it had been decided in the case of Thompson v. Lacy [Case No. 13,965], at March adjourned court, at Washington, 1802, that a resident of Alexandria, arrested here, must give special bail, although no previous writ had been issued against him in Alexandria county; and after further argument THE COURT (nem. con.) ruled the defendant to give special bail; being of opinion,

1. That the act of assembly of Maryland did not apply, inasmuch as there was but one county in this district subject to the law of Maryland. THE COURT had considered the two counties, for several purposes, as two separate states; slaves imported into Washington from Alexandria had been decided to be imported from another state. Process does not run from one county to the other.

2. That the law of practice of England, not to hold to bail in an action on a judgment does not apply, because this is not the jurisdiction under which the original judgment was rendered. The reason of the decisions in England, was the oppression and vexation of holding to bail, a second time, when the plaintiff might have had execution.

3. That the law of Virginia for not holding to bail, being also founded upon the supposed vexation or oppression of twice holding to bail, can only apply to the same jurisdiction.

[See Cases Nos. 5,231 and 5,232.]

Case No. 5,617.

GORDON v. The MARY J. VAUGHAN and The TELEGRAPH.

[Cited in The D. S. Gregory, Case No. 4,100. Probably an earlier decision in The Mary J. Vaughan, Id. 9,217. Nowhere reported; opinion not now accessible.]

Case No. 5,618.

GORDON et al. v. The MARY VAUGHAN.

[8 Int. Rev. Rec. 114.]

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

COLLISION—LOSS OF PROPERTY—MEASURE OF DAMAGES.

[Where property is lost through a collision, the measure of damages is the value of the article at the port of shipment.]

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

In this case both parties appealed from the decision of Judge Blatchford in the court below [Case No. 9,217]; the libelants [John Gordon and others], on the question of damages; and the respondents [the propeller Mary Vaughan and the steamboat Telegraph] upon the collision.

Mr. Lyon, for libelants.

Mr. Van Santvoord, for the Vaughan.

Mr. Fithian, for the Telegraph.

NELSON, Circuit Justice. This libel was filed by Gordon and others to recover damages for the loss of a quantity of barley shipped from Canada to New York. The barley was in a canal boat at Troy, and taken in tow by the propeller Mary Vaughan for transportation to the city, and, as alleged in the libel, was lost by a collision through the carelessness and mismanagement of the navigation of the Mary Vaughan and the steamboat Telegraph, on its way down the North river. The court below, after a careful examination of the proofs, which are very voluminous, condemned the two vessels, and referred the case to a commissioner, to hear evidence and report the amount of the damages. We concur in this decree, as fully supported by the proofs. But, as at present advised, we are unable to concur in the rule adopted by the court in the estimate of these damages. We agree that the value of the article at the port of shipment is the rule established by authority, but doubt as to the principle which has been adopted in carrying it into effect. The value of the barley at the time of the loss at Montreal was seventy cents per bushel, Canada currency. The estimate of value in the present case is according to this currency, denying the right to convert it into the currency of the United States, where the loss occurred and the damages are to be paid. The result is, upon this view, the owner and sufferer fails utterly in his indemnity, as, at the time this barley was purchased and shipped, $1 in Canada currency was equivalent to $2.16 in our currency. So much the purchaser had to pay of our currency per bushel. The indemnity is less than half the actual loss, according to the rule as applied in the case. So great an injustice, and such an inequitable result, would seem strongly to argue some defect in the principle as

applied. At all events, before we can agree to it, we desire a further argument upon the point, and will hear the counsel in the case some day in the coming term of the court.

Case No. 5,619.

GORDON v. RIDDLE.

[1 Cranch, C. C. 329.] [1]

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

BAIL.

If bail has not been required upon the capias ad respondendum, it will not be required upon setting aside the office judgment without affidavit.

Assumpsit against the drawer of a check; no affidavit to hold to bail.

E. J. Lee moved to set aside the office judgment, without giving bail, no bail being originally required.

C. Lee, contra, produced the check, but no affidavit.

THE COURT permitted the defendant to appear, and set aside the office judgment without special bail.

Case No. 5,620.

GORDON et al. v. SCOTT et al.

[2 N. B. R. 86 (Quarto, 28);[2] 3 Pittsb. Rep. 109; 7 Am. Law Reg. (N. S.) 749; 6 Phila. 484; 25 Leg. Int. 276; 15 Pittsb. Leg. J. 542; 1 Am. Law T. Rep. Bankr. 99.]

District Court, W. D. Pennsylvania. 1868.

WITNESS—SERVICE OF SUBPOENA—FEES—TAXATION OF COSTS IN BANKRUPTCY.

1. In the courts of the United States it is not necessary that the subpoena, for witnesses, should be served by the marshal.

[Cited in Stuart v. Hines, 33 Iowa, 60.]

2. The party who serves the same is entitled to recover for service and mileage.

3. The docket fee of twenty dollars is not taxable in cases of voluntary bankruptcy. But it is in cases of involuntary bankruptcy where there is a "trial" by jury, and in those voluntary cases where, under the thirty-first section of the act [of 1867 (14 Stat. 532)], the court is authorized to direct a trial upon specifications of objections to the bankrupt's discharge.

[Cited in Cummings v. Akron Cement & Plaster Co., Case No. 3,473; Morgan v. Thornhill, 11 Wall. (78 U. S.) 77; In re Mead, Case No. 9,364.]

These were exceptions to the taxation of costs in bankruptcy, which are sufficiently explained in the opinion of the court.

Mr. Marshall, for creditors.

Mr. Grant, for debtors.

McCANDLESS, District Judge. The questions presented are material to both the debtor and creditor, as well as to gentlemen of the legal profession. They have been raised to settle a matter of practice about which there has been much diversity of opinion.

This is a case of involuntary bankruptcy. The debtors filed their answer, denying the acts of bankruptcy alleged in creditor's petition, and demanded a trial by jury, which was allowed. There was a trial, and the jury rendered a verdict that the facts set forth in the petition were not true. It then became the duty of the court, under the forty-first section of the act, to dismiss the proceedings, and the respondents were entitled to recover costs. They filed their bill, to which the creditors except.

First. That the subpoena having been served by the party, and not by the marshal, the fees for service and mileage are not recoverable. It is true that the marshal is the executive officer of the court, and may be directed by the court to serve it; but the mandate of the writ is not to him, but to the witness, who is commanded to appear and testify. As there is no legislation of congress directing the service of a subpoena by the marshal, we do not feel disposed to depart from the practice of the state courts, which has always permitted the party to serve the precept, and allowed him costs for the same. The 28th section of the act of 24th of September, 1789 [1 Stat. 87], requires the marshal "to execute throughout the district all lawful precepts directed to him, and issued under the authority of the United States." But the subpoena is not directed to him, but to the witness, and the marshal might legitimately refuse to serve it, unless commanded so to do by an order of the court. The party is interested in the production of the witness, and we can see no reason why, if he serves the writ, he should not be paid for it. It is further objected that the distance charged for mileage was not actually traveled, but as there are no proofs to sustain this allegation, it is dismissed. The first exception is overruled.

Second. The second exception raises the question whether the docket fee of twenty dollars allowed to the attorney of the successful party, in the courts of the United States, is properly taxable in bankruptcy, and, so far as this court is advised, it is a question of the first impression. It is clear that in cases of voluntary bankruptcy it is not allowable; but we are of opinion that in those of involuntary bankruptcy, where there is a trial by jury, that it is taxable, as also in those voluntary cases, where, under the thirty-first section of the act, the court is authorized to direct a trial upon specifications of objections to the bankrupt's discharge. By the act of the 26th of February, 1853 [10 Stat. 161], it is provided that "in lieu of the compensation now allowed by law to attorneys, solicitors and proctors in the United States courts," the following and no other compen-

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

[2] [Reprinted from 2 N. B. R. 86 (Quarto, 28), by permission.]

sation shall be taxed and allowed: In a trial before a jury in a civil and criminal cause, or before a referee, or on a final hearing in equity or admiralty, a docket fee of twenty dollars. In cases at law, where a judgment is entered without a jury, ten dollars, and five dollars where a cause is discontinued. These are all in cases of adversary proceedings, and the distinction is drawn between a trial, and judgment without a trial. The word "trial" here, as illustrated by Mr. Justice Story, in U. S. v. Curtis [Case No. 14,905], means a trial by jury. The pleadings may be filed, the issue made up, but until the jury is sworn, there is no trial. In the case before us there was an issue, the jury were sworn, there was a trial, and a verdict against the creditors. Besides, general orders in bankruptcy, thirty-one, "costs in contested adjudications," provides that "in cases of involuntary bankruptcy, where the debtor resists an adjudication, and the court, after hearing, shall adjudge the debtor a bankrupt, the petitioning creditor shall recover, to be paid out of the fund, the same costs that are allowed by law to a party recovering in a suit in equity; and in case the petition is dismissed (as in this case) the debtor may recover like costs from the petitioner." The second exception is, therefore, also overruled, and the clerk is directed to tax a docket fee of twenty dollars to the attorney for the respondents.

GORDON (SMITH v.). See Case No. 13,052.

Case No. 5,621.

GORDON v. SOUTH FORK CANAL CO. et al.

[1 McAll. 513.] [1]

Circuit Court, N. D. California. Jan. Term, 1859.[2]

CONSTITUTIONAL LAW — IMPAIRMENT OF OBLIGATION OF CONTRACTS—LAWS AFFECTING THE REMEDY.

1. The legislatures of the states may pass laws which go to the remedy on past as well as on future contracts, provided they do not impair their obligation.

2. An alteration by law of a remedy to such extent as to materially affect a right vested under a prior contract, is unconstitutional.

[Cited in Midland Ry. Co. v. Wilcox, 122 Ind. 90, 23 N. E. 508; Smith Bridge Co. v. Bowman, 41 Ohio St. 48.]

[See note at end of case.]

[This was a suit in equity by George Gordon against the South Fork Canal Company.]

A bill was exhibited in this case to enforce a statutory lien and for other objects. The defendant filed a plea setting forth the invalidity of the lien sought to be enforced.

McDougal & Sharp and Hall McAllister, for complainant.

Crockett & Crittenden, for defendants.

McALLISTER, Circuit Judge. To the bill exhibited in this case a demurrer was filed; and it was sustained by the court for want of proper averments to give jurisdiction, with liberty to amend. The complainant has done so; and one of the defendants, D. K. Newell, has filed a plea which raises an issue as to the validity of the lien to enforce which is one of the objects of the bill.

The first and preliminary objection to the argument of this plea is, that the issue now raised was disposed of by the decision on the demurrer. The court does not so consider, as its action on it was limited to the question of jurisdiction. Again, the allegation in the bill was general; it was, that notice of the lien was recorded according to law. This general averment on the argument of the demurrer was taken as true. The plea now filed sets forth the notice, and specifies wherein the alleged invalidity exists. The court cannot consider the decision on the demurrer as precluding the defendant from setting up this defense in form of a plea. The grounds on which it rests are,—1st. That by the act of 12th April, 1850 (Comp. Laws, 808), no lien was given except upon buildings and wharves; and this was the only law in force at the date of the contract with Gordon & Kenyon. The bill in this case seeks to enforce a lien upon a canal. 2d. That the act of 17th May, 1853 (Comp. Laws, 811), was passed subsequent to the date of the contract, and after most of the work done by the complainant had been performed. This act was prospective, and could not retroact so as to confer a lien where none existed at the date of the contract. By these objections, it is apparent that the date of the contract is made the point of time which is to limit the operation of the act, and beyond which it could create no right. The conclusion drawn in the brief of defendants' counsel is, that "the legislature had no power to incorporate a new element into the contract, and create a lien on a canal where none existed at the date of the contract." With a view to sustain the theory that the lien affects the contract, it is urged, that the labor performed and materials furnished could only have been done and furnished under a contract. This is true; for no cause of action can arise ex contractu that is not founded on contract; but that may be verbal, in writing, or implied.

The case of Houghton v. Blake, 5 Cal. 240, cited by defendants, simply affirms the principle that the materials furnished must have been so by the express terms of the contract. A reference to the case of Bottomly v. Rector, etc., of Grace Church, 2 Cal. 90, adopted and relied on in the former case, will show that all that was decided is, that the statute never contemplated that a person should have the right of following the materials which he had sold in general terms, and obtain a lien upon any building to which the materials had been applied. The materials

[1] [Reported by Cutler McAllister, Esq.]

[2] [Reversed in 6 Wall. (73 U. S.) 561.]

must have been furnished to the particular building on which the lien was to be enforced by the terms of the contract in pursuance of which it was constructed. With a view to ascertain whether the lien under the law which creates it operates upon the contract in this case, it is necessary to examine the legislation of this state in relation to the liens of mechanics and other operatives.

The act of the legislature of 12th April, 1850 (Comp. Laws, 808), created a lien on buildings and wharves in favor of two classes of laborers. 1st. The first were master builders, mechanics, and all other persons furnishing labor or materials by contract with the owner himself. By the 7th section of this act, this class, to secure their lien must file in the recorder's office of the county in which the building or wharf is situated, before the expiration of sixty days from the completion of the work or repairs, notice of his intention to hold a lien upon the property declared by the act liable to the lien, specifically setting forth the amount claimed. It is also provided, that suit shall be brought to enforce the same within one year after the work is done or materials furnished, or within one year after the expiration of any credit which may have been given; but no lien shall continue for a longer term than two years from the time the work is completed, or the materials furnished, by any agreement to give credit. The second class of persons in favor of whom a lien is created, are contractors, journeymen, &c., performing labor or furnishing by contract with the masters or contractors, and between whom and the owner there is no privity of contract. This second class of persons, in order to fix their lien are to pursue the course prescribed by the second, third, and fourth sections of the act. By these, they are required, first to look to their employer, next to the owner, which latter is only liable in cases where notices have been served upon him in conformity with the statute. No period of notice to the owner by this second class is prescribed; and the construction which has been placed by the supreme court of this state upon this portion of the statute is, that it intended to provide for the first class an actual lien existing from the commencement of the work (in this construction this court coincides) until sixty days after its completion, leaving the second class their remedy by notice to the owner; and no time being fixed when such notice shall be given, that their lien attaches only upon the service thereof—that this mode of proceeding was intended to prevent litigation by substituting a proceeding in the nature of an attachment; and they put this class of cases on the same footing as ordinary attachments, in which the rule "qui prior est in tempore potior est in jure" obtains. Cahoon v. Levy, 6 Cal. 295.

The next act of the legislature of this state upon the subject of a mechanics' lien, is that of 17th May, 1853 (Comp. Laws, 811). It extends the lien for all labor done and materials furnished, to "bridges, flumes, or aqueducts constructed to create hydraulic power or for mining purposes; and gives such to all persons performing labor or furnishing materials for, or employment in, the construction of any such bridge," &c., subjecting it to the provisions and regulations as in and by said act of 12th April, 1850 (Comp. Laws, 811), are provided for buildings and wharves. It is a rule in the interpretation of statutes, that all in "pari materia," must be construed together. A fortiori, such should be the rule where, as in this case, the provisions and regulations of the previous law are expressly incorporated into the more recent statute. The effect in such case is, to make all the provisions of the old law part and parcel of the new, which are not repugnant, and which form portions of the provisions and regulations which regulate the lien.

The complainant rests his claim to a lien under the act of 17th May, 1853, for until the passing of that act no lien on a canal existed; but to sustain his claim he must show he complied with that law, and if he does so, he can be required to do no more. It is true that the legislature of this state on the 27th April, 1855 (Pamph. Laws 1855, p. 156), passed an act repealing the law of 12th April, 1850; but at the same time it expressly enacts, that "nothing herein contained in this act shall be deemed to apply to or affect any lien heretofore acquired," &c. By this latter act it is required that the notice of lien to be given shall contain a correct description of the property on which the lien is intended to be enforced. The act of 12th April, 1850, required a description of the property without using the word "correct." But this omission in the older act can give rise to no different construction in the interpretation of the two statutes. When the previous act prescribed a description of the property it is to be deemed that a correct one was as much required by its language as when the legislature in the subsequent law used the word, correct. It is only important to construe the language used in both acts with a view to enable us to arrive at the true intention of the law. To this comparison we will come hereafter when the objection made to the description of property given in this case in the notice of lien is to be considered.

Both acts, that of 12th April, 1850, and that of 17th May, 1853, annex the liens created by them to no contract; but to labor done and materials furnished. Whatever the nature of the contract, the character of the lien is not affected. The law does not alter or impair the obligation of any contract, the lien is founded upon the labor and materials. Going upon the idea, that "the laborer is worthy of his hire," the legislature make the result of his work the sole meritorious ground of the lien. If the act operated upon the contract made prior to the passing of it, and divested a vested right, it would be obnoxious to the

objection made to it on the ground that it is unconstitutional. To sustain that proposition, the case of People v. Hays, 4 Cal. 127, has been cited. That case was decided on two grounds. 1st. That by the terms of the act under consideration the act was not to take effect until July following, and consequently was by its saving clause to take effect in futuro. 2d. That previous to the passing of the act, the right had vested in the party, as purchaser from the sheriff, to receive an absolute deed for the property of which he had been divested by the subsequent law giving the right of redemption. The principle decided in the latter proposition is embodied in the case of McCracken v. Hayward, 2 How. [43 U. S.] 608. The act under consideration does not attach to the contract, it goes exclusively to the remedy. It may indirectly affect the contract; but it does not impair it, nor does it divest a vested interest under it. Most legislation as to the remedy, more or less affects the contract; though it may not to such extent as to invalidate the law. In McCracken v. Hayward, above cited, the supreme court of the United States say, "It is, however, not to be understood that, by that or any former decision of this court, all state legislation on existing contracts is repugnant to the constitution." As legitimate instances of the exercise of this power, they allude to the right of the legislatures of the states to pass recording acts, by which the elder grant shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts. The power to limit a remedy by barring the right of action, being remedial legislation, although it affects the contract, is constitutional. Id. In Bronson v. Kinzie, 1 How. [42 U. S.] 315, the same court say, "Undoubtedly a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may shorten the period of time within which claims shall be barred by the statute of limitations."

Now, each of foregoing instances in which it is admitted the state legislatures have a right to legislate, affect the contract to as great extent as does the act under consideration, which gives to a party to a contract an additional remedy,—a lien upon his work. In the case of Bronson v. Kinzie, 1 How. [42 U. S.] 316, the court further say, "And although a new remedy may be deemed less convenient than the old one, and may, in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law will be unconstututional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract." It is difficult to perceive, how an act which gives an additional remedy to the holder of a contract can be said to impair its obligation. Of what vested right does it deprive the party? The obligation imposed upon him by its terms, was to pay for the work. It vested in him no right not to pay. Can the law which from motives of policy gives an additional remedy and security, be said to divest a right from him which he never possessed? The true distinction is, that what belongs to the remedy, if it does not impair the obligation of the contract, is within the legitimate limits of state legislation. The court cannot consider the law under consideration as unconstitutional, or having divested a vested right. Whether the law should be deemed to create a lien on any labor or materials done and furnished subsequent to the passage of it, is a question not now to be determined. That it does create a lien on all labor and materials done and furnished prior to the passing of it, there can be little doubt; and the plea admits that some portion of the labor and materials are in that category. Whatever be that portion is matter of proof on the trial of the case.

Another objection to the validity of the lien is, that the notice of lien filed by complainant was insufficient, on two grounds—1. The description of the property in the notice of lien is inaccurate. 2. That if the complainant ever had a valid lien, he has lost it by a failure to bring suit in time. The act of 12th April, 1850, requires that the suit should be brought within one year after the work was done, which was not done in this case. As to the description of the property, we have seen that the act of 12th April, 1850, requires that notice of the intention to hold a lien on the property declared by that act shall be recorded, specifically stating the amount claimed. The act of 27th April, 1855, requires a correct description of the property to be given. No form is prescribed. Under the latter law the case of Montrose v. Connor, 8 Cal. 344, cited by defendant's counsel, was decided. The description of the property in the notice of lien in that case was in these words, "As a dwelling house lately erected by me for J. W. Connor, situated on Bryant street, between Second and Third streets, in the city of San Francisco, on lot —" In relation to such description the court say, "There are a number of lots on Bryant street between Second and Third streets, to any of which it would apply as well as to the one in question." That description of an individual object which was so inaccurate as to apply equally well to a number of objects, was decided not to be a correct description of the individual object which it was intended to identify. What is meant by a correct description? Does it mean a description by metes and bounds, and require the particularity demanded in a deed? The word "cor-

rect" is not a technical one. Its obvious meaning in a statute is, such description which identifies the individual object intended to be designated. Such object is accomplished in this case; the subject on which a lien is sought is "the works known as the South Fork Canal, near Placerville, in El Dorado county." If there was no object in existence at the time which answered to that description, the rule, "de non apparentibus et de non existentibus eadem est ratio," must apply, and the description must be deemed sufficiently "correct."

The next objection to the validity of the lien is, that the notice, after giving the information that it was intended to hold a lien on the specific work, does not state that the labor was done on, and the materials were furnished to, that work; but "that the same were for the use of the South Fork Company." The fact that they were so used is not required to be inserted in the notice, nor does it constitute a part of the description of the property. That is matter of allegation and proof, without which no recovery can be had. To that extent goes the case of Houghton v Blake [supra], cited by defendant's counsel.

The last objection to the validity of the lien is, that if it ever existed, it has been lost by failure to bring a suit to enforce the lien within a year from the time the work was done. Now, there is a conflict as to the time when the work was done, and inasmuch as a plea is not, like an answer, deemed evidence, and the matter is one of avoidance, and as such, if embodied in an answer, must have been proved on the final hearing, it must be submitted to proofs on both sides. After a careful review of this case, the court has come to the conclusion that the plea must be overruled, and it is ordered accordingly.

[NOTE. On appeal to the supreme court the judgment was reversed in an opinion by Mr. Justice Swayne, because the circuit court held that the lien extended the entire length of the canal instead of limiting it to the upper section, where all the work was done. Mr. Justice Field, Mr. Justice Miller, and Mr. Justice Grier dissented, because they regarded the lien as extending to the whole canal, as much so as a lien for work upon a wing of a house extends to the entire building. 6 Wall. (73 U. S.) 561. [A motion was afterwards made in the circuit court to carry into effect the mandate of the supreme court, and, in an opinion by Mr. Justice Field, it was held that the mandate of the supreme court must be promptly and implicitly obeyed, except so far as the enforcement thereof may be modified by events occurring subsequent to the period covered by the record in the supreme court. The obedience required is an intelligent, not a blind one. Where judgment has been obtained, and, pending a writ of error, no stay of proceedings having been obtained, the judgment is enforced, and the property of the defendant is sold, the purchaser acquires a good title, which cannot be divested by a reversal by the supreme court. The judgment being valid until reversed, and its enforcement not having been stayed, all persons relying on it are protected. Case No. 13,189.]

GORDON (SOUTH-FORK CANAL CO. v.). See Case No. 13,189.

GORDON v. STOTT. See Case No. 5,620.

GORDON (SUNDAY v.). See Case No. 13,616.

GORDON (UNITED STATES v.). See Cases Nos. 15,231–15,234a.

GORDON (VIRGINIA v.). See Case No. 16,961.

GORE, The (DICKENSON v.). See Case No. 3,893.

Case No. 5,622.

The GORGAS.

[10 Ben. 541.] [1]

District Court, S. D. New York. Aug., 1879.

COLLISION — TUG AND TOW — LIGHTS ON CANAL-BOAT IN TOW—INSPECTOR'S RULES—FERRY.

1. The tug G. having towed three canal-boats out of a slip at Jersey City into the river, all three on her port hand in the neighborhood of the ferry from Desbrosses street, in order to take one of the boats, the N., on the other side, her lines were slacked and she was dropped back till her stem was ten or fifteen feet from the sterns of the other two boats, and a line was made fast from her to one of the other boats. In this position the N. was run into by a ferry-boat crossing from New York to Jersey City. When the approach of the ferry-boat was seen, the master of the N. hailed the tug to go ahead, but the hail was not heard. The master of one of the other boats went forward abreast of the pilot-house of the tug and spoke to the master of the tug, but he failed to start his boat ahead in time to get the N. out of the way of the ferry-boat, and the owner of the N. filed a libel against the tug to recover the damages sustained by the N. The N. had no light on her at the time of the collision, and was not seen by the ferry-boat in time: *Held*, that the place chosen by the tug in which to shift the canal-boat was not well chosen, being in the track of the ferry-boat, and that the master of the tug was bound to greater vigilance, therefore.

2. The master of the tug was not as vigilant as he should have been, in that he did not see the approach of the ferry-boat in time, and did not start ahead with his tug when warned to do so.

3. The tug was liable for the damages to the boat.

4. It seems that the rules of the inspectors throw the duty of seeing that a boat in tow has a light upon the steam-tug and not on the boat, and that there is no such duty on the part of the boat to have a light that the failure to have one constitutes negligence on the part of the boat as regards the tug.

In admiralty.

E. D. McCarthy, for libellant.

W. R. Beebe, for claimant.

CHOATE, District Judge. This is a libel to recover for an injury sustained by libellant's canal-boat, the Charles J. Norton, by a collision with the ferry-boat New York, on the evening of the 11th of May, 1877, while

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

the canal-boat was in tow of the Gorgas. The libellant's boat with two other canal-boats, the O'Donnell and the Mary Dee, were lying together at a pier near the foot of Morgan street, Jersey City. These boats employed the tug Gorgas to tow them to Port Johnson. The tug came into the slip where they were lying lashed together, put her line on the middle boat, the O'Donnell, and backed out into the river, drawing them after her. When she had the canal-boats clear of the piers she came along side of the Mary Dee, thus placing all three boats on her port side, the libellant's boat being outside. The tug and tow were then heading nearly across the river, but a little down stream, and were from two hundred and fifty to five hundred yards from the line of the piers. The tide was ebb, setting directly down the river. The night was starlight and clear, with very little wind. The three canal boats were light. Having got the tow in this position the tug came to a standstill in the water, and ordered the libellant's boat to cast off her lines and fall back for the purpose of taking her up on the starboard side. The lines were slackened and the libellant's boat fell back and her lines were passed on to the Mary Dee preparatory to her being taken up on the starboard side of the tug. As soon as she was far enough back to be well clear of the other boats, her stem being ten or fifteen feet from the sterns of the other boats, the line was made fast, connecting her with the Mary Dee. And at this stage of the manoeuvre of shifting her from one side of the tug to the other, the ferry-boat New York, bound from her slip at the foot of Desbrosses street, New York, to her slip in Jersey City, which is a short distance below Morgan street, came in collision with her port side, about two feet from the stern, striking a glancing blow and breaking in some of her upper planks. The tug had her lights set and burning, as required by statute of a tug having other vessels in tow. There was no light on the libellant's boat.

It is alleged in the libel, as negligence on the part of the tug; that she left the canal-boat helpless and motionless for several minutes in the track of this ferry-boat, and that when libellant saw the ferry-boat coming upon a course likely to cause a collision, he called out to the master of the tug to go ahead; but he neglected to do so. The answer does not directly meet and reply to this charge of negligence in not responding to the call of the libellant to go ahead, but alleges that the tug and tow at the time of the collision had been lying dead in the water for about ten minutes; that the collision happened through no negligence or fault of the tug, but through the fault and negligence of the ferry-boat in not avoiding the canal-boat, in not having a careful lookout and pilot, and in not changing her course so as to avoid the canal-boat, and in not stopping and backing, and through the fault of the canal-boat "in having no lights set, as required by law."

The evidence shows that while the ferry-boat was still at a considerable distance, those on the canal-boats observed that she was making such a course in relation to their position, that a collision with the libellant's boat was likely to take place, and that first the libellant from his boat and then the master of the O'Donnell shouted out to the master of the tug to go ahead, that the ferry-boat was running into them. The libellant's boat was so far astern that it is probable that his call was not heard, but the master of the O'Donnell ran forward on his boat to a point directly opposite to the pilot-house of the Gorgas and spoke to the master. His call was certainly heard. The master of the tug swears that he rang to go ahead immediately on hearing this call. On this point the testimony is conflicting. I think the preponderance of the testimony is, that he did not start his boat ahead as quickly as he could; that he had time enough to move her forward and thereby to have avoided the collision. In his testimony he suggests that he did not know, when he first heard the shout, whether the libellant's boat was made fast or not. The inference would be that any delay was excusable, because he had no assurance that if he went ahead he might not leave her behind in the river. There is nothing of this in the answer, and it seems to be an after-thought. On another point, the master of the tug is, I think, shown by the testimony to be in error. He places the tow a little below the ferry-slip, at the time of the collision. Other witnesses place it a little above, which is far more probable, considering the state of the tide. The ferry-boat, in making her slip, would naturally have kept a little above the slip as she approached it, to counteract the effect of the tide. The evidence shows that the tow stopped above the ferry-slip, and in executing this manoeuvre of shifting the libellant's boat, the tug and tow were slowly drifting down the river across the track of the ferry-boat. Upon the whole the testimony of the pilot of the tug seems to me less to be relied on than that of libellant's witnesses, some of whom are disinterested. The fact that he had not observed what was evident to those on the tow, the movements and course of the ferry-boat threatening a collision, shows inattention on his part. It is argued that he might assume that on such a clear night the ferry-boat would see the canal-boat and keep out of her way. Up to a certain point, undoubtedly, one vessel may and must assume that another approaching her sees her and will observe the common rules of navigation, and may properly act on that assumption; but it is equally the duty of every vessel to observe and be ready to

take immediate action with reference to any indication that the approaching vessel is proceeding in disregard of those rules. It may have been negligence in the ferry-boat not to see and keep out of the way of the canal-boat; but it was the duty of the tug to keep her under such observation that if the ferry-boat gave any indications by her movements of not seeing her or of not keeping out of her way, she could take immediate measures for the protection of her tow. The testimony of the deck-hand on the tug who, before the collision, went aft to take the line of the libellant's boat when she should come up on the starboard side, does not greatly aid that of the master. He was not in a position to see the approach of the ferry-boat, and was busy with his duties there. The position chosen by the master of the tug for shifting this canal-boat was not well chosen. It was too nearly in the track of the ferry-boat, of which he must be presumed to have had notice, especially as the canal-boat had no light, of which also he had notice. The situation imposed on him the duty of great vigilance in so executing the manoeuvre, which was undoubtedly a proper one, if executed in a proper place and manner, that the canal-boats should not be run down while lying motionless and helpless in the river. On the whole, therefore, I think the point is fairly made out against the tug, that she was negligent in leaving the libellant's boat helpless and motionless in the river, and in not going ahead and avoiding a threatened collision with the ferry-boat, of which the tug had sufficient notice, and which, if the notice given had been insufficient, she was bound to have observed.

It is no answer to this charge that the canal-boat had no light. There is no statute requiring her to have a light, and the rules of the supervising inspectors referred to in argument were not put in evidence, and if they are considered in the case, they seem to impose the duty of setting lights on vessels in tow upon the tug rather than upon the canal-boat. It is very probable that if there had been a light on libellant's boat, the ferry-boat would have seen it and kept out of her way. But it seems not to be such a duty on the part of a canal-boat, in the absence of a special requirement, as to make the failure to set a light in such a case negligence on her part towards the tug. The tug violated a plain duty towards the canal-boat in not keeping her out of the danger threatened, and this seems to me to have been, as between these two vessels, the immediate cause of the collision. The tug had notice of the absence of a light on her, and if that made her situation more hazardous, it only increased the obligation of the tug towards her. Decree for libellant, with costs, and reference to compute damages.

[For a hearing on exceptions to the commissioner's report, see Case No. 5,623.]

Case No. 5,623.

The GORGAS.

[10 Ben. 666.] [1]

District Court, S. D. New York. Dec., 1879.

COLLISION—DAMAGES—DEMURRAGE.

A canal-boat, while on a voyage to Port Johnson, to take on board a cargo of coal which she had agreed to carry to Middletown, Conn., at a stipulated rate, was injured by a tug, which was held liable to pay the damages. The commissioner, to whom it was referred to ascertain the damage, reported as part of the damages $53 80, the estimated net freight which the boat would have earned. It was proved that the voyage in question would have taken fifteen days; that the boat was detained for repairs five days, and at the end of that time was again employed by her owner in her usual occupation: *Held*, that the owner of the boat was not entitled to recover the whole of the net freight, but only a proportionate part, viz., one-third of it.

[Cited in The Belgenland, 36 Fed. 505; The City of Alexandria, 40 Fed. 699.]

In admiralty.

L. S. Gove, for libellant.

F. A. Wilcox, for claimant.

CHOATE, District Judge. The libellant having had a decree for his damages [Case No. 5,622], the commissioner has reported the same as amounting to $243.34. This includes the sum of $53.80, the estimated net freight the libellant's canal-boat would have earned in the voyage from Port Johnson to Middletown, Conn., upon which she was prevented from entering by the collision. She was injured on her passage to Port Johnson, there to take on her cargo of coal, which she had agreed to carry at a stipulated price. She was detained for repairs five days and at the end of five days was again employed by the libellant in her usual occupation, whether profitably or not does not appear. The proof is, that the projected voyage would have required fifteen days.

Under the particular circumstances of this case, I think this allowance of the full net freight was excessive. What the libellant is entitled to is indemnity for the loss of the use of his boat for five days. This evidence shows that the use of the boat for fifteen days was worth $53.80, and no further evidence was offered on either side as to the value of such use of the boat. In some cases of total loss the net freight for the voyage entered upon has been allowed. This is, perhaps, an established exception to the doctrine that speculative or contingent profits are not allowed as damages. The Heroine [Case No. 6,416]; The Galatea [Id. 5,185]. The rule in case of detention is to allow what the vessel would earn for the owner on hire during the period of detention. Williamson v. Barrett, 13 How. [54 U. S.] 111. If she has been chartered for a voyage, the

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

probable length of which is substantially coincident with the time required for repairs, then the freight reserved, deducting the cost of earning it, may be taken as a measure of what the owner has lost by the detention. As pointed out in the case last cited, if a longer period is required for the repairs than the probable length of such voyage, then such net freight obviously falls short of an adequate allowance. By Nelson, J., Id. 111. It is equally plain that if the time required for the repairs is far short of the probable length of such voyage, then the net freight would be an excessive allowance, for the reason that the vessel could not earn so much during the period of detention. At the end of five days the owner resumed the use of her and therefore no question arises as to subsequent want of employment being attributable to the collision, if in any case such subsequent loss of employment could be made the ground of recovery. The libellant having, after that time, actually used the boat in her usual employment, I think it must be presumed in the absence of evidence, if that point is material, that for such employment he received an equivalent consideration—in other words, what the use of her was fairly worth. If he did not, the matter was wholly within his own knowledge and it was for him to show the fact. The case of Williamson v. Barrett [supra], as I understand it, does not make the net freight the absolute measure of the amount recovered for detention without regard to the length of the detention. One-third only of the sum of $53.80 should be allowed for demurrage. The other exceptions are not well taken. Claimant's 2d exception sustained, 1st and 3d overruled. Libellant's exceptions overruled and decree for amount reported, deducting $35.87.

GORGAS, The E. W. See Cases Nos. 4,585 and 7,248.

GORGOZA (STEWART v.). See Case No. 13,428.

GORGUS, The E. W. See Case No. 4,586.

Case No. 5,624.

In re GORHAM.

[9 Biss. 23; 18 N. B. R. 419; 11 Chi. Leg. News, 58; 26 Pittsb. Leg. J. 112.] [1]

District Court, N. D. Illinois. Nov., 1878.

BANKRUPTCY OF A FIRM—RIGHTS OF COPARTNER—ESTOPPEL—RIGHT OF COPARTNER TO BE MADE PARTY TO PROCEEDINGS.

1. A firm may be adjudicated bankrupt so long as there are undistributed partnership assets, and partnership debts and liabilities.

2. The right of one partner to have the firm adjudicated bankrupt is co-extensive with the right of the firm creditors or of another partner.

3. One copartner, as between himself and the firm creditors, cannot estop himself by any dealings with the other partner from claiming partnership assets.

4. Where one member of a firm filed his petition in bankruptcy, scheduling the assets and liabilities of the firm, and also his individual assets and liabilities: *Held*, that it was the right of the other member to be made a party to the proceedings thus initiated and to have the firm adjudged bankrupts on their own petition.

In bankruptcy.

Goudy, Chandler & Skinner, C. B. Lawrence, and Wirt Dexter, for Seldon H. Gorham.

M. W. Fuller and John Morris, for E. F. Hollister.

BLODGETT, District Judge. This case comes up upon the petition of Hollister to be made a party to the voluntary petition of Gorham, to be adjudged a bankrupt. The facts, which are undisputed in the case, seem to be these: Hollister, Gorham and Dwight were partners from March, 1875, to March, 1878, under the firm name of Hollister & Gorham, and were engaged in the business of wholesale dealers in carpets, upholstery and furnishing goods in this city. Hollister and Gorham were general partners, and Dwight a special partner, under the Illinois statute in regard to limited copartnership.

On the second of March, 1878, the partnership expired by limitation, and Dwight and Hollister, by bills of sale, transferred their interests in the partnership assets to Gorham. At the same time an agreement was made between Hollister and Gorham, by which Gorham agreed to faithfully apply the firm assets to the payment of the firm debts; that the business should continue under the firm name of Hollister & Gorham, and that Hollister should be paid a salary of $150 per month from March 1, to July 1, 1878, and also be entitled to three-eighths of the profits of the business, if any, from January 1, to July 1, 1878.

On the first of January, 1878, the firm was unable to meet its liabilities as they then matured, and obtained an extension from a portion of its creditors on their then pressing liabilities until March and April last. At the time Gorham took the transfer of the interest of Hollister and Dwight, the financial condition of the firm as to assets and liabilities, remained about as in January, except so far as relieved by the temporary extension to March and April. After Gorham took the bill of sale he made purchases for the business in the firm name of Hollister & Gorham, to the extent of about nine thousand dollars, and paid from the sales of the stock and collections about the same amount of indebtedness of the old firm. On the 29th of April, Gorham made a voluntary assignment for the benefit of his creditors, to George F. Phelps, but nothing seems to have been consummated under it, and no particular steps were taken to carry that assignment into effect.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 26 Pittsb. Leg. J. 112, contains only a partial report.]

On the 4th of May, Gorham filed his voluntary petition in bankruptcy in this court, scheduled the assets of the firm of Hollister & Gorham, or rather the assets which he had received from Hollister and Dwight, as the firm assets, about $57,000, and liabilities about $73,000, which included his liabilities as a member of the firm of Hollister & Gorham and about $2,800 due to one Charles P. Thayer. On the 18th of May, Gorham amended his schedule and added about $6,000 to the assets, and an individual liability to his father, C. P. Gorham, of $6,000.

On the 22d day of May, Gorham filed a petition for composition, and offered to pay his creditors 30 per cent. on their demands. This offer was rejected by the creditors at a creditors' meeting, and on the 6th of July, C. P. Gorham, the father of the bankrupt, filed proof of debt for $31,527, against the bankrupt individually, although the bankrupt in his schedule in bankruptcy, and in his composition schedule, had only put his father down as a creditor to the amount of $6,000. On the 18th of July, Hollister filed a petition, setting forth in substance the existence of the partnership up to March 2; that Hollister then retired from the firm, leaving assets in the hands of Gorham, with the agreement that they should be applied to the payment of the copartnership debts; that the copartnership debts amounted on the 1st of March to over $66,000, all or nearly all of which remained unpaid; that Gorham by his proceedings in bankruptcy, was seeking to apply the firm assets to the payment of his individual liabilities, to the prejudice of the firm creditors, and asked that he might be made a party to the bankruptcy proceedings, and that the firm might be adjudicated bankrupt to the end that the firm assets should be applied to the payment of the firm debts. To this petition the bankrupt, Seldon H. Gorham, objects, and objection is also made by and in behalf of the individual creditor of the bankrupt, Mr. C. P. Gorham.

The petitions and objections were referred to the register to hear proofs and reports, and he has reported against allowing the prayer of the petition. Exceptions are taken to the finding on this report. On the 15th of August, Hollister filed a petition in the name of the firm, asking that the firm be adjudicated bankrupts, and that a rule be made on Gorham to show cause why such prayer should not be granted. On the same day, W. W. Phelps, assignee of Gorham in bankruptcy, filed a supplemental petition in the case of Seldon H. Gorham, asking that Hollister be made a party, and the firm adjudicated, so as to enable him to reach partnership assets, and properly distribute the assets among the individual and partnership creditors. On the 31st of August, certain firm creditors filed an involuntary petition in bankruptcy against Hollister & Gorham, alleging acts of bankruptcy, and asking for the adjudication of the firm.

The bankrupt, C. P. Gorham, resists the petition filed by Hollister in behalf of the firm, and by the assignee, but no objections are urged by them against the involuntary petition. The questions raised have been ably and exhaustively argued and discussed, the discussion being mainly directed to the effect of allowing Hollister to become a party on a distribution of the assets between the individual and the firm creditors. It may be assumed that several of the petitions have been filed out of abundance of caution, as the repeal of the bankrupt law was about to take effect, and in order that an adjudication might be secured in some one of the forms asked for.

The only question I propose to definitely dispose of, is the right of Hollister to become a party to the bankruptcy proceedings, and have the firm adjudicated, either on his own petition or on that of the assignee. Whatever may have been held in other circuits, the rule in this circuit has been uniform that so long as there are undistributed partnership assets and partnership debts or liabilities, the firm may be adjudicated bankrupt. The authorities directly in support of this are In re Noonan [Case No. 10,292]; In re Cook [Id. 3,151]. The same rule is well settled in other circuits, as will be seen by reference to Hunt v. Pooke [Id. 6,896]; In re Independent Ins. Co. [Id. 7,017]; In re Green Pond R. Co. [Id. 5,786]; In re McFarland [Id. 8,788].

There can be no doubt, in the light of these authorities, that Gorham, at the time he filed his petition, could have asked to have the firm adjudged bankrupt; that is, at the time he filed his voluntary petition in bankruptcy, on the 4th of May, 1878; and on the filing of such petition a rule would have been entered requiring Hollister to show cause why adjudication should not be entered against him and against the firm. This is clearly shown by the general orders in bankruptcy, which have been the rule of all the bankrupt courts since the bankrupt law went into effect, in June, 1867. Rule 18 reads as follows:

"In case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law, and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent, or has not committed an act of bankruptcy; and to take all other defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made

upon the petition, such copartner shall be required to furnish to the marshal, as messenger, a schedule of his debts and an inventory of his property, in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made." And on the return of this rule, no act of bankruptcy need be proven. It is sufficient if it be shown that the firm owed more than $300, and is unable to pay its debts in full.

This was held by Judge Drummond in the case (In re Noonan) above cited. So, too, the creditors of the firm could have filed an involuntary petition against both members, and had the firm adjudicated if an act of bankruptcy could have been alleged against the firm and proven. With these rights on the part of Gorham, or of the firm creditors, to bring Hollister and the firm into bankruptcy, I can see no escape from the conclusion that Hollister had a corresponding right to have the firm adjudicated. It seems very clear to me, that his right was co-extensive with that of Gorham, or co-extensive with that of the creditors of the firm, and that if Gorham or the creditors could have required the firm to be adjudicated, then Hollister can ask to be made a party to the adjudication, which Gorham has already obtained. His liability on the partnership debts was not extinguished, and he therefore had the right to invoke the aid of the court, both for the purpose of obtaining his own discharge, and also to protect the firm creditors.

What valid reason, then, can be urged against his right to intervene in the petition filed by Gorham? Gorham's neglect or refusal to join him in the proceedings cannot defeat his right, and when he makes known to the court by his petition sufficient facts to show that he ought to have been joined in the proceeding by which Gorham attempted to bring the copartnership assets and creditors before the court, it seems to me he has made out a right to become a party to those proceedings. He seems to me to have been a necessary party to the proceeding in order to enable the court to make a proper order for the distribution of assets between the firm and the individual creditors, and it is not proper for the court to allow a mere question of form or the manner in which he seeks thus to be made a party, to interfere with the substantial rights of Hollister, or of the creditors.

It is urged, however, with much earnestness, that there are no partnership assets; that by the sale, the assets of the firm became the individual property of Gorham, and that Hollister has estopped himself from saying that there are partnership assets, and from asserting that he is thereby entitled to become a party to these proceedings. Two answers to this position occur to me: First, that as between himself and the firm creditors, Hollister cannot estop himself by any dealings with Gorham from any duty he owes these creditors. By law Hollister is bound, and it is made his duty, to see that the partnership assets are properly applied to the payment of the partnership debts, and no dealing between himself and Gorham can estop him from exercising that duty. Secondly, that by the express written agreement between Gorham and Hollister, the assets are pledged to the payment of the debts of the firm, and Gorham is only made a trustee for the benefit of the creditors, to convert the assets, and pay the debts of the firm, and it is competent for either of these copartners to bring these firm assets into the bankrupt court, for the purpose of having them distributed in accordance with the bankrupt law [of 1867 (14 Stat. 517)] to the various creditors who are entitled to them.

Without further discussing the matter, then, I am of opinion that the register erred in holding that Hollister could not file this petition, and the exceptions to his finding in that regard are sustained, and an order should be made upon the petition and proofs, allowing Hollister to become a party to the petition in bankruptcy filed by Gorham, and that Hollister, and the firm of Hollister & Gorham, should be adjudged bankrupts on their own petition. No order will be made for the present in regard to the other petitions that have been filed.

It was urged on the hearing, that I should decide the ultimate question involved in this discussion, which is the application of the proceeds in the hands of the bankrupt court to the payment of the individual and the copartnership debts; but it seems to me that a decision at this time would be premature, as it would bind nobody, as there is, properly speaking, no question before the court to which that opinion could be made to apply, and error could not be assigned to any finding which I might now make as to the proper distribution of the copartnership assets. That will come up hereafter; but I am clearly of opinion, that the right of Hollister to be made a party to these proceedings must be conceded; and while the register seemed to be of opinion that the proper form of proceeding was for Hollister to have filed an original petition asking for an adjudication of the firm, and asking that Gorham should show cause as an indifferent or objecting member of the firm, why the firm should not be adjudicated; yet I can see no reason why that mere form, when it only reaches the same terminus after all, should be insisted upon in this case. It seems to me that Gorham, being in bankruptcy, having brought the firm assets and the firm creditors into the bankrupt court, it was the right of Hollister to be made a party to the proceedings which Gorham had initiated.

Case No. 5,625.

In re GORHAM.

[The case reported under above title in 2 N. Y. Leg. Obs. 388, is the same as Case No. 7,537.]

GORHAM (GILTNER v.). See Case No. 5,453.

GORHAM (LYNDON v.). See Case No. 8,640.

Case No. 5,626.

GORHAM v. MIXTER et al.

[Brunner, Col. Cas. 327;[1] 46 Jour. Fr. Inst. 254; 1 Am. Law J. (N. S.) 539; 19 Hunt, Mer. Mag. 296; 5 West. Law J. 525.]

Circuit Court, D. Massachusetts. 1848.

INFRINGEMENT OF PATENT—WHAT CONSTITUTES.

A patent for a combination has not been infringed unless defendant has used, constructed, and operated it in substantially the same way as under the patent; to change the form and obtain a new manner of operating, or to obtain a new and useful result, is subject to a patent.

[Cited in Stainthorp v. Humiston, Case No. 13,281; Crompton v. Belknap Mills, Id. 3,406.]

[Cited in Tillotson v. Ramsay, 51 Vt. 312.]

This was an action on the case for an alleged infringement of a patent [No. 1,503, granted to the plaintiff, Chester Gorham, March 3, 1840] for "an improvement in the machine for pressing palm-leaf hats." The defense set up was: First. That defendants [William Mixter and others] had not infringed; or, in other words, that the machine used by them was substantially different in its construction and mode of operation from the machine described in plaintiff's specification of claim in his letters patent. Second. That plaintiff was not the original and first inventor of the machine patented; but that the same was known and used prior to his supposed invention thereof.

The plaintiff made application in the autumn of 1839, and obtained his letters in March, 1840. The history of the art of pressing in this commonwealth, so far as it is known to witnesses, was traced from 1830 to the trial. In 1830 the machine in general use had three blocks for the hat, with a lever and a flat to each, and the pressing of the rim, crown, and top of the hat was performed separately, at three successive operations on the respective blocks, by removing the hat from block to block. These blocks were attached to revolving shafts, which were moved by hand or other power, as circumstances dictated; and the levers to which the pressing flats were attached were arranged and the pressing done by hand. In 1832 the plaintiff made an attempt to improve upon the old machine. He constructed a machine in which but one block was used, and made an angular flat to fit the side and top of the hat at the same time, thereby pressing the whole hat without removing it from the block. It did not appear in evidence, however, that by this arrangement the whole hat was pressed at one operation, without a change of flats. A similar machine to the last, though somewhat improved in its structure, was shown to have been put in operation in 1834 by one Brown, of Dana, Massachusetts, used for a time, and abandoned. Also, one Charles Rice, of Boston, testified for the defense that in 1835 he constructed a machine of the same general character, using one lever and one flat; that in 1836 he added the second lever and flat, making the two answer the purpose of three flats; and in 1838 he added the third lever and fourth flat. In this machine the block shaft was turned and the levers operated by hand, but the whole hat was pressed without changing flats. In 1837 the plaintiff invented and put in operation a machine with one block, three levers, and the same number of flats, by which the hat in all its parts was pressed by one operation. The shaft was moved by water-power, and the levers to which the flats were appended were fastened by a catch, so as to press upon the hat while it revolved in connection with the shaft, thus dispensing with the power of the operator, and in a measure acting automatically. In the machine patented by the plaintiff four flats, two for the rim on opposite sides, one for the side of the crown, and one for the top are attached to a sliding frame, which by means of a lever is brought to and removed from the hat block at pleasure. The hat is placed on the block with a table for the rim on a vertical rotating shaft. After the hat is placed the sliding frame is brought forward by means of the lever, bringing all the flats to their relative and proper position over and against the hat. Then another lever is disengaged from a catch, which permits a weight to act upon a third lever, which in its turn acts upon the vertical shaft surmounted by the hat, and brings the hat in contact with the flats while the shaft revolves, and thus the pressing is performed. After being thus put in motion no further attention from the operator is required until the hat is sufficiently pressed. One man can operate three or four machines at the same time, pressing from twelve to fifteen hundred hats per day, while on the old hand machine one man could ordinarily press but five hundred a day. This machine, and what the plaintiff contended were modifications of it, came into general use soon after its construction, and superseded all that had gone before.

The defendants claimed that the modification used by them was an original invention of one Paul Hildreth, formerly of Petersham, made subsequently to plaintiff's invention and patent. This was denied by the

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

plaintiff, who insisted that it was taken from his machine, with alterations and modifications, for the purpose of evading the patent; but under the ruling of the court it was immaterial as affecting plaintiff's right of recovery, whether an original invention or otherwise, being subsequent in point of time to plaintiff's invention and patent. The point most strenuously urged by the defendants was that their machine differed substantially from the one patented by plaintiff, and on this point, under the ruling of the court, the case turned. The question arose what plaintiff had claimed and patented, whether a machine as a machine, new in its structure as a whole, or merely a new combination of old parts; and if a combination merely, whether a combination effected by any mechanism, or a combination effected by the means, and operating in the particular manner described in his specification of claim. If the latter, the question of priority of invention was disposed of, for it was not pretended that any prior machine contained the same combination, constructed and operating in the same way. But it was contended on the part of defendants that if this construction were given to the claim, they did not infringe, as some of the elements of combination in their machine were constructed and operated substantially different from corresponding elements in plaintiff's. On the question of identity of machines, the plaintiff called as experts Thomas Blanchard and R. H. Eddy of Boston, and the defendants called Charles M. Keller of New York City.

Rufus Choate and H. E. Smith, for plaintiff.

B. R. Curtis and Cyrus Cummings, for defendants.

SPRAGUE, District Judge, charged the jury that the plaintiff had claimed and patented a combination, constructed and operating as described in his specification, and to that he was limited; that to constitute an infringement, the defendants must have used the same combination, constructed and operating substantially in the same way; that if they had used only two of the three elements of combination, it was not an infringement. Nor was it an infringement if any one or all their elements of combination were constructed and operated substantially different from plaintiff's. Yet a mere change in form or proportion, or a substitution of mechanical means or equivalents, in any one or all the elements, producing the same result, would not constitute a substantial difference within the meaning of the patent law. Nor would it be a defense, that they had added to the combination, or any element thereof, and made improvements, provided they used plaintiff's combination, constructed and operating substantially in the same way. Such additions and improvements, though meritorious, gave them no right to appropriate what belonged to another without making compensation. It was for the jury to say, in view of the evidence, under the instructions of the court, and from an inspection of the models before them, whether the defendants' machine did in fact contain the combination claimed and patented by plaintiff, constructed and operating substantially in the same way.

The jury returned a verdict for the plaintiff, and assessed damages at $1,110, $510 of which was for use of machines, and $600 for counsel fees.

GORHAM (OVERTON v.) See Case No. 10,626.

GORHAM (UNITED STATES v.). See Case No. 15,235.

Case No. 5,627.

GORHAM MANUF'G CO. v. WHITE.

[7 Blatchf. 513;[1] 1 Fent. Pat. 138; 2 Whitm. Pat. Cas. 392.]

Circuit Court, S. D. New York. Sept. 15, 1870.[2]

PATENTS FOR A DESIGN — TEST OF INFRINGEMENT —RESEMBLANCE.

1. The letters patent granted to John Gorham, Gorham Thurber and Lewis Dexter, Jr., July 16th, 1861, for a design "for the handles of table-spoons and forks," are not infringed by articles constructed, in design, in accordance with letters patent granted to Le Roy S. White, January 15th, 1867, for a design for the handles of spoons and forks, or with letters patent granted to said White, March 31st, 1868, for a design for the handles of spoons and forks.

[See note at end of case.]

2. The mere fact, that the resemblance between a patented design and another design is such as to mislead ordinary purchasers and casual observers, and to induce them to mistake the latter design for the former, is not enough to make the use of the latter an infringement of the patent. The test in regard to a patent for a design, on the question of its infringement is not the eye of an ordinary observer.

[See note at end of case.]

3. The same principles which govern in determining the question of infringement in respect to a patent for an invention connected with the operation of machinery, must govern in determining the question of infringement in respect to a patent for a design.

[Cited in Hartell v. Viney, Case No. 6,158.]

4. The proper test is substantial identity, in view of the observation of a person versed in the business of designs, in the particular trade in question.

[See note at end of case.]

5. A patent for a design must be for the means of producing a certain result or appearance, and not for the result or appearance itself.

[See note at end of case.]

In equity.

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

[2] [Reversed in 14 Wall. (81 U. S.) 511.]

Charles M. Keller and Charles F. Blake, for plaintiffs.

George Gifford, for defendant.

BLATCHFORD, District Judge. This suit is founded on letters patent granted to John Gorham, Gorham Thurber, and Lewis Dexter, Jr., July 16th, 1861, for a design "for the handles of table-spoons and forks." The completed spoon or fork consists of a bowl or fork, a stem, and an enlarged end, the stem being interposed between the enlarged end and the bowl or fork. The stem and the enlarged end constitute the handle. The stem is gradually but slightly increased in width from about the middle of its length towards each end, the swell being more sudden where it joins the bowl or fork. At the other extremity of the stem, where the enlarged end of the handle commences, a rounded shoulder spreads out on each side. The enlarged end then gradually spreads out on each side in concave lines. These lines afterwards gradually become convex to the widest part of the enlarged end. From this point they run back and inwards, and they finally unite to form a nearly semi-circular end. Along each edge of the stem and of the enlarged end of the handle, there is a small rounded moulding, and just within this a second moulding, and at the rounded shoulders, these mouldings, which look like wires, are united by two rosettes, having somewhat the appearance produced by twisting together the ends of wires, to unite them. At the end of the enlarged end of the handle, the two sets of mouldings from each side are turned into a rosette, the two rosettes coming in contact in the middle of the width of the handle, and a small rounded tip making the central finish. Between the two inner mouldings the surface is swelled, such swell being gradually flattened from the stem towards the widest part of the enlarged end of the handle. The patent claims "the design herein specified for the handles of spoons and forks, as set forth and represented."

The bill alleges, that the defendant [George C. White], has infringed the patent by selling spoons and other articles embodying the invention covered by the patent. The infringement is denied. Some of the articles sold by the defendant have been constructed, in design, in accordance with letters patent granted to Le Roy S. White, January 15th, 1867, for a design for the handles of spoons and forks, and the rest of them have been constructed, in design, in accordance with letters patent granted to the said White, March 31st, 1868, for a design for the handles of spoons and forks.

In the patent of 1867 to White, the handle is made with a comparatively long and narrow stem or shank, and with low rounded shoulders upon its side edges, at the points where the handle begins to expand or broaden, and terminates with a small rounded projection at the extreme end. Along the edges of the front and rear side of the handle is formed a single line, following the contour of the handle, and extending down upon the head of the fork or spoon in the form of a rounded angle, such angle extending further down on the rear than on the front side of the head. Along the sides of the broader part of the handle is formed a second line, terminating at each end with an inward curve and a bead. In the space between the end curves of such second lines and the outer line, where the latter follows the outline of the rounded projection on the end of the handle, a shield is formed, having a central longitudinal rib or raised line. There is, also, on each side of the enlarged end of the handle, a short curved line, starting from the end curve of the before-mentioned second line, and uniting with such line at the broadest part of the handle.

In the patent of 1868 to White, the stem or shank portion of the handle is made with two rounded formations along its side edges, constituting a raised border, which follows the contour of the whole handle. The stem or shank portion forms its junction with the upper or expanded portion of the handle by a swell on either side, of convex shape. These swells gradually merge in concave lines, which give a narrowed configuration to the expanded portion of the handle above the swells. Further up, the boundaries are continued by convex lines, which present a wider form, and the spread out portion finally terminates in a rounded or arched projection at the extreme end. Along either side of the broader portion of the handle, within the before-mentioned raised border, is a second line, following, for the most part, the contour of the border, but terminating at each end with an inward curve and a bead. In the space between the upper end curves of the before-mentioned second lines and the raised border, where it follows the outline of the projection on the end of the handle, a shield is formed, having a central longitudinal rib or raised line. There are also short curved lines, joining the end curves of the before-mentioned second lines with the broadest part of the handle.

The question to be determined is, whether the designs of the White patents are or are not substantially the same as the design of the plaintiffs' patent. Each design may properly be considered as composed of two elements —the outline which the handle presents to the eye when its broader face is looked at, and the ornamentation on such face. If the plaintiffs' design be compared with the White design of 1867, a general resemblance is found between such outlines in the two designs. In other words, if the ornamentation on the handle in the plaintiffs' design formed no part of such design, and such design were confined to the form of the outline before-mentioned, it would be difficult to say that the plaintiffs' design and the White design of 1867 were not substantially identical. But the moment the

ornamentations on the faces of the two handles come to be considered, striking differences appear between the plaintiffs' design and the White design. In the former, the outer thread is broken at the end of the handle, at the shoulders, and at the junction of the handle with the bowl; while in the latter, such thread is continuous around the entire handle, from the junction of the stem with the bowl or fork, back to the same point, it having there the form of a Gothic arch. In the former, the outer thread is, at the shoulders, turned inward, to form rosettes, which present the appearance of two parts twisted in together; while in the latter, the outer thread is continuous. In the former, there is, on the stem of the handle, on each side, extending from the shoulder to the bowl or fork, an inner thread, parallel with and inside of the outer thread; while in the latter, there is no such inner thread. In the former, the inner threads on the enlarged end of the handle turn outwards from each other towards the end of the handle, so as to form diverging scrolls; while in the latter, such inner threads, as they approach the end of the handle, turn inwards and form re-entering scrolls. In the former, the scrolls of the inner threads form, at the end of the handle, a part of the outline boundary of the handle; while in the latter, such scrolls are entirely inside of such outline boundary. In the former, the end of the handle is formed by a tip inserted between the two diverging scrolls into which the inner threads are formed; while in the latter, the continuous outer thread forms such extreme end. In the latter, a figure in the form of a shield is inserted between the scrolls into which the inner threads are formed and the outer thread; while in the former, no such figure is found, and no place exists where it could be inserted. In the latter, there is, on each side, a third and short thread, extending from the said scroll to the widest part of the handle; while no such thread is found in the former. In the former, the inner thread on the enlarged end of the handle abuts, at the shoulder next the stem, against the scroll or rosette into which the outer thread is there formed, and looks as if it were a continuation of the outer thread on the stem, passed under the said scroll; while in the latter, the inner thread on the enlarged end of the handle is, at the shoulder, turned into a scroll or rosette, and has no appearance of being a continuation of the outer thread on the stem. In the former, the inner threads on the stem unite in a swell or boss near the bowl or fork; while no such swell or boss is found in the latter. It is, also, to be noted, that, in the former, the outline at the end of the enlarged end of the handle has the form of a portion of a trefoil, while in the latter it has the form of a Gothic arch; and that, in the former, the surface of the enlarged end between the threads is swelled between the shoulders, and such swell is gradually flattened towards the widest part of the handle, so that the swell at such part is substantially different in appearance from the swell at the shoulders, while in the latter the swell is substantially the same from the shoulders to the broadest part of the enlarged end.

The differences thus observed between the plaintiffs' design and the White design of 1867, exist, also, between the plaintiffs' design and the White design of 1868. In addition, in the plaintiffs' design, the contour of the enlarged end of the handle spreads outward progressively from the shoulders until the widest part of the handle is reached; while, in the White design of 1868, the sides of the enlarged end tend inward for a distance after leaving the shoulders, and then spread outward to the widest part.

From the comparisons thus instituted, it appears, that the plaintiffs' design and the White design of 1867 are, in what has been called outline, very much alike, while they differ from each other, in a marked manner, in what has been called ornamentation; that the plaintiffs' design and the White design of 1868 differ from each other, in a marked manner, both in outline and in ornamentation; and that the two White designs differ from each other, in outline, in a marked manner, while they scarcely differ at all from each other in ornamentation.

There can be no doubt, on the proofs, that the plaintiffs' design is a very meritorious and salable one. The entire strength of their case, on the question of infringement, is put on the claimed ground, that the resemblance between their design and each of the two designs of White is such as to mislead ordinary purchasers and casual observers, and to induce them to mistake the one design for the other. It is urged, that the merit of a design appeals solely to the eye, and that, if the eye of an ordinary observer cannot distinguish between two designs, they must, in law, be regarded as substantially alike. In the present case, it is claimed, that the eye of the ordinary observer is and will be deceived, when looking at a handle of the plaintiffs' design and a handle of either of the designs of White, because, in addition to the resemblance in contour, the handles have all of them a threaded pattern around the edges, and small knobbed ornamentations at the shoulders, and small knobbed ornamentations near the end, and a pointed projection at the end, and that the general effect on the eye of the ordinary observer is not and will not be modified by the differences which have been pointed out.

It is impossible to assent to the view, that the test, in regard to a patent for a design, is the eye of an ordinary observer. The first question that would arise, if such a test were to be admitted, would be, as to what is meant by "an ordinary observer," and how he is to exercise his observation. One of the witnesses for the plaintiffs testifies, that the plaintiffs' design and the White design of 1867 are sufficiently alike to mislead ordinary purchasers as to their identity, but not on a second examination, and that, if an ordinary

purchaser did not have before him a sample of the plaintiffs' design, he would be apt to consider the White design of 1867 to be the same pattern as the plaintiffs' design. Another of the witnesses for the plaintiffs states, that he does not think that an ordinary observer would notice any difference between the two designs, on a casual observation. The expert examined for the plaintiffs testifies, that, in saying that the White designs are substantially identical with the plaintiffs' design, he means such an identity as would deceive him, when going, as a purchaser, to ask for one spoon and being shown another, and that, when he saw articles of the plaintiffs' design and of the White design of 1867 separately, he took them to be of the same design, until he laid them side by side and compared them minutely.

The same principles which govern in determining the question of infringement in respect to a patent for an invention connected with the operation of machinery, must govern in determining the question of infringement in respect to a patent for a design. A design for a configuration of an article of manufacture is embraced within the statute, as a patentable design, as well as a design for an ornament to be placed on an article of manufacture. The object of the former may solely be increased utility, while the object of the latter may solely be increased gratification to a cultivated taste, addressed through the eye. It would be as reasonable to say, that equal utility should be the test of infringement in the first case, as to say that equal appreciation by the eye should be the test of infringement in the latter case. There must be a uniform test, and that test can only be, as in the case of a patent in respect to machinery, substantial identity, not in view of the observation of a person whose observation is worthless, because it is casual, heedless and unintelligent, and who sees one of the articles in question at one time and place, and the other of such articles at another time and place, but in view of the observation of a person versed in the business of designs in the particular trade in question—of a person engaged in the manufacture or sale of articles containing such designs—of a person accustomed to compare such designs one with another, and who sees and examines the articles containing them, side by side. The question is not, whether one design will be mistaken for another by a person who examines the two so carelessly as to be sure to be deceived, but whether the two designs can be said to be substantially the same, when examined intelligently, side by side. There must be such a comparison of the features which make up the two designs. As against an existing patented design, a patent for another design cannot be withheld because, to a casual observer, the general appearance of the later design is so like that of the earlier one as to lead him, without proper attention, to mistake the one for the other. The same test must be applied on the question of infringement.

Applying these principles to the evidence in this case, and comparing the designs of White with the plaintiffs' design, it is satisfactorily shown, by the clear weight of testimony, that the designs of White are not substantially the same as the plaintiffs' design. The strength of the testimony of the witnesses on the part of the plaintiffs themselves, leads to this conclusion. The substance of the evidence of the most intelligent of them, persons in the trade, is merely to the effect, that the White designs are not substantially the same as the plaintiffs' design, but were intended to appear to be the same to an ordinary purchaser, and will so appear to him, but that a person in the trade will not be deceived, by the resemblance, into purchasing an article of the one design for an article of the others.

A patent for a design, like a patent for an improvement in machinery, must be for the means of producing a certain result or appearance, and not for the result or appearance itself. The plaintiffs' patent is for their described means of producing a certain appearance in the completed handle. Even if the same appearance is produced by another design, if the means used in such other design to produce the appearance are substantially different from the means used in the prior patented design to produce such appearance, the later design is not an infringement of the patented one. It is quite clear, on a consideration of the points of difference, before enumerated, between the plaintiffs' design and the designs of White, that each of the latter is substantially different from the former, in the means it employs to produce the appearance it presents. Such is the undoubted weight of the evidence, and such is the judgment of the court. The bill must be dismissed, with costs.

[NOTE. From this decree the Gorham Company appealed to the supreme court, where, in an opinion by Mr. Justice Strong, the decree was reversed. 14 Wall. (81 U. S.) 511. Justices Field, Miller, and Bradley dissented. The question as to what constitutes identity of design was fully considered with the aid of the testimony of the experts, and the application of the language of the patent acts of August 29, 1842 (5 Stat. 543), and of March 2, 1861 (12 Stat. 246).

[The mode in which the appearance of a design is produced was held to have very little to do with the salability of it. The appearance itself is the test of popularity. The patent here was for the product, and not for the elements entering into it. It is the effect upon the eye which gives such an article value. Sameness of appearance is the true test of identity of design.]

GORHAM, The JOSEPH. See Case No. 7,537.

Case No. 5,628.

Ex parte GORMAN.

[4 Cranch, C. C. 572.] [1]

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

WITNESS — ATTACHMENT AND PENALTY ON FAILURE TO OBEY SUMMONS—JUSTICE OF PEACE.

If a witness summoned by a justice of the peace of Washington county, to attend before him and testify in a suit for a small debt, fail to attend accordingly, the justice may issue an attachment returnable to the circuit court, who will impose the penalty of two dollars and sixty-seven cents, as required by the 8th section of the Maryland act of 1791, c. 68. The court cannot impose a higher fine.

[John B.] Gorman was summoned by T. C. Coote, Esq., a justice of the peace, to attend before him as a witness for the corporation of Washington against Robert Crook; and having failed to attend, the justice on the 11th of May, 1835, issued his attachment under the act of Maryland of 1791, c. 68, § 8, returnable to this court on the fourth Monday of May, instant, to which day this court stood adjourned. Mr. Gorman answered on oath, but did not purge himself of the contempt. The act authorizes the justices, at their discretion, to fine the offender any sum, not exceeding twenty shillings, current money, for every such offense.

The attachment was as follows: "District of Columbia, Washington County, ss. You are hereby commanded to attach John B. Gorman, and have him before the circuit court of the District of Columbia, for Washington county, on the fourth Monday of May, instant, to answer unto the United States of America, for a contempt by him committed, in not attending as a witness for the mayor, board of aldermen, and board of common council of the city of Washington, against Robert Clarke, before the subscriber, a justice of the peace in and for the said county, after being thereto legally summoned. Hereof fail not. Given under my hand and seal this 11th day of May, 1835. Clement T. Coote. (Seal.)"

THE COURT (nem. con.) imposed the fine of two dollars and sixty-seven cents, (being twenty shillings, Maryland currency.) And CRANCH, Chief Judge, said that he was of opinion that, as the case before the justice appeared by the attachment to be a case of small debt, recoverable in the manner provided for by the act of 1791, c. 68, the punishment of the witness could not be extended beyond that prescribed by that act.

GORMAN (KENNEDY v.). See Case No. 7,702.

GORMAN (LENOX v.). See Case No. 8,246.

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

Case No. 5,629.

GORMAN v. MARSTELLER.

[2 Cranch, C. C. 311.] [1]

Circuit Court, District of Columbia. May Term, 1822.

TRESPASS QUARE CLAUSUM FREGIT — DIFFERENT STATES—PROOF OF ENTRY.

1. In trespass quare clausum fregit, the plaintiff must prove a trespass in the county in which the suit is brought.

2. If the close lie partly in Virginia, and partly in the District of Columbia, the injury done in the Virginia part may be given in evidence under the alia enormia.

3. An entry into the District part with intent to do injury in the other part of the close, is unlawful, although without such intent, it would have been lawful.

Trespass quare clausum fregit. The close was called Spring Garden, the greater part of which was in Virginia, and the remainder in the county of Alexandria, in the District of Columbia. The entry upon the District part, was with intent to do an injury in the Virginia part; and without such intent, the entry would not have been a trespass.

THE COURT (THRUSTON, Circuit Judge, absent,) at November term, 1821, instructed the jury, 1st. That the plaintiff must prove a trespass in the county of Alexandria, in the District of Columbia.

2d. (CRANCH, Chief Judge, strongly doubting.) That the injuries done on the Virginia side of the line might be given in evidence under the alia enormia; and

3d. That an entry on the District part of the close, with intent to do the injury on the other part, was a trespass.

See Pope v. Davies, 2 Camp. 266; Bulwer's Case, 7 Coke, pp. 1a, 49; Doulson v. Matthews, 4 Term R. 503; Mostyn v. Fabrigas, Cowp. 164; Alves v. Hodgson, 7 Term R. 241.

Verdict for the plaintiff, $100.

A motion for a new trial, upon a suggestion of misdirection of the jury by the court, as to the admission of evidence of injuries done in Virginia under alia enormia, (those injuries being of themselves substantial causes of action in Virginia,) was argued at November term, 1821, by Mr. Mason, for defendant [Samuel A. Marsteller], and Mr. Wise, for plaintiff [John B. Gorman], and continued to May term, 1822, for consideration, when it was argued again before a full court, by Mr. Mason and Mr. Hewitt, for defendant, and Mr. Wise and Mr. Fendall, for plaintiff, when the new trial was refused.

CRANCH, Chief Judge, still doubting.

GORMAN (UNITED STATES v.). See Cases Nos. 15,236 and 15,237.

GORRELL (PREVOST v.). See Cases Nos. 11,400–11,405.

GORSLINE (KING v.). See Case No. 7,796.

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

Case No. 5,630.

GOSHORN v. ALEXANDER et al.

[2 Bond, 158.] [1]

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

DECEDENT'S DEBTS—DORMANT JUDGMENT — SUIT ON APPEAL BOND—RETURN OF SHERIFF —OHIO CODE OF 1853.

1. Under the statutes of Ohio, the widow and heirs of a deceased person, who are the recipients of property from the estate, are liable for his debts to the extent of such property, under the conditions and limitations of the statute.

2. The courts of the United States take cognizance of cases to enforce remedies given by a state statute, where the plaintiff who sues is a citizen of another state.

3. Suit was brought, in 1867, on an appeal bond executed in 1839, under the provisions of the statute of 1831 regulating judgments and executions which provided "that in all cases where judgment shall be rendered in the supreme court against the appellants . . . the successful party shall, before he brings suit on the appeal bond, issue execution against the principal debtor," etc. *Held*, that said provision was repealed by the Code of Ohio which took effect in 1853, yet being in force when the appeal bond was executed, it is the law of the contract, and applies to all bonds dated before the adoption of the Code.

4. The Ohio statute of 1831 makes it a condition precedent to the right to sue the surety in an appeal bond, that it shall appear by the return upon the execution that the principal in the bond had not property sufficient to satisfy the execution, and this court can not give it a construction in conflict with this requirement.

5. The statute referred to provides that an action on the appeal bond shall be barred after one year from the return of the execution that the principal has no property. Where an execution was issued against the principal on a dormant judgment by complainants, such execution and the return thereon were not nullities; they are voidable but not void.

6. A sheriff made the following return upon an execution: "Received this writ April 19, 1856, at four o'clock p. m., and on examination I find that the lands within described have all been sold under a proceeding in favor of Robert Boyd, in the court of common pleas, against the defendants and others; and as to the command for further levy, I have made search, and can find no property of the defendants, or either of them, in my bailiwick whereon to levy." *Held*, that it sufficiently appeared by the return upon the execution, that the defendants had not sufficient property to satisfy the writ.

7. A sheriff is protected from liability in obeying the command of an execution on a dormant judgment, and his proceedings can not be collaterally impeached, especially by the person at whose instance they have been commenced.

In equity.

John W. Okey, for complainants.

B. S. Cowan, for defendants.

OPINION OF THE COURT. The complainants [John and William Goshorn], citizens of the state of West Virginia, have filed this bill against Jane Alexander, as the widow of James Alexander and seven others, his heirs at law, citizens of the Southern district of Ohio, charging their liability to a debt, alleged to be due to the complainants, as the recipients and distributees of the estate of said James Alexander. The case is before the court on the bill and answer, and the exhibit and testimony. As to the material facts, there is no substantial controversy between the parties, and the questions arising are therefore mainly on the construction and legal effect of the facts. The facts are, in substance, that in September, 1839, the complainants recovered a judgment against J. and A. Sinclair, in the common pleas of Monroe county, for $2,589.64; from which judgment the said Sinclairs appealed to the supreme court, and executed an appeal bond, in which the said James Alexander was the surety. The condition of the bond was in conformity with the statute then in force, that the obligees should faithfully pay the amount that should be adjudged against the defendants in the supreme court. In October, 1839, judgment was entered against the Sinclairs in the supreme court for the same amount as in the common pleas; and upon the mandate to that court, execution issued on the judgment in the spring of 1840. Without noticing specially all the executions issued, with the returns made on them, and other intermediate proceedings, it will be sufficient to state, that between the date of the first execution and the month of August, 1856, various other executions issued, on which money was made. from time to time, still leaving a balance due on the judgment against the Sinclairs. The amount claimed as due when this bill was filed, including interest, is stated to be about $4,000. James Alexander died in 1841, and his widow, the said Jane Alexander, was appointed his administratrix. She made a final settlement of the estate in 1846, and no property or assets to be administered have come to her hands since. The claim of the complainants on the appeal bond has never been presented to the administratrix or allowed by any court. It is averred in the bill, that the judgment against the Sinclairs, having become dormant by the failure to issue execution, was revived in 1865, and that an execution afterward issued was returned no property found whereon to levy; and that until that return, no return of any execution against the Sinclairs showed they had not sufficient property to satisfy the judgment. It is also averred in the bill, and substantially admitted by the answer, that the defendants, as the widow and heirs of James Alexander, the surety in the appeal bond, received as such some real estate, and were also the distributees of a small amount of money, the proceeds of the personal property remaining in the hands of the administratrix after her settlement. There is some discrepancy between the averments in the bill and the answer as to the value of the real property which descended to them, and the amount received from the administratrix. This, however, does not affect the question of the legal

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

liability of the defendants, and does not here require further notice.

The ground on which the liability of these defendants is insisted on is, that there was at the time of the filing of this bill a valid and subsisting debt due to the complainants from the estate of James Alexander, the surety in the appeal bond, which was not presented, and could not have been presented to his administratrix, while acting as such; and that his widow and heirs are liable for such debt to the extent of the property received by them from the estate of said Alexander. That under the statutes of Ohio, which must control this question, the widow and heirs of a deceased person, who are the recipients of property from the estate, are liable for his debts to the extent of such property, under the conditions and limitations of the statute, is not disputed and can not be doubted. Such has been the law in Ohio, either by statutory provision or otherwise, from the first organization of the state. The act of 1850 relating to executors and administrators distinctly provides such a remedy. Sections 232 and 233 of this act (Swan & C. Ohio St. 610) declare, in substance, that a creditor after the settlement of a deceased debtor's estate, and after the expiration of the time limited for the commencement of an action against the executor or administrator, shall have a remedy against the widow, heirs, devisees, or legatees of the decedent to the extent of property received by them, if no suit could have been brought against the executor or administrator, or for which no other provision is made by law. The right to sue in such case is limited to one year after the cause of action accrued. And by section 235, if more than one person is liable, the proceeding by the creditor shall be by bill filed on the chancery side of the court of common pleas.

There are several grounds of defense urged by the defendants. Among these, the principal are (1) that this court has not jurisdiction of the case; (2) that the action is barred by the Ohio statutes of limitation; (3) that a court of chancery will not entertain the complainants' claim, by reason of the lapse of time since the occurrence of the transactions involved, and the consequent staleness of their demand. These points, with some others of less significance, have been discussed by the counsel on both sides at great length and with much research. It seems to the court, however, that there is one view of this case, arising under the Ohio statutes, to which I shall presently advert, that is decisive, and which will save the court the labor of considering the other numerous points made. In advance of the consideration of this point, it is proper to say that I have no difficulty on the question of the jurisdiction of this court. The courts of the United States take cognizance of cases to enforce remedies given by a state statute, where the plaintiff who sues is a citizen of another state. This doctrine is conclusively settled by numerous decisions of the supreme court of the United States, and is not open to question. [Clark v. Smith] 13 Pet. [38 U. S.] 195; [McNutt v. Bland] 2 How. [43 U. S.] 9; [Huff v. Hutchinson] 14 How. [55 U. S.] 586; [Fitch v. Creighton] 24 How. [65 U. S.] 159.

I propose now briefly to consider whether the claim asserted in the complainants' bill is barred by any Ohio statute of limitations. The statute in force when the appeal bond was executed in 1839 was passed in 1831, being the act to regulate judgments and executions. 3 Chase, 1715. Section 27 of this act provides: "That in all cases where judgment shall be rendered in the supreme court against the appellant . . . . the successful party shall, before he brings suit on the appeal . . . . bond, issue execution against the principal debtor; and if, by the return upon the execution, it shall appear that the principal debtor has not goods and chattels, lands and tenements sufficient to satisfy the same, the successful party may then commence suit on the appeal . . . bond." Although this provision was repealed by the Code which took effect July 1, 1853, yet being in force when the appeal bond was executed, it is the law of the contract, and applies to all bonds dated before the adoption of the Code. 1 Ohio, 236; 6 Ohio, 536; 7 Ohio, 247; [Bronson v. Kinzie] 1 How. [42 U. S.] 311; [McCracken v. Hayward] 2 How. [43 U. S.] 608; [Gantly v. Ewing] 3 How. [44 U. S.] 707; [Howard v. Bugbee] 24 How. [65 U. S.] 461. The statute just cited makes it a condition precedent to the right to sue the surety in an appeal bond, that it shall appear by the return upon the execution that the principal in the bond had not property sufficient to satisfy the execution. It is obviously a very important question in this case, in reference to the operation of the statute of limitations, when the right of action as against these defendants accrued. They are sued as the widow and heirs of the deceased surety in the appeal bond; and the Ohio statute of 1840, relating to executors and administrators, before cited, limits the right to sue in such a case to one year after the right of action accrued. Now, in behalf of the complainants, it is insisted, first, that no evidence of the insolvency of the principal in the appeal bond, except the return of an execution showing such insolvency, can be considered by the court, as that is the requirement of the statute; and, secondly, that there was no such return to any of the numerous executions issued until the year 1865; and that this suit, having been brought within one year after such return, is not barred by the one year's limitation of the act of 1840 before referred to. On the other hand, the counsel for the defendants strenuously insist that if it reasonably appears as a matter of evidence, by the returns of the executions or otherwise, that between 1840, when the first execution issued, and the year 1865,

when the last execution against the principal was returned, that the principal in the appeal bond was insolvent, and that the complainants failed to bring suit for one year after such insolvency appeared, their right of action against the defendants, as the widow and heirs of the deceased surety, is barred.

There is certainly great force in the reasoning of the defendants' counsel on this point in the mere equitable view of this case. It was obviously the intention of the legislature in limiting the right to sue the widow and heirs to one year after the insolvency of the principal, to enforce promptness on the part of the creditor in the assertion of his rights as against the representatives of a deceased debtor. It was a just and wise policy to protect them from annoyance and litigation after being in peaceable possession of their portion of the estate of the decedent. But if the statute has prescribed the evidence by which alone the insolvency of the principal can be established, and as the condition on which the surety or his representatives shall be liable to suit, such statutory requirement is obligatory on the court. It is undoubtedly true that, looking to the returns of some of the numerous executions and orders of sale issued against the estate of the principal, there is a strong presumption that all his property had been exhausted prior to 1856, and that he was at that date actually insolvent. I can not take time to refer to these various executions and orders of sale—some sixteen in number—and the returns made to them. In March, 1841, the sheriff returned on an execution against the principal, "No goods or chattels found whereon to levy;" but neglected to return that there was no real estate subject to levy. Between that date and the year 1845, numerous other executions issued on which small sums of money were collected, but none of which showed that the principal had any property, real or personal. In 1846, one Boyd filed a creditor's bill against the Sinclairs, making these complainants and other creditors parties. It appears that a decree was entered in the case for the sale of all the property of the Sinclairs; and upon orders of sale issued in the case some real property was found, the last of which was sold in 1855. Now these proceedings certainly establish the fact of the actual insolvency of the Sinclairs, the principals in the appeal bond, in 1855, and ten years prior to the commencement of this suit. But up to that time, the fact of their inability to pay the judgment was not established by the return of an execution showing that fact. The statute referred to requires this in clear terms, and the court can not give it a construction in conflict with this requirement. Indeed, the decisions of the supreme court of Ohio on this statute are decisive of this question. That court has held in several cases that nothing short of the return of an execution against the principal can be received as evidence of his insolvency, and that such return is necessary as the condition on which alone suit can be brought against the surety. 13 Ohio, 135; 17 Ohio, 244. But it is insisted by the counsel for the defendants that to an execution issued on April 9, 1856, there is an unequivocal return that there was no property, personal or real, of the Sinclairs to be found, and that upon such return a right of action against these defendants accrued. This was nine years prior to the commencement of this suit, and it is claimed that the statute referred to operates as a bar to the action. It appears that on April 28, 1856, the sheriff made the following return upon an execution: "Received this writ April 19, 1856, at 4 o'clock p. m., and on examination I find that the lands within described have all been sold under a proceeding in favor of Robert Boyd, in the court of common pleas, against the defendants and others; and as to the command for further levy, I have made search and can find no property of the defendants, or either of them, in my bailiwick whereon to levy." This return proves clearly the insolvency of the Sinclairs in April, 1856. It is conceded that no other execution issued on the judgment until the year 1865, and after the lapse of about nine years. In that year the judgment was revived, and another execution issued a short time before the commencement of this suit, which was returned, "No property."

The important—and, in one aspect, the controlling—question in this case is, whether the return of the execution of 1856, showing that the Sinclairs then had no property, can be received as evidence of that fact within the requirement of the statute of Ohio. If it can be so viewed, a cause of action accrued to these complainants immediately upon the return of the execution, as against the widow and heirs of the deceased surety in the appeal bond. The statute already referred to provides that the action shall be barred after one year from the return of the execution that the principal has no property. It is admitted in the case that when the execution of 1856 issued, no execution had been issued for five years, and consequently that the judgment was dormant under the statute of Ohio. And the argument of the counsel for the complainants, in avoidance of the one year's limitation, is, that the execution and the return upon it were for all purposes mere nullities, and that consequently no right of action accrued against the widow and heirs of the deceased surety. If this view is sustainable, it follows that the action is not barred by the statute, as this suit was commenced within one year after the return of "No property," to the execution of 1865. But I do not assent to the proposition that the execution and return of 1856 were nullities, in view of the question before the court. An execution upon a dormant judgment and

proceedings under it are undoubtedly voidable, but not absolutely void. They will be set aside on application to the court from which the execution issued; but until that is done they can not be treated as nullities. The complainants in this case—plaintiffs in the judgment—did not choose to consider the judgment as dormant, in the sense that an execution could not issue upon it. It was on their application that the execution issued, and was placed in the hands of the sheriff for service. The sheriff returned in due form, that after search for property on which to levy, none could be found. Now, I understand the law to be well settled, that a sheriff is protected from liability in obeying the command of an execution on a dormant judgment. If property is levied upon and sold, on such an execution, the title of the purchaser will be good, if there is no direct application to the proper court to vacate the proceedings. They are so far in the nature of judicial proceedings, that they can not be collaterally impeached, especially by the person at whose instance they have been commenced. This question was distinctly before the supreme court of New York in the case of Woodcock v. Bennett, 1 Cow. 711. In that case there had been a sale of property on an execution issued upon a dormant judgment. The judge, in his opinion, says: "The validity of the sale turns on the question, whether the execution is to be considered as void or voidable, more than a year and a day having elapsed after judgment and before execution, and there having been no revival by scire facias, I am of opinion that, for this cause, the execution was voidable merely, and that all legal acts done under it, before it was set aside, were valid; and consequently the sale can not be impeached on this ground." The same point had been previously ruled in New York, and seems to be the settled law in that state. 16 Johns. 537; 8 Johns. 361; 3 Caines, 271. And I am not aware that any contrary decision has been made by the courts of Ohio. The cases are numerous in the Reports of the supreme court of the United States, and other courts of the highest authority, that no judicial proceeding can be collaterally impeached. This doctrine is so well known and acquiesced in, that it seems useless to cite the cases in which it has been held. The return of "No property" to the execution of 1856 against the Sinclairs, must be viewed as a compliance with the statute, making it a condition precedent to a suit against the surety in an appeal bond, that there should be such a return. A right of action, therefore, accrued to the complainants in 1856. This suit was not brought until 1865, nine years after the right of action accrued, and is consequently barred by the limitation act referred to.

This conclusion renders it unnecessary to consider the other defenses asserted by the defendants. They set up in their answer, and it is strenuously urged in argument by the defendants' counsel, that the lapse of time since the origin of the complainants' claim, and the intervening facts connected with it, are a valid defense to a decree in their favor. If the rights of these parties stood alone on that ground of defense, I do not see how it could be sustained within the settled principles of equity jurisprudence. Although there has been a long period intervened between the judgment against the parties to the appeal bond, there is no proof of such negligence by the plaintiffs in the judgment as would invalidate their claim, on the ground of its staleness. Unless the failure of the complainants to sue within a year after their right of action against the surety accrued can be regarded as negligence, they seemed to have pursued their claim with great pertinacity and a good degree of diligence. Yet there are certainly some equitable views of this case that might properly induce a chancellor to withhold a decree for these complainants, unless demanded by the clearest and most stringent principles of law. I do not propose to consider minutely the facts leading to the conclusion, that a decree against these defendants would operate with great hardship on them. In a mere equitable aspect of the case, there are some facts which, though not a defense to the action, are significant and not wholly unworthy of notice. The suit is against the representatives of a deceased surety in an appeal bond executed more than twenty-five years before the bringing of this suit. The estate of the deceased surety was finally settled by his administratrix in 1846, and she was discharged from her trust, without any presentation of the claim of the complainants against the estate. Indeed, it is in evidence that in 1845, one of the complainants assured Mrs. Alexander, the administratrix, that she should not be troubled with any claim against her husband's estate on account of his suretyship in the appeal bond. Upon the final settlement of James Alexander's estate, some land, not exceeding $2,000 in value, was apportioned to the widow and some six or seven children, together with a trifling sum as the proceeds of the personal property. And from 1846 to 1865, they have been in the quiet enjoyment of their scanty inheritance. Another fact is, that nearly the whole of the $4,000, now claimed of these defendants, is for interest which has accumulated during the long period in which these transactions have been in progress. The judgment rendered against the Sinclairs, in 1839, on the appeal bond was between $2,500 and $2,600; and it appears that the sums paid upon the judgment and collected on execution and orders of sale, from time to time, amounted to $2,310, leaving less than $300 of the principal of the judgment yet due. In view of these facts, it is not perceived that upon abstract questions of equity, these complainants ought, at this late day, to insist

upon a decree, which shall strip the widow and heirs, who are defendants in this case, of the pittance received as their inheritance, and of which they have been in the undisturbed enjoyment for more than twenty-five years. Upon the whole, the bill must be dismissed at the costs of the complainants.

GOSLEE v. SHUTE. See Case No. 8,958.

GOSLER (UNION BANK OF GEORGETOWN v.). See Case No. 14,358.

GOSS (BUCKNAM v.). See Case No. 2,097.

GOSS & P. MANUF'G CO. v. GERHARD. See Case No. 5,843.

GOSSLER (DELAWARE MUT. SAFETY INS. CO. v.). See Case No. 3,766.

Case No. 5,631.

GOSSLER et al. v. GOODRICH.

[3 Cliff. 71.] [1]

Circuit Court, D. Massachusetts. May Term, 1867.

CUSTOMS DUTIES—REPEAL—ASSESSMENT—"BOUND TO THE UNITED STATES."

1. Where an act specified that certain duties and rates of duty should be imposed upon certain imports in lieu of the duties heretofore imposed. *Held*, that the language was tantamount to a repeal of the prior rates of duty.

[Cited in Washington Mills v. Russell, Case No. 17,247.]

2. A person purchased certain sugars in a foreign port, and expressed an intention of shipping them to the United States, and the charter-party was for a voyage to a certain foreign port for a cargo, thence to New York or Boston as ordered. Before the ship sailed from the port at which she was lying, a stipulation was added to the charter-party, giving the charterers the option of sending the vessel to Falmouth for orders to discharge at one of the several enumerated foreign ports. Before the departure of the ship, the purchaser notified the parties through whom the purchase was made, that the vessel would not go to America. The bill of lading and all the papers were made out to send the vessel to Falmouth for orders, and the goods were consigned to Hamburg. When the ship arrived at Falmouth the purchaser then ordered her to proceed to Boston, where she arrived January 22, 1862. Duties upon the cargo were assessed and collected according to the act of December 24, 1861. *Held*, that such assessment was correct.

This was an action of assumpsit [by John H. Gossler and others] against the defendant [John C. Goodrich], the collector of the port of Boston, to recover the sum of $29,112.04, part of the sum of $40,350.70 paid, under protest, as duties upon a cargo of white and brown sugars, and was presented to the court upon facts agreed. The goods were imported in the ship Southern Cross. Markwald & Co. purchased the sugars under the directions of one Henry Devens, agent of the plaintiffs, and also a general agent of Gossler & Co., of Hamburg, of which firm two members were also members of the firm of Gossler & Co., of Boston. When the ship was chartered she was lying at Macao, and the charter-party was for a voyage to Bangkok for a cargo, thence to proceed to New York or Boston, as ordered, for the sum of $13,500 in American currency. Before the ship sailed, however, from the port where she was lying, an additional stipulation was, at the request of Devens, appended to the charter-party, giving the charterers the option to send the vessel to Falmouth for orders, to discharge at London, Hamburg, or Bremen. In such case the freight was to be £3,750, and the stipulation was, that orders should be given before the departure of the vessel from Bangkok. Before the departure of the ship, Devens decided that the cargo should be sent to Falmouth for orders, and caused Markwald to be notified that the vessel would not go to America, but to Europe. Pursuant to his direction, the bill of lading, and all the papers were made out to send the vessel to Falmouth for orders, and the goods were consigned to Berenberg, Gossler & Co., Hamburg. It was agreed that the vessel accordingly proceeded to Bangkok, was there loaded, and then sailed for Falmouth, under the provision appended to the charter-party giving the charterer that option. When she arrived there she was ordered by Devens, who had previously reached London, to proceed to Boston, where she arrived January 22, 1862, and on the 25th of the same month her cargo was entered for warehousing on behalf of the plaintiffs. The plaintiffs contended that section 5, c. 68, Acts 1861 (12 Stat. 179), was operative in reference to the sugars; that the sugars were actually on shipboard and bound to the United States on the 5th of August, 1861, and therefore were liable to a duty of three fourths of a cent per pound, under section 5 (P), c. 68, Act 1861 (12 Stat. 179).

C. L. Woodbury and M. E. Ingalls, for plaintiff.

The goods were bound to the United States. What is the meaning of "bound to the United States," as used in the act of congress of 1861? Does it mean that these goods upon the 5th of August, 1861, were on their way to the United States, and in the most direct course between Bangkok and this country? Not by any means. It means simply this: that these sugars upon that day were intended for the markets of the United States, no matter when or by what route they were to be brought here. And all the plaintiffs have got to do is to furnish proof of that fact, such as would be sufficient to satisfy a jury of twelve men. Were these sugars, then, upon the 5th of August, 1861, intended for the markets of the United States? It is apparent from the facts, that on the 5th of August, 1861, these sugars in question, on board the Southern Cross, were intended for the United States market. That this intention was

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

liable to be defeated by certain contingencies has no weight, because those contingencies did not take place, and the sugars did arrive here. Then arises the further question, whether the fact that these sugars were imported by the way of Falmouth, not the most direct course, can have any influence? Gant v. Peaslee [Case No. 5,212]; Millar v. Millar [Id. 9,546]; Grinnell v. Lawrence [Id. 5,831]; Wilbur v. Lawrence [Id. 17,635]. Again, if these sugars were not intended for the United States market, on the 5th of August, when was such intention formed? For the sugars are here, and they could not have come here, unless brought here intentionally by the importers. Was this intention formed at Falmouth? Then these sugars were imported from England, and the collector should have ascertained their value in the principal markets of that country. That he did not do this, when the facts were fresh in his mind, and all the parties to the transaction before him, is convincing proof that he did not believe at that time the theory which has since been devised in this case. The facts are in favor of the plaintiff upon this second proposition, and likewise the equities of the case. The fifth section of the act of congress of August 5, 1861, was not repealed upon the 3d of May, 1862, but was in full force and effect. It is not repealed by this statute by express words. Is it repealed by implication? Repeals of statutes by implication are not favored, unless there is a positive repugnancy between the two acts. The question to be considered then is this: Is there so clear a repugnancy between the act of congress of December, 1861, and the 5th section of the act of August, 1861, that the earlier statute must give way to the latter? There is no repugnancy whatever, when we look at the intention of congress and the spirit of their legislation. In 1861, congress made a radical change in the spirit of its legislation as to the collection of duties on imports. Previous to that time congress had made the arrival of goods the date upon which new duties should attach. That is, if a new duty act happened to be passed upon the 20th of March, then all goods which arrived after the 19th of March were subject to the new duties. By this rule goods became subject to new rates of duties, not when the importation commenced, nor when it ended, but in the midst of the act. In 1861, congress fixed the period of importation to be from the time when the goods were put on shipboard in the foreign country, until the duties were paid at the custom-house, and they also established the rule that legislation as to duties, whether increasing or decreasing them, should not operate upon goods in process of importation, unless it was so declared in specific words. The first act of congress which inaugurates this policy is that of March 2, 1861. The real preamble to this act is in the fifth section, which is also the enacting clause for that tariff. It is in these words: "There shall be levied, etc., on goods, wares, and merchandise, herein enumerated and provided for, imported from foreign countries, the following rates and duties."

The meaning of the words "imported from foreign countries" is given in the thirty-third section, and is there defined to mean goods whose importation had not commenced by going on ship-board. By saying in the thirty-third section that that act should not apply to goods on shipboard or in warehouse, they say that the words of the enacting clause should be like this: upon goods as to which the act of importation has not commenced by going on shipboard, the following duties shall be levied, etc. The same language is used in the act of August 5, 1861. That this was the intention of congress is further seen by the joint resolution of January 11, 1862. The act of December 24, 1861, increased the duties upon tea, coffee, and sugar. The treasury department construed it to impose the new duties upon goods in warehouse, and the attention of congress was called to this construction, and they passed the joint resolution referred to, expressly negativing the idea that they intended these new duties to apply to goods in process of importation. By examining the act of July 14, 1862 [1 Stat. 543], we shall find further and stronger proof of this intention. In the twenty-first section they expressly repeal a portion of the fifth section of the act of August, 1861, thus showing that they did not consider it repealed. The language in the first part of the section is very significant with reference to the matter under discussion. It is in these words: "Goods which shall remain in the public stores or bonded warehouse for more than three months from the date of original importation, if withdrawn for consumption, and all goods on shipboard on the first day of August, shall be subject to the duties prescribed by this act." By the first section the act is to take effect on the 1st of August. Now if no change in legislation had been made by congress up to that time, why specify that goods on shipboard on the 1st of August should be subject to the duties imposed by that act? This would follow as of course if the old system of legislation was in force. It must be clear to every mind that why congress particularly specified goods upon shipboard in this section was because they thought the exigencies of the government needed these duties, and they could not be collected unless mentioned.

G. S. Hilliard and W. A. Field, for defendant.

The date of the arrival of merchandise within the port of entry and discharge is the date of importation, and chapter second of the act of congress of 1861 (12 Stat. 330), took effect on December 24, 1861, the day of its passage; and all sugars arriving at a port of entry and discharge within the United States from a foreign port, on and after December 24,

1861, were subject to the duties expressed in said act, which are the duties actually levied. U. S. v. Arnold [Case No. 14,469]; Id. 9 Cranch [13 U. S.] 104; U. S. v. Vowell, 5 Cranch [9 U. S.], 368. The only provisions of law relating to the duties on sugars, intervening between the acts of the 5th of August, 1861, and the 24th of December, 1861, are contained in section 1, c. 45, Acts 1861 (12 Stat. 292). Section 33, c. 68, Acts 1861 (12 Stat. 199), is in many respects similar to section 5, c. 45, Acts 1861 (12 Stat.), and the two are exceptional provisions in the statutes relating to customs. The phraseology in chapter 2, Acts 1861, to wit, "that from and after the date of the passage of this act, in lieu of the duties heretofore imposed by law, on articles hereinafter mentioned, there shall be levied, collected, and paid, on the goods, wares, and merchandise herein enumerated and provided for, imported from foreign countries, the following duties and rates, that is to say," is substantially the same phraseology used in all acts relating to customs duties, passed since the establishment of the government, some acts going into effect on the day of passage, and others on a day named in the act. Section 1, Act 1789, (1 Stat. 24); section 1, Act 1790 (1 Stat. 24); section 1, Act 1791 (1 Stat. 199); section 1, Act 1792 (1 Stat. 259); section 1, Act 1794 (1 Stat. 390); Act 1795 (1 Stat. 411); section 1, Act 1797 (1 Stat. 503); section 1, Act 1800 (2 Stat. 84); section 2, Act 1804 (2 Stat. 299); Act 1812 (2 Stat. 768); section 1, Act 1816 (3 Stat. 310); section 1, Act 1824 (4 Stat. 25); section 1, Act 1828 (4 Stat. 270); section 2, Act 1832 (4 Stat. 583); Act 1841 (5 Stat. 463); sections 1, 2, et seq. Act 1842 (5 Stat. 549); sections 1, 2, et seq. Act 1846 (9 Stat. 42); section 1, Act 1857 (11 Stat. 192); Act 1861 (12 Stat. 178, §§ 5-25, 33); Resolution No. 15, § 2 (12 Stat. 252); Act 1861 (12 Stat. 292, c. 45, §§ 1, 5) the act being an act to provide increased revenue; Act of 1863 (12 Stat. 742); section 1 et seq. Act 1864 (13 Stat. 202); section 2 et seq. Act 1865 (13 Stat. 493); Act 1866 (14 Stat. 8); section 1, Act 1866 (14 Stat. 328); Act 1867 (14 Stat. 559).

It thus appears that the time of arrival of goods within a port of entry and discharge is the date of importation, and the duties established by law at the time of such arrival are the duties imposed on such goods; that congress has not in general regarded the time of exportation in levying duties, and that section 33 of the act of March 2, 1861, and section 5, act of August 5, 1861, are exceptional in reference to regarding the time when goods were put on shipboard, and bound to the United States, as the time at which duties accrue; that in reference to tea, coffee, and sugar that exceptional policy was abandoned by the act of December 24, 1861 (chapter 2, Act 1861); and in reference to all goods by the act of July 14, 1862, c. 163, § 21. Chapter 2, 1861, is entitled "An act to increase the duties on tea, coffee, and sugar." Sections 33 and 35, ubi supra, do not purport to give a statutory definition of the word "imported" in the revenue sense; the language is not "that goods, wares, and merchandise shall be held to be imported when they are actually on shipboard and bound to the United States." These sections leave the meaning of the phraseology—"there shall be levied, collected, and paid on goods, wares, and merchandise imported into the United States, the following duties, that is to say"—unaltered, and that meaning was established and well known. These sections are exceptions in terms from the legal operation of such a phraseology. Chapter 2, 1861, ubi supra, does not in terms impose additional duties, but duties in lieu of duties, and contains no exceptions, and establishes a duty of two and a half and three cents on all brown and white sugars imported on and after December 24, 1861. But even if the law were as the plaintiffs contend, the facts do not bring this case within the language of the said section five. The goods were not bound to the United States, and this fact alone is decisive. The sugars were consigned to J. Berenberg, Gossler & Co., of Hamburg, and not to persons within the United States. Until after the order was given that the Southern Cross should proceed to Boston, these sugars were as truly bound to London, Hamburg, or Bremen, as to Boston or New York. These facts in this case are distinguished from Gant v. Peaslee [Case No. 5,212]; Millar v. Millar [Id. 9,546]; Warren v. Peaslee [Id. 17,198]; Grinnell v. Lawrence [Id. 5,831]; Griswold v. Maxwell [Id. 5,838]. See Sampson v. Peaslee, 20 How. [61 U. S.] 571; Irvine v. Redfield, 23 How. [64 U. S.] 170. The construction that a vessel must be actually bound, in the sense of actually proceeding to the United States, gives force to all the words of the clause of section 5, and seems analogous to the construction put upon other clauses of the statutes relating to customs.

CLIFFORD, Circuit Justice. Raw sugar, called "muscovado," and brown sugar, not advanced beyond the raw state, under the act of the 2d of March, 1861, was subject to a duty of three fourths of one cent per pound. Refined sugars were subject to two cents per pound, whether loaf, lump, crushed, or pulverized. 12 Stat. 479. All goods, wares, and merchandise, under the act of the 5th of August, 1861, entitled "An act to provide increased revenue from imports," which were actually on shipboard and bound to the United States, were subject to pay only such duties as were provided by law before, and at the time of the passage of that act. 12 Stat. 295. Rates of duty on sugars were increased by the act of the 24th of December, 1861; and the parties agree that the rates of duty assessed and collected in this case, are those expressed in that act, which went into effect at the date of its passage. The language of the provision is, "that from and after the date

of the passage of this act, in lieu of the duties heretofore imposed by law, on articles hereinafter mentioned, there shall be levied, collected, and paid on the goods, wares, and merchandise herein enumerated and provided for, imported from foreign countries, the following duties and rates of duty, that is to say," tea, coffee, and sugars, as therein classified and provided.

Observe that these "duties and rates of duty" are imposed in lieu of the duties heretofore imposed by law on the articles therein mentioned. Direct repeal would be no stronger, as it is expressly enacted that the increased duties and rates of duty shall be imposed in lieu of the duties heretofore imposed by law. Terms more explicit and comprehensive could not be employed, and the provision neither contains any exception, nor admits of any, without the necessity of resorting to positive legislation.

Goods actually on shipboard, and bound to the United States at the date of the prior act, were specially exempted from its operation, and were only required to pay such duties as were previously provided by law; but the act of the 24th of December, 1861, under which the duties in this case were assessed and collected, contains no such exception, and there is nothing in any other act of congress which affords any support to the theory of the plaintiffs.

Reference is made to the joint resolution of the 11th of January, 1862, as affording support to that theory, but it is clear that it cannot be construed to have any such effect, as it is expressly limited to goods warehoused at the date of the passage of the act, entitled "An act to increase the duties on tea, coffee, and sugar." Viewed as a provision for one class of goods only, and that a different one from the importation in this case, the argument from it is rather against the theory of the plaintiffs than in their favor. "Expressio unius est exclusio alterius."

Suppose it were otherwise, however, and that it can be admitted that the provision in the prior law, exempting goods actually on shipboard, and bound to the United States at the date of the new enactment, was in full force, still we are of the opinion that the plaintiffs ought not to prevail, because it is clear, we think, that the goods constituting the importation in this case were not, on the 5th of August, 1861, bound to the United States. Plaintiffs concede that they cannot prevail, unless the agreed statement shows that the goods were actually on shipboard at that date, and bound to the United States.

Having come to the conclusion that the goods were not at that date bound to the United States, it is not necessary to decide whether, on the facts agreed, they were, or were not, actually on shipboard, and we express no opinion on that point. Undoubtedly the case shows that the person who purchased the goods expressed an intention to make the purchase, and ship the goods to the United States; but the record contains the most plenary evidence that he changed his mind, and that the goods were actually purchased, shipped, and forwarded to Falmouth, without any definite intention to import them here, and with the right expressly reserved to discharge at London, Hamburg, or Bremen. They were invoiced in the name of a foreign house, and consigned to Berenberg, Gossler & Co., of Hamburg. Bills of lading were signed by the master, wholly inconsistent with the theory of the plaintiffs, and the vessel actually cleared for Falmouth, and for orders. The shippers were bound by the charter-party to make their election before the ship sailed, and they made it as required, and gave notice in writing.

Other questions were discussed at the bar, but in the view of the case we have taken it is not necessary to examine them, as the points actually decided dispose of the controversy. The duties were correctly computed and properly collected, and according to the agreement of the parties, there must be judgment for the defendant, with costs.

GOSZLER (MACKALL v.). See Case No. 8,835.

Case No. 5,632.

GOTTFRIED et al. v. BARTHOLOMAE et al.

[3 Ban. & A. 308; 8 Biss. 219; 13 O. G. 1128; Merw. Pat. Inv. 167; 10 Chi. Leg. News, 388; 6 Reporter, 390.] [1]

Circuit Court, N. D. Illinois. June 24, 1878.

PATENT—ANTICIPATION—INFRINGEMENT.

1. A simple, economical invention is not anticipated by a complex and expensive one. A stationary apparatus for surface-coating the interior of barrels, in which an air blast is forced up through a grate fire, and the escaping gases and products of combustion discharged into the barrel, to heat its surface, is not anticipated by a device wherein the air blast circulates through heated pipes, and passes thence into the barrel.

[Cited in Gottfried v. Phillip Best Brewing Co., Case No. 5,633; Same v. Crescent Brewing Co., 9 Fed. 762; Crescent Brewing Co. v. Gottfried, 128 U. S. 165; 9 Sup. Ct. 85.]

2. Letters patent No. 42,580, issued to John F. T. Holbeck and Matthew Gottfried, May 3rd, 1864, for an improved mode of pitching barrels, *held* to be valid, and to be infringed by round, portable machines producing and applying a similar blast for a similar purpose.

[In equity. Bills by Matthew Gottfried and others against Frank Bartholomae and others for the alleged infringement of a patent.]

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and by Josiah H. Bissell, Esq., and here compiled and reprinted by permission. Merw. Pat. Inv. 167, and 6 Reporter, 390, contain only partial reports.]

Banning & Banning, for complainants.
Jussen & Anderson, for defendants.

BLODGETT, District Judge. These are suits brought by the complainants as the owners of a patent issued by the United States to J. F. T. Holbeck and M. Gottfried, dated May 3, 1864 [No. 42,580], for an improved mode of pitching the inside of barrels. The complainants' invention consists of a device by which air is driven through fire by a fan or blower, where it becomes heated to a high temperature, whence it is forced by the blast into the barrels so as to heat the inside of the barrels sufficiently to melt the pitch or resin, which is used for the purpose of pitching the insides, so that it will readily flow into the cracks or pores of the wood. The cask is then closed and rolled until the melted resin has covered the entire inner surface. The complainants' device is a furnace, with grate bars in the bottom upon which the fire is built with anthracite coal or any other combustible; underneath the grate bars comes a pipe, to which is attached a fan or blower by which the blast of air is driven into and up through the ignited combustible —coal or wood, as the case may be—into the dome or air chamber over the grate, and from this air chamber a nozzle projects, to which the cask or barrel to be pitched is attached, by the nozzle being inserted in the bung hole, so that the air, which becomes heated by being forced through the fire, is expelled through the nozzle into the cask, thereby heating the inside of the cask to such an extent as to melt the pitch or resin.

The defendants' two devices embody applications of the same principle. One is a portable device in which the fan or blower is attached by a pipe at the bottom; the air is driven through the fire, there being a grate bar in the bottom, and the cask is attached upon the pipe. This is called the "Vogt Machine." The other, also portable, involves the same principle, but is so adjusted as to receive a larger number of casks, the casks being suspended upon hooks so that the air nozzles fit into the bung holes, and the air is driven into them. This is known as the "Shlaudeman Machine." The object of all these devices is simply to coat the inner surface of the cask with pitch or resin, so as to make it more capable of holding liquids, especially ales and beers.

It must be admitted, I think, that the devices—that of the complainants and those used by the defendants—are alike in their mode of operation and effect. There is no substantial difference in the principle upon which they operate; they both accomplish the same end by substantially the same means; that is, a blast of air driven through the fire and escaping into the cask. The defendants contest the novelty of the complainants' device, and in support of their position rely upon a patent granted in England to Robert Davison and William Symington in November, 1843, and upon the various devices for producing a hot air blast in furnaces, such as the Neilson blast and the various other hot air blasts used in smelting furnaces, where heated air is driven into the furnace for the purpose of securing a higher degree of heat and increasing the melting power of the furnace.

The Davison and Symington device was specifically arranged for the purpose of cleansing barrels. We have no model of that, but we have the specifications and drawings in connection with it. They show an arrangement for cleansing the inside of casks and barrels, and the inventors specially say that it is adapted to the cleansing of beer and ale casks particularly, so as to renovate them and make them available for further use. That device combined several applications. One was the use of hot air which was driven into the cask by a blast, in the same manner as in this case, except that the air was heated by being driven through heated tubes; that is, a nest or group of iron pipes was arranged in a furnace, and the pipes becoming hot, the air was driven through them into the cask, whereby the inner side of the cask became heated. By that it was claimed the must and various impurities were expelled. The same device, also, combined a mechanism for introducing a rough chain into the inner side of the barrel, and shaking or rolling the barrel with the chain inside, whereby the barrel was cleansed of impurities which stuck to the inside. Sometimes, instead of using the chain, they used gravel or any other substance by which attrition upon the inside of the cask could be obtained. A further device was connected with the same mechanism for driving steam at a high temperature into the cask for the purpose of still further cleansing.

All these devices were intended really to cleanse the inside of the barrel, and not to pitch it; but it is obvious that heating the inside of the barrels, so as to melt the pitch, could have been accomplished by the Davison and Symington process; that is, when you once conceive the idea of the necessity of the pitching or coating the inside of the barrel with any substance susceptible of being melted, it could be heated by the Davison and Symington process as readily as by the complainants' process; but the mechanism, it is noticeable, by which the heating was obtained is widely different.

The complainants' process is, perhaps, the simplest process by which air can be heated and then driven into casks, and so simple that one can hardly deny that they should have a patent upon it if they were the first to invent it. All you have to do is to apply a simple fan or blower, and drive the air through the fire. What the fire does not consume will, of course, escape into the cask in a heated condition, heated to the extent of the intensity of the fire. And one of the merits, so to speak, of the device is that by the very process of blowing or driving the air through

the fire, you increase the intensity of the fire, and therefore the intensity of the heat of the air which escapes into the cask. It is true that with the heated air will go some smoke and the products of combustion, such as the carbonic acid gas, etc., but for the purpose for which the complainants apply their device, that is not objectionable—the only object being to get the inner surface of the cask heated sufficiently to melt the resin or other substance with which it is desired to coat it. That is accomplished by this process readily. And while, as I have already said, the Davison and Symington process may produce the same results, yet they produce them by a different mechanism and a mechanism much more costly; it costs much more to make a machine, and fully as much if not more to operate it; you would have to produce heat enough in your furnace and around your pipes to make the air sufficiently hot, and then keep up that heat by an additional blast of air into your furnace in addition to the blast which drives the air into your cask. So that the two mechanisms, while they produce the same result and reach the same end, do it by two different processes. Therefore, I do not think the Davison and Symington device anticipates the complainants'.

As I have already stated, the defendants' devices are but other forms of the complainants' device. The complainants drive their air by a fan or blower through the fire upon the grate bars, into the cask to be heated; the defendants do the same and by substantially the same mechanism. The method of attaching the pipe at the bottom, or anywhere below the grate bars is the same, and undoubtedly an infringement of the complainants' patent.

It is urged that the Shlaudeman device is different, because that is a device by which the air can be driven directly from the fan or blower into the cask. That would simply drive cold air in, or at the most the air would only become heated to the extent of whatever heat there was in the chamber over the fire, as the air would not pass through the grate bars. But in so far as this machine provides for driving the air through the fire by turning a cock and closing the direct entrance into the chamber above the fire, the moment the upper aperture is closed, it becomes the complainants' machine to all intents and purposes.

I therefore find, that the infringement is clearly made out and that the complainants are entitled to the relief claimed. Injunctions will accordingly be granted, and references ordered to the master to take proof and report the damages the complainants have sustained by the defendants' infringement.

[For other cases involving this patent, see Gottfried v. Phillip Best Brewing Co., Case No. 5,633; Same v. Crescent Brewing Co., 9 Fed. 762; Same v. Miller, 10 Fed. 471, 104 U. S. 521.]

Case No. 5,633.

GOTTFRIED et al. v. PHILLIP BEST BREWING CO. SAME v. BLATZ. SAME v. JOSEPH SCHLITZ BREWING CO. SAME v. OBERMANN et al. SAME v. FORTUNE et al. SAME v. BARTHOLOMAE et al. SAME v. SCHOENHOFEN.

[5 Ban. & A. 4;[1] 17 O. G. 675.]

Circuit Court, E. D. Wisconsin. Dec. 1, 1879.

PATENTS—JOINT INVENTION—CHANGES IN ORIGINAL INVENTION—SPECIFICATION—"IMPROVED MODE OF PITCHING BARRELS."

1. To overthrow the presumption of joint invention raised by the filing of a joint application upon a joint oath, the evidence must be clear and unequivocal.

[Approved in Consolidated Bunging Apparatus Co. v. Woerle, 29 Fed. 451. Cited in Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co., 54 Fed. 693.]

2. Joint invention is the result of mutual contributions of the parties; and, if one suggests an idea in a general way and the other falls in with it, and, by his aid, develops and gives definite practical embodiment to it, the two may be considered joint inventors.

3. If a patented machine is torn down and afterwards rebuilt, and, in the rebuilding, changed so as to lose its identity and become substantially a new construction, its owner will not be authorized to use it under a license limited to the original machine.

4. Features of construction indispensable to the operation of a machine for the purpose for which it is intended, cannot be disregarded in determining whether such machine anticipates a subsequent patent.

5. The description in a prior patent or publication, to anticipate a subsequent patent, must embody substantially the same organized mechanism, operating substantially in the same manner as that described in the patent claimed to have been anticipated.

6. Old instruments placed in new and different organizations, producing in such situation different results, or the same results by a new and different mode of operation, do not prevent such newly organized mechanism from being patentable.

7. To justify a court in overthrowing a patent granted for what appears to be a new and useful invention or improvement, on the ground that the device has been anticipated by another and earlier invention, the court should be well satisfied by clear and credible testimony, that the alleged earlier invention actually existed; that it was a perfected device, capable of practical use, and that it was embodied in distinct form, and carried into operation as a complete thing, and was not merely an unperfected or abandoned experiment.

[Cited in Gottfried v. Crescent Brewing Co., 9 Fed. 763; Crescent Brewing Co. v. Gottfried, 128 U. S. 165, 9 Sup. Ct. 85.]

8. A rude machine constructed for the purpose of experiment, and subsequently broken up, deserted, and abandoned, cannot be regarded as such a perfected invention as will defeat a patent.

9. Particular changes may be made in the construction and operation of an old machine, so as to adapt it to a new and valuable use not

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

known before, and to which the old machine had not been, and could not be, applied without those changes; and, under these circumstances and conditions, if the machine, as changed and modified, produces a new and useful result, it may be patentable and upheld under existing laws.

10. Claims containing words referring back to the specification, must be construed in the light of the explanations contained in the specification.

11. A claim to "the application of heated air, under blast, to the interior of casks, by means substantially as described and for the purposes set forth," embraces the particular means and mode of operation described in the specification.

12. The validity of letters patent No. 42,580 granted to Matthew Gottfried and J. F. T. Holbeck, May 3d, 1864, for an improved mode of pitching barrels, reaffirmed.

[Cited in Gottfried v. Miller, 10 Fed. 472.]

[These were bills in equity brought by Matthew Gottfried and others against the Phillip Best Brewing Company, and against Valentine Blatz, the Joseph Schlitz Brewing Company, Jacob Obermann and others, Peter Fortune and others, Frank Bartholomae and others, and Peter Schoenhofen.]

Banning & Banning, for complainants.

Finches, Lynde & Miller and Jussen & Anderson, for defendants.

DYER, District Judge. The Issues and History of Cases.—These are cases involving the validity of a patent issued to complainants, as the alleged inventors of an improvement in pitching barrels. The four first entitled cases were commenced and are pending in this court. The three other cases are pending in the circuit court of the United States for the Northern district of Illinois, and, as all involve the validity of the same patent, it was stipulated that all should be heard together and decided by the court in this district, and that the same decrees might be entered in the cases in Illinois that should be entered in the cases pending in this court. The bills in all the cases are similar, alleging that complainants Gottfried and Holbeck were the original and first inventors of a new and useful improvement in pitching barrels; that letters patent were issued to them, dated May 3, 1864 [No. 42,580], and that the defendants are infringers; and the prayers of the bills are for injunctions and accounts.

The answers of the defendants in the cases pending in this court deny that Gottfried and Holbeck were the original inventors of the alleged improvement or device, and present issues as to the validity of complainants' patent. As further defences, it is alleged that complainants' invention is anticipated, first, by a mechanism used by one Samuel Pierce, at Greenfield, Massachusetts, in the soldering business; second, by what is known as the Beck machine; third, by the Davison and Symington patent, granted in England in 1843; fourth, by a patent granted in England to Charles Pierre De Vaux in 1835; fifth, by the Neilson patent, granted in England in 1828; sixth, by a patent granted in England to George Hinton Boville in 1846; seventh, by the Cochrane and Galloway patent, granted in England in 1818. Further defences are interposed to the effect that the description of complainants' invention, as set forth in the specifications annexed to the letters patent, is incomplete and ambiguous; that complainant Holbeck was not a joint inventor with complainant Gottfried; that complainants' apparatus is an old invention applied to a new use and object, and that this new use and object are analogous to the use and object to effect which such invention had been previously notoriously used; and infringement by the defendants is denied.

The original answers in the Illinois cases also deny that Gottfried and Holbeck are the original and first inventors of their device. They further set up the Neilson patent and the Davison and Symington patent as anticipating complainants' invention, and infringement is denied. The cases in Illinois were brought to final hearing, and, in June, 1878, a decree was entered in favor of complainants. Afterwards, and at the December term, 1878, on motion, the decree was opened and the defendants allowed to make further defences. On the 4th day of March, 1879, the defendants in those cases filed amendments to their answers, in which it was averred that complainant Holbeck was not a joint inventor with Gottfried of the device which they alleged was their invention, and in which the defendants set up anew the Davison and Symington patent, and also the patent issued to De Vaux, as anticipating complainants' patent. The defendant Schoenhofen, in his amended answer, also alleged that about the 12th day of April, 1877, complainant Holbeck gave him full license to use and operate the pitching machine which was then in use in his brewery.

From the issues made by the bills and original answers in the Illinois cases, and from the opinion of Judge Blodgett.—Gottfried v. Bartholomae [Case No. 5,632],—it is evident that the contest in those cases was upon the questions as to whether complainants' patent was anticipated by the Davison and Symington, and the Neilson patents, and as to whether the devices employed by the defendants in those cases were infringements of complainants' patent. The court held that complainants' patent was not anticipated by the two patents mentioned, and that the devices used by the defendants in those cases, including what are known as the Vogt machine and the Shlaudeman machine, infringed complainants' patent.

The application for a rehearing in the Illinois cases was based upon affidavits to the effect that complainant Holbeck was not a joint inventor with complainant Gottfried of the invention covered by their letters patent, and that complainants' patent was antici-

pated by the patent to De Vaux, issued in 1835, all of which was claimed to be newly discovered evidence which came to the knowledge of the defendants in those cases subsequent to the entering of the decree sustaining complainants' patent. And, from the opinion of Judge Blodgett opening the decrees and granting a rehearing, it appears that such action was taken to enable the defendants in the Illinois cases to interpose, as new defences, the claims that Holbeck was not a joint inventor with Gottfried, and that their patent was anticipated by the De Vaux patent, and these, together with the claim by the defendant Shoenhofen, that he obtained from the complainant Holbeck a license to use and operate the pitching machine in use in his brewery, constitute the additional defences set up by the defendants in the Illinois cases in their amendments to their original answers, which were filed after the decree was opened and the re-hearing granted.

Complainants' Invention.—Complainants' alleged invention consists of an improvement in pitching barrels, or, more accurately speaking, in heating barrels preparatory to the operation of pitching them; the object of the invention being the preparation of casks or barrels for receiving pitch to render them impervious to the air, by subjecting them to blasts of highly heated air by means of an apparatus which is described as consisting of a furnace which has a vertical central opening through it. Near the base of the furnace is a grate, beneath which is an ash pit, and above which is a fire-chamber covered by a lid. An opening is made through the side of the furnace, which forms an external communication with the internal chamber, either below or above the grate. This opening communicates with a fan case, arranged outside the furnace, and which is furnished with a series of rotary fans which may be rotated by any convenient motive power. The movement of the fans creates a blast of air which is carried into the furnace chamber through the opening which communicates with the chamber, and through the fire on the grate, and which is allowed to escape through a passage near the top of the furnace. Between this passage and the cask which it is desired to heat, a communication is formed by means of a detachable pipe. This pipe enters a short tube which passes through and is affixed to a covering plate, which is employed to close or partially close the opening in the head of the cask by adjusting it on the inner side of the cask head. By this apparatus, the heated products of combustion are forced into the cask, and, when the interior of the cask is thus subjected to heat, it is claimed that, as melted resin or other substance is applied, it will thoroughly permeate the pores and interstices of the inner surface.

The patentees claim as new: First, the application of heated air under blast to the interior of casks by means substantially as described, and for the purposes set forth; second, the use of a removable conductor, in combination with a furnace and blowing apparatus, arranged and operating substantially as described; and third, the tube-holding plate in combination with the removable pipe and blast furnace, substantially as and for the purposes described.

Taking up the questions involved in suitable order:

1. Joint Invention.—Were Gottfried and Holbeck joint inventors of the device covered by their patent? The application for the patent, and the oath accompanying the same, affirm that these parties jointly invented the device for which they sought to secure letters patent, and the patent was issued to them jointly. To overthrow the presumption of joint invention, created by the filing of a joint application upon a joint oath, the evidence should be clear and unequivocal. It is true, that, where a device or combination is claimed to have been the joint invention of two or more parties, and the question arises for determination upon evidence, it must appear that it was the product of their mutual suggestions and joint efforts, for joint invention is the result of the mutual contributions of the parties. And, if one suggests an idea in a general way and the other falls in with it, and by his aid develops it and gives it definite practical embodiment, the two may be considered joint inventors. Chase v. Chase, Com. Dec. 1873, p. 99.

Upon the whole testimony bearing on the question, and without entering upon an analysis of it in detail, I am of opinion that both the mechanism and application of the principle involved in its operation are shown to have been the product of the mutual suggestions and experiments of these parties, and that they took an equal interest in perfecting and patenting the invention, so that in a just sense it may be said to be the product of their joint ideas, suggestions, and experiments.

2. Claim of License by Defendant Schoenhofen.—As to the defendant Schoenhofen's claim that he has a license to use the invention covered by complainants' patent. The evidence shows, that a stationary pitching machine was built in 1863, at the brewery of Gottfried and Schoenhofen. Subsequently, Gottfried sold his interest in the brewery and business, including the pitching machine, to Schoenhofen, and it is claimed by the latter that he is now using that machine, and has the right so to do by virtue of his purchase from Gottfried, and under the implied, if not express permission of Gottfried and Holbeck. The determination, therefore, of the question as to whether Schoenhofen has the right of a licensee, would seem to depend upon the identity of the machine which he is now using, with that which he thus purchased from Gottfried, and upon this question, in the light of the evidence, I think there can be no doubt. Schoenhofen testifies that the machine built in the brewery in 1863, was there after the

dissolution of the partnership; that he bought it with the remainder of Gottfried's interest in the brewery, and used it for three or four years thereafter; that he erected a building at the place where the old machine stood, and that he was obliged to tear down the machine to secure necessary room; that this was done in 1871; that he moved such parts of the original machine as could be used, to another place, and that he put up another machine consisting of parts of the original machine.

Without going into the evidence in detail, it is enough to say that it tends clearly to establish the fact that the machine which the defendant Schoenhofen is using, and which he claims he has a right as licensee to use, is substantially a new construction; that the identity of the original machine built at the brewery in 1863, has been destroyed, and that the evidence does not disclose such facts as satisfy my mind that Gottfried and Holbeck have expressly or impliedly given to Schoenhofen license or permission to use the machine which it is understood he has now in operation.

3. Cochrane and Galloway Patent.—In contesting the novelty of complainants' device, defendants have introduced an English patent issued to Cochrane and Galloway in 1818, in which is described an invention for "working or making a manufacture, being a machine for removing the inconvenience of smoke or gases generated in furnaces or fire places by the ignition or combustion of coals or other inflammable substances, and in certain cases for directing the heat and applying such smoke or gases to various useful purposes."

The mechanism described in the specifications and drawings accompanying this patent is very complicated, and bears no resemblance to that of complainants. The invention consists of an improved air-tight stove, furnace or fire place, in which combustible substances may be used to generate and convey heat by the ignition and combustion of such substances, and with appliances for permitting the entrance, and preventing the escape of, atmospheric air or gas into or from the same, except by the means formed for the introduction and exit of such air or gas by means of pumps, valves or other suitable machinery, capable of supplying the machine with atmospheric air to keep up ignition and combustion, and at the same time to force out any smoke or gas so generated against any required resistance or pressure.

The inventors describe their invention as of a three-fold character. The first part of it is for removing the inconvenience of smoke or gases by the ignition or combustion of inflammable substances; the second part is, in certain cases, for directing the heat so generated, and the third is for applying such smoke or gas to various useful purposes. And the inventors, in their specifications, say that their mechanism has in view the condensing and dissipating of smoke and gas generated in air-tight stoves, furnaces or fire places.

Upon a careful examination of the Cochrane and Galloway invention, as it is described in the patent, I am unable to discover that it involves what may be properly called a hot blast. One of its objects is the heating of boilers containing water, with which there are cold and hot water pipe connections; and so essentially different is this mechanism from complainants', and, so far as I can judge, so widely dissimilar are the objects of the different inventions and the uses for which they are designed, that I do not think complainants' device should be regarded as anticipated by the Cochrane and Galloway invention.

4. Boville Patent.—The same must be said of Boville's invention, a patent for which, granted in 1846, has been put in evidence, and which invention relates, first, to an arrangement of apparatus for heating the blast from the flames passing off from the top or tunnel head of blast furnaces; second, to an improved mode of heating the air or blast by blowing the same partly through and partly over the fire in a closed retort or fire-proof chamber. This invention was intended to be employed in the manufacture of iron, and is described as an improved method of puddling iron and calcining the iron ore. Two claims are made by the inventor. Under the first claim, cold air is carried in thin currents through air cells, absorbing heat in its passage through such cells from the flame of the furnace. By this arrangement, the air is brought into contact with a heated surface, and absorbs heat therefrom. Under the second claim, the heating apparatus is so arranged that part of the air may pass through the fire and part over it, and with a furnace having fire bars working with water, in order that the character of the heated air, and its effects in the furnace may be varied. Cold air mixes with the products of combustion and vapor of water supplied from the water troughs of the fire bars.

It is evident from this description of Boville's invention, that it does not involve the production of the same character of heated air or gases as are produced by the operation of complainants' device. To produce the results intended by the first claim of the Boville patent, it is evident that the mechanism and its methods of generating heat are wholly unlike that of complainants', for, by the Boville invention, the cold air passes in thin currents through air cells; and is heated by absorption in its passage through such cells; and, looking to the second claim, although the air may in part pass through and in part over the fire, it mixes not only with the products of combustion, but with the vapor of water which is produced by certain apparatus connected with the fire bars. And it seems apparent

that neither the construction nor purpose of this invention is to such a degree analogous to that of complainants' device, as to sustain the conclusion that the latter is anticipated by the former.

5. Pewterer's Hot Blast.—As to the so-called pewterer's hot blast, the only testimony offered in support of the claim that Gottfried and Holbeck's invention was anticipated by the use of a hot blast for soldering purposes, is that of James D. Pierce, who says that he has seen or known in use a hot air blast, where the cold air was blown in upon the fuel or flame and out through a hot air pipe; that it was used in Greenfield, Massachusetts, for the purpose of soldering pewter of Brittania ware, by his grandfather, Samuel Pierce, forty or forty-five years ago, and that he, the witness, worked the bellows for the hot blast. And he says he has not seen such blast used at any place since that time. The witness must have been, according to his present age, only eleven or twelve years old at the time referred to. He gives no description of the mechanism by which the hot air blast was produced or used, and I do not deem the testimony adequate to establish the claim that complainants' invention was anticipated by the use of a hot blast by Pierce.

6. Davison and Symington Patent.—In contending that complainants' device does not possess the merit of novelty, defendants strongly rely upon an English patent, granted in 1843, to Robert Davison and William Symington, which was a device designed and arranged for cleansing barrels.

So far as the defendants in the Illinois cases invoke this device as anticipating that of Gottfried and Holbeck, it might be well held that the point is adjudicated by the decision of the circuit court in the Northern district of Illinois, rendered in those cases, in which the Davison and Symington patent is considered, and is distinctly held as not anticipating complainants' patent. The question is, however, an original one in the cases pending in this court, and the defendants in those cases are, therefore, entitled to have it considered as an original question here.

The invention is described in the specifications as "a method of cleansing, purifying and sweetening casks, vats and other vessels;" and the object of the invention is to free the wood of which casks and other like vessels are constructed, while in course of manufacture and in an unfinished state, from any injurious coloring or flavoring matter with which it may be impregnated, and to remove from casks and barrels, after they have been in use, any mould, must or other injurious substances which may collect on the inner surface, by exposing the same to the action of rapid currents of hot air. And where a very high temperature is found necessary to purify the casks, steam may be introduced with and in addition to the hot air. This device is well described in the opinion delivered by Judge Blodgett in the Illinois cases, in which he says: "That device combined several applications; one was the use of hot air, which was driven into the cask by a blast, in the same manner as in this case, except that the air was heated by being driven through heated tubes—that is, a nest or group of iron pipes was arranged in a furnace, and the pipes becoming hot, the air was driven through them into the cask, whereby the inner side of the cask became heated. By that it was claimed the must and various impurities were expelled. The same device, also, combined a mechanism for introducing a rough chain into the inner side of the barrel, and shaking or rolling the barrel with the chain inside, whereby the barrel was cleansed of impurities which stuck to the inside. Sometimes instead of using the chain, they used gravel or any other substance by which attrition upon the inside of the cask could be obtained. A further device was connected with the same mechanism for driving steam at a high temperature into the cask for the purpose of still further cleansing."

The mechanism described in the Davison and Symington patent, and a model of which has been put in evidence, is a furnace with horizontal pipes extending along its side, and "pipes of a horse-shoe form which rise vertically from the horizontal pipes and communicate therewith." There are two passages, one "for the inlet of atmospheric air from the fan blower or other impelling apparatus;" and another "for the outlet of the heated air from the pipes," and "nozzles through which the heated air rushes into the casks or other like vessels."

The Davison and Symington device is much more complicated that complainants', and the two were designed for different purposes. As before stated, the apparatus for heating the air described in the English patent, consists of a series or group of pipes, bent in the form of a horseshoe, which are heated by the external application of heat, and through which the air passes and thus becomes heated before its escape into the cask. By this means, the air is not brought into immediate contact with the fire. If the Davison and Symington device could be employed to heat barrels for the purpose of pitching them, it is evident that such result would be produced by a wholly different mechanism and different process from those which are employed by complainants. The peculiarity of the Gottfried and Holbeck invention is that, by the use of their mechanism, the air is carried directly through the fire, by means of which the element of oxygen is eliminated; whereas the Davison and Symington device provides for a blast of pure air, which is driven through heated tubes, and then forced into the barrel. Another of the peculiarities of complainants' device, as stated by Judge Blodgett in his opinion, is, "that by the very process of

blowing or driving the air through the fire you increase the intensity of the fire, and, therefore, the intensity of the heat of the air which escapes into the cask."

The mechanism of the two devices being radically different in construction, and the methods of heating the air being also dissimilar, I think it is plain that the blasts produced by the Davison and Symington device, and by the Gottfried and Holbeck device, must be chemically different. The chemical constituents of complainants' blast, as stated by some of the witnesses, are nitrogen, carbonic acid gas, highly heated steam, and perhaps a little unconsumed oxygen, the presence of the latter depending upon the regulation of the current of entering air; and a great merit of complainants' process would seem to be, that the removal of the oxygen removes the danger of burning the cask or barrel in heating it, for oxygen being essential to combustion, injurious burning could not take place in its absence. The pure air blast of the Davison and Symington patent, it would appear, would contain the original constituents of air, for the reason that it had not come in direct contact with the fire, but was heated by external heat applied to tubes through which it passed, and, therefore, the blast would tend to injure the cask, although the introduction of steam would undoubtedly diminish the injurious effects of the oxygen of the air upon the cask.

Now, the question is, does the Davison and Symington device, which confessedly is much older than complainants', produce, by substantially the same mechanism, the same or substantially the same character of heated air, or heated gases, which are injected into the cask for the purpose of heating it, that are produced by the Gottfried and Holbeck device? The evident object of the latter device is to generate and apply to the interior surface of a cask or barrel, heat of such a character and so intense in degree that the pitching of the barrel may be speedily and effectually done, without burning the barrel or impairing the properties or fibre of the wood; and, to do this, it would seem that the element of the air which tends to produce combustion must be eliminated. And it is claimed that this is done by the peculiar but simple mechanism of Gottfried and Holbeck for heating the air, and transmitting it into the cask or barrel. In my examination of these two devices and their methods of operation, I have become convinced that it must be true, as stated by one of the witnesses, that there is greater economy in passing the air directly through the fire than through pipes, since it thereby becomes a powerful means of increasing the heat, and also a more direct and efficient means of introducing it into the cask; further, that the amount of heat required simply to cleanse the interior of the cask might be much less than to thoroughly dry it and open the pores, as is contemplated by the Gottfried and Holbeck invention, and that the idea of assisting the process by the introduction of steam, renders it more clear that no such degree of heat was considered necessary, in the operation of merely cleansing the cask, as is required in heating it for the process of pitching.

The expert witness, Ruschaupt, states that there is this difference between the two devices, namely, that, in the Davison and Symington mechanism, the atmospheric air being heated to a suitable degree for cleansing or pitching barrels, is, in a chemical respect, not materially changed, whilst the gases or products of combustion in Gottfried and Holbeck's invention differ most essentially from atmospheric air; and that, in the Davison and Symington blast, if the pipes through which the air is carried are air-tight, there cannot be any more carbonic acid in the blast than is present in the outer atmospheric air. It may be, and such is the opinion of some of the witnesses, that, by the Davison and Symington process casks or barrels could be heated for pitching purposes, but it is evident, not only that the construction of the two mechanisms is widely different, but that the character of the hot blast produced by each is essentially dissimilar; the one, in its ordinary operation, involving the use of pure air, heated only to such a degree as will effect the cleansing of the barrel or cask, and sometimes in connection with steam, and the other contemplating the use of heated gases, the products of combustion, from which the oxidizing element of the air has been abstracted, and absolutely requiring an intensity of heat sufficient to reduce pitch to a watery consistency, so that it may flow over the interior surface of the cask or barrel, and at the same time of a character not to produce combustion.

We have, then, two mechanisms producing their respective results by essentially different processes, the one, it may be added, being much more simple, and capable of being operated with greater economy than the other. This point has been made very clear in the opinion of the learned judge, before referred to, in which he says of the Davison and Symington device: "You would have to produce heat enough in your furnace around your pipes to make the air sufficiently hot, and then keep up that heat by an additional blast of air into your furnace in addition to the blast which drives the air into your cask." And, as the court says in King v. Hammond [Case No. 7,797], the patent law protects simplicity and economy of construction, as against prior complex and expensive combinations. In view of the foregoing considerations, I am of opinion that the Gottfried and Holbeck invention is not anticipated by the Davison and Symington device.

7. Neilson Patent.—What has been said

with reference to the claim that the Gottfried and Holbeck device is anticipated by the Davison and Symington mechanism, may be remarked of the Neilson patent. His invention was for the improved application of air to produce heat in fires, forges, and furnaces. And it was to be applied as follows: The blast or current of air produced by the blowing apparatus was to be passed from it into an air vessel or receptacle, and from that vessel or receptacle, by means of a tube or pipe, into the fire, the receptacle being kept artificially heated by heat externally applied. By this apparatus, therefore, the atmospheric air did not pass into or through the burning fuel contained in a closed furnace or fire place, but it was heated by being forced through pipes or vessels heated from without, from which it is apparent that the method of heating was similar to that employed in the Davison and Symington device.

8. De Vaux Patent.—As anticipating the alleged invention of Gottfried and Holbeck, defendants strongly rely upon an invention covered by an English patent, issued in 1835, to Charles Pierre De Vaux, which letters patent, with accompanying drawings, and also a model of the De Vaux device have been put in evidence. This invention consists of "certain improvements in smelting iron-stone, or iron ore," and, although the mechanism devised by De Vaux, and that employed by complainants, are essentially dissimilar, they are alike in their operation to this extent; that, in both, the hot blast is produced by the passage of atmospheric air through fire. The De Vaux invention is described as relating to the arrangement of apparatus between an ordinary blowing machine and the furnace which contains the iron ore to be smelted, whereby the blast of atmospheric air is forced through the fuel in the fire enclosed in such apparatus thereby supporting combustion in the fire, becomes heated, and in some degree decomposed, and is then constantly forced forward by the pressure of condensed air in the apparatus, carrying with it the gas and vapors evolved by the fuel in the fire, and becomes a heated and gaseous blast in the furnace containing the ore to be smelted. The apparatus consists of three chambers, A, B, and C, which are formed of plates of iron connected by screw bolts or otherwise, and the joints being perfectly secured with iron cement, in order not to leave any opening for the escape of the condensed air which they are to contain. The chamber A is of sufficient size to admit a person who may feed the fire. B is another chamber into which the person first enters; and C is the chamber which contains the furnace. Pipes convey the heated air from the furnace containing the fire to the furnace containing the iron ore. The lower part of Chamber C forms an ash-pit which is open to the chamber A, so as to admit the free passage of air. Chambers A and B communicate with each other by an opening sufficiently large to allow a person to pass from one to the other. Chamber B communicates with the atmosphere by a similar opening. These openings are covered by doors which consist of plates of iron, and the edges of which are so faced with some material as to make them, when closed, air-tight. In these doors are openings which are covered with a disk of metal which can be turned outside or inside, by means of which, passages may be left for the air in A to pass into B, or the air in B to pass into the outer atmosphere and to equalize the pressure on the two sides of the doors. On the upper part of the chamber A is a valve opening inwards. In the chamber C are placed the fire-bars. The chamber A communicates with a blowing machine by a pipe extending upward from the top of the chamber. There are some other details of construction mentioned in the specifications essential to the operation of the mechanism, but enough has been stated to show the character of the device.

Now the question is, whether this device, which is intended to produce a hot blast for a smelting furnace, and which contemplates as an essential part of its arrangement, the forcing of atmospheric air through the burning fuel, anticipates the device covered by the Gottfried and Holbeck patent. And, in considering this question, it is first to be observed, that all the parts of the De Vaux mechanism, precisely as arranged by the inventor, are essential to its operation for the purposes for which it was designed, and that the omission of any part would affect its efficiency. It is next to be observed, that, as preparatory to heating the air, by forcing it through the fire, it is condensed in the chambers A and B, and this must have been regarded as indispensable to the successful operation of the apparatus. It is next evident that the object of the De Vaux invention, is to increase combustion, and thereby raise the temperature of the smelting furnace.

Experts called by the defendants have testified that the furnace and the mode of creating the hot blast in the De Vaux invention is precisely similar to that used in the Gottfried and Holbeck device, and that they could be used interchangeably for heating barrels or stacks of smelting furnaces; that the functions of the two machines are identical; that the hot blast in the De Vaux invention is produced in the same way and will produce the same effect as that of the Gottfried and Holbeck apparatus, and that the chemical constituents of the two blasts are the same.

I cannot agree with these conclusions for several reasons. First, it is evident that the objects of the two inventions are not the same, but, on the contrary, are quite opposed. Clearly, the object of the De Vaux invention is, as before stated, by the increase of com-

bustion to intensify the temperature of the smelting furnace; and, in the language of one of the witnesses, in whose opinion I concur, "to accomplish this purpose, as much free oxygen as possible should be present in the hot blast." In the Gottfried and Holbeck device, the purpose, is not to produce combustion at all, but simply to melt pitch, and heat the barrel, and were combustion to be produced by the blast, the object of the invention would be defeated; hence, as little free oxygen as possible should be present in the blast. The object of the one blast is, then, to promote burning, in the other, this is to be avoided; in the one, free oxygen must be present, in the other, it is better absent. The feature of the De Vaux apparatus which provides for condensation of air in the chambers A and B, is not to be regarded as of minor importance in connection with the operation of the device, for the evident purpose of the accumulation of compressed air in the chambers is to constantly force through the fire a great quantity of air, and in its rapid passage through the fire, it seems reasonable that a considerable quantity of oxygen would be unconsumed and be present in the hot blast; and, as one of the witnesses states, "since the intensity of combustion depends largely on the amount of oxygen supplied, the compressed air will produce more burning and therefore a higher temperature than air which is not compressed."

Furthermore, I am convinced that the accumulation of compressed air in the chambers A and B of the De Vaux apparatus, must have been regarded by the inventor, and is an essential part of the device, for the purpose of securing uniformity in the blast, which scientific authorities appear to regard as essential to the best results in the production of a good quality of iron. Greenwood, in his Manual of Metallurgy, says: "To avoid the fluctuations, irregularities and intermittent action of the blast that would occur from an injection of the blast direct from the engine to the furnace, a regulator is inserted in the course of the main, between the engine and the furnaces. This is merely a reservoir of iron or occasionally of masonry lined with cement, of a capacity equal to from twenty to fifty times the volume of the blast delivered per second, and provided with a manhole and safety-valve. In this manner the blast is delivered in a continuous stream." Another writer says: "The oscillations of the pressure ought to be as slight as possible. It is almost impossible to make a uniform blast without a receiver; for this reason, it is advisable to employ a regulator at every blast machine." In the De Vaux apparatus, it is evident that the chamber which is made the receptacle of compressed air operates, and was intended to operate, as a receiver or regulator regarded as essential to secure uniformity in the blast.

We find then that the two mechanisms in their entirety, and in every part, are unlike; that they also differ in the purposes for which they were designed; that, in the one, atmospheric air is driven directly into the fire, and the products of combustion are thence carried to the point of their practical application; that, in the other, the air is not driven directly from the blowing apparatus into the fire, but is first driven into a condensing chamber, and is thence conducted into the fire, the evident object of this feature of the apparatus being to make an equable blast; therefore, that there is a difference in the mode of operation of the two machines; and that, by the De Vaux process, it is only intended that the air which is forced into the fire, shall become in some degree decomposed, and that the value of the one consists in its ability to increase combustion, while the value of the other is to prevent it, in the blast.

In the case of Clark Patent Steam & Fire Regulator Co. v. Copeland [Case No. 2,866], it was held that, in order to find an invention anticipated in a prior printed publication, it must be found from the evidence that the description embodied substantially the same organized mechanism, operating substantially in the same manner as that described in the patent claimed to have been anticipated, and that old instruments placed in a new and different organization, producing, in such new organization, different results, or the same results by a new and different mode of operation, do not prevent such newly organized mechanism from being patentable. Looking at the De Vaux and the Gottfried and Holbeck devices with reference to their construction, mode of operation, and uses for which they were designed, and the effects which, as they are constructed and operated, they must necessarily accomplish, and, in the light of the principles before stated, I have come to the conclusion, though not without some doubt, that the Gottfried and Holbeck device ought not to be held anticipated by the De Vaux invention. And I cannot help thinking in this connection that, as was said by the court in the case last cited, it is a pertinent question, if the mechanism described in the prior patent was substantially the same as complainants', organized and capable of operating substantially in the same way, why, during the period that the former was known to the world, it has not been applied to the same use as complainants'.

9. The Beck Machine.—In addition to the inventions which have been already considered, the contrivance known as the "Beck Machine" is also relied upon, as showing that the use of a hot blast, in pitching barrels, was not new with Gottfried and Holbeck. A model of the Beck machine has been put in evidence, which, in construction, shows a complete mechanism, consisting of a revolving fan connected with a furnace, from the upper part of which a pipe leads to the cask to be pitched. From another opening in the cask, a pipe leads to the revolving

fan. When the machine is put in operation, the products of combustion pass into the cask, and then back again through the return pipe to the fan, and are again driven through the furnace.

The alleged inventor, Beck, testifying as to its practical operation, says that "the heat coming from the barrel to the blower, is carried back to the furnace under the grate; the hot air goes from the furnace into the cask, and escapes from the cask through the pipe at the bottom into the fan, and then back into the furnace from the grate; the pipe and blower are tight."

Much testimony has been taken on the part of defendants to prove, and on the part of complainants to disprove, the original existence of this machine; and we have also expert testimony on the question as to whether a machine constructed according to the model can be made to operate successfully. It seems, from the testimony, that in 1860, and from that time until 1863, inclusive, Beck was operating breweries in Rockland county, state of New York. And there is testimony tending to show that in 1860, when he was operating what is mentioned in the testimony as the old brewery, he made and used some kind of apparatus for pitching barrels. He testifies that it consisted of a stove and blower, and connections between the blower and stove and the blower and the cask; that the pipe from the blower entered the stove below the grate, and that the pipe conducting hot air from the stove to the cask was inserted in the upper part of the stove, and that, by means of the blower, air was forced through the burning fuel in the stove and thence into the cask. There is testimony, also, tending to show that he built a second machine, the first one being merely temporary. Witnesses have been examined who testify that they saw the machine or machines in use at the breweries; and other witnesses testify that they worked at the breweries, and were familiar with the premises, and the business carried on by Beck, and that they never saw any such machines used by Beck for pitching purposes, and some are positive in their statements that no such machines were used.

Upon the whole testimony, it is claimed by defendants, that a machine was invented and used by Beck as early as 1860, by means of which a hot blast, substantially like that produced by complainants' invention, was employed in the process of pitching barrels; that it was a complete machine, such as is represented by the model in evidence, and that it was susceptible of practical and successful operation. On the other hand, it is claimed by complainants, that the testimony does not satisfactorily establish the existence of a machine such as is represented by the model; that if its existence were to be admitted as claimed, its construction as represented by the model would prevent its successful operation, and that, in any event, it amounted to nothing more than an abandoned experiment, and should not, therefore, be regarded as a perfected invention, anticipating complainants' patent. The model of the Beck machine shows a contrivance entirely different in construction and in adaptation of parts from that described in the Gottfried and Holbeck patent. The Beck machine was never patented, and it does not appear that the alleged inventor ever applied for a patent. Upon a careful examination of the whole testimony, I have had a good deal of doubt whether the model in evidence is a correct representation of any machine actually used by Beck in pitching barrels.

It will be admitted, that, to justify the court in overthrowing a patent granted for what appears to be a new and useful invention or improvement, on the ground that the device has been anticipated by another and earlier invention, the court should be well satisfied by clear and credible testimony, that the alleged earlier invention actually existed; that it was a perfected device, capable of practical use; that it was embodied in distinct form, and carried into operation as a complete thing, and was not of such character as to entitle it only to be regarded as an unperfected or abandoned experiment.

It is so easy, after a new and useful invention has come into existence and been brought into public use, especially if a characteristic of such invention is simplicity, for persons to come forward with claims that they invented the same thing many years before, and should, therefore, be esteemed the real and original inventors, that the court should require convincing proof of the merit of such claims before overturning the patent. Especially so, when it appears that the alleged earlier inventor has not apparently regarded his supposed invention of sufficient importance to push it upon public notice, or to apply for a patent which would protect him in its exclusive use.

In passing upon the question which I regard important in connection with the Beck machine, some notice of the salient points in the testimony seems essential. The witness Beck testifies that in 1860 he invented a machine consisting of the parts which have been mentioned; that in December, 1863, he presented to the brewers' association, in New York, a paper referring to his machine, and inviting the attention of brewers to it. And it appears that there was really no further recognition of his supposed invention by the association, than an acknowledgement that his paper had come to their notice and would be considered. He says that he used his machine in pitching barrels at his breweries; that he confined its use to the pitching of puncheons or large casks; that the machine worked successfully; that the model in evidence is a good representation of it; that, before submitting his

paper to the brewers' association, he told nobody of his invention except his own people, because, as he says, "I wanted first to work it out myself; it was not my interest to tell others about it; something which is not fully finished is not in the interest to be told to anybody else;" that he kept it secret from everybody except his own workmen and family; that he pitched small kegs and barrels by hand in the old way, and never tried to pitch them with his machine; that it took about fifteen minutes to heat a cask which he pitched with his macine, and that he never made any essential changes in it; that his first machine was only a temporary one, and that he made a second machine immediately after; that he did not obtain a patent for his machine because he wanted it to come into public use for the benefit of brewers, and that his machines, when not in use, were taken to pieces, and the parts laid aside, except the furnace or stove.

The witness Kreuder says that he saw Beck pitch barrels in the usual way at the old brewery, "also by the use of a pipe or tube on the kettle, leading to the keg or barrel;" that "Beck got the hot air into the keg or barrel by pipes or tubes, or something like them;" that, in pitching in the old way, they took the ends of the barrels out, and that, in pitching in the new way, "they had a sort of globe stove with a fire in it, and on top there was a tube or pipe leading to the barrel, and he used a small bellows; the nozzle of the bellows was in the fire below." He says further: "I remember that the pipe leading from the keg was attached to the stove at the top, but how it was attached is more than I can tell. I did not see any pipe leading back from the keg to the bellows; I never saw in either of the breweries a furnace built of brick for the purpose of pitching barrels provided with pipes; never saw anything used in connection with the stove at the new brewery to blow the fire, except the bellows which I have mentioned." He says that he never saw at either of the breweries, in connection with the stove, any revolving or circular fan or blower. Upon being shown a drawing like the model of the Beck machine, he testifies that he does not know that the mechanism represented by the drawing is the same as the stove which he saw at the breweries; that the theory is the same, but the mechanism is not the same.

The witness Roemmelt testifies that about 1863, Beck used a furnace, and applied a tin or copper pipe connecting it with the furnace, and conducting hot air into the cask, and used a bellows to increase the heat. He states that that was the whole secret of the machine. He testifies further: "Beck told me about making improvements on his pitching machine; he wanted his machine in a more correct and economical shape. * * * He had not got money enough to do it. He explained what he needed to make it perfect. It wanted a separate stove or separate furnace; it wanted a set of pipes. The furnace was not a perfect one for the purpose he wanted to use it; he said he tried it at that time to find out if hot air would answer the purpose of pitching casks, but he had not got the machine perfect; it is very hard to tell what he said about the blower; he spoke about using a blacksmith's bellows or something similar to that; he said that it could be made more perfect; * * * he said that his machine was not a perfect one, but it could be made so with a small amount of money."

The witness Becher was a partner of Beck's in the brewing business, and testifies that the machine in question was a furnace or an oven with a blower and a pipe connecting it with the cask, and, from the other end of the cask, was a pipe leading to the blower again; that the blower was an ordinary blacksmith's bellows. He further testifies that "there was a pipe leading from the blower to the furnace under the grate; the second pipe was leading from the top of the furnace to the hogsheads, and afterwards he put a third one in what he had not in the first experiment, as you might call it, leading from the hogshead to the blower again;" that the machine was only used in pitching large kegs, because it was thought better to pitch the small kegs in the old way; that he would not call the machine a perfect one; that it took half an hour to heat a cask containing ten, fifteen or twenty barrels, sufficiently for pitching; and upon being shown the drawing of which the model in evidence is a representation, he says that when he saw the machine they did not use the kind of blower represented in the drawing.

The witness Emma Stelcener, who is a daughter of Beck, says, that the kind of pitching machine her father used in 1860, was an old kettle with some pipes and a blower; that the hot air was forced into barrels by the blower, and that there was a pipe connecting the blower with the stove. On cross-examination, she is unable to give any satisfactory description in detail of the machine, except that the blower which was used, was an old fashioned hand bellows. She says she never saw but one machine in either or both of the breweries, and that she does not recollect that there was a pipe running from the barrel to the blower or bellows.

Magdalena Beck, wife of Joseph Beck, testifies that, in pitching barrels, Beck made a fire and put a pipe into the cask and admitted the heat; that she cannot remember what the fire was built in, but there was a fire and a blower attached, which she says was a bellows. She states further that the first machine which her husband used, he destroyed, and that the second machine was used in the new brewery; that the furnace in the second machine consisted of an old stove; that the blower was a blacksmith's

bellows; that she does not know to what part of the stove the pipe extending to the barrel was attached, but only knows that the pipe went into the cask.

Numerous witnesses have been examined on the part of the complainants, some of whom testify that they were frequently at the breweries operated by Beck, and some of whom were workmen in his employment, and all of whom testify that they never saw at either brewery, in operation or otherwise, any machine for pitching barrels by means of which hot air was transmitted from the furnace or stove into the cask or barrel; that they oftentimes saw barrels pitched at the breweries, but always by the old process. One of the witnesses was a purchaser of one of the breweries, and was the successor of Beck in its operation. He says that there was no pitching machine at the brewery or on the premises at the time he purchased, and that there were no parts of such a machine on the premises when he took possession. Some of these witnesses testify that they assisted in pitching casks; that it was always done by taking out the heads, heating them with hot irons and applying the pitch in the old way, and that they never saw any machine or contrivance, or any parts of a machine, for pitching barrels by the application to them of hot air or of the products of combustion, as represented by the Beck model. Much of the testimony of these witnesses, notwithstanding it is of a negative character, certainly tends strongly to disprove the existence and use at the breweries operated by Beck of any machine for pitching purposes by means of which hot air was applied to barrels for the purpose of heating them; and in the light of the testimony, it is certainly a peculiar feature of this case, if such a machine or apparatus as Beck claims he invented for the purpose of pitching barrels was used by him for that purpose at his breweries, that so many persons familiar with the premises, accustomed often to visit them and some of whom were for a long time in his employment, should so positively testify that no such machine was used, or was ever seen in use, at the breweries.

Some of the witnesses, it should in fairness be said, testify that they never saw any barrels pitched at the breweries, but the witness Pfeiffer testifies that he worked for Beck from 1858 to 1862, and that during that period he and the witness Jacob Gross pitched all the barrels that were pitched at the breweries; that the barrels were heated with hot irons; that, after the pitch was heated, it was poured into the casks, and that he never saw any casks heated or pitched in any other way; and he testifies that Beck never had or used a machine or apparatus of any sort by which hot air was forced into the casks for the purpose of heating them, and in this testimony he is corroborated by the witness Gross.

Upon being further examined on the part of complainants, Beck testifies that the pitching machine which he had described as the second one he made, "went to dust and ashes;" that it was remaining at the brewery when he left it, and that "it was an old stove with the pipes to it and the blower; it was in pieces; as a whole it was no good; it was no longer useful; the pieces were separate, but were all there, so that it could have been put up by any one that knew it; when I went away no one knew it; I could have put it together again." And he admits that there was not a fan attached to his first machine, like the one represented in the drawing in evidence; he says that he first used a fan in connection with his second machine; that he never used that machine in the old brewery, and that it was in course of construction, from time to time, from 1860 to 1863; and finally he thinks that he first applied a blower in forcing the air through the furnace in 1863, but does not know exactly.

Whatever doubt this testimony casts upon the question of the existence and identity of the device spoken of as the Beck machine, be it little or great, the testimony on the part of defendants fails to convince me that there was such an embodiment of the idea of heating barrels or casks for pitching purposes, by the application of a hot blast, in a perfected machine applied to practical use as gives to Beck the right to assert that he was the original inventor of the device covered by complainants' patent, or its equivalent in mechanical construction and application. The law upon this subject is very well settled. "A machine, therefore, in order to anticipate any subsequent discovery, must be perfected; that is, made so as to be of practical utility, and not to be merely experimental, and end in experiment. * * * Until of practical utility, the public attention is not called to the invention; it does not give to the public that which the public lays hold of as beneficial. If it is an experiment only, and ends in experiment, and is laid aside as unsuccessful; however far it may have been advanced, however many ideas may have been combined in it, which, subsequently taken up, might, when perfected, make a good machine, still, not being perfected, it has not come before the public as a useful thing, and is therefore entirely inoperative as affecting the rights of those coming afterward." Howe v. Underwood [Case No. 6,775]. In Seymour v. Osborne, 11 Wall. [78 U. S.] 552, Mr. Justice Clifford says: "Original and first inventors are entitled to the benefit of their inventions if they reduce the same to practice, and seasonably comply with the requirements of the patent law in procuring letters patent for the protection of their exclusive rights. Crude and imperfect experiments are not sufficient to confer the right to a patent; but in order to constitute an invention, the party must have proceeded so far as to have reduced his idea to prac-

tice, and embodied it in some distinct form. Desertion of an invention consisting of a machine, never patented, may be proved by showing that the inventor, after he had constructed it, and before he had reduced it to practice, broke it up as something requiring more thought and experiment, and laid the parts aside as incomplete, provided it appears that those acts were done without any definite intention of resuming his experiments, and of restoring the machine with a view to apply for letters patent. He is the first inventor in the sense of the patent law, and entitled to a patent for his invention, who first perfected and adapted the same to use, and it is well settled that until the invention is so perfected and adapted to use it is not patentable under the patent laws."

Now, admitting that Beck had in mind the idea of heating barrels for pitching purposes, by application to them of heated air and of a mechanism for that purpose, the whole testimony leaves upon my mind a strong belief that whatever may have been the stage to which his machine was advanced, it was never perfected in the sense of the patent law; that it was in fact an experiment never actually completed, and, so far as it existed, when Beck left his second brewery, was broken up, deserted and abandoned. Of all the witnesses examined, no one, except Beck himself, has testified that he constructed and attached to his machine such a revolving fan as is shown in his model. All are agreed, even the members of his family, that the instrument used for creating a draft of air through the fire was an ordinary blacksmith bellows, and it seems difficult to understand, if this be so, how there could exist in his machine such connections as are represented in his model. It seems, from the testimony, that he never used his machine for any other purpose than pitching large casks or puncheons, that, at the very time he was so using it, he heated and pitched kegs and ordinary barrels in the old way. The various parts which, it is said, comprised his apparatus, were evidently of a rude and imperfect character, and he says that, when they were not in use, they were disconnected and laid aside in separate parts, and that no one but himself would understand how to put them together so as to make a machine for practical use. Beck himself speaks of it as a thing not fully finished. Witnesses called to prove its existence and character are uncertain as to its mode of construction and operation. It appears, I think, quite clearly that it was not a perfect device, that this was at the time admitted by Beck; and Becher, who was a partner of Beck, says that he would not have called the machine a perfect one, and that "he does not know what improvements he would have put on at that time, but does know what he would do in that regard today;" which well illustrates how easy it is, after an invention has been brought by improvement to a state of at least comparative perfection, for persons enlightened and aided by subsequent discoveries to say that they now know what improvements they would make upon the invention, which originally they were unable to embody in distinct form. The testimony clearly shows that Beck destroyed the machine which he first used in the old brewery, and, as we have seen, he himself testifies that his second machine "went to dust and ashes."

The brewers' association seems to have regarded his supposed invention as not worthy of serious consideration. As before stated, he never obtained a patent, nor applied for a patent, and so far as appears in this case, nothing was ever heard of his invention, after he left the breweries in Rockland county, until this litigation arose, when he comes forward with the claim that he was the first inventor of the device of which complainants are now the patentees.

In conclusion, upon this branch of the case, I must say that the testimony is much too inconclusive and unsatisfactory to justify the court in holding that Beck should be regarded as the first inventor of the device in question. The principle asserted in Parkhurst v. Kinsman [Case No. 10,757], is applicable here, namely, that "crude and imperfect experiments, equivocal in their results, and then given up for years, cannot be permitted to prevail against an original inventor, who has perfected his improvement and obtained his patent." Much also that is said by the court upon this subject in White v. Allen [Id. 17,535], might be pertinently repeated as bearing upon the question here presented.

10. Generally, as to Validity of Complainants' Patent.—It is claimed, generally, by defendants, that the Gottfried and Holbeck device was not patentable, because it discloses only old means which produce old and well known results; that the employment of a hot blast is old, and that a furnace is old, that conducting pipes are old, and that a fan-blower is old; that the case is, therefore, only the combination of old appliances applied to a new use; that the complainants were not entitled to a patent for a mechanical apparatus, because it had been in use long before; nor to a patent for a process because the process consisted merely of the application of a well known machine to a well known use. And upon the argument there was considerable discussion as to whether complainants' patent is for a mechanical device or for a process.

It is an elementary principle, that the mere application of an old thing to a new use is not patentable, or, as the court says in Smith v. Nichols, 21 Wall. [88 U. S.] 119, "a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent."

And again, in Roberts v. Ryer, 91 U. S. 157, it is said: "It is no new invention to use an old machine for a new purpose. The inventor of a machine is entitled to the benefit of all the uses to which it can be put, no matter whether he had conceived the idea of the use or not." It is not understood, however, that these principles are to be so applied as to deny patentability to improvements which disclose inventive skill, and produce new and useful results. It is true, it may be said, that the several parts which make up complainants' mechanism are old, but, as is stated by the court in Strong v. Noble [Case No. 13,543], "there is scarcely a patent granted that does not involve the application of an old thing to a new use, and that does not, in one sense, fail to involve anything more. But the merit consists in being the first to make the application, and the first to show how it can be made, and the first to show that there is utility in making it."

Now, complainants' device is claimed to be, and, if anything, it is, a new and useful improvement in heating barrels or casks for the purpose of pitching them. And the actual invention of the patentees I consider to be a mechanism consisting of several parts, which are so arranged and connected as to produce a hot blast, composed of such elements or chemical constituents as will heat the cask or barrel sufficiently to allow it to be quickly and thoroughly pitched, and yet not subject it to such a degree and quality of heat as will produce combustion and destroy or injure the barrel. This is the essence of the patentees' invention, and it is embodied in the mechanism which they have devised; and, though the various elements or parts of the mechanism, when separately considered, may be regarded as old, yet we are to view them in the light in which they have been combined, in connection with the new and useful results which the combination accomplishes. Its value does not consist simply in throwing heat into a barrel, because undoubtedly this could be done by the Davison and Symington device, or by the De Vaux mechanism, but, the one might not sufficiently heat the barrel, and the other might burn it up.

The merit of complainants' device consists in pouring into the barrel a blast or volume of heat of such quality and temperature as will put the interior surface in the peculiar condition required for the rapid and successful application of pitch, while the integrity of the receptacle is fully preserved. This I consider to be the precise merit of the Gottfried and Holbeck invention, and I think it is patentable. And, again, with reference to the application of old means to a new use, as is stated in one case cited on the argument, "particular changes may be made in the construction and operation of an old machine so as to adapt it to a new and valuable use not known before, and to which the old machine had not and could not be applied without those changes; and, under these circumstances and conditions, if the machine as changed and modified produces a new and useful result, it may be patentable and upheld under existing laws." In Rice v. Heald [Id. 11,752], the court said that no machine can be an anticipation of the patented invention, which could not be made to produce, without altering its construction, substantially the same results as were produced by the patented machine. Any prior machine which would not produce substantially the same results as the one patented, could not be substantially the same machine, no matter how strongly the prior machine may resemble the patented machine in its construction. To make one mechanical device the equivalent of another, it must appear not only that it produces the same effect, but that such effect is produced by substantially the same mode of operation. Conover v. Roach [Id. 3,125].

11. Sufficiency of Claim and Specifications in Application for Patent.—Objection is made that the patentees do not, in their application, particularly specify and point out the part, improvement or combination, which they claim as their own invention or discovery, but I do not think the objection is maintainable. The specifications, in connection with drawings, describe the mechanism and every part of it, and its mode of operation. Then, the first claim is: "The application of heated air, under blast, to the interior of casks, by means substantially as described and for the purposes set forth."

The act of congress requires of the applicant for a patent a distinct and specific statement of what he claims to be his invention. "The patentee ought to state distinctly what it is for which he claims a patent, and describe the limits of the monopoly." Hastings v. Brown, 1 Ell. & Bl. 453. "It is for the purpose of warning an innocent purchaser, or other person, using the machine, of his infringement, and at the same time, of taking from the inventor the means of practising upon the credulity or fears of other persons, by pretending that his invention was different from its ostensible objects. * * * The claim, or summing up, however, is not to be taken alone, but in connection with the specification and drawings; the whole instrument is to be construed together. But we are to look at the others only for the purpose of enabling us correctly to interpret the claim." Brooks v. Fiske, 15 How. [56 U. S.] 215.

Do the specifications and claim in this case meet the requirements of these established rules? I think they do. It is true, that each of the parts of complainants' mechanism, when taken separately, is old. But it is the combination of these parts in a mechanism by which the distinctive character of hot blast, capable of successful use in heating barrels for pitching purposes is produced, which constitutes the invention; and the claim must, in my opinion, be regarded as a claim to the particular means and mode of operation describ-

ed in the specifications. Burden v. Corning [Case No. 2,143]. And these means and this mode of operation are described in detail in the specifications, and both claim and specifications are to be construed together. If the words "by means substantially as described" were omitted, the question would be a very different one. But as the claim contains words referring back to the specifications, it must be construed in the light of the explanations contained in the specifications. Seymour v. Osborne, 11 Wall. [78 U. S.] 547.

It is objected that the patentees did not, in their specifications and claim, distinguish old parts from new. But they describe each and all the parts, and it is the mechanism as a whole so constructed and operated as to produce a certain character of blast, to be applied to certain purposes, which they claim as their invention. Phillips v. Page, 24 How. [65 U. S.] 164, is distinguishable from this. There the patentee invented certain improvements in constructing the portable circular saw-mill, and they were designed to adapt it to the sawings of logs in a saw-mill, a use to which it had not before been applied. But in his claim he did not set up the improvements or additions, which he had invented, to the old machine, which he had not invented, so as to enable him to adapt it to the new use, but his claim was merely for the precise organization of the old machine enlarged, and it was held that the mere enlargement did not afford ground for a patent. As I read the case, it did not appear that the patentee had even contrived the means of adapting the enlarged old organization to the new use. In Merrill v. Yeomans, 94 U. S. 568, the claim was for the new manufacture of the deodorized heavy hydro-carbon oils, suitable for certain purposes, and the only question was whether the word "manufacture," as thus used, covered a process or the product of a process. It was held that it should be construed to mean the new mode of manufacturing hydro-carbon oils, and not the product. It was a claim for the process of manufacture. It may be said of this case that the claim of the patentee was subjected to a rather limited construction, but, accepting the case, as of course we do, as authoritative upon the question involved, I do not regard it as sustaining the position that the specifications and claim of the patentees in the case at bar are so indefinite and insufficient as to render the patent void.

12. Infringement.—As to infringement by the defendants in the Illinois cases, I think there can be no doubt that they are infringers. I understand the defendant Schoenhofen to be using complainants' device under a claim of license, the validity of which has been heretofore considered. The defendants Bartholomae and Roesing are using what is known as the Vogt machine, and the defendants Fortune Bros. are using what is known as the Shlaudeman machine. Both of these are portable devices—the Vogt machine, according to the specifications contained in the letters-patent, issued to the patentee July 11, 1871, showing a fan or blower attached by a pipe at the bottom of the machine and the air being forced through the fire. The Shlaudeman machine is so adjusted that a number of casks may be heated at the same time. In his opinion, delivered in these cases, in 1878, Judge Blodgett held that these devices embodied applications of the same principle, and were like the complainants' in mode of operation and in effect; that they accomplished the same end by substantially the same means—that is, a blast of air driven through the fire and escaping into the cask. The conclusion of the learned judge in this respect, as announced by him in the Illinois cases, should be held res adjudicata in in those cases.

Respecting the devices employed by the other defendants, I think it must be said that they also infringe the mechanism covered by complainants' patent. The conclusion is sustained by the evidence on the part of the defendants. The witness Haskins testifies that the principle involved in all the machines used by the defendants is the same as that described in the Gottfried and Holbeck patent, and says that if it should be held that complainants' patent is valid as to its first claim, it would be his opinion, as an expert, that the defendants are infringers. The defendants Obermann and Fueger, and the Joseph Schlitz Brewing Company, are using a machine covered by letters patent issued to J. P. Benoit, October 26th, 1869, and the defendant Valentine Blatz is using a device covered by letters patent issued to Henry Lehmann, January 4th, 1876. Complainants' witness Haines testifies that these two patents embrace the invention covered by complainants' patent, so far as its first and second claims are concerned, and that the alleged inventions of Benoit and Lehmann produce the same kind of a blast, and that such blast produces the same effects as are produced by complainants' invention; and I think this is evident from an examination of the descriptions and specifications of the inventions contained respectively in the Benoit and Lehmann patents.

Although there are some differences between the mechanism described in these patents and that of which complainants claim to be the inventors, it is evident that all embrace the application of the same principle, and are alike in the result which they accomplish. The court did not understand it to be seriously contended on the argument that the defendants are not infringers if complainants' patent can be sustained as against other inventions which, it was claimed, anticipate that patent.

[The cases at bar involve many and important questions. Their determination is certainly not free from difficulty, and the conclusions arrived at are stated not without some diffidence on the part of the court; but, on the whole, after a somewhat painstaking consideration of the questions involved, no other conclusion is satisfactory to my mind than

that complainants are entitled to the decrees which they ask.][2]

Decree for complainants.

[For other cases involving this patent, see note to Gottfried v. Bartholomae, Case No. 5,632.]

GOTZIAN (OWENS v.). See Case No. 10,634.

GOUGHNOUR (UNITED STATES v.). See Case No. 15,238.

Case No. 5,634.

GOUGHRAN v. ONE HUNDRED AND FIFTY-SEVEN TONS OF COAL.

[Cited in The Mary E. Taber, Case No. 9,209. Nowhere reported; opinion not now accessible.]

Case No. 5,635.

GOULD et al. v. BALLARD et al.

[3 Ban. & A. 324; 13 O. G. 1081; Merw. Pat. Inv. 166.][1]

Circuit Court, D. New Jersey. June 18, 1878.

PATENT—REISSUE—ENLARGEMENT—NOVELTY.

1. While enlargement by the use of new instrumentalities is forbidden in a reissue, restriction by the disuse of some of the old is allowable. Carver v. Braintree Manuf'g Co. [Case No. 2,485]; Gallahue v. Butterfield [Id. 5,198]; and Dorsey Harvester-Revolving Rake Co. v. Marsh [Id. 4,014],—cited.

2. The reissued patent No. 7,149, dated May 30th, 1876, for improvement in corner-clamps or protectors for trunks, granted to complainants, the original letters patent having been granted to Edward A. G. Roulstone, *held* invalid for want of novelty.

[In equity. Bill by William B. Gould and others against George M. Ballard and others.]

A. V. Briesen, for complainants.

E. L. Sherman, for defendants.

NIXON, District Judge. This suit is brought against the defendants for infringing reissued letters patent No. 7,149, dated May 30th, 1876, for "improvement in corner-clamps or protectors for trunks." The original patent [No. 59,458] was granted November 6th, 1866, to one Edward A. G. Roulstone, the assignor of the complainants, for "improvement in trunk molding." The defences set up in the answer are: 1. That the reissued letters patent are void, because they include more than was specified in the original, and are inventions and things substantially different. 2. That the invention claimed in the reissue was described in several letters patent anterior to complainants' patent, and was known, and in public use by certain persons therein specified, and hence is void for want of novelty. 3. That they have not infringed, but are making and selling the corner-clamps for trunks, which the complainants allege are an infringement, under and according to letters patent[3] granted to Edward A. G. Roulstone, October 30th, 1866, and reissued May 23d, 1876,[4] and assigned to the defendants, March 23, 1876.

1. Is the reissue void for including matter not disclosed in the original patent? To determine this question it will be necessary to compare the original with the reissue. Prima facie, the latter is for the same invention, and the burden of showing the contrary falls upon the defendants. The only claim in the original reads as follows: "I claim as a new article of manufacture. the corner molding or guard, a, for trunks, made of corrugated metal, formed into shape for application, and strengthened by a wire, b, substantially as described." The defendants insist that, in view of the state of the art when the patent was issued, such a claim is susceptible of only one construction, to wit, a corner molding or guard strengthened by a wire, and that there is nothing else therein which was not fully disclosed and patented by the same inventor, Roulstone, in letters patent No. 27,476, and granted to him as early as March 13, 1860. But it is not always safe or proper in construing a patent to confine attention to the claims. These are sometimes too narrow to embrace the whole invention disclosed in the description and specifications.

In the present case the complainants say that the original patent has two features; one relating to the manner of protecting trunk-corners, and the other of the construction of a trunk molding, and that this view is fully sustained by the specifications. Turning to the specifications, we find it declared that: "The invention relates to the manner of protecting or re-enforcing the corners of leather and wooden travelling trunks by metal caps or moldings, or the construction of such moldings as articles of manufacture, and consists in a metal molding made into form to cover or project over the three surfaces, meeting at each corner or angle of the trunk, when this molding, so struck up or formed into shape, is made of corrugated metal re-enforced in the horizontal angle by a metal wire." Having thus stated of what his invention consisted, he proceeds to state the good results which would follow its introduction: "Such moldings or corner-pieces applied to the four upper corners of a trunk enable the corners to stand, without damage, the very rough usage to which they are subjected by express and baggage men. Any blow received upon the molding is imparted not directly to the trunk, but to the protecting corrugation or corrugations of the metal upon which the blow may happen to fall, thereby preserving the body of the trunk from injury. . . The article thus made into shape, ready for appli-

[2] [From 17 O. G. 675.]

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 166, contains only a partial report.]

[3] [No. 59,272.]

[4] [No. 7,130.]

cation to trunk-corners without any subsequent shaping or bending, and so as to protect the three surfaces meeting at either angle of the trunk, and presenting, by means of a corrugated surface, obstacles at all points to the direct impact of any body against the surface of the trunk, is of great utility, presenting to manufacturers of travelling trunks a cheap and reliable means of improving and strengthening their productions."

The reissue is dated May 30th, 1876; whether it is for the same invention depends upon the solution of the question whether leaving out certain features described in the original has so changed its character as to render the reissue substantially different. The claims of the latter are: "The corner-clamp A, made with the outwardly-projecting beads, b, at the corner, said beads being convex at the outer and concave at the inner side, substantially as herein shown and described. 2. The corner-clamp corrugated substantially as herein described, as a new article of manufacture." There is nothing more here than the original contained, but less. In the reissue the inventor has made no mention of the strengthening-wire nor of the three-winged clamp, which were so fully described in the original. They were omitted by design. The three-winged clamp, because it was found to be anticipated by the patent to H. T. Lee, No. 42,670, and granted May 10th, 1864; and the wire, because it was ascertained to be of no value in protecting the trunk. Not much was left except the guard or clamp, made hollow around the trunk-corners for the purpose of protection, so that, in the words of the original patent, "any blow received upon the molding would be imparted not directly to the trunk, but to the corrugation or corrugations of the metal upon which the blow might happen to fall, thereby preserving the body of the trunk from injury." Are the strengthening-wire and the three-cornered clamp such important particulars of the original patent, that their omission so changes the scope of the invention as to render the reissue void?

In the recent case of Russell v. Dodge [93 U. S. 460], the supreme court exhibited a disposition to criticise the facility with which reissues were obtained at the patent office, and held that, where the original patent was for a process of treating bark-tanned lamb or sheep skin by means of a compound in which heated fat liquor was an essential ingredient, and in a reissue a change was made in the original specification by eliminating the necessity of using the fat liquor in a heated condition, and making in the new specification its use in that condition a mere matter of convenience, and by inserting an independent claim for the use of fat liquor in the treatment of leather generally, the character and scope of the invention as originally claimed were so enlarged as to constitute a different invention.

I was inclined to the opinion at the first blush that the case under consideration came within the principle of Russell v. Dodge [supra], but after a more careful examination I have come to a different conclusion. The difficulty there was that the changes introduced into the reissue extended and enlarged the operation of the original patent, "bringing under it," as was stated in the opinion of the court, "manufacturers not originally contemplated by the patentee." But here the omission tends to restrict rather than to enlarge; and while enlargement by the use of new instrumentalities is forbidden, restriction by the disuse of some of the old is allowable.

This question was early before the late Mr. Justice Story,—Carver v. Braintree Manuf'g Co. [Case No. 2,485],—who held that an inventor was always at liberty in a reissue to omit a part of his original invention, if he deemed it expedient, and to retain that part only which he deemed it fit to retain. To the same effect was the opinion of the late Judge Woodruff of the Second circuit, in the case of Gallahue v. Butterfield [Id. 5,198]. The patentee in his original patent had a weight co-operating with a spring to give greater efficiency to the spring, and in the reissue he claimed the action of the spring alone. In commenting on this change, the learned judge said: "Nor do I perceive any sound objection to allowing the inventor, in his reissue, to claim the action of the spring alone. It is shown in the record of his patent; and surely a patentee, whose devices are new, is at liberty to claim each, by way of reissue, although he may have represented and claimed them originally as acting conjointly." In determining the case of Dorsey Harvester Rake Co. v. Marsh [Id. 4,014], Judge McKennan of this circuit held that any feature of the invention, which was actually a part of it, that was only suggested or indicated in the specifications or drawings, might be distinctly described in an amended specification and protected by a reissued patent, and, hence, that the claims of a patent might be restricted or enlarged to cover the real invention. "Nor is it any objection to a renewed patent," he adds, "that part of the original invention is omitted. This an inventor may do, because the public may use it, and there is nothing in the policy or terms of the patent act which forbids it."

2. Holding the reissue to be good, notwithstanding these omissions, the inquiry recurs: What is the invention described and sought to be covered by it, and is the same void for want of novelty?

It is a corner-clamp, made with an outwardly-projecting bead at the corner, the bead being convex at the outer and concave at the inner side. The inventor called it a corner molding or guard in his original description. In the Lee patent it is denominated a metal corner and cap or protecting-

cap, but is solid, and not hollow. In the patent issued to Roulstone, March 13th, 1860, and numbered 27,476, the whole trunk, embracing sides, ends, tops, and bottom, as well as corners, is made of corrugated-metal plates or outwardly-projecting beads with an exterior convexity and an interior concavity. The object of the invention is the protection of the corners of a trunk, and it is done by the use of corrugated metal. When it is once demonstrated that the entire trunk may be improved and strengthened by covering it with corrugations, is there anything patentable or novel, or does it require invention, to apply to the covers of a wooden trunk substantially the same protection? The complainants' reissued patent does this and nothing more. The invention lost its distinguishing feature by the omission of the strengthening-wire. Every valuable thing left in it is so plainly suggested by the previous patent, to Roulstone, for trunks wholly covered with corrugated metallic plates, that a mechanic would naturally make the application of such corrugated metal to the corners of wooden trunks, without the exercise of more than ordinary skill. This view of the case renders it unnecessary to inquire whether the manufactures of the defendants are an infringement of the patent of the complainants. The bill must be dismissed with costs.

GOULD, UNITED STATES ex rel. (BROWN v.). See Case No. 1,862.

Case No. 5,636.

GOULD v. CHRISTIANSON.

[Blatchf. & H. 507.] [1]

District Court, S. D. New York. Feb., 1836.

MINOR SEAMEN—CORPORAL PUNISHMENT — DISCIPLINE—DUTY OF MASTER.

1. A minor, who is placed by his father in a ship for an experimental voyage, to improve his health, and to learn navigation and the duties of a seaman, and who signs the shipping articles as a boy, is subject to the rules and discipline of the ship.

2. The master, in the exercise of a reasonable discretion, may rightfully inflict corporal punishment on such minor. No distinction, in this respect, exists in law, between common sailors and young men of education and refinement and of gentle bringing up.

3. It is a matter of public policy to encourage youths of cultivated minds and respectability of character and position to enter the merchant marine as seamen.

4. Discipline on shipboard should, in all cases, be carried out, if it is practicable, by suasion and reasoning addressed to the men: and masters can employ force only when it is manifestly necessary. This principle is most strictly obligatory in respect to boys who are known to the master to labor under physical infirmity, or to have been delicately brought up, or to possess talents and acquirements and to have entered the service to qualify themselves for the profession.

5. The master is not in loco parentis, in respect to a minor, so as to be exempt from responsibility in an action by such minor for a wrongful exercise of power in correcting him, to the same extent that a father might be exempt.

6. In such action, damages will be estimated with regard to the character and position of the libellant, and will not be limited exclusively to a remuneration for the bodily injury.

7. Excessive or vindictive damages will not be awarded in such a case, unless the punishment has been wantonly inflicted by the master, with a view to the disgrace and mortification of the libellant, and not for the enforcement of discipline.

This was a libel in personam [against Charles H. Christianson] to recover damages for assault and battery.

The pleadings in this case are inserted at large, that the references made to them in the opinion of the court may be the better understood, and that the version of the case given by each party under oath may fully appear. The libel, which was filed on the 20th of November, 1834, was as follows:

"To the Honorable Samuel R. Betts, Judge of the United States for the Southern District of New-York: The libel of John Gould, an infant, under the age of twenty-one years, exhibited by Edward S. Gould, his nearest friend, showeth:

"That your libellant, with a view of learning the art of navigation and the management of ships at sea, engaged himself on board the ship Commerce, of Philadelphia, of which Charles H. Christianson was master, in the month of May, in the year of our Lord one thousand eight hundred and thirty-three, to perform a voyage from the United States to the Pacific Ocean, and the ports of Chili and Peru therein, and thence to Canton, and back to New-York; and your libellant entered on board the said ship as a sailor or boy before the mast, and, at all times during the said voyage, while on board the said ship, performed his duty according to the best of his knowledge, skill and bodily strength. Your libellant further showeth, that he was then of the age of eighteen years, of slender make and strength, and had never before been to sea, and had been wholly unaccustomed to the duties and hardships of a sailor's life, and, having friends and relatives in easy and affluent circumstances, pains were taken to explain the situation of this libellant to the said Charles H. Christianson, who was wholly apprised of your libellant's situation, before the sailing of the said ship. Your libellant further showeth, that at various times prior to this libellant's leaving the said ship at Valparaiso, in South America, hereinafter mentioned, and without any just or reasonable cause, and, as your libellant believes and alleges, with the mere wantonness of cruelty, and to show his power and dominion over what he termed a gentleman's son, the said Charles H. Christianson beat, bruised and ill-

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

treated, by blows with his fists, with his feet, and with large and unsuitable ropes, the body of your libellant, and degraded and disgraced him as far as was in his power, and accompanied his said ill-treatment with oaths, curses and gross verbal abuse, all of which misconduct on his part was committed on the high seas, and within the jurisdiction of this honorable court, and without the criminal jurisdiction of any other court.

"Your libellant, in specification of his aforesaid general allegation in this behalf, doth further show, allege and declare as follows, that is to say: First.—That on or about the third day of June, of the said year, after they had been at sea about a fortnight, this libellant passed forward along the weather side of the companion-way, doing so in ignorance of and inadvertence to the etiquette of that passage being reserved to the ship's officers and passengers; whereupon, the said Charles H. Christianson seized this libellant with great violence, and pushed him as violently as possible against the lee rail of the ship, inflicting a severe bruise upon the body of this libellant, the effects of which continued for several days, at the same time using, in presence of the supercargo, a passenger, and several of the crew, language to the following effect: 'You damned booby, I'll teach you to come this side.' Second.—That, on the fourth day of June aforesaid, your libellant being put to picking potatoes on the quarter-deck, and leaning against the binnacle-house, the said Charles H. Christianson came up, and, without any order or remonstrance to this libellant, and without any knowledge or suspicion on your libellant's part that he was in any fault, kicked your libellant under his right arm with violence, in the presence of the other boy on board, at the same time using language to the substance and effect following, namely: 'You damned lazy rascal, lie down to your work.' Third.—That, on or about the second day of said June, when the ship was in the operation of tacking, at about five o'clock in the afternoon, this libellant, not knowing which rope was the main sheet, and being guilty of no fault in this respect, the said Christianson violently collared your libellant with one hand, and struck him violently with his other fist in the back, and shoved your libellant towards the rope, using the language: 'There, damned rascal, see it now.' Fourth.—That, on or about the twentieth day of June aforesaid, this libellant, being ordered to find the mizzen-royal brace, and being unable, from his inexperience, to do so, the said Christianson showed it to this libellant, and asked him if he would know it, whereupon this libellant answering, 'Yes, sir,' the said Christianson struck this libellant with the said rope, with his full strength, adding: 'Shall you remember it now, you damned rascal?' Fifth.—That, on the same day last mentioned, this libellant being forward, and lifting the fore-topmast studding-sail, and declaring his inability to lift it, the said Christianson used to your libellant the language: 'Yes, you can, you damned rascal, you don't lift a pound;' and, as your libellant was stooping to try to lift it again, the said Christianson knocked your libellant down upon the deck by a stroke with the end of the main-tack, a very hard rope, about two inches in diameter, upon the small of the back, and stood over your libellant, ready to renew the blow; that he then laid down the rope, and turned away; that the effect of this blow was a chronic inflammation of the membrane enclosing the spine, and an injury from which your libellant has not yet recovered. Sixth.—That, on or about the twenty-fourth day of June, being on the quarter-deck, in presence of several passengers, the said Christianson asked your libellant where a rope led which he had hold of; that your libellant, being near-sighted, could not immediately tell, upon which said Christianson knocked off this libellant's hat, caught him by the hair, pulled his head back, and rubbed his ears violently and said: 'Now, you damned blind man, do you see?' and your libellant declares that he was inexperienced, and did not know all the ropes in the ship, and the said Christianson was well aware of the fact. Seventh.—That, on or about the twenty-fourth day of July, the wind blowing a gale, and the ship rolling heavily, your libellant was walking aft, holding on to steady him, whereupon the said Christianson struck your libellant and kicked him down to leeward, and, as your libellant stopped half way, he followed him, and kicked him the remainder of the distance across the deck, adding: 'You damned wooden man, take that.' Eighth.—That, on the twenty-sixth day of July, your libellant having a leather belt around him, fastening his coat around him, the said Christianson, without other cause or provocation than merely this deponent's having on said belt, (never having been forbidden to wear it,) took off the said belt, flogged your libellant with it, and threw it overboard, and in the evening pulled your libellant's nose and ears, and slapped his face. Ninth.—That, on or about the fourth day of August, your libellant was sick, and was ordered by said Christianson to feed the pigs on board. Your libellant told the man bringing the order, of his inability, upon which the said Christianson renewed the order, and threatened to flog your libellant. Your libellant then went on deck on his hands and knees, and crawled about to execute said order, being unable to do otherwise, whereupon the said Christianson kicked your libellant along, saying that he was a damned lazy skulking rascal. Tenth.—That, on or about the nineteenth day of August, this libellant standing awkwardly at the pump in pumping the ship, the said Christianson kicked and struck this libellant until the said Christianson was tired and ceased for that reason.

"And your libellant further shows that, in a vast number of other instances, for the most trifling causes and on the most insufficient provocation, the said Christianson was in the habit of striking, beating and swearing at your libellant, and treating him in all respects in the most degraded and brutal manner, in presence of crew and passengers, he, the said Christianson, knowing that, from the libellant's previous mode of life, such conduct was more deeply wounding to the feelings of this libellant, as a man able to feel disgrace, than the mere bodily suffering, however severe. Your libellant humbly submits that the said Christianson, both by way of redress and reparation to your libellant, and by way of example to others and of monition to himself, ought to be compelled to make ample satisfaction to your libellant for the said grievances, and that five thousand dollars is claimed by your libellant as such satisfaction. Your libellant further showeth, that the said Christianson is now within this district, and your libellant apprehends that he will depart therefrom without delay. To the end, therefore, that the said Charles H. Christianson may be compelled to answer in this honorable court in the premises, and may be decreed to satisfy your libellant in the premises for all the said grievances, and that he may be held to bail in such sum as your honor shall think meet, may it please your honor to award the process of this honorable court to the marshal, commanding him to take the said Charles H. Christianson, and hold his body until he shall have answered the premises, and have performed and made such satisfaction in damages to your libellant as your honor shall judge suitable and decree in this behalf. And your libellant will ever pray.

"Sworn this 20th day of November, A. D., 1834. John Gould.

"Fred. J. Betts, Clerk.

"Daniel Lord, Jr., Proctor."

On the filing of the libel, bailable process in the sum of $500 was issued. The answer, which was filed on the 3d of December, 1834, was as follows:

"To the Honorable Samuel R. Betts, District Judge of the United States for the Southern District of New-York: The answer of Christian H. Christianson, who is proceeded against by the name of Charles H. Christianson, master of the ship Commerce, to the libel of John Gould, who sues by his next friend, Edward S. Gould:

"This respondent, saving and reserving all manner of benefit of exception to the many errors, insufficiencies and untruths in the said libel contained, for answer thereto, or so much thereof as is necessary to be answered, says, that it is true that this respondent was master of the ship Commerce, of Philadelphia, for the voyage from the port of New-York to Canton, and back, in the libel mentioned, and that the libellant shipped on board the said vessel for said voyage out and home, as boy, but not as seaman. And this respondent supposes, and therefore admits, that the said libellant may have had a view of learning the art of navigation and the management of ships at sea, in engaging in the said voyage. And this respondent admits that the libellant was at the time aforesaid, of about the age of eighteen years, and was of a rather slender frame, though not remarkably so for that age, and that his friends were in easy and affluent circumstances, and that the libellant was unaccustomed to the duties and hardships of a sailor's life. But this respondent denies that he was ignorant of the hardships he would be compelled to undergo in this occupation. On the contrary, this respondent saith, that he was applied to by Mr. Pelatiah Perit, of the house of Goodhue & Co., of the city of New-York, the consignees of the said ship, in behalf of the said libellant, for a situation for the said libellant as ship's boy for the said voyage. That respondent was averse to taking the libellant, from his experience of the trouble and difficulty often arising from taking persons under similar circumstances, and stated such objections to the said consignee, and that the respondent did not consent to take the libellant until he had an interview with the father of the libellant, when respondent repeated to his said father his objections to taking the libellant, and stated to him distinctly the nature of the duties that would be required of him, and the hardships that must be encountered, to all which his father replied, that the libellant was aware of it, but had set his mind upon going to sea, and urged deponent to receive him accordingly, and defendant at length consented, as a favor, to receive him in that capacity.

"And this respondent further saith, that he endeavored to teach the libellant the duties of practical seamanship, by himself and officers, by showing him the different ropes and parts of the vessel, and explaining their names and use, and by putting him to such work as was suitable to his strength and capacity, and, in so doing, used no undue or unreasonable hardship or severity, and not more than the necessity of the case required, nor than is customary in training boys for the rough and hardy life of a seaman. And this respondent denies that he was guilty of cruelty towards the libellant, through wantonness, or to show his dominion and power over a gentleman's son, or through any other cause, or that he at any time bruised or ill-treated him either with his fists, feet, or with large or unsuitable ropes. On the contrary thereof, this respondent saith, that the libellant was treated with kindness and indulgence; that he was not required to sleep in the forecastle with the common sailors, but occupied the steerage with the carpenter and one John Childs, a gentleman's son, who came on board under like circumstances; and further, that a part of the time the libellant was excused from his regular duty on deck, and only assisted in the cabin; and that, at all other times, he was only required to attend to the

ordinary boys' business on board ship. And respondent further saith, that the libellant was exceedingly awkward and useless about ship, and that he either took no pains or was unusually dull in learning his duty on board, and was accustomed to set about his work muffled up in great-coats and jackets, entirely unfit for his station and occupation, and for all of which this respondent at times reprimanded the libellant, but without abuse, curses or other ill language, and respondent may at times have gently laid his hands upon libellant, and quickened his movements, or directed his attention when he was peculiarly backward or dull in executing orders, but without any more violence than was requisite for such purpose, and without any intention of injuring or ill-treating the libellant; but defendant has no recollection of other instances than such as are hereinafter set forth And this respondent further answering denies, that he was guilty, at the several times in the libel particularly mentioned, of the assaults and outrages therein set forth, or any of them. And this defendant denies, that on or about the third day of June, in the libel mentioned, he seized the defendant, and pushed him with violence against the lee rail of the said ship, or inflicted any serious bruise on the body of the libellant, but defendant admits that, after he had informed the libellant of the usage of ships in regard to the use of the weather side, and had cautioned him against trespassing against the said usage, upon libellant's disobeying such direction, this respondent may have taken hold of the libellant and removed him to the proper side of the vessel, using no more force than was proper and necessary for that purpose. And this respondent denies that on the fourth of said month of June this defendant kicked the said libellant. And this defendant denies, that on or about the 2d day of June aforesaid, this respondent collared and struck violently the said libellant; but this respondent says, that about that time, to the best of respondent's recollection, on the occasion of tacking ship, the libellant being ordered to take hold of the main-sheet, and being very slow or backward in obeying the orders, respondent slightly pushed the libellant towards the same to quicken his steps, but without abuse or undue violence. And this respondent further answering denies, that on or about the twentieth day of June, this respondent struck the libellant with his full strength with the mizzen-royal brace; but this respondent saith, that at or about that time, as nearly as respondent recollects, the libellant, having been repeatedly shown the said rope, and being, in the course of the duty of the ship, ordered to take hold of the same, did not obey the order; that defendant thereupon showed him the rope again, and slightly hit the libellant with the bight of it over his jacket or great-coat, for the purpose of quickening his attention and making him more observant of his duty, but the same was without violence, and could have inflicted no injury on the libellant. And respondent saith, that the said royal mizzen-brace is one of the smallest and loosest ropes on board the ship, of about half an inch diameter. And the respondent further answering denies, that on the same day last mentioned, or at any other time, this respondent struck or knocked down the libellant with the main-tack or with any other large rope; and the respondent says that the main-tack is a very large, hard rope, and deponent believes that such a blow as in the libel stated would have killed or disabled the libellant. That this respondent is very certain that he never struck a common sailor in such a manner, and that he certainly could not have so struck a lad like the libellant. And this defendant further answering denies, that on or about the twenty-fourth of said June, respondent knocked off libellant's hat, pulled his hair or rubbed his ears with violence, but respondent saith, that at or about that time, as well as respondent can recollect, libellant, through neglect and inattention, not being able to find a rope which he was ordered to do, this respondent may have slightly taken hold of libellant and turned his head in the direction of the rope, for the purpose of directing his attention thereto and making him more attentive to his duty, but without violence or the abusive treatment in the libel stated. And this defendant further answering denies, that on the 24th day of July, this respondent kicked the libellant, or that he kicked him at any time.

"And this defendant further answering says that the said libellant was ordered and instructed to dress himself in proper seaman's apparel, but that, in neglect and disobedience of such orders, he persisted in going about muffled up in great-coats, jackets and handkerchiefs, altogether unfit for his station and occupation, and that some time, on or about the twenty-sixth day of July, as well as respondent recollects as to the time, the libellant being about his work in a superfluous quantity of coats and jackets, secured round his body by a leathern belt, which incapacitated him for prompt and seamanlike attention to his business, this respondent took off and threw away the said belt, and directed the libellant to adopt a different sort of dress while about his work; and this respondent thinks that he hit the libellant over his great-coat with the said belt, which was a very light and trifling one, for the purpose of enforcing his orders aforesaid, but without inflicting any injury on his person; and this respondent denies that he pulled the libellant's nose and slapped his face; and this defendant denies, that on or about the fourth of August, this respondent kicked the libellant, or used the abusive language in the libel mentioned; that defendant did not, on that occasion, require the libellant to perform any work beyond his health and strength; that he did not then, nor does he now, suppose or believe that the said libellant was unwell or unable to attend to the lighter

duties about the ship; and defendant saith, that he was required to feed the pigs as a necessary piece of work usually attended to by the boys on board, and not as an ignominious or disgraceful thing for the libellant to do; and defendant denies, that on or about the nineteenth of August, this respondent kicked or struck the libellant till respondent was tired, or that then, or at any other time, to the best recollection of respondent, he kicked or struck the libellant at or near the pump; and this respondent denies that he made use of the profane and abusive language in the libel stated. On the contrary, this respondent saith, that the use of such language was contrary to the public standing orders of the ship, and contrary to the habits and usage of respondent. And respondent submits, that, in the instances of slight correction aforesaid, this respondent, as such master, was justified and required so to correct the libellant, as well for his own improvement as to insure the prompt and seamanlike attention to the duties and necessary etiquette of the ship. And this respondent further answering denies, that he was in the habit of striking, beating or swearing at the libellant for trifling causes, or otherwise; or that, to the best of deponent's recollection, he ever struck him at any other times than above stated, or that he ever treated him in a brutal or degrading manner, or sought in any way to disgrace him or to wound his feelings. On the contrary, this respondent says, that the libellant was treated with more kindness and indulgence than ship-boys usually are. That, on putting to sea on the said voyage, respondent called all hands aft, and gave them instructions and orders for the voyage, by which he forbid all swearing or fighting on board the said vessel, and forbid the officers of the vessel striking any of the men, except by respondent's orders, and their striking the boys under any circumstances, for the purpose of protecting the boys from the usage which it is common for them to receive, and that he never suffered the officers or crew to strike them at all. And defendant further saith, that he suffered the libellant to abandon the voyage and go on shore at Valparaiso, without any suspicion that the libellant had any ill-will or subject of complaint against this respondent. That, before reaching Valparaiso, libellant repeatedly stated to respondent that he was sick of the sea, and desirous to abandon the voyage, stating, among other things, that his health was improved, but he did not like the life. That respondent, finding the libellant was of no use on board, and, as respondent believed, would never make a sailor, freely consented to his going on shore and giving up the voyage, and referred him to the United States consul for such certificate as would justify respondent in discharging him in a foreign port, which certificate was granted by the consul, and the respondent thereupon discharged the libellant. That, after the libellant had left the ship, respondent repeatedly saw libellant, and had no intimation from him of any complaint against respondent. On the contrary, libellant voluntarily informed the respondent of the embezzlement of the ship's stores by the carpenter, which, he stated, he had been afraid to mention while on board, for fear of the carpenter. And defendant further saith, that as he is informed and believes, and therefore alleges, the said libellant, on his return to the port of New-York, had an interview with Mr. Perit aforesaid, by whom the situation for libellant was obtained, and the libellant then stated that he had seen enough of the sea; and, on being asked by Mr. Perit how he was pleased with the captain, meaning this respondent, the libellant answered that he had no complaint to make against him, or words to that effect.

"Wherefore this respondent prays he may be considered as justified in the premises, and be hence dismissed, with his costs, &c.

"C. H. Christianson.

"J. Coit, Proctor for Defendant.

"On this 2d day of December, 1834, before me personally appeared Christian H. Christianson, who, being duly sworn, says, that he has read, or heard read, the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on his information and belief, and, as to those matters, he believes it to be true.

"Geo. W. Morton, U. S. Comm'r."

Daniel Lord, Jr., for libellant.
Joshua Coit, for respondent.

BETTS, District Judge. Both parties have gone into very extended proofs in support of their respective pleadings and to repel the allegations brought against them. One commission was executed at Valparaiso and one at Canton; ten other depositions were taken out of court, and six witnesses were examined orally on the hearing. It is not important to analyze, in this opinion, this mass of testimony. Its general bearing throughout is in contradiction of the inflamed charges of the libel, and goes to prove the conduct of the respondent, in the treatment of the libellant, to have been, ordinarily, mild and unobjectionable. This is the tenor of the evidence given by the libellant's own witnesses, who were in the ship with him—not merely the crew, but passengers in reputable walks of life, who may be supposed to appreciate personal rights more justly; whilst the rest of the crew, and all the passengers, including a supercargo and the American consul at Valparaiso, speak in unqualified terms of approval of the general deportment of the respondent in his command, and in regard to the libellant, so far as his situation came under their notice or they heard him speak of it. But, abating the exaggerations in the statement of the libellant's case, and making

broad subtractions from the evidently prejudiced representations of two of his witnesses, the boy Childs and the carpenter, I think there is direct and unimpeached evidence, that on two or three occasions the respondent assaulted the libellant and committed violence upon his person, in a manner not justified by the proofs—first, in pushing the libellant forcibly across the deck, and accompanying the act with a blow or slap on the side of his head, for a breach of etiquette in walking on the weather side of the quarter-deck; again, in cuffing him for awkwardness or lack of activity in setting the pump to work; also, in twitching his head backwards and slapping him for failing to know and find a particular rope he was ordered to haul upon; also, in pulling off the libellant's belt, striking him over the shoulders with it, and throwing it overboard, in presence of the passengers, and taunting and deriding him for his clumsy and ungainly dress and appearance; and again, for striking him across the small of his back with a rope's-end, when he was stooping down in the effort to raise from the deck one end of a yard with a wet sail on it. The court is very careful not to be carried away by the picture given in the libel of this last-named transaction, or by the dubious colorings applied to it by the testimony of the boy Childs, and of another sailor, because their testimony is inconsistent with the after conduct and representations of the libellant himself, and because their credibility as witnesses, if not legally impeached, is much impaired by the testimony of the passengers and of others of the crew. Yet, I cannot deny my belief of the fact that a blow with a rope was given at the time by the respondent. This is the substance of the credible proof in support of the charges in the libel. It may embrace another instance or two of like character; but no punishment or a more aggravated kind appears to have been inflicted on the libellant by the master.

The argument for the defence is, that if the master has not succeeded in wholly discrediting the evidence against him on this subject, he was justified in law for his acts, under the circumstances and in the relation of the parties to each other; and that, in respect to this minor, the master stood emphatically in loco parentis, and was empowered to correct him under the same immunity that a father may correct a child. The rightful authority of a master to correct a mariner at sea, for malconduct or culpable negligence on shipboard, is not now in debate. The libellant's action is put on the footing, that he was entitled to a privilege or exemption in this service, which distinguished his liability to the authority of the master from that of a common sailor; and, if not, that the punishment he received was excessive and cruel. It is in proof that the libellant was about eighteen years of age, and of a delicate constitution, and was desirous of making a long sea voyage to benefit his health and learn navigation with a view to that profession. He was of highly respectable connections, and had been brought up in a distinguished family and with cultivated and refined tastes. He had never been accustomed to hard labor, and was entirely without experience of the exactions and hardships of seafaring life. From these considerations, his father and friends were opposed to his undertaking the voyage; but, yielding to his persistency, they obtained a berth for him on board the ship Commerce, commanded by the respondent. The libellant's father explained the young man's situation to the respondent, and besought for him treatment on board which might render the service useful and encouraging to him, and contribute to strengthen his constitution and health. The master was reluctant to receive him and another young man, his companion, of about the same age and position in society, alleging that sons of gentlemen were troublesome in merchant ships and proved to be poor sailors, and that the libellant, if he engaged in the voyage, would find the service more severe than he anticipated, and become dissatisfied with his position. He was, however, accepted as one of the crew, and signed shipping articles for the voyage as a boy. He was stationed in the steerage with the carpenter and another boy, and was not put in the forecastle with the common sailors.

The old distribution of titles and rank amongst the ship's company [2] has, in respect to boys at least, gone into disuse in modern times. In American ships, cabin-boys, apprentices or pupils, and raw or green hands, are all rated as boys, without regard to their ages. The full-grown man, if not an ordinary seaman, ranks as a boy. Cabin-boys are usually attendants upon the master or steward, are regarded rather as servants than as mariners, and are rarely put to gen-

[2] The persons ordinary for sailing in ships have divers denominations: The first, which is the master, known to us and by most nations both now and of old, and especially by the Roman laws, "navicularius" or "magister navis"; in English rendered "master"; or "exercitor navis"; in the Teutonick "skipper"; by the Graecians, "navarchus" or "nauclerus"; by the Italians, "patrono." But this is only to those vessels that are ships of burden and of carriage; for to ships of war the principal there is commonly called "commander" or "captain." The next in order of office to the master, is he who directs the ship in the course of her voyage, by the French called "pilote"; by the English and Flemming, "steersman"; by the Romans, "gubernator"; by the Italians, "nochiero pilotto," and "navarchus," as Gerettus writes. The third is esteemed the master's mate or companion, chiefly if the master be steersman himself; of old by the Graecians and Romans called "proreta"; his charge is to command all before the mast. His successor in order is the carpenter or shipwright, by those two nations of old called "naupegus" by the latter; by the first "calaphates." From the loins of one of that rank sprang that great emperor Michael, surnamed "Calaphates," who denied not to own the quality of his father among his regal titles. The very name of "chalaphate"

eral ship's duty. It is otherwise with apprentices or pupils; but, as they serve under special articles or hiring, their cases come less under the supervision of the law maritime than those of other members of the crew. In this case, the libellant was a boy, in a general and nautical sense. He was a raw hand, and, having signed the shipping articles, was subject to the rules and authority of the ship, in every respect, according to his capacity and experience, the same as an ordinary seaman. The master might rightfully punish him for delinquencies, in the same manner as a common sailor, and, when the misfeasance was of a kind to call for personal chastisement, there was nothing in his position which exempted him from its infliction. Nevertheless, the effect of the infliction of unjustifiable punishment upon a delicate, educated and sensitive youth, and upon a hardy seaman, inured to rough usage from officers and from his messmates, would be widely different, and the consequences to the master for the wrongful act ought not to be the same. In my judgment, it is proved in this case, that personal chastisement was applied to the libellant in several instances, where no necessity is shown for its infliction. It was administered for very trivial delinquencies, if the acts or omissions of the libellant could be so termed, and abruptly, without calling the libellant to explain his conduct, or giving him an opportunity to offer apologies or amends for it. Nor did the master pronounce it faulty, so as to afford a caution to the libellant or the crew against its repetition. The correction administered was the only admonition given, and in this respect the method of instruction was the same that it would have been if the libellant had been an irrational animal. This was unwarranted in law. A master has no authority to fall upon a mariner with blows for every inadvertency or act of misbehavior, unless the urgency to subdue him instantly or to resist some outrage threatened by him, be palpable. Nothing mutinous or violent or refractory, on either occasion, on the part of the libellant, is shown. I think it clear, upon the proofs, that the punishments complained of were exceedingly slight in kind, inflicted no injury upon the person of the libellant, and were only calculated to wound his pride and sensibilities. They do not, therefore, demand any startling reparation by damages, and, but for some circumstances peculiar to this case, the court would feel constrained to award little beyond costs and nominal damages. But the relation of the libellant to the master and to the ship presents considerations both of a general bearing and special to the case, which deserve notice. The government and discipline on board ships at sea being necessarily largely in the discretion of the master, courts can exercise little more supervision than to see that the discipline is administered temperately, and with reasonable regard to the capacity, constitution and feelings of the crew. Rice v. The Polly and Kitty [Case No. 11,754]. If there arises a necessity for corporal restraint or punishment to individuals of the crew, the same measure of severity is not permitted towards the inexperienced, the feeble of frame or the improvident, as towards thoroughly trained, robust and perverse offenders. The libellant was under physical infirmities, of which the master was aware, which called for leniency and forbearance, if an order failed to be promptly and correctly fulfilled by him at the instant it was given. His eyesight was bad, he was of slender strength, he was timid in undertaking work which was strange to him, and he was awkward in learning. It should, accordingly, have been the occasion for careful teaching, or at most for reproof, if he failed to find or haul upon the right rope at once, or bungled in rigging up the pump, or went aloft clumsily or with hesitation, or was prone to cover himself with more clothing than was convenient to an easy and prompt action on duty, rather than for using a rope's end upon him, or boxing his ears, whether either produced bodily suffering or not. The offences set forth in the answer, in excuse of the corrections given to the libellant, appear to have been chiefly inadvertencies, or the results of ignorance, and his failure to lift at once the spar and sail for which he was struck across the back, if owing, in a degree, to the lack of a hearty good will for the work, must also be deemed, on the evidence, attributable in part to the weight of the spar and sail, compared with his actual strength. It appears to me, that every instance of misconduct or neglect alleged against the libellant was a fit subject for expostulation, caution or reproof by the respondent, and did not demand personal chastisement to correct the error or stimu-

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the Venetian and Italian still use to this day. The next who succeeds in order, is he who bears the charge of the ship's boat, by the Italians called "brachierie"; by the Graecians and Romans, "carabita," from "carabus," which denotes the boat of a ship. The sixth in order, especially in ships of burden, is the clerk or purser, by the Italians called "scrivano"; whose duty is the registering and keeping the accounts of all received in or delivered out of the ship; for all other goods that are not by him entered or taken into charge, if they happen to be cast overboard in a storm, or are stolen or imbezzled, the master answers them not, there being no obligation on him by law for the same; his duty is to unlade by day, not night. The seventh, a most necessary officer, as long as there are aboard bellies, sharp stomachs and provision, called the "cook." The eighth is the ship's boy, who keeps her continually in harbours, called of old by the Graecians, "nauphilakes"; by the Italians, "guardino": These persons are distinct in offices and names, and are likewise distinguished in their hires and wages; the rest of the crew are under the common name of "mariners"; by the Romans called "nautae"; but the tarpollians, or those youths or boys that are apprentices, obliged to the most servile duties in the ship, were of old called "mesonautae." 1 Molloy, bk. 2, c. 3, pp. 341, 342.

late the libellant to a proper performance of his duties. If he was to be regarded and treated merely as a sailor, yet, as he was an educated and intelligent person, the master should have appealed to his reason and sense of right, to lead him to obedience, before resorting to blows.

The case presents another aspect, which should be adverted to. The libellant was making an experimental voyage, partly with a view to acquaint himself with navigation and the duties of a seaman, in order to qualify himself for that calling. It is of national concernment that the merchant marine should be supplied with men of intelligence and character, not only to officer the ship, but to fill every station on board of her. Nor is this consideration limited to the importance of having the ship's company made up of men competent, in every emergency, to navigate the vessel, and to deal intelligently with her lading, nor to the advantages to be derived by commerce and trade alone, from such a composition of a crew. Crews of American ships, if a creditable and true representation of American intelligence and morals at home, would abroad, wherever they went, become envoys more efficient than diplomacy or arms can send forth, in spreading arts, culture, religion and the love of peace and liberty. They would efface the disrepute attached, in a degree, to the calling of a sailor, and would render those who fill this vast field of enterprise on the high seas, common participators, in reputation and worth, with the merchants whose business they transact. The country has thus a deep interest in encouraging young men of capacity, ambition and good character, to seek employment in the merchant marine, and in having the ship of the merchant, like his counting-house, become to a school to his employés, for the culture of general intelligence and refinement of manners, together with a thorough knowledge of their special pursuit. The coarse and rude usage which the libellant received from the respondent is not, then, in my judgment, to be estimated solely by the consideration of the positive bodily harm which accompanied it; but the misconduct of the respondent is to be measured with some regard, also, to the broader interests, both those of navigation and those of a public nature, affected by it, in view of its tendency to deter sensitive and worthy young men from entering the merchant's service as mariners. Nor is it to be overlooked, that, in appreciating the wrong received from torts of the description proved in this case, the wound to the libellant's pride and self respect is entitled to weight, in determining the damages to be awarded him. Although, then, I hold the respondent acquitted of any wanton maltreatment of the libellant, and of any intentional cruelty towards him, and of any design to disgrace and humiliate him by the mode of punishment adopted, and although the actual injury received by him therefrom was inconsiderable, and was not made matter of complaint on board, yet the respondent was culpably in fault in using force upon the libellant, on the occasions where moderate reproof and admonition or plain instruction to his inexperience was all the correction his delinquencies seem to have demanded. The humiliation and suffering to the libellant's feelings, in being subjected to corporal punishment, must have been greater than would have been experienced by a lad brought up roughly and with associates accustomed to like treatment; and this consideration will properly enter into the estimate of damages.

A master of a vessel, under the imputed authority of a parent over his crew, or even over mere boys under his charge, cannot claim the exemption or immunity which a father enjoys, to chastise a child at his discretion, without responsibility to the law, by punishments other than such as are cruel and injurious to the life or health of the child or are a public offence. On the contrary, a ship-master is liable directly to a minor for every personal tort committed upon him without legal justification. The considerations before suggested will, in this case, augment the damages beyond a mere remuneration for the bodily injury sustained by the libellant, but will not entitle him to vindictive or aggravated damages. I shall decree him $100 damages and his costs. Decree accordingly.

GOULD (COX v.). See Case No. 3,301.

Case No. 5,637.

GOULD et al. v. GOULD et al.

[3 Story, 516.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1844.

ADMINISTRATORS—FRAUD—LACHES—JURISDICTION—EVIDENCE.

1. Where A and B held certain valid claims for services during fifteen years against the estate of the intestate, and his administrator gave notes therefor, with the understanding, that the notes should only be good for the amount allowed by the judge of probate, and the administrator credited himself with the amount of the note given, as money paid, and the claims were fully allowed by the probate judge, and the plaintiffs being heirs, and having received their portion of the estate, after nineteen years brought this bill to set aside the allowance, as fraudulently obtained; it was *held*, that the proceedings by the administrator were wholly unjustifiable, but that the plaintiffs had been guilty of gross laches in not bringing their suit before, and as the parties making the original claim were dead, and as the evidence on which the court had proceeded was wholly gone, that the judgment was to be presumed as founded upon a valid claim, although personal notice had not been served upon the plaintiffs.

[Cited in Eberstein v. Willets, 134 Ill. 104, 24 N. E. 967.]

2. This court possesses full jurisdiction in equity in all cases of fraud, including fraud in ob-

[1] [Reported by William W. Story, Esq.]

taining judgments and decrees in other courts, excepting fraud in obtaining a will of real and personal estate; and has concurrent jurisdiction with the state courts in all such cases.

[Cited in Goodenow v. Milliken, Case No. 5,535; Sullivan v. Andoe, 6 Fed. 647.]

[Cited in Maloney v. Dewey, 127 Ill. 398, 19 N. E. 848; Wheeler v. Wheeler, 134 Ill. 525, 25 N. E. 588.]

3. A court of equity will never entertain a bill for relief, even in cases of asserted fraud, when the plaintiff has been guilty of gross laches and unreasonable delay.

[Cited in Holden v. Meadows, 31 Wis. 289; Kobiter v. Albrecht, 82 Wis. 66, 51 N. W. 1124.]

4. To found a claim for relief in equity, it is not sufficient for the plaintiff to raise suspicion of bad faith, but he must establish it beyond reasonable doubt.

[Cited in Gindrat v. Dane, Case No. 5,455.]

[Cited in Oliver v. Oliver, 119 Ill. 533, 9 N. E. 891.]

5. An answer responsive to allegations in a bill in equity, is positive evidence, and to be taken as true, unless disproved by the testimony of two credible witnesses, or of one credible witness and facts entirely equivalent to and as corroborative as another witness.

[Cited in Jewett v. Cunard, Case No. 7,310; Tufts v. Tufts, Id. 14,233.]

6. A deposition in perpetuam, which has not been recorded according to the law of the state where it is taken, is not competent evidence in the courts of the United States.

[Cited in Sheldon v. Rockwell, 9 Wis. 183.]

Bill in equity. The bill sets forth in substance, that the plaintiffs [Daniel Gould and others] are the only surviving children of Nathan Gould, deceased, who was one of the brothers of Jacob Gould of Stoneham, in the county of Middlesex and commonwealth of Massachusetts, yeoman, deceased, intestate; that their said father, Nathan Gould, died in November, A. D. 1816; that their said uncle, Jacob Gould, died on the nineteenth day of November, A. D. 1819, leaving considerable real and personal estate, intestate and without issue; that the plaintiffs, together with their sister Mary Towle, wife of one Laban Towle, both now deceased without issue, and Thomas Gould and David Gould, 2d, brothers, and Mary Gould, Susanna Converse, and Elizabeth Knight, sisters of said Jacob, were his heirs at law; that the said Mary Towle is now deceased, intestate, without issue, and leaving no father surviving; that the plaintiff, the said Abigail Gould, widow of the said Nathan Gould, is the mother of said Mary Towle, and, as such, is one of her heirs and legal representatives, and entitled to a distributive share of the estate, real and personal, of the said Mary. That at the time of the decease of their said uncle, Jacob Gould, the plaintiffs were out of this commonwealth, and resident in distant parts of the United States; and that they have so continued to reside until the filing of this bill of complaint, except that the plaintiff, David Gould, removed to the state of New Hampshire from the state of Ohio, in the year 1823, where he has since resided. That on the twelfth day of February, A. D. 1820, Thomas Gould, Junior, of Stoneham, aforesaid, yeoman, a nephew of said Jacob, obtained from the judge of probate for the said county of Middlesex, letters of administration on the goods and estate of said Jacob Gould, and by virtue thereof possessed himself of the same. That on the nineteenth day of April, A. D. 1820, the said administrator returned into the probate office, for the said county of Middlesex, the inventory of said estate, amounting to $3650.00 in real estate, and $657.00 in personal estate. That on the first day of June, A. D. 1820, the said administrator settled his first administration account with the said estate. That on the fourteenth day of February, A. D. 1821, the said administrator settled his second administration account with the said estate, and claimed allowance for the following items among others: To David Gould, Jr., $1276.00; to Mary Gould, on account, 866.00. That on the twenty-first day of February, A. D. 1821, the said administrator petitioned the said judge of probate for leave to sell real estate for the payment of the balance due to him, as by his account last recited, and filed a list of debts to the amount of $2966.12: whereupon the said judge decreed a sale of the real estate to the amount of $2151.29. That on the twenty-ninth day of May, A. D. 1821, the said administrator filed his affidavit of sale, whereby it appeared that the sales of the said real estate amounted to $2201.29, the said David Gould, Jr., becoming the purchaser. That on the twenty-first day of August, A. D. 1821, the said administrator settled his third administration account with the said estate.

And the plaintiffs further show, that the item of fifteen hundred and seventy-six dollars, charged by the said administrator in his second administration account as paid to David Gould, Junior, and the other item of eight hundred and sixty-six dollars, charged therein as paid by him to said Mary Gould, were never, in fact, due to them from the estate of said Jacob Gould, but that they were fictitious and fraudulent claims against the estate aforesaid, which the said administrator fraudulently allowed, with a secret unlawful understanding between the said administrator and the said David Gould, Junior, and Mary Gould, that if the said administrator would permit said David, Junior, by means of such fictitious claims, to possess himself of the homestead farm of the said Jacob Gould, the intestate, and would settle the estate according to their, the said David, Junior, and Mary's wishes, the said David, Junior, would devise the said real estate to the said administrator on his decease, and the said Mary would make her will in favor of other heirs of the said Jacob, the intestate, whom it was desirable to conciliate to this fraudulent arrangement. That the said administration accounts were allowed and adjudged by the said judge of probate, and

were not resisted by the plaintiffs, and other heirs, at the time of such adjudication, and have been suffered to remain undisturbed and without examination from thence hitherto, for divers strong and controlling reasons and obstacles, to wit: first, because the plaintiffs then were, and for a long time have been, resident in far distant parts of the United States, and had but little communication with their relatives in this commonwealth; secondly, because the plaintiffs had no personal legal notice of the proceedings in the said probate court; thirdly, because the plaintiffs have been in poor circumstances, and unable to sustain the expenses of an investigation into the said proceedings and doings of the said administrator; fourth, because of the fraudulent bribes, solicitations, and promises made and offered to some of the other heirs then in this commonwealth, who might have resisted. the said accounts and charges by the said David, Junior, and Mary, and the said administrator; and because of the fraudulent understanding between the said administrator and the said David, Junior, and Mary, concerning the settlement of the said estate; inasmuch as in particular the said Mary Gould, in order to suppress all opposition to this arrangement, promised the said Susanna Converse and Jesse Converse, her husband, to make her will in their favor, if they would not object to the said accounts and charges, and the said David, Junior, promised to give to Thomas Gould, Senior, the father of said administrator, a certain wood-lot, if he would not object, and the said David, Junior, and Mary, offered to said Nathan Gould, a brother of the plaintiffs, (who is now resident in the state of New Hampshire, and cannot be made a party defendant to this bill, and refuses to become a party plaintiff herein), money, if he would not object to their charges, and the said Mary promised to remember him in her will, and he thereupon withdrew the opposition which he had prepared and intended to make, and suppressed the evidence which he had discovered against the validity of the said accounts and charges; of all which the plaintiffs have only been recently informed and could not at the time have known. That among other evidence known to the said Nathan Gould, and also known to the said administrator, and the said David, Junior, and Mary, and which ought to have deterred the said administrator from allowing and paying the said claims, and is proof that the said administrator colluded with the said David, Junior, and Mary, in the allowance of their said claims, and which they induced the said Nathan to suppress, were the facts, that the said Jacob Gould, a short time before his decease, had declared to one William Abbott, that he, the said Jacob, had settled with the said David, Junior, and Mary, and did not owe them five dollars, and that he did not owe five dollars in the world, which declarations and other similar ones the said Jacob had repeatedly made to and in the presence of the said administrator.

And the plaintiffs further show, that the said David Gould, Junior, deceased, in the year 1834, and, in pursuance of the agreements and understandings above set forth, devised to the said administrator, Thomas Gould, Junior, the real estate of which he had so possessed himself, in fraud of the other heirs of Jacob Gould; that the said Mary Gould, in pursuance of the agreements and promises she had made, being part of the same collusive arrangement, on her decease, in the year 1836, bequeathed to said Nathan Gould one hundred dollars, and the residue of her property to Jesse Converse, Junior, son of said Jesse and Susan Converse, except a few hundred dollars, which the said Jesse, Junior, advised her, in order to prevent suspicions, to distribute among her other nephews, nieces, and cousins; and that the said David, Junior, Mary, and the said administrator, made, and carried into effect divers other agreements, arrangements, and bargains, with and among each other, and with and among other heirs of the said Jacob Gould, not the plaintiffs, in pursuance of the fraudulent design, formed at the beginning, of procuring the allowance of the said David, Junior, and Mary's charges against the said Jacob's estate, and of enabling the said David, Junior, thus to possess himself of the real estate of said Jacob, to the prejudice and exclusion of other heirs. And the plaintiffs further show, that being entitled, as heirs of said Jacob Gould, to the said Nathan Gould's distributive share of his estate, they have frequently, by themselves and by their agents, applied to the said administrator, and requested him to come to a full and true account with the plaintiffs for the estate and effects of the said Jacob, and to bring into the general fund of the said estate, the sums so fraudulently charged, as paid by him to the said David, Junior, and Mary, and to pay to them their respective just shares thereof, and to surrender, for division among the heirs of said Jacob, the real estate, of which he now claims to be the owner, under the will of said David, Junior;—with which just and reasonable requests the plaintiffs hoped the said Thomas Gould, Junior, would have complied. But now so it is, may it please your honors, that the said Thomas Gould, Junior, administrator, as aforesaid, absolutely refuses to open and correct his administration accounts, or to bring into the general fund of the said estate the sums so fraudulently charged by him, or to pay to the plaintiffs their just shares thereof, or to surrender for distribution the said real estate, of which he claims to be the owner, under the will of said David Gould, Junior; and the said defendants pretend that the moneys, so charged by the administrator, as paid to said David, Junior, and Mary,

were true and proper charges against the estate aforesaid, and that the same were due in full: Whereas the plaintiffs charge the contrary thereof to be the truth; and so it would appear, if the said defendants would set forth, as they ought to do, all the agreements and doings which transpired, at the time before, and when the said several proceedings on the estate aforesaid, were had before the said judge of probate.

The answer of Thomas Gould (which was adopted by the other defendants, who made answer to any of the material facts), was in substance as follows: That the said Jacob Gould died seized of certain real and personal estate, and that his heirs were his brothers and sisters, together with the children of those who had died, as set forth in the bill. That he was informed and believed that all the complainants then resided out of the state, and still continue to do so, except the complainant and Gould, who in the year 1822 returned to Stoneham and there resided many years. That he was duly appointed administrator, and accepted and acted under the appointment, and returned his first account as administrator on April 25th, 1820, and his second account on January 11th, 1821; and that notice was, pursuant to an order of the probate court, served upon the heirs at law and creditors, to appear and show cause, if any they had, against the allowance of the said account. That he afterwards obtained leave from the court, after notice to the heirs and creditors at law, to sell so much of the real estate as might be necessary to raise the sum of $2170.29, and that the said David Gould, Junior, and Mary Gould were the purchasers thereof. That on June 23rd, next ensuing, the defendant filed his third account, which was allowed by the said court, after due notice had been served on the parties interested. The defendant denies that the said sum of one thousand five hundred and seventy-six dollars, so by him charged in his said second account, as paid to the said David Gould, Junior, and the sum of eight hundred and sixty-six dollars, so by him charged in his said account, as paid the said Mary Gould, were, so far as he knew, was informed or believed, not in fact due to said David and Mary respectively, from the estate of said Jacob Gould, deceased, or that the same were fraudulent or fictitious claims against the said estate; on the contrary, this defendant further answering, says, that it was well known to him, this defendant, that both said David Gould, Junior, and said Mary Gould, had for many years lived on the farm of, and with the said Jacob Gould, and had been by him employed, and had rendered him services of great value, and which were by the said Jacob stated to this defendant to be of great value and importance to him the said Jacob. And this defendant further answering, says, that after the decease of said Jacob, the said David Gould and the said Mary Gould did present to him, as administrator as aforesaid, their respective accounts and claims against the estate of said Jacob, which original account this defendant here produces and annexes, marked K and L, and prays that the same may be taken as part of this his answer. And this defendant believed the same to be fair and just claims against said estate; but this defendant being unwilling, and believing it to be improper to allow the same upon his own judgment, and without notice to, and the consent of, the heirs and other parties interested in said estate, or unless the same should be established, upon a hearing and proof thereof, before the court of probate for said county of Middlesex, did so notify the said David and the said Mary, and did decline to pay the same. That thereafterwards, the said David and the said Mary, having respectively procured the written consent and approbation of a portion of the heirs of said estate, most largely interested in disputing the said accounts and claims, authorizing the allowance of the same by this defendant, the defendant did thereupon consent and agree to and with said David and Mary respectively, to pay and allow the said claims, provided the sum should be approved and allowed by the court of probate of said county, after a hearing and notice to all parties interested, there to show cause for or against the same; and this defendant thereupon, for the purpose of presenting said claims for adjudication to the said court of probate, and under the belief that the proper mode of so doing would be to charge the same in an account of his administration of said estate, he, this defendant, being unaccustomed to the course of proceedings in said court, did, on the tenth day of January, in the year of our Lord one thousand eight hundred and twenty-one, agree to and with said David and Mary respectively, to give, and did give, to each of them his promissory note for the amount of their respective claims, and did take from said David and said Mary respectively their obligations to give up and restore said notes, or reduce the respective amounts thereof, in case they, said David and Mary, should fail to prove, support and procure to be allowed, in whole or in part, their respective claims against said estate, upon a hearing thereof before said probate court, to be had after notice as aforesaid, and the respondent did thereupon, on January 11th, present to the said probate court, for hearing and allowance, his said second account, as administrator of said estate as aforesaid, and in said second account did insert and charge said claims and accounts of said David and the said Mary respectively; and this defendant did, at the time of presenting his said second account to said court of probate, exhibit to the said court, the said respective accounts of the said David and Mary as afore-

said, and did state and explain to said court the circumstances under, and the manner in, which the same had been so entered in his said account; and the said court thereupon, on the same eleventh day of January, did direct an order of notice to be issued to all persons interested, and to be served in the manner hereinbefore set forth, returnable on the fourteenth day of February, then next as aforesaid. That at a probate court, holden on the said fourteenth day of February, the said order of notice was returned, duly served as aforesaid; and thereupon the said Nathan Gould, the brother of said complainant, did appear before said court, and the said accounts and claims of the said David Gould and the said Mary Gould were exhibited, and the said Nathan Gould did object to the allowance of the same, or any part thereof; whereupon the said court of probate did proceed to hear and examine the proofs of the respective parties for and against the said claims and the allowance thereof, and the said David Gould and Mary Gould did then produce witnesses and proof in support of their respective claims; and the said Nathan Gould, on his part, did produce testimony to the said court, to defeat or diminish the amounts of said respective claims of said David and Mary, and to prevent the allowance thereof, all which were heard and considered by said court; and the said court did thereupon decree that the said respective claims and accounts of the said David and Mary be allowed, and that the said respective accounts, and the receipts thereto, be accepted and recorded, and that the original thereof, when recorded, be delivered back to this defendant; and the said court of probate did thereupon, on the said fourteenth day of February,—by a decree reciting, that due notice had been given to all persons interested in said estate, and that said Nathan Gould appeared and objected thereto, and that the parties were fully heard,—order that said accounts of this defendant be approved and allowed, and that the same be recorded accordingly.

The defendant denies that the said accounts were allowed or paid fraudulently, or with a secret unlawful understanding between him and the said David Gould, Junior, and Mary Gould, or either of them, that if he, this defendant, would permit the said David Gould, Junior, by means of said claims, to possess himself of the homestead farm of said Jacob Gould, deceased, and would settle said estate according to the wishes of said David and Mary, the said David Gould, Junior, would, at his decease, devise said estate to this defendant, and that the said Mary would make her will in favor of other heirs of said intestate, whom it was desirable to conciliate to said alleged arrangement, as in said bill most wrongfully set forth; or that said claims of said David and Mary, or either of them, were allowed and paid by this defendant in consequence of, or in pursuance of, any other or similar, secret or unlawful understanding whatever; or that any understanding or agreement, expressed or implied, of any kind whatever, in relation to said claims of said David and Mary, or either of them, or the allowance or payment thereof, ever existed, or was known to, or heard of by this defendant, other than is hereinbefore set forth by this defendant. And the defendant further answering, admits that the said administration accounts of this defendant were allowed by the said court of probate as aforesaid, without resistance by said complainants, or by most of the other heirs of said intestate, but this defendant doth deny that the same were not resisted by any of said heirs; on the contrary this defendant doth aver, that the allowance of the said second and principal account of this defendant was earnestly resisted by the said Nathan Gould, the brother of said complainants, and in the manner hereinbefore set forth.

And the defendant admits that all of the said complainants, except the said David Gould, have been, since the allowance of the said accounts as aforesaid, resident in distant parts of the United States, but whether said complainants have had little or frequent communication with their relatives in the commonwealth, this defendant doth not know, and is not informed; but as to the complainant, the said David, this defendant doth deny, that he has been resident for a long time in far distant parts of the United States; on the contrary, the defendant avers that the said David, on or about the year 1823, returned to this commonwealth, and there remained, as the defendant believes, until about the spring of the year 1832, when he removed to the state of New Hampshire, and that from and after his return, to this commonwealth, until his said removal to New Hampshire, said complainant did, for much the larger portion of said time, live with him at Stoneham. And the defendant denies, that the said complainants had not legal notice of said proceedings in said probate court, in the manner and to the extent hereinbefore set forth; but whether the said complainants, or any of them, had or had not actual notice of the same, or of any, and if any, of what part thereof, the defendant doth not know, and cannot set forth. And the defendant further answering, saith, that he doth not know, nor is he informed, of the true and actual pecuniary circumstances of said complainants, or of their abilities to sustain the expenses of any investigation of his (the defendant's) doings, as such administrator; but this defendant is informed, and believes that the father of said complainants died seized of certain real estate and buildings thereon in the said state of Ohio; and this defendant is informed, and believes, that said complainants, as heirs of said Jacob, did receive from said David Gould, Jr., several hundred dollars upon the assignment to him, said

David, of the residue of the real estate of said Jacob, in the proceedings for partition before said probate court, as hereinbefore set forth. And the defendant further answering, doth utterly deny that any fraudulent bribes, solicitations, or promises, of any kind whatever, were by him, the defendant, or so far as the defendant knows, is informed, or believes, by the said David Gould, Jr., and the said Mary Gould, or by either of them, ever made or offered to any of the heirs of said Jacob Gould, deceased, in or out of this commonwealth, or to any other person or persons whatever, to induce said heirs or persons, or either of them, to consent to the allowance of any of said accounts of this defendant, or not to resist the allowance thereof, or for any other or similar purpose, or in any way or manner whatever. And the defendant denies that the said Nathan Gould did, by reason of said alleged promises, or for any other reason, withdraw any opposition which he had intended to make to said charges of said David and said Mary, or either of them, or to said account of this defendant, or that said Nathan, so far as the defendant knows or is informed, suppressed any evidence against said accounts and charges; on the contrary, he says, that the said Nathan did not at any time withdraw his said opposition to said charges and accounts, but did produce all such testimony as he saw fit against the same, and the same was heard by said probate court; and that the said Nathan did, as this defendant believes, and as is recited in said decree of said probate court, resist the allowance of said claims and accounts, until the decree so made in the premises as aforesaid.

The defendant further says, that at the said trial and hearing, so had before said probate court, on the said fourteenth day of February, as aforesaid, said Nathan Gould did produce and offer the said William Abbott as a witness to sustain his objection to the allowance of said claims, and to said account of the defendant; and the said Abbott was accordingly sworn and examined at said hearing, and did then and there testify, as nearly as the defendant can recollect, that the said Jacob Gould, shortly before his decease, declared in his presence, that he did not owe any person any thing; and he may also have testified, though the same is not recollected by the defendant, that the said Jacob also declared, that he had settled with the said David and said Mary, and did not owe them five dollars. And the defendant further answering, says, that he doth not believe, and cannot believe, that said Jacob did, in fact, make any such declarations in the presence of or to the said Abbott, as are in the said bill alleged, because of the said declarations so repeatedly made by the said Jacob, in the presence of the defendant, as aforesaid, and because in addition to the said claims of the said Mary for services contained in her said account, a few months prior to his decease, a settlement was had by and between the said Mary and the said Jacob, in the presence of the defendant, concerning certain promissory notes of the said Jacob, by him long previously given to the said Mary, towards her share of her father's estate, which had been received by the said Jacob, and which notes were then held by the said Mary, and the said Jacob then and there gave to the said Mary his two other promissory notes, amounting to about one hundred and seventy dollars, in payment of the balance due her on said notes first mentioned, which notes were afterwards paid to said Mary by the defendant, as administrator of the said Jacob, and are charged in his said administration account, hereto annexed; and the said Jacob was also indebted to various other persons, in sundry amounts, at the time of his said decease, which sums have since been paid by the defendant, and are charged in his said administration account. And the defendant further answering, says, that the said Mary Gould died in or about the month of November, in the year of our Lord one thousand eight hundred and thirty-six, testate, and as the defendant is informed and believes, devised a part of her estate to Jesse Converse, Junior, the child of her said sister Susanna Converse, and parts and portions of her property to and among her nephews and nieces, but in what proportion said estate was in and by said will devised, or the precise contents of said will, the defendant never having seen or read the same, or heard the same read, and having no interest therein, cannot set forth.

And the defendant denies that the said devise and bequest of the said Mary Gould to said Jesse Converse, Junior, or any other of said devises and bequests in the said will of the said Mary contained, were made in pursuance of any agreement and promises made by her, or as part of any collusive arrangement by her entered into, at any time, with the defendant, or to which the defendant was a party, or that any such or similar agreements, promises, or collusive arrangements as are in said bill set forth, were ever made with the defendant, or with any other person or persons whatever, to the knowledge, information, or belief of the defendant, or that the said Mary was, so far as the defendant knows or believes, or ever has heard, advised by the said Jesse Converse, or by any other person or persons whatever, to devise or bequeath any part of her estate to her other relatives and nieces, to prevent any suspicion, or for any other purpose whatever. And the defendant further denies, that the said David Gould, Junior, the said Mary Gould, and the defendant, or either of them, so far as he knows, is informed, or believes, made or carried into effect, at any time, any other agreements, arrangements, or bargains to and among each other, or with and among the other heirs of the said Jacob Gould, deceased, in pursuance of any fraudulent design, form-

ed at the beginning, or at any other time, of procuring the allowance of the said charges of the said David, Junior, and the said Mary, or either of them, against the estate of the said Jacob Gould, and of enabling the said David Gould thereby to possess himself of the real estate of the said Jacob, to the prejudice and exclusion of the other heirs of the said Jacob, or for any other or similar purposes, or that any agreements or arrangements of any kind were ever made by the defendant, or with the knowledge of this defendant, by the said David and the said Mary, or either of them, of the character stated in said bill of complaint, or in any way similar thereto, or in any manner relating to the allowance of the said claims and charges of the said David and the said Mary, or either of them, or to the obtaining possession, by the said David, of the real estate of which the said Jacob died seized, or any part thereof. And the defendant further denies, that at the time he charged in his said second account of his said administration, the said sums, so due to and claimed by the said David Gould, Junior, and the said Mary Gould, as aforesaid, or at any other times, he either knew, or believed, or suspected, or had reason to know, believe, or suspect, that the said Jacob Gould did not owe the said David Gould and the said Mary Gould the said sums so claimed by them, respectively, or that he, the defendant, a short time previous to the decease of the said Jacob, or at any other time, heard the said Jacob say, that he did not owe either the said David or the said Mary one cent, or any other sum, or that he, the said Jacob, did not owe five dollars in the world, or any other similar declarations; and the defendant has already, in this, his answer, set forth all that he recollects to have heard the said Jacob say, within the then last years of his, the said Jacob's life, respecting his debts. That both the said David Gould and the said Mary Gould, did, in support of their said claims against the said estate of the said Jacob, produce and exhibit to the defendant, books of account, in which their said claims against the said Jacob Gould were entered, and, according to the best recollection of this defendant, said charges were, and appeared to be, annually entered and charged by said David and Mary, respectively, in their said books; and the defendant did require of the said David and the said Mary, that the validity and amount of their said claims should be proved to, and allowed by, the said probate court, in the manner hereinbefore set forth. That he believes the said accounts and claims of the said David and the said Mary, to be just and fair, and having no reason to doubt the validity of the same, he did not, and could not communicate to said judge of probate any facts or reasons to doubt the validity thereof, but did submit the whole matter to said judge of probate, upon the testimony produced by the respective parties, as hereinbefore set forth. And the defendant denies, that the said Nathan Gould was induced, by any promises, offers, or solicitations, made by the defendant, or by any other person or persons, with his knowledge, to go home from the said probate court, and not object to the allowance of said accounts, or the claims of the said David and Mary, or that any promises, offers, and solicitations, of any kind, were ever, to the knowledge, information, or belief of the defendant, made to said Nathan Gould, to induce him, the said Nathan, to relinquish his said objections, or to go home from said probate court; on the contrary, the defendant answering, says, that the said Nathan Gould, so far as he, the defendant knows, is informed, or believes, did insist on his said objections to said accounts and claims of the defendant, and of the said David and Mary throughout, and was fully heard therein by the said court, and did not forbear, waive, or relinquish the said objections, but insisted on a decree of said court upon the same, and said decree was made accordingly by the said court, in the manner hereinbefore set forth.

R. H. and E. T. Dana, for plaintiffs.
Sidney Bartlett, for defendants.

STORY, Circuit Justice. It can scarcely be denied that there are some suspicious circumstances in the present case, which cast upon it a shade of doubt. It appears that Jacob Gould, the intestate, died in 1819, (by murder), leaving an ample personal estate for the payment of all his debts, except the two debts now in controversy, one asserted to be due to David Gould, Jr., (his brother), amounting to $1576, and the other asserted to be due to Mary Gould, (his sister), amounting to $866. The defendant, Thomas Gould, Jr., (the son of another brother), took administration upon the estate of Jacob Gould, in February, 1820, and in his second administration account, rendered to the judge of probate in February, 1821, he represented himself to have paid the said sums in cash to David Gould, Jr., and Mary Gould, and charged the estate therewith, accordingly. In point of fact, he had not paid the same; but had only made a formal settlement with them, and given his notes for the amount, with an understanding, that the notes should stand good against him, only for the amount which should ultimately be allowed by the judge of probate, as due to them. This was certainly an extraordinary proceeding, and utterly unjustifiable. It could scarcely have been resorted to, except for the purpose of escaping from a trial at law, of these contested claims, in the presence of the whole county. The proceeding does not appear to have been made known to the judge of probate, or the true state of the facts brought to his notice. If it was not, then it must have operated as a surprise upon his judg-

ment, and led him to less scrutinizing and jealous inquiries than he would otherwise have bestowed upon the claims. I do not stop to inquire, whether the judge of probate had jurisdiction to examine and finally to settle unliquidated claims like the present, which from their very nature and character are open to controversy. But I may say with all due respect, that in a case circumstanced like the present, where the real estate of the intestate was to be sold for the discharge of these claims, it would have been a far more satisfactory mode of proceeding, for the judge of probate to have sent the case to be decided, in the first instance, by a trial and judgment at law. What was the nature of these claims? It seems, that both of the claimants had lived with the intestate for many years, and, while living with him, were maintained by him. The debt of David Gould, Jr., was, with the single exception of one item of $11 for money lent, for services rendered from April, 1806, to November, 1819, and all the services were charged in general terms, "for services rendered in farming," annually, from the 1st of April, 1807, down to the 1st of April, 1819, at $112 per annum. The account of Mary Gould was "for keeping house" for the intestate, from the 1st of April, 1803, to the 25th of November, 1819, at $1 per week, being charged at the rate of $52 per year.

Now, there is no direct evidence whatsoever, before this court, that there was between the intestate and either of these claimants, any agreement for the payment of wages, during any portion of this long period, or any acknowledgment by the intestate, of any unliquidated debt, for these services, owing to them by him, or any account rendered to him, or recognized by him, during this whole period, extending from twelve to fifteen years. This very circumstance was calculated to excite some notice and to call for some explanation; especially as it would have been the duty of the administrator, in the absence of all controlling proofs, to have interposed the bar of the statute of limitations, as well as to have contested the general validity of the claims. It does not appear what was the exact evidence before the judge of probate, to establish these claims; and indeed, it can scarcely be supposed that those proofs are now within the memory of the parties, so as to enable this court to see their full bearing and strength. The general rule certainly is, that the acts of a court of justice are to be presumed to be rightfully done, according to the maxim, "Omnia rite acta presumentur." The case, however, would have been much stronger in favor of the presumption, so far as the administrator and the claimants, then before the court, are concerned, if all the other heirs had been present at the hearing; or had had personal notice to attend the hearing, and had neglected to do so; or if the claims were shown to have been then bona fide contested with all the zeal, and earnestness, and vigilance of persons having an adverse interest, which they were resolutely determined to support for themselves and all the other heirs having a similar interest. But, in point of fact, the present plaintiffs lived, at the time, in distant states of the Union; they had no personal notice of the claims, or of the presentment thereof for adjustment, before the judge of probate. The only person, who appeared to contest the claims, was Nathan Gould, a brother of the female plaintiffs, and he appeared without counsel; and if his own statement, given in his deposition in this case, is to be credited, (and it is certainly open to very grave objections, in point of credit), he himself withdrew his opposition upon an agreement made and negotiated between himself and the claimants, with the knowledge of the administrator, by which he was to receive a pecuniary compensation. In short, it was, according to his statement, a bargain for hush-money, ex turpi causa.

Independent, however, of the serious objections to the testimony of Nathan Gould, founded upon his supposed want of veracity, and his general reputation, there are some other circumstances, which go greatly to diminish its force and credibility. The intestate died leaving two brothers and two sisters living, and the children of one brother and one sister, deceased, who were entitled to share in the distribution of his estate. It was, therefore, divisible into six parts, of which the plaintiffs claim (with Nathan Gould, their brother), only one sixth. When these contested claims were before the judge of probate for allowance, the surviving brothers and sisters, not interested in the claims, made a written statement, that they had seen and examined the account, and agreed to allow the same. So that, in point of fact, the claims were admitted by the heirs of three-sixths, and were then and are now contested by the heirs of one-sixth only. Now, the bill charges, that the settlement and allowance of the claims were procured by a fraudulent agreement and conspiracy between the administrator and all the heirs, except those concerned in the sixth represented by the plaintiffs, and, of course, with a design to defraud the plaintiffs of their proper share in the intestate's estate. This is a very grave charge; and certainly ought to be made out by strong and satisfactory proofs. In the first place, it is to be considered, that it is brought forward, for the first time, about nineteen years after the settlement of the claims in and by the probate court. In the next place, all the parties asserted to have been engaged in the transaction, except the administrator and the husband of Mrs. Converse, (one of the sisters of the intestate), are now dead. If the claimants of these debts, Daniel Gould, Jr., and Mary Gould, were now living, there ought to be ample means yet remaining to estab-

lish these claims, and, at all events, they could be called upon to explain all the circumstances upon which their claims were founded. In the next place, the answer of the administrator pointedly and explicitly denies all the allegations in the bill, in respect to the fraud and conspiracy charged in the bill; and the answers of all the other defendants do, in effect, either positively adopt, or impliedly admit the truth of the statements of the administrator. Now, each of these considerations is of great importance in a case circumstanced like the present. The plaintiffs apply for relief in a case asserted to be of fraud in the settlement of a probate account nearly nineteen years ago. That this court is competent in point of jurisdiction to grant relief in such a case, if fully made out in proof,—notwithstanding similar relief may be attainable in the state court,—is a matter upon which I entertain no doubt. This court possesses full jurisdiction in equity, in all cases of fraud, including fraud in obtaining judgments, and decrees, in other courts; and is not limited in its exercise to cases, where, by the state laws, no relief can be granted by the state courts. The jurisdiction is concurrent with the state courts in all such cases. I know of but a single exception, which has been allowed, and that is, fraud in obtaining a will of real or personal estate, which has already been held to be exclusively examinable and triable in the proper court, having jurisdiction in the premises, whether it be a court of common law, or an ecclesiastical court. See 1 Story, Eq. Jur. §§ 184, 238, 440, and the cases cited in the notes Id. See, also, Allen v. Macpherson, 5 Beav. 469; on appeal, 1 Phil. Ch. 133; Smith v. Spencer, 1 Younge & C. Ch. 75. Even this exception, has been thought to stand more upon authority than upon principle. In the case of Gaines v. Chew, 2 How. [43 U. S.] 619, 645, the supreme court of the United States said: "In cases of fraud, equity has a concurrent jurisdiction with a court of law; but in regard to a will, charged to have been obtained through fraud, this rule does not hold. It may be difficult to assign any very satisfactory reason for the exception. That exclusive jurisdiction over the probate of wills is vested in another tribunal, is the only one that can be given." But of the jurisdiction of a court of equity to relieve in cases of fraud in the settlement of probate accounts, it does not appear to me, that there is any reasonable ground to entertain a doubt. In the case of Pratt v. Northam [Case No. 11,376], I had occasion fully to consider and act upon the matter. But how do the plaintiffs account for their delay in bringing the present suit? A court of equity will never entertain a bill for relief, even in cases of asserted fraud, if the plaintiff has been guilty of gross laches or unreasonable delay. The present suit was brought more than twenty years after the death of the intestate. His death could not but have been known to them, as it was a case of murder of no ordinary celebrity. Indeed, the plaintiffs do not pretend to any ignorance of that fact, nor even that administration had been taken upon his estate. David Gould (one of the plaintiffs), although at the time out of the state, afterwards came and resided within it for a number of years, and then removed to New Hampshire. Now, why did he not, when he resided within the state, make examination and inquiries into the validity of these claims? They were spread at large upon the probate records, and might then have been examined, and, if fraudulent, an application might have been made to the probate court to re-examine, and annul them. No such application was then made.

Supposing that David Gould did not communicate any facts to the other plaintiffs, touching the existence or allowance of these claims in the probate settlement, a supposition, which ought not to be lightly indulged, still, as the plaintiffs must have known, that administration had been taken upon the intestate's estate, they had ample means within their power, at a very early period, to ascertain from the probate records the amount of his real and personal estate. If they did not choose to institute any such inquiries, but lay down in indolent indifference, they have no right to ask a court of equity, at a great distance of time, under a great change of circumstances, to supply their want of negligence. It is said, that they were poor, and lived in distant states. Be it so; but the means of communication and inquiry, without any serious expense, were then within their reach; and if so, they were bound to make due inquiries, and act upon the results within a reasonable time. Suppose they had made such inquiries, and ascertained the facts of the allowance and settlement of these claims in the probate court, would their poverty, or distance, have constituted of themselves a sufficient ground for a court of equity, fifteen or eighteen years afterwards, to re-examine the validity of these claims? Or would they have not been required, with reasonable diligence, to have followed up these inquiries by some legal proceedings? Would they have had a right to lie by, until, by lapse of time, and the death of parties, great obscurity must necessarily have been thrown over the original transactions, and greatly impaired the proofs to justify them? Besides; after the administrator's sale of a portion of the real estate of the intestate, under the authority of the probate court, in 1821, a partition of the residue of his real estate was made in the same year, under the authority of the same court, and the plaintiffs, upon that division, had awarded to them for their share or owelty of partition a sum of money, which their own witness asserts to have been paid, and received by them. Certainly, under such circumstances, they were put upon inquiry, what was the true amount of their shares,

and what had been the disposition made of the residue of the intestate's estate. Why was no inquiry then made? It is said, that the plaintiffs then had no knowledge of the secret fraudulent agreement and conspiracy, and that it has come to their knowledge only within a recent period. And from whom does the information now come? From their own brother, Nathaniel Gould, admitting himself to be a participator in the fraud, if, indeed, he was not the dux facti. And when does he make the discovery? Upon their own showing, after most of the parties interested were in their graves, when, if his statements were false, they were far less liable to detection and overthrow by opposing proofs. The claimant David Gould, Jr., died in 1834, and the claimant Mary Gould, died in 1836. If they had been living, they might have satisfactorily established the validity of their own debts; and, at all events, might have disproved the asserted fraud and conspiracy. Thomas Gould too, if living, might have disproved the fraud and conspiracy, in which he is asserted to have been a party and an actor. But he, also, is dead. So that we see, that the bill is now brought after a great change of circumstances; and it seeks to charge the dead, as well as the living, with co-operation in a base and deliberate fraud. It seeks, if one may venture upon the bold figurative expression of an eminent judge, to make men sin in their graves. Now, under such circumstances, it is plainly the duty of the court, to require the most full and satisfactory proofs, that there was such a fraud and conspiracy as the bill charges, and that the debts brought forward by David Gould, Jr., and Mary Gould, were wholly fictitious, and unfounded in fact. It is not sufficient to raise suspicions of bad faith, from the doubtful character of the claims. The plaintiffs must go farther; they must establish the truth of the charge beyond any reasonable doubt, and by evidence, not only competent but credible. Fraud is never presumed, even against the living; and a fortiori never against the dead, whose presence cannot be demanded to meet and falsify the charge. The onus probandi then is upon the plaintiffs to make out the case, omni exceptione major. Have they so done?

It is a perfectly well settled rule in equity, that an answer, responsive to the allegations of the bill, is positive evidence for the defendant, and is to be taken as true, unless disproved by the testimony of two credible witnesses, or by one credible witness and facts entirely equivalent to, and as corroborative as another witness. In the present case, the principal defendant, Thomas Gould, Jr., has in the most direct and positive manner denied all the charges of fraud and conspiracy stated in the bill. He is supported by the concurrent answers of all the other defendants, not one of whom contradicts, or impugns, or denies the truth of his answer. What, then, is the evidence in support of the bill? First; it is said, that the debts are in themselves of a suspicious character, under the circumstances. It does not follow, that they may not, nevertheless, have been entirely well founded; for though open to suspicion and inquiry, they are not of a character, which stamps upon them either falsity, or incredibility. They are just such as may have arisen, and from the entire personal confidence between the people, in the near relation in which they stood to each other, none but the members of the family might know, or be presumed to know of their existence. Then as to the positive testimony to contradict the answers. The main reliance, if not the exclusive reliance, is upon the deposition of Nathaniel Gould, and the deposition of Ebenezer Buckman. As to the former, it is impossible not to feel, that he stands in a very peculiar predicament. It does not strike me, that he is incompetent in point of interest. But his testimony labors under very grave difficulties. The opposing testimony against his credibility is so strong, that it seems shaken to its very foundation; and then again, he comes confessedly to testify to his own turpitude. The maxim of the Roman law, allegans suam turpitudinem non est audiendus, seems to have been transferred into our law, at least to the extent of taking from such testimony, standing alone, all its intrinsic force and efficiency. Branch, Max. p. 10; 4 Co. Inst. 279. Then as to Buckman's testimony. It was not taken in this cause; but it is a deposition taken in perpetuam rei memoriam before state magistrates, under the statute of Massachusetts. Rev. Acts Mass. c. 94, p. 574, §§ 34–37. It has not been recorded within the time prescribed by law; and therefore is not, according to the terms of the statute, admissible in evidence as a deposition. This is not denied; but then it is said, that it is offered, not as a deposition, but as proof of what a deceased witness swore upon a lawful occasion, as to the subject in controversy. Now, there are various objections to its admissibility in this latter view. In the first place, the deposition was not taken in any suit at all; nor was it taken in a controversy substantially by and between the same parties. The deposition was taken at the request of the present plaintiff, David Gould, and none of the co-plaintiffs were parties; and the only adverse party summoned to attend the taking of the deposition, was the defendant, Thomas Gould, Jr., and none of the other defendants were summoned as parties. Neither in substance nor in form, was it, therefore, between the same parties. It does not appear to me, that, under such circumstances, it could, in Massachusetts, be used at all under the local law; for to reject it as a deposition taken in perpetuam rei memoriam, and yet to receive it as evidence in the cause, would be to defeat the very objects and policy of the statute of Massachusetts. It would be, to enable the party

to avail himself of his own laches, and to give him the benefit of the evidence, when he had chosen to violate the precepts of the statute. But, however it might be in the state court, it seems to me, that it is not admissible in the courts of the United States; for the act of congress, of the 20th of February, 1812, c. 28 [2 Stat. 682], does not apply to any case where the deposition could not be admissible, as such, in the state court. That act declares, "that in any cause before a court of the United States, it shall be lawful for each court, in its discretion, to admit in evidence any deposition taken in perpetuam rei memoriam, which would be so admissible in a court of the state wherein such cause is pending, according to the laws thereof." Even if this court possessed a discretion on the subject, it could scarcely be deemed a fit case, under such circumstances, to admit the deposition. Taking then the deposition of Ebenezer Buckman out of the case, there is no testimony in support of the bill, which can possibly overcome the strong denials of the answer of the defendant, Thomas Gould, Jr. Even if his deposition were admitted, I should have great difficulty in placing confidence in the truth of the charge asserted in the bill, under all the circumstances. The whole of the supposed bargain was by parol; and it was followed up by no acts of the parties during their lifetime, in performance thereof. And, as it should seem, all the parties rested satisfied with that state of things, during a long course of years, without any public complaint, or any attempt to compel a perform ance of the bargain, although some of the terms seem to require a prompt fulfillment. A parol promise would seem a very slender foundation, upon which to rest an acquiescence for so many years, accompanied, as it must have been, with a present sacrifice of title to some portion of the assets of the intestate.

Upon the whole, without going farther into the facts of the case, my judgment is, that the charges in the bill are not made out, and that the bill ought to be dismissed; that each party ought to pay his own costs, except the costs of printing the record, which ought to be equally divided between the plaintiffs and the defendants; the plaintiffs ought to pay one moiety, and the defendants the other moiety thereof; the printing of the record being for the benefit of both parties.

Case No. 5,638.

GOULD et al. v. HAMMOND.

[1 McAll. 235.] [1]

Circuit Court, N. D. California. Aug. Term, 1857.

CUSTOMS DUTIES—PERISHABLE GOODS—SALE OF—LIABILITY OF COLLECTOR.

1. When a statute gives a person discretionary powers to be exercised by him upon his own opinion of certain facts, it is a rule of construction that the statute constitutes him judge of those facts.

2. In the exercise of that discretion, he is in the discharge not of a ministerial but a quasi judicial function.

3. To render him liable in damages for his conduct, it must be proved, either that he exercised his powers in cases not within his jurisdiction, or in a manner not confided to him, or with malice, corruptly, or oppressively.

4. When upon a report made to the collector by the warehouse keeper, of the perishable condition of goods, the collector directed two United States appraisers to obtain information and report to him the condition of the article; and upon their recommendation of the necessity of an immediate sale, ordered the perishable article to be sold under the proviso of the 1st section of the act of congress, 6th August, 1846 [9 Stat. 53],—*held*, that in the absence in the argument on the trial of any imputation to defendant of a corrupt motive, the shortness of the public notice of the contemplated sale was not, per se, sufficient evidence of fraud to warrant a judgment against the collector.

This action was brought against the defendant to recover damages arising from an alleged illegal sale of goods under his order as collector of the port of San Francisco. A jury trial was waived by the parties, and the case left to the court on the facts and law. The former are sufficiently set forth in the opinion of the court.

Irving & Wistar, for plaintiffs.

P. Della Torre, U. S. Dist. Atty., for defendant.

McALLISTER, Circuit Judge. It appears from the testimony, that a report having been made by the warehouse keeper that these goods were in a perishing condition, the defendant as collector directed an examination of them to be made, by two United States appraisers; and upon a report made by them that the goods were in a perishing condition and that an immediate sale was necessary, the defendant ordered the goods to be sold. They were sold at public auction, but only on a day's notice, and at prices considerably less than their real value. The defendant justifies the sale on the ground that the goods were in a perishable condition, and such sale was sanctioned by the act of congress of 6th August, 1846,—Dunlop's Laws U. S. 1106 [9 Stat. 53]. The language of the proviso in the first section of the act, enacts, "that all goods of a perishable nature, and all gun-powder, fire-crackers, and explosive substances deposited as aforesaid, shall be sold forthwith." It was not contended that any fraud or other corrupt motive is to be imputed to defendant. But it is urged, the goods were not in a perishing condition and the notice of the sale was not duly advertised. There is no doubt, that the notice of sale was so brief that nothing short of immediate and pressing necessity could have justified it. But unless the briefness of the notice is to be considered per se, in the face of the other testimony in the case, sufficient evidence of fraud or a

[1] [Reported by Cutler McAllister, Esq.]

corrupt motive, we cannot consider that fact as concluding this case. If the law left the sale to the discretion and judgment of the collector, misguided views of duty, an error of judgment, free from corrupt motive, cannot render him liable in this action. If a jury had been empaneled in this case, I would have left the evidence of the briefness of the notice of sale to their consideration as a fact on which they should pass; but the court is unwilling in a case where fraud is not imputed, to infer it from that fact alone. The perishable condition of the goods had been reported to the defendant, by the storekeeper; he thereupon referred the matter to two sworn appraisers, and on their report he ordered the sale. It cannot be deemed practicable for a collector to inspect personally each article of every shipment supposed to be perishable. If he consults with merchants of good character, or with sworn United States appraisers, he will be deemed to have taken the usual and ordinary means of arriving at the true condition of the goods and the necessity of a sale, and the degree of promptitude required. Being pro hac vice a judicial officer, the defendant is not liable to an action if he falls into an error, in a case where the act done is not merely ministerial, but one in relation to which his duty is to exercise his judgment and discretion, although an individual may suffer by his mistake. Kendall v. Stokes, 3 How. [44 U. S.] 87.

If a discretion was reposed in him by law the defendant is not punishable, unless it be first proved either that he exercised the power confided in cases not within his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or willful oppression. In Otis v. Watkins, 9 Cranch [13 U. S.] 355, 356, the court say, "This instruction implies that the collector is liable if he form an incorrect opinion, or if in the opinion of the jury it shall have been made unadvisably or without reasonable care or diligence. But the law exposes his conduct to no such scrutiny." If the jury believed he honestly entertained the opinion under which he acted, although they might deem it incorrect, or without sufficient grounds, he would be entitled to their protection. This does not preclude the proof of malice or other circumstances to impeach the integrity of the transaction. In Martin v. Mott, 12 Wheat. [25 U. S.] 31, it is said: "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." Wilkes v. Dinsman, 7 How. [48 U. S.] 89, 132. It is urged that the discretion of the collector may be abused and perverted to oppressive purposes. This argument will apply to every case in which discretion may have been reposed in an individual. It would be impracticable to carry on the government in all its details without confiding in some instances in the judgment and discretion of public officers; and the numerous decided cases which have enunciated the principles which regulate the responsibility of public officers in whom a discretion has been reposed by law, establish not only those principles, but the numerous instances in which the legislature have been constrained to impose on officers the duty of doing acts involving on their part the exercise of discretion and judgment. The argument that discretion may be abused, is to be addressed to the legislature as to the expediency of imparting any. When it is given, it is the duty of the court to see that the legal principles are applied to each case in which a controversy as to its exercise may arise. No better settled principle exists than the one enunciated by foregoing authorities. A contrary one, in the language of Chief Justice Taney, would indeed "be pregnant with the greatest mischief." [Kendall v. Stokes] 3 How. [44 U. S.] 98. In municipal seizures, the party who seizes does so at his peril, with the knowledge that their legality is to be tried by tribunals to which the adjudication of them is awarded. If condemnation follow, he is justified; if an acquittal, he must refund in damages for the tort, unless he can shelter himself under some statute. The seizure is deemed a ministerial act; hence, various statutory provisions have been passed, enabling the party to protect himself in the event the goods seized are not condemned, by procuring from the court a certificate of probable cause of seizure. These cases of municipal seizure do not apply to this case. This action is not brought for damages, for the commission of a mere ministerial act. The statute on which defendant relies, authorized and required him, as collector, to sell forthwith all perishable goods and explosive substances. In the performance of that duty, he had to form a judgment as to the condition of the goods, and that judgment must be necessarily based upon the facts. Now we have seen that where a statute gives a person discretionary power to be exercised by him upon his opinion of certain facts, it is a sound construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. Martin v. Mott, 12 Wheat. [25 U. S.] 31. In the case at bar, the statute required him to sell forthwith, perishable articles. To sell any other would have been an abuse of power. To perform the duty imposed upon him, he must, ex necessitate, pass upon the question of perishability or explosiveness. How otherwise could the fact have been ascertained? The law provides no other way. His duty was not, as in case of a municipal seizure, to hold the goods to await judicial action; but having them in possession, they "shall" be sold "forthwith." How can he sell without ascertaining the condition of the goods? What can he invoke for the exami-

nation save his own intellect, the discretion and judgment to which the law had left it? If, when he is impelled by no corrupt motive, or negligence so gross as to amount to fraud, the facts on which he acted are to be submitted to a jury in every case in which a party may feel aggrieved, then those facts which the law has confided to the discretion and judgment of the collector will be transferred to juries whose verdicts in different cases might embody different results upon similar statements of facts. It would subject the officer to indefinite liability, and seriously embarrass the government in the execution of the laws; for in a case like the present, the validity of the sale and the title of the purchaser of the goods, would depend on the opinions of the jury as to the facts acted on by the collector. It has been urged very strongly that the case of Warne v. Varley, 6 Durn. & E. [6 Term R.] 443, is conclusive in favor of the plaintiffs in this case. Now, that case simply affirms the distinction between a ministerial and a judicial or quasi judicial act. The action was against defendants for an alleged illegal seizure and detention of goods. The defense was, that defendants were appointed under an act of parliament which authorized them to view and search all tanned hides and skins that should be brought to Leadenhall market. That plaintiffs had offered for sale in the market hides which had not after the tanning thereof been well and thoroughly dried, in the judgments of the defendants, according to the true intent and meaning of the said act of parliament; wherefore defendants had seized and carried them away until it might be duly tried in manner as directed by said statute; and that they had given due notice to the lord mayor, that triers might be appointed for trying the same according to the statute, &c. The plaintiffs replied, that the said skins were dried according to the true intent of the statute, that they had been duly tried by persons appointed by the lord mayor, who determined that the said skins were properly dried, and that said leather had been restored to them. Now, in that case the statute, so far from reposing any discretion, any quasi judicial power in the seizors, expressly excluded them from it by reserving the question of fact to be ascertained by others, to be appointed in the mode prescribed by the statute. The searchers were in the position of those who make a municipal seizure. They were only justified in making seizures in cases deemed legitimate by the appropriate tribunal to which the adjudication of them was confided. The law only authorized them to seize undried leather, within the meaning of the statute; and whether the seizure was legal did not depend upon the judgment or discretion, however honest, of the seizors; but on those of others selected by the law, and subject to whose decision the seizure was made. The act of the former was deemed merely ministerial; that of the latter was quasi judicial. The language of Mr. Justice Lawrence renders it evident, that the distinction between the two kinds of acts was kept in view. "It is clear (he says), that in all cases, where a protection is given to a judge, it is incumbent on the party justifying the particular act to show he was acting as a judge. In this case the defendants were not acting as judges; they had seized the leather in order to carry it before other persons,—the triers, who were to act as judges." 6 Durn. & E. [6 Term R.] 450. It is clear, then, that the seizors were not acting in the exercise of a quasi judicial power; because all discretion as to the condition of the goods was expressly vested out of them, and in others, by the very law under which themselves acted. Had those persons have found against the leather, and the owner had sued them, nothing short of a corrupt motive could have rendered them liable in damages. It does not appear to the court that the foregoing case conflicts with the principles enunciated by preceding decisions.

The second ground taken by plaintiffs is, that they are entitled, independently of all other considerations, to a verdict, because the sale of the goods was not made in conformity to law. The 12th section of the act of 1842 [5 Stat. 561], amended by the act of August, 1846,—Dunlop's Laws, 1106 [9 Stat. 53],—which authorized the sale, applies to two distinct classes of goods. The body of the section refers to one class of goods to be sold, viz. such as have been deposited in the public stores, and shall have remained therein one year without the payment of duties and charges. Such it directs to be appraised by the U. S. appraisers, and if there be none, then by two respectable merchants appointed and sworn by the collector; and after such appraisement they shall be sold at public auction, on due public notice as prescribed by a general regulation of the treasury department; that at said public sale distinct printed catalogues with the appraised value thereof shall be distributed, and a reasonable opportunity afforded to persons to purchase. The foregoing details are made to protect the sale of the first class of goods; and a neglect of any one essential particular would render a collector liable. These details enumerated in the enacting part of the section, are not even inferentially alluded to when the act speaks in its proviso of the second class of goods, the perishable and explosive articles. This proviso declares, that all such shall be sold forthwith. It has been urged that the details regulating the sale of the first class of goods, apply to the second, mentioned in the proviso. The office of a proviso is generally either to except something from the enacting clause, or to qualify and restrain its generality, or to exclude some possible ground of misinterpretation of it as extending to cases not intended by the legislature to be brought within its purview.

Minis v. U. S., 15 Pet. [40 U. S.] 445. When, therefore, the legislature, as in this case, in the proviso declares that all goods of a perishable nature shall be sold forthwith, it expressly exempts such from the provisions of the enacting clause. It seems, that when congress directed the immediate sale of the second class of goods they intended to commit the regulation of the sale exclusively to the collector, as no precise rules could be prescribed without the hazard of defeating the whole law in regard to perishable goods. It cannot, therefore be justly considered that the details of sale enumerated in the body of the twelfth section, apply to the second class of goods, referred to in the proviso. The rule of law enunciated by the decisions is well settled. The court cannot relax it. It must be uniform, though it may operate harshly in particular cases. The defendant having honestly exercised his discretion, whatever view may be taken of the erroneous or mistaken manner in which he acted, he cannot be made responsible in this case. Let judgment be entered for the defendant.

Case No. 5,639.

GOULD et al. v. HASTINGS.

[5 Hunt, Mer. Mag. 74; 1 Betts, C. C. MS. 7.]

Circuit Court, S. D. New York. April Term, 1840.

COPYRIGHT—SUBJECTS OF—OPINIONS OF JUDGES—ASSIGNMENT—INJUNCTION.

[1. Reporters of the opinions of the judges of state supreme courts or courts of errors, delivered in writing, cannot appropriate to themselves, by copyright, an exclusive property in the publication of such opinions.]

[2. The assignee of a copyright may maintain a suit to enjoin infringement, without first establishing his title to the copyright by action at law.]

[This was a bill in equity by William Gould and David Banks against Hiram P. Hastings for an injunction against the publication of certain copyrighted law reports, to which they claimed an exclusive right as assignees of the original publishers.]

The bill was filed in this case by the complainants, as assignees of Esak Cowen and John L. Wendell, and proprietors of nine volumes of Cowen's Reports, and seventeen volumes of Wendell's Reports. It alleges, in substance, that the above volumes were composed and duly copyrighted by the reporters; that the complainants, as their assigns, have sole right or exclusive privilege of printing, reprinting, publishing, or vending the said reports; that the defendant has publicly declared his intention to publish, and is proceeding to publish, nine volumes of condensed reports, to embrace all the cases contained in the said twenty-six volumes of complainants' reports; that he has already published and prepared for sale a part of the ninth volume of his proposed condensed reports, which contains the same matter published in the sixteenth volume of Wendell's Reports, and is a violation of the said copyright; that the defendant is preparing to publish the residue of the said ninth volume, and the antecedent eight volumes, to the great injury of the complainants, and they pray an injunction, etc. An injunction was accordingly granted, to continue to the end of the succeeding term of the court, and at the same time an order was made, referring it to a master to collate the two works, and report to this court whether the defendant's publication was a copy or colorable transcript of the sixteenth volume of Wendell (except the opinions of the judges), or whether it was a fair abridgment thereof, or whether it was compiled by the defendant from the materials supplied by the complainants' publication. This order of reference was, by consent of parties, executed by William Kent, Esq., who made a detailed and clear report upon the matters of reference; upon filing which, and on his answer, the defendant moved to dissolve the injunction issued in the cause. The defendant, in his answer, admits his acts and intentions as charged in the bill, but denies many facts upon which the complainants rest their title and rights, and alleges in bar various objections, spread out at length in the answer, and which may be comprised under three general heads. First. It is asserted that the reporters are public officers, performing a duty assigned by the legislature, for which they are compensated by salary; that the publication of the reports is the essential part of their public service; and that they cannot appropriate to themselves by copyright an exclusive property therein. Second. That these law reports cannot be made subjects of copyright, the reporters not being authors in the composition or compilation of such works, in a sense to authorize them to acquire any exclusive right or privilege to publish them. Third. That, if the copyright be valid, the defendant's publication is no infringement of it. It is not important to the present history of the case to present a more ample statement of the pleadings or report of the master, or to notice various intermediate applications to the court, upon the one side and the other, to enlarge the time for proofs, to dismiss the bill, etc.

Paine & O'Connor, for plaintiffs.
Mr. Bidwell, for defendant.

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

THE COURT, after advisement, decided that the complainants could not secure by copyright an exclusive right or privilege to publish the opinions of the judges of the supreme court, or members of the court of errors, delivered by them in writing in the cases decided in those courts respectively, and that, accordingly, no injunction would

lie against the defendant in respect to that part of the publication in question.

THE COURT further remarked that the decision of some of the other important points in the case depended upon facts at issue between the parties, upon which the proofs were not yet fully completed; and that, the master not being directed to take proofs, his report was not definitive upon other points that might have an important bearing on the final decision, and therefore the court would defer pronouncing any opinion upon the question whether these law reports are subjects of copyright; and, if they may be so to any extent, what parts are to be regarded original matter entitled to be so protected; and also whether the defendant's publication is to be regarded a fair abridgment or a copy or colorable transcript of the complainant's work, or whether the defendant is entitled to claim any part of his publication as an original composition or compilation,—until the cause should be brought to a hearing upon the pleadings and proofs.

THE COURT further ruled that the complainants were not bound to resort to a suit at law and establish their right in the first instance; and that, if they are entitled to the privilege of copyright, the remedy at law is not adequate to the defence and protection of such right; and that, accordingly, injunction, as an appropriate and secure remedy, will be retained until the cause is disposed of upon the merits.

Motion for continuance of injunction. On granting the injunction the circuit judge had ordered a reference to an auditor to collate the book alleged to be pirated and report to the court whether it be taken wholly or in substance from plaintiffs' work, or is original or a fair abridgment. On the coming in of the report, and hearing counsel on both sides, THE COURT decided that the publication by defendant of the opinions of the court was not an infringement of the plaintiffs' copyright; that whether the statements of the cases and arguments of the counsel were copied from the plaintiffs' work, or were digested and prepared by the defendant, were matters of fact to be determined upon the proofs; and that the injunction stand until the next term, to enable proofs to be furnished, and, if the plaintiff did not then set down and bring on the cause to hearing, the injunction be dissolved.

GOULD (LEWIS v.). See Case No. 8,324.

GOULD (LITTLE v.). See Cases Nos. 8,394 and 8,395.

Case No. 5,640.

GOULD v. LITTLE.

[See Case No. 8,395.]

GOULD (UNITED STATES v.). See Case No. 15,239.

GOULD (WASHBURN v.). See Case No. 17,214.

GOULD (WOODWARD v.). See Case No. 18,004.

GOULD, The JAY. See Case No. 7,245.

Case No. 5,641.

GOULDING v. FENWICK.

[2 Cranch, C. C. 350.] [1]

Circuit Court, District of Columbia. Oct. Term, 1822.

JUSTICE OF PEACE—FIERI FACIAS—GARNISHMENT—SALE—JURISDICTION OF CIRCUIT COURT.

1. This court has no jurisdiction to quash a fieri facias, issued by order of a justice of the peace, from the office of the clerk of this court, under the 4th section of the act of congress, of the 3d of May, 1802 [2 Stat. 193], and the 15th section of the act of 24th June, 1812 [Id. 755], nor to render judgment of condemnation of the rights and credits returned upon such fieri facias as levied upon by the constable in the hands of a third person.

2. The law has provided no means to compel the garnishee to pay the money in his hands.

A fieri facias against the rights and credits only of the defendant was issued from the office of the clerk of this court, by order of the justice of the peace who rendered the judgment, and was returnable to the same office on the 1st Monday of October, 1822. This fieri facias was issued under the 4th section of the act of congress of the 3d of May, 1802 (2 Stat. 193), and the 15th section of the act of the 24th of June, 1812 (2 Stat. 755). By the 4th section of the act of 1802, it is enacted that no ca. sa. shall issue on any judgment in any case where the judgment, exclusive of costs, shall not exceed twenty dollars; "but that in such cases execution shall be only on the goods and chattels of the debtor, and shall issue, by order of the justice who may have taken cognizance of the action from the clerk's office, and shall be returnable thereto, and that all such executions be returnable on the first Monday of every month." By the 15th section of the act of 1812, it is enacted, "that upon a fieri facias issuing out of the office of the clerk of the county of Washington, upon the judgment of a magistrate, the plaintiff, upon such fieri facias, shall be entitled to have his execution against the goods and chattels, lands and tenements, rights and credits of the defendant." The constable returned on the execution, that he had "levied on the rights and credits of John Fenwick, in the hands of Matthew Wright, and served a notice of the same, in writing, on the said Wright, notifying him to retain the sum of $20.49, it being the amount of the debt, interest, and costs."

Mr. Key, for plaintiff, moved for a rule on the defendant and garnishee, to show cause

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

why the court should not render judgment of condemnation of the rights and credits of Fenwick, in the hands of Wright.

Mr. Marbury, at the same time, moved the court to quash the execution.

THE COURT (THRUSTON, Circuit Judge, absent) overruled both motions, being of opinion that this court has no jurisdiction in the cause; and that the law has provided no means of compelling the garnishee to pay the money.

THE COURT said that, perhaps, if the garnishee upon such notice, should voluntarily pay, he might plead such attachment and payment against his creditor, but upon this point they did not mean to give an opinion.

GOULDING (PALYART v.). See Case No. 10,701.

Case No. 5,642.

GOULD'S MANUF'G CO. v. COWING et al.

[12 Blatchf. 243; 1 Ban. & A. 375; 8 O. G. 277.][1]

Circuit Court, N. D. New York. July 10, 1874.

PATENTS—INFRINGEMENT—MEASURE OF DAMAGES—PROFITS.

1. In a suit in equity brought for the infringement of letters patent granted to the plaintiffs, the Gould's Manufacturing Company, as assignees of William H. Pollard, the inventor, August 8th, 1871, for an "improvement in gas-pumps," the plaintiffs had a decree referring it to a master to ascertain and report their damages. He reported the damages at $47.71 per pump on 298 pumps. The plaintiffs proved the expenses of making and selling the pumps, that they were prepared and ready to fill the orders taken by the defendants, and the prices at which the pumps were sold by the defendants. The master took, as the measure of damages, the difference between such expenses and such prices: *Held*, that the rule was an erroneous one.

2. The invention was one only of an improvement in the pump, and not of the entire pump. Numerous parts of the pump were in general use prior to the patent, and were not claimed therein, and were free to be used by the defendants. The patented invention claimed was a special construction of a side-chamber, whereby the same was adapted to use with the valve-casings bolted on the outside, and the damages could not exceed the profits upon such improvement.

[Cited in Schillinger v. Gunther, Case No. 12,457.]

3. As the plaintiffs failed to show the profits or damages arising from the use of the improvement, the master should have decided that nominal damages only could be recovered.

[Cited in Buerk v. Imhaeuser, Case No. 2,107. Followed in Gould Manuf'g Co. v. Cowing, Id. 5,643. Cited in Star Salt Caster Co. v. Crossman, Id. 13,320; Calkins v. Bertrand, 8 Fed. 758; Maier v. Brown, 17 Fed. 737.]

In equity. This suit was brought [against John P. Cowing and others] upon letters patent [No. 117,925] granted to the plaintiffs, as assignees of William H. Pollard, the inventor, August 8th, 1871, for an "improvement in gas-pumps." The specification stated that the improvement was one "in gas-pumps for oil-wells." It said: "This improvement is applicable to any ordinary use where a double-acting pump is required, but it is specially designed for drawing off the gas from the casings of oil-wells, and conducting the same to the furnace of the engine. For this purpose it is necessary to have tight joints to the pump; and the invention consists in the construction of the side-chamber of the cylinder and the valve-casing, as hereinafter described, with this special purpose in view. In the drawing, A represents the base of the pump; B, the cylinder; C, the cap or top of the pump; and D, the piston. These parts, in general arrangement, are the same as those in use in ordinary double-acting pumps. On one side of the cylinder is cast a chamber, E, extending from top to bottom. This chamber is divided longitudinally by a partition, a, which thus forms two longitudinal passages, b, b, which have no direct communication with each other, or with the cylinder. Lateral ports, c, c, are made in the sides of these passages, for the connection of the pipes which extend to the well and to the furnace. These passages b, b, do not open at top and bottom into the interior of the cylinder, as in ordinary double-acting pumps, but open outward by ports d, d, and thus communicate with similar ports, d′, d′, of the valve-casings, F, the construction of which will presently be described. By this arrangement the passages b, b, are made to communicate with a valve-casing bolted outside the pump, which is a distinguishing feature of my invention. Two of the valve-casings F, F, are used, one at the top and one at the bottom, and they are simply bolted tightly in place against the plane-seats f, f, with only a packing between. These valve-casings are each cast in a single piece, and, besides, the ports d′, d′, before spoken of, have a central port d^2, which communicates with the interior of the cylinder by a similar port, d^3, formed in the latter. These ports are shut off from the pasages b, b, and the gas from the latter can reach them only by making the circuit through the hollow valve-casings. The valve-casings are each cast hollow, and provided with seats, g, g, on which strike the valves h, h. The ports d′, d′, which open from the passages b, b, open one over and the other under the valves h, h, so as to produce a reverse action, as the piston goes up and down; and the open spaces i, i, above and below said valves, respectively, connect directly with a central space, which forms a continuation of the central port d^2. This construction (which is clearly shown in Fig. 2) consists simply of a web, which is cast entire in the hollow valve-casing, thereby allowing the free reverse action of the valves without any of the loose or open joints that occur where the valve-casing is made up of several

[1] [Reported by Hon. Samuel Blatchford, District Judge; reprinted in 1 Ban. & A. 375, and here republished by permission.]

separate and detached parts. In this improved construction there is but one joint to each end of the pump, and that is at the junction of the valve-casing with the seat f; all else, both of the side-chamber and the valves, is inclosed by a solid construction; and hence there can be no essential escape of the volatile gas as it passes through. The special construction of the valve-casings to produce this result, I believe to be new. The stems of the valves h, h, rest in screw sockets, l, l, in the usual manner. I am aware that it is common to cast a side-chamber to a double-acting pump, to allow the medium to follow the action of the plunger. Such, in its broad sense, I do not claim. I claim only the special construction of my chamber, whereby the same is adapted to use with the valve-casings bolted upon the outside. In this connection the passages b, b, must open outside, while in other pumps they open inside the cylinder. In the same manner I do not claim, broadly, locating the valves in a hollow casing, but only the special construction of the casing described, whereby the same is adapted to be bolted upon the outside of the gas-chamber, thereby making but a single joint at each end of the pump. It will be noticed that there is not only an alternate action of each pair of valves in a single casing, but also a similar action in each pair situated in line at the top and bottom, thus producing a compound action, which keeps up a continuous movement of the gas. In a gas or air-pump, it is essential to get the full stroke of the piston, to leave none of the medium or fluid at either end at the reverse movement. What I claim, as my invention, and desire to secure by letters patent, is: 1. The chamber E, provided with the longitudinal partition a, forming distinct and separate passages, b, b, which have side ports, c, c, for the attachment of the induction and eduction pipes and ports, d, d, at top and bottom, opening outward into the valve-casings, as herein described. 2. The duplex valve-casings F, with the ports d′, d′, d^2, opening respectively to the passages in the side-chamber and to the cylinder, and provided with the seats g, g, so arranged as to admit the gas or other fluid over one valve and under the other, as herein described. 3. The combination and arrangement with the cylinder B, of the outside chamber E, provided with the seats f, f, of the valve-casings F, F, bolted thereon, in the manner and for the purpose specified."

J. B. Perkins, for plaintiffs.
Elisha Foote, for defendants.

HUNT, Circuit Justice. Upon the hearing of this case upon the merits, it was adjudged by the court that the patent to the plaintiffs, dated August 8th, 1871, was a valid patent, and that the defendants were infringing in respect to all the pumps manufactured and sold by them subsequent to that date. It was referred to a master to ascertain and report the complainants' damages. The master reported that the complainants should recover damages on 298 pumps manufactured, to the amount of $47.71 per pump. To this report the defendants filed exceptions, and the case now comes before the court on the hearing of such exceptions.

The principal question arises upon the third exception, and regards the rule for the measure of damages adopted by the master. The complainants proved the expenses of making and selling the pumps in question, that they were prepared and ready to fill the orders taken by the defendants, and the prices at which the pumps were sold by the defendants. The master found the damages to be the difference between such expenses and such prices, and reported accordingly.

If the plaintiffs had been the inventor and patentee of pumps, or of double-acting pumps, the argument would have been strong in favor of the rule adopted. But the invention patented and infringed was of an improvement upon pumps merely. Such was the decree, which did not restrain the defendants from making pumps, or even the pumps in question, but only certain devices, forming a part of them, and which devices the court adjudged to be an improvement belonging to the plaintiffs, which had been infringed by the defendants. The decree adjudges that the letters patent in question, "for an improvement in gas pumps, dated August 8th, 1871, and more particularly set forth in the complaint, were and are valid in law, and that the defendants infringe on the rights secured thereby;" and the defendants are restrained "from making, using or vending the device or improvement secured thereby." In making the report, his master says: "While admitting, of course, the doctrine that, in some cases, the profits resulting from the mere improvement must be separated from those of the entire machine, and allowed to the plaintiff as the sole measure of damages, I am unable to see how, upon any correct principle, this separation can be made in the present case. I have said, in the opinion accompanying this report, that, as it appears to me, the comparison must be made between the machine as it stands, with its patented improvements, and what would be left of the same machine if these improvements were taken away, and not between this machine, with its patented improvements, and any other one having the same general character, not patented, and used in the business, and sold in the market. If this criterion is the correct one, and, for the purposes of this decision, I hold it to be so, it is very plain that, if the patented improvements on this gas-pump are removed, there is nothing left which can be called a machine, and in respect of which any profits can be predicated. I distinctly hold, then, in order that the question may be distinctly presented —although it seems to me to be a matter of law, a sort of construing the machine in the

same way that a court construes a writing—that the profits resulting from the patented portion of this pump cannot be separated from those resulting from any other part of it." In concluding his report, he says: "In conclusion, I find and report, that the plaintiffs are entitled to recover, as 'damages' sustained by them, by the sale of the aforesaid 298 pumps by the defendants, as aforesaid, at the rate of $47.71 for each pump so sold by the defendants, that being the whole profit which, as appears from the evidence, the plaintiffs would have made from the sale of each entire pump."

Pumps have been in use since the earliest ages of the world. Double-acting pumps, like the one in question, have long been in use. Double-acting pumps, having cast a side chamber, to allow the medium to follow the action of the plunger, have long been in use; and, in this patent, it is expressly stated that this is not claimed as an invention by the plaintiffs. The base, the cylinder, the top, the piston, are the same, in general arrangement, as are used in ordinary double-acting pumps. These things are not claimed by the plaintiffs to be within their improvement. Their use is free to the defendants. Only a special construction of the side chamber is claimed, whereby the same is adapted to use with the valve casings bolted on the outside. Valves must exist in every pump, and they must open on the outside. They are located in hollow casings, but this the inventor, in his patent, says that he does not claim. A valve-box or valve-case, (that is, the portion of the passages to and from the cylinder that contains the valves, cut off from the rest, for the convenience of fitting the valves, and then bolted on again to the outside of the cylinder,) is a valuable device, forming a part of this machine, but it is not claimed to belong to the plaintiffs, although the specification is said to have been drawn with reference to it. I do not pursue the analysis of the patent so carefully carried out by the defendants' counsel, showing all the parts which were in use before the alleged improvement, and showing, specifically what the patent claims. Enough has been said to present the main question in the case, viz., whether the patentees can recover the profits for the manufacture of the entire pump, or whether their claim is limited to the profits upon the improvement embraced within the patent. The master concedes the latter to be the rule in some cases; but, if I understand his reasoning, above quoted, he takes this case out of it on a ground that, I think, cannot be sustained. The comparison is to be made, he says, "between the machine as it stands, with its patented improvements," (the plaintiffs' improvements, I assume,) "and what would be left of the same machine if these improvements were taken away, and not between this machine, with its patented improvements, and any other one having the same general character, not patented, and used in the business, and sold in the market." The portion of the pump in question which belongs to or is included in the improvement of the plaintiffs is very small, and a machine constructed upon other known principles and devices applicable to pumps, omitting the plaintiffs' improvement, would include nearly everything useful that is to be found in the present machine. A different view of this matter of fact is the basis of the master's opinion. I judge that the master holds the plaintiffs' improvement to be more extensive than it is.

The proposition is simply this: The patentee takes the well-known portions of a pump used in pumping gas-oil, with passages, valves, piston, chambers, openings, &c., as ordinarily made and used, and adds a chamber of an important construction, as it is alleged, and a combination with certain other parts described. Now, if this addition is not a new and useful improvement, no damages can be claimed for its use. If it is such an improvement, the improvement, in its nature and by law, is and must be capable of being described and pointed out, and must be described and pointed out. Every skilful mechanic must be able to learn, from the patent itself, precisely what the monopoly covers. Act July 8, 1870, § 26 (16 Stat. 201). If this alleged improvement is so confounded with portions of the machine which are the subjects of other patents, or which, from long continued use, are open to the public, that it cannot be separated from them, or if, when so separated, it has no value, it is not a patentable invention, and no damages are due for its use. The decree in this case has adjudged the patent to be valid. In its nature, therefore, it is, and must be, capable of separation and distinction from other portions of the machine. The ruling of the master, that the profits arising from the improvement of the plaintiffs cannot be separated from the profits of the machine generally, seems to be based upon the idea that the improvement of the plaintiffs is all that is valuable in the machine. I cannot but consider this a great mistake, as I have already shown.

I understand the rule to be settled, that, when the patent is for an improvement upon a machine, the damages for the infringement of such patent are confined to the profits made by the use of the improvement only, and not by the manufacture of the whole instrument. What profit or advantage did the defendants obtain by the use of the plaintiffs' improvement? What advantage did they have that they would not have had, if they had built their machines without the improvement? In Philp v. Nock, 17 Wall. [84 U. S.] 460, although the case did not, perhaps, require an adjudication of the point, the rule is thus laid down, by Swayne, J.: "Where the infringement is confined to a party of the thing sold, the recovery must be

limited accordingly. It cannot be as if the entire thing were covered by the patent; or, where that is the case, as if the infringement were as large as the monopoly. * * * The plaintiff must show his damages by evidence. They must not be left to conjecture by the jury." In Mowry v. Whitney, 14 Wall. [81 U. S.] 620, 649, the precise point before us was in question. The defendant was charged by the master with $91,000, as the profits arising from the use of the plaintiff's patent, in manufacturing car wheels, which was the profit obtained from the manufacture of the entire wheel. In delivering the opinion of the court, Strong, J., says: "It is clear, that Whitney is not entitled to recover more than the profits actually made in consequence of the use of his process in the manufacture of the 19,819 wheels. It is the additional advantage the defendant derived from the process—advantage beyond what he had without it—for which he must account; * * * but the master charged the profit obtained from the entire wheel, instead of that resulting from the use of Whitney's invention in a part of the manufacture. * * * It is as true of a process invented as an improvement in a manufacture, as it is of an improvement in a machine, that an infringer is not liable to the extent of his entire profits in the manufacture. The question is, what advantage did the defendant derive from using the complainant's invention, over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits. They are all the benefits he derived from the existence of the Whitney invention."

The burden of proof rested upon the complainants. The damages to the plaintiffs, or the profits to the defendants, (they are the same thing,) must be proved like the other points in the case. For all the profits or advantages with which they have been charged, (except that precise advantage derived from using the plaintiffs' improvement,) the defendants may still be liable to other inventors, or they may have already paid for them to those inventors. Upon no principle can the plaintiffs assume that they belong to themselves, and call upon the defendants to disprove this assumption. It is not necessary further to examine the cases on this point. The supreme court have decided it explicitly, and, if there are cases found to the contrary, they must be considered as overruled. The master should have decided that, as the plaintiffs had failed to show the profits or damages arising from the use of the improvement, nominal damages only could be recovered.

The third exception is allowed, and, as it goes to the basis of the entire recovery, it is not necessary to consider the other exceptions in the case.

[See Case No. 5,643.]

Case No. 5,643.

GOULD'S MANUF'G CO. v. COWING et al.

[14 Blatchf. 315; 3 Ban. & A. 75; 12 O. G. 942.] [1]

Circuit Court, N. D. New York. Sept. 14, 1877.[2]

PATENTS—IMPROVEMENT—INFRINGEMENT—NOMINAL DAMAGES.

In Gould's Manuf'g Co. v. Cowing [Case No. 5,642], it was held, that the invention covered by the plaintiff's patent was of an improvement in a pump, and that, as the plaintiff had failed to show the profits or damages arising to the defendants from the use of such improvement, it was entitled to only nominal damages. On further evidence being given, showing that, after the plaintiff's pump had been introduced into certain oil regions, other pumps could not be sold in those regions: *Held*, that such further evidence did not show that the plaintiff was entitled to other than nominal damages.

[Cited in Schillinger v. Gunther, Case No. 12,457; Star Salt-Caster Co. v. Crossman, Id. 13,320.]

[See note at end of case.]

In equity.

J. B. Perkins, for plaintiff.

Elisha Foote, for defendants.

JOHNSON, Circuit Judge. This case comes up on exceptions, taken by the defendants [John P. Cowing and others], to the report of the master under the interlocutory decree, directing an account upon the infringement of the plaintiff's patent. This decree was made in March, 1874, Judge Woodruff presiding. Under it an account was taken before Mr. Pomeroy, acting as master. Upon his report exceptions were taken by the defendants, which were heard before Mr. Justice Hunt. The learned judge allowed the exceptions, and, in the first instance, ordered that the plaintiff was entitled only to nominal damages, but subsequently allowed the plaintiff a further opportunity to produce evidence. Upon the decision of the case, an elaborate opinion was delivered, which is to be found in [Case No. 5,642]. It was held, that the invention was one only of an improvement in the pump, and not of the entire pump; that numerous parts of the pump were in general use prior to the patent, and were not claimed therein, and were free to be used by the defendants; that the patented invention claimed was a special construction of a side chamber, whereby the same was adapted to use with the valve casings bolted on the outside; and that the damages could not exceed the profits upon such improvement. It was further held, that, as the plaintiff failed to show the profits or damages arising from the use of the improvement, the master should have decided that nominal damages only could be recovered. This decision furnishes the law of this circuit upon the questions involved, and, in an especial

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 75; and here republished by permission.]

[2] [Reversed in 105 U. S. 253.]

sense, it furnishes the law of this case, which no judge has a right to review or modify, except upon appeal. Being convinced of its correctness, I have as little inclination, as I have right, to depart from it. Upon the further reference, the report upon which is now before the court, on exceptions taken by the defendants, the clerk of this court, acting as master, has made substantially the same report as was made by the first master, founding his decision upon proof that, after the plaintiff's pump had been introduced into certain oil regions, other pumps could not be sold in those regions. This is relied upon as taking from the former decision all its force, and absolving the party from the necessity of giving proof, as that decision holds, of the profits or damages arising from the use of the improvement. The force of the former decision cannot thus be avoided. The fact newly introduced has no bearing upon the question, but leaves the rule announced in the former decision of Mr. Justice Hunt, uncomplied with. The attempt to get rid of that decision in this way must necessarily fail. To a court which has decided that evidence of a particular fact is necessary, it is no answer to say that it cannot be given. The consequence of that state of things is, that the party on whom the burthen rests must fail. This is the situation of the plaintiff in the case before the court. It has not given the evidence which the court has held it must give, to entitle it to more than nominal damages. This must be attributed to the impossibility of proving any damages within the rule laid down by the court. The exceptions must be allowed, and the report reduced to nominal damages, and there must be a final decree on that basis. If the views of the plaintiff are to prevail, the only remedy is in the supreme court, upon appeal. To the decision of Mr. Justice Hunt heretofore made in this cause, is now to be added the decision of the same learned judge, made in this court, in Black v. Munson [Case No. 1,463], in which the same doctrine laid down by him in this case is reaffirmed, and applied to the circumstances of Black v. Munson. Let there be a decree for the plaintiff, with nominal damages only.

[NOTE. The complainants thereupon appealed to the supreme court, which, in an opinion by Mr. Chief Justice Waite (105 U. S. 253), reversed the decree below, and ordered one entered against the appellees for $4,470, at the rate of $15 per pump. The fruits of the infringer's advantage were his profits, and they were peculiar, as the evidence shows a monopoly in favor of the complainants in certain regions. The market was not only limited in locality, but in demand. While nominally, the plaintiffs made only an improvement in pumps, it was really an improved pump. For ordinary uses, the improvement added nothing to the value of the old pump; but, for the new and special purpose in view, the old pump was useless without the improvement. Therefore, damages above the cost of manufacture should have been given.]

GOURDIN (EINSTEIN v.). See Case No. 4,320.

GOURDIN (STRAIN v.). See Case No. 13,521.

GOURE (UNITED STATES v.). See Case No. 15,240.

GOURLAY (UNITED STATES v.). See Case No. 15,241.

Case No. 5,644.

GOVE v. The BOLD RUNNER.

District Court, D. Massachusetts. 1859.

MARITIME LIENS—MATERIALS AND LABOR—SWORN STATEMENT OF DEMAND.

Laws Mass. 1855, c. 231, in providing for liens on vessels and ships, in favor of mechanics and material men, requires (section 2) the filing of a sworn statement of the demand claimed. *Held*, that the certificate must contain the Christian as well as the surname of the lien claimant.

[Cited in 2 Pars. Shipp. & Adm., to the point stated above. Nowhere more fully reported; opinion not now accessible.]

Case No. 5,645.

The GOVERNOR.

[Abb. Adm. 108.][1]

District Court, S. D. New York. Jan., 1848.

COLLISION—BURDEN OF PROOF—WEIGHT OF TESTIMONY.

1. Where two vessels are running in the same direction, the one astern of the other, there rests upon the rear vessel an obligation to exercise precaution against collision, which is not chargeable to the same extent upon the other.

[Cited in Whitridge v. Dill, 23 How. (64 U. S.) 454; The City of Merida, 24 Fed. 234; The City of Macon, 47 Fed. 924.]

2. A vessel of superior speed, running in the same direction with a slower one, has a right to pass her if she can do so with safety to both; but the burden of proof is upon her, in case of collision, to show the prudence of her own conduct, and also to prove negligence or misconduct on the part of her rival.

[Cited in Whitridge v. Dill, 23 How. (64 U. S.) 454; The Narragansett, Case No. 10,016; Simpson v. Spreckels, 13 Fed. 94; The City of Macon, 47 Fed. 924.]

3. A vessel in advance is not bound to give way, or to give facilities to enable a vessel in her rear to pass her, though she is bound to refrain from any manoeuvres calculated to embarrass the latter in an attempt to pass.

[Cited in The Commodore Jones, 25 Fed. 509; The St. Johns, 34 Fed. 766.]

4. In collision cases, the court will attach a greater weight to the testimony of witnesses to facts which occurred within their own knowledge, on board their own vessel, than to any opinions or judgments formed by those upon one vessel respecting the management of the other.

This was a libel in rem by John Van Pelt, owner of the steamboat Worcester, against the steamboat Governor, to recover damages

[1] [Reported by Abbott Brothers.]

for a collision. The collision complained of occurred under the following circumstances: The steamboats Worcester and Governor were passenger vessels, which sailed triweekly from New York, on the same day and at the same hours. They left New York on the afternoon of March 2, 1847, about simultaneously, bound on the same course up the Sound for Boston. The Worcester belonged to the Norwich line of steamboats, the Governor to the Stonington line. As they passed through the East river and through Hell Gate, the Worcester was somewhat ahead, the Governor being most of the time in her wake, and occasionally lapped upon one quarter. The Governor was slightly the superior in speed, and was seeking, from time to time, between New York and Sands' Point, to avail herself of a favorable opportunity to pass her rival. The boats ran in company in this manner, from one to two lengths apart, until, when they reached the Stepping-Stones, three or four miles from Sands' Point, the Governor took a course parallel with that of the Worcester, and continued a length or two distant from her, each boat steering for Sands' Point buoy, and in such manner as to give it in passing the usual safe berth. They came in collision at that place—the larboard bow of the Governor striking the starboard quarter of the Worcester, near the gangway and just aft the boiler, and causing some little damage, the expense of repairing which amounted to $53.

The cause now came before the court upon the pleadings and proofs. There was some conflict of testimony upon the question which of the boats was responsible for the collision. Several witnesses, who were on board the Governor at the time, testified that that boat held her course steadily, edging as close to the shore as could be done with safety, and in such manner that she brought the buoy at Sands' Point against her starboard guards and under them; and that the Worcester, as it appeared to the witnesses, deviated from her true course, bearing towards the Governor, until, when within a quarter of a mile from the buoy, she sheered directly across the bows of the latter boat, thus causing the collision. The two pilots on board the Worcester, on the contrary, both swore that that boat was running by the compass N. E. ¼ E., from the time of passing the Stepping-Stones up to the moment of collision; that she was not sheered from that course towards the Governor; that the course of the Worcester was the course usually taken by steamboats on the Sound to pass Sands' Point, being calculated to secure a safe berth from the buoy; and that the usage of navigation was to run near Sands' Point in going into the Sound. In these general statements as to the course of navigation, all of the witnesses on both sides, who were acquainted with the subject, concurred.

Luther R. Marsh, for libellants.

John Sherwood and S. Sherwood, for respondents.

BETTS, District Judge. If the Worcester and the Governor had been running in opposite directions, the collision might, probably, have been deemed to be so far the result of mere casualty and misadventure as to leave each vessel to bear for herself the consequences of the accident falling upon her.[2] But the fact that they were running in the same direction, the one astern of the other, imposed upon the rear boat an obligation to precaution and care which is not chargeable to the same extent upon the other. In the light of this principle, the circumstances of the present case manifestly cast the burden of proof upon the Governor. She was astern, and was seeking to run past the Worcester. She had a right to the advantage of her superior speed, and under such circumstances it would have been tortious and blameable conduct on the part of the Worcester designedly to intercept the Governor, to crowd her off, or to baffle her in that effort.[3] But it devolves upon the Governor to show the prudence of her own conduct, as well as to prove negligence or misconduct on the part of the Worcester. It was not the duty of the latter boat to veer from her course so as to open a passage for the Governor, or to lend her any facility in aid of her purpose to pass. We may censure any rigid adherence to strict right by which one competing boat interposes embarrassments in the way of her competitor, and may regret the want of a magnanimous and liberal course of conduct which might relieve a vessel of superior speed and endeavoring to get ahead, from delay or difficulty in accomplishing that object. But the court is only empowered to adjudicate the legal rights of the one and the responsibility of the other.

It was therefore clearly the duty of the Governor to select a place for passing the Worcester, and a mode of effecting it, which would not expose the latter to injury. The rear boat, in such case, must stop her way, or back off and await the opening of a sufficient passage, if the leading boat is so placed that safe room is not left to pass without coming within a hazardous proximity to her. The general law of navigation secures to vessels under way the track they are rightfully pursuing, and makes it cause of damage for others to molest or crowd upon them in it. Jac. Sea Laws, 338. This subject is often regulated by municipal laws in respect to vessels within the jurisdiction of the particular government; and if such laws are not of positive obligation in mari-

[2] See The Moxey [Case No. 9,894], where the authorities upon this point are mentioned.

[3] Compare the case of The Rhode Island [Id. 11,745], where the relative rights and duties of two steamboats, bound in the same direction, the one in advance of the other, are discussed.

time courts, they are frequently adopted as rules of decision in respect to collisions on the waters of the state, or by vessels owned within it.[4] The defence has accordingly been placed upon the ground that the Governor was on a course which afforded ample room for both boats to pass the buoy and Sands' Point without interfering, and that the Worcester, by design or through carelessness, veered from her proper track, and bore across that of the Governor. This fact is the turning point in the case, and vital to the defence.

Several witnesses, who were on board the Governor at the time of the collision, give their opinion in decided terms that such was the fact. The master of the Governor, her pilot, and several passengers on board, concur in stating that the Worcester suddenly bore off her course to the starboard, when the Governor was a quarter of a mile in her rear, and that she crowded in upon Sands' Point so much that the Governor, if she continued moving, must either strike her or go upon the rock.

It appears to me this evidence fails to establish a justification of her conduct, for two reasons:—

First.—It is not shown that the engine of the Governor was stopped, or slowed, as soon as there appeared to be danger that the two boats might come together, nor that the full means in her power were employed in due season to avoid coming upon the Worcester; for the master of the Governor, in his testimony, admits he could have avoided striking the Worcester, if, at the time when he first noticed that she was altering her course, he had supposed that she would crowd in so closely upon his track.

Second.—The evidence charging the fault upon the Worcester is essentially matter of opinion, and not statements of facts. The witnesses say that the Worcester appeared to them to bear down upon and to cross the Governor's line of approach. These witnesses were upon the Governor, and their judgment as to the direction of the other vessel was guided by nothing more than the apparent approximation of the two, and the impression that the converging was caused by a wrong movement of the Worcester. Their position was most unfavorable to an exact and accurate judgment on that point. No range was taken to any fixed object, nor was the course or bearing of either boat observed by the compass. They were themselves advancing with great speed, and were looking at an object several hundred yards distant, moving from them with velocity. Very slight reliance can be placed in the opinions of witnesses so circumstanced, as to the actual bearing and course the Worcester was pursuing at the time. These impressions and opinions of the witnesses must be weighed as part of the evidence in the case, particularly so far as they may avail in corroboration of facts proved, or to countervail testimony of like character from the other party; but alone they would scarcely justify a judgment in conformity to them. They are, however, met by the testimony of the two pilots on board the Worcester, both of whom deny that there was any deviation or alteration in her course, such as was stated to have taken place by the witnesses on the Governor, and who say that her course was the one usually taken by steamboats on the Sound in passing the point.

In collision cases, the court always discriminates carefully between the testimony of witnesses to facts which they assert to have occurred upon their own vessel and within their own knowledge, and the opinions and beliefs expressed by them in respect to what occurred upon the adverse vessel. Where the witnesses are credible, their direct testimony to what was done or omitted by themselves or by others under their immediate and direct observation, is far more satisfactory and decisive than any opinions or inferences formed in respect to matters lying without their positive knowledge, especially where those matters relate to the management of another vessel. However intelligent and upright the witnesses may be, there must always be great difficulty in judging accurately in respect to the manner in which a distant vessel is navigated; and the natural difficulties in the way of forming a sound judgment in respect to the management of such vessels are greatly enhanced in the case of collision, by the excitements of the occasion, and by the many circumstances which go to give a bias or prejudice to the mind. Thus it is observed that persons on board each vessel almost invariably attribute the collision and fault of the occurrence to the opposite one. The testimony of witnesses to their knowledge of what occurred upon their own ship accordingly justly outweighs that of superior numbers who speak only from a judgment or opinion, formed from distant observation.[5]

In this view of the case, I regard it as proved, by a preponderance of testimony, that the Worcester held her regular and proper course without deviation. That course, having an inclination towards the buoy, brought her nearer to it, and with greater rapidity than was anticipated or supposed by those on board the Governor.

[4] A statute of the state of New York prescribes that "whenever any steamboat shall be going in the same direction with another steamboat ahead of it, it shall not be lawful to navigate the first mentioned boat so as to approach or pass the other boat so being ahead, within the distance of twenty yards; and it shall not be lawful so to navigate the steamboat so being ahead, as unnecessarily to bring it within twenty yards of the steamboat following it." 1 Rev. St. 682, § 7. Penalty, $250. Id. 683, § 8.

[5] See, also, remarks of the court upon this subject in The Narragansett [Case No. 10,019]; The Argus [Id. 521]; The Rhode Island [Id. 11,745].

The latter boat was accordingly kept on a line of direction as if under the persuasion that the Worcester must continue at about the same distance from the buoy in running out her course as she was from the Governor. The master of the Governor, however, was evidently aware that the boats were approximating each other, and enough was brought to his notice to have put him upon his guard and to call for the exercise of great caution. He says that he could have avoided the Worcester when he first saw her alter her course near the place of collision, but he had no idea that she would "jam in so close." As soon as he became aware of it, he shut off the steam and stopped his boat. It was then too late, however, as the boats were already almost in the act of striking. Upon these facts, the Governor is chargeable with blame, and must be liable for the consequences.

The damages were fortunately very slight. The bill of repairs presented, the payment of which only is claimed, amounted to no more than $53. The payment of that sum would have avoided this controversy; and, as the Worcester demanded no more than her actual disbursements, to which she was clearly entitled, the claimant must be charged with the costs arising from the contestation of that claim. Decree for the libellant for $53, with interest at six per cent. from March 10, 1847, together with costs to be taxed.

GOVERNOR, The (WAKEFIELD v.). See Case No. 17,049.

Case No. 5,645a.

The GOVERNOR CAREY.

[2 Hask. 487.] [1]

District Court, D. Maine. May, 1881.

STOWAGE OF CARGO—WRECK—OFFSET OF FREIGHT—SERVICES OF MASTER.

1. Clean bills of lading, for the carriage of goods between ports where no usage to the contrary exists, require the cargo to be stowed under deck.

2. Cargo stowed on deck in violation of a contract is at the vessel's risk, unless clearly shown that it would have been destroyed if it had been loaded below deck.

3. Goods on deck, not only are too much exposed to loss, but embarrass the crew in the management of the ship; and if disaster come from a tardy response of the crew in working ship, when they are likely to have been delayed by the deck-load, the burden is upon the master to show that the deck-load was not the cause of the disaster.

4. In case of wreck from the fault of the master in carrying cargo on deck, amounts paid by the owners of the cargo in recovering their property may be offset against freight and general average charges due the vessel.

5. The master cannot recover for services and expenses in saving the cargo from wreck, when his contract required its delivery at port of destination as a pre-requisite to the earning of freight.

In admiralty. Arbitration upon the claim of the owners of a vessel, in case of wreck, for the entire freight for the voyage and general average charges, less the freight, upon cargo saved, from place of wreck to port of destination, and for expenses of the master in saving and forwarding cargo, to which the owners of the cargo seek to offset their expenses of saving and recovering it, incurred on account of the disaster.

FOX, District Judge. In September last, Twitchell, Champlin & Co. shipped on board this schooner, then at New York, and bound to Portland, 750 casks of kerosene oil, at a freight of thirty-two cents per cask; fifty-five tons of pig iron were also shipped by the Portland Company at 170 cents per ton. Clean bills of lading for both oil and iron were given by her master. A portion of the oil was placed on deck, there not being room in the hold for the whole quantity. The iron was stored in three layers in the bottom of the vessel, the depth of the hold not allowing of three tiers of oil, excepting forward. On her passage down the sound, the schooner met with bad weather; her mast was broken so that she had to put into Edgartown where a new mast was procured; general average charges were thereby incurred amounting to $196.02 on the oil, and $54 upon the iron.

The vessel again started on her voyage, but, by reason of a loss of some of her sails, she again returned to Edgartown. The deficiency being supplied, she again got underway, and, being unable to get by Cape Ann, the master bore away for Boston harbor. About nine p. m., October twenty-seventh, she misstayed and went ashore on the Hardings. The wind was N. N. W., a wholesail breeze; the moon at times was obscured by clouds; the crew, six all told, left the vessel that night in her yawl with their dunnage, and rowed to old Boston light. The next morning they returned to the wreck and found the sea breaking over her, the deck-load all gone, her decks ripped up, and most of the oil washed out of her hold. 685 barrels were picked up on Nantasket beach, and afterwards taken to Portland, the salvors receiving $1.50 per barrel for their services. The iron was nearly all saved by wreckers at a salvage of thirty per cent.

The freight on the oil and iron from Nantasket to Portland was less than the entire freight from New York, and for this difference, being twenty cents per cask of oil, and seventy cents per ton of iron, the owners of the schooner claim to recover, and also the amount of general average charges, with the expenses of the master while employed in saving and sending forward the cargo after the loss of the vessel.

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

The actual number of casks of oil on deck, at the time of the disaster, is in dispute. The mate testified that eighty only were on deck when they sailed from New York, to which eighteen were added at Edgartown, taken from the hold when the new mast was put in place, and which were not again stowed below on account of the difficulty in so doing; that all of the ninety-eight casks were well aft to trim the vessel, and were stowed on end, and there were none on top of the tier. These statements of the mate are confirmed by the master's testimony. Two witnesses of credit testify that the master of the schooner, after the disaster, stated to them that there were about 150 casks on deck, two tiers in height, one being on end with a riding tier on top, on the bilge. The master swears most positively that he never stated to either of these witnesses that there was a riding tier over the casks which were on their heads; but, in my opinion, he must have made some such a statement, and I am strongly inclined to the opinion that a portion of the oil was so stowed in order to bring the trim of the vessel as well aft as possible.

Jacob McLellan, also, testifies that the master of the schooner told him there were 150 casks on deck. The master says he was unwell when the cargo came on board; that it was all received and stowed by the mate, and that he has no certain knowledge of the precise number of casks on deck.

The bill of lading was signed by the master September twenty-third. The vessel sailed the twenty-fifth, and was not wrecked until twenty-seventh of October. During all that time, the master was in daily sight of his deck-load, and should have known the number of casks he had thus at his risk. The weight of the evidence is that there were about 150 casks on deck, and some of them, as I think, in a double tier.

There would seem to have been no occasion for the loss of this vessel, if there had been proper attention to their duties by those on board. The weather was not bad. Boston light, about three miles distant, was in plain sight. The sea was moderate, as six men were able in an eighteen-foot boat, with all their dunnage, to reach the light without difficulty. The master was well acquainted with Boston harbor, having, as he says, often been there. There was a bell-buoy on the Hardings, and, with reasonable care on the part of the master, who was at the wheel, this vessel should not have gone so near to those rocks as to put her ashore in case she misstayed.

Waiving this objection, there is, in my opinion, a complete answer to the claim made for freight and general average; and it is that by the wrongful stowage of this large quantity of oil on deck, this disaster was occasioned, which has resulted in the loss of eighty-five casks of the oil, and in the owners of the cargo having been subjected to expenses in saving their property, far in excess of the claims here made against them by the owners of the schooner.

It is admitted that the master, having given clean bills of lading for oil, was without excuse in stowing it on deck, as it is not claimed that, by usage or custom between these ports, he was justified in so doing. His contract, therefore, being to carry all the oil in the hold, was at the vessel's risk, and if lost overboard, the owners could recover its value, unless it is clearly established that, if it had been below deck, it would certainly have been destroyed, and that its being on deck in no respect occasioned its loss.

If a ship in mid-ocean should be run down and instantly sunk in a collision, it may well be that if her master had, in violation of his contract, taken a portion of his cargo on deck, he would not be held accountable for the loss of his deck-load, as the entire cargo, without regard to its position on the ship, would have been totally lost by the accident, and the owner of the cargo would not have sustained any loss by reason of a portion having been on deck instead of below; the misconduct of the master would not in any way have occasioned the damage thus sustained by the owners, as the loss of the deck-load would not have been caused by its being on deck, but all on board, whether on deck or below, would have been, at the instant, destroyed by the sinking of the ship.

It is, however, most clearly established by numerous decisions of courts of admiralty, that "goods on deck are too much exposed thereby to loss; and not only this, but, by encumbering the deck, they embarrass the crew, render the management of the vessel difficult, and in tempestuous weather endanger the safety of the vessel and the rest of her cargo." The Paragon [Case No. 10,708].

A double tier of oil casks on a part of this vessel's deck must necessarily have been attended with the consequences so clearly stated by Judge Ware. In getting forward and aft, the crew must have been greatly impeded in their movements by clambering over such a barricade, and they must have been hindered and delayed thereby in obeying the master's directions as to handling the vessel. Under these circumstances, the loss having been occasioned by the schooner's failure to come about, any delay in the execution of the order, even for a few seconds, would have been disastrous and fatal to her change of course. Delay and interruption being the natural consequences of the oil thus being wrongfully on her deck, it was incumbent on the master to satisfy me that, in the present instance, the misstaying was not caused thereby; and this he has wholly failed to do. I therefore am forced to the result, that the disaster was caused by the deck-load; and the amount which the owners of the cargo have been

compelled to pay to recover their property being greater than the balance of freight and general average charges, they are a proper subject of allowance against these claims of the owners of the schooner; and the owners of the schooner, therefore, are not entitled to demand and receive anything on account of the freight and general average from the owners of the cargo.

A claim is also made for the time and expenses of the master, after the wreck, in saving and forwarding the cargo; as this was all incurred by the master in performance of his duty and contract to deliver the cargo at Portland, and so earn his freight, he can not be allowed for these items, as is well settled in England. Schuster v. Fletcher, 2 Q. B. Div. 418.

I did not, at the hearing, understand that any claim was made in behalf of the owners of the cargo to recover from the owners of the vessel the amount expended by them in saving and recovering the cargo, over and beyond the claims for freight and general average; and I, therefore, have not passed upon said owners' claims, or made any award or decision touching the same; but have and do limit my award to the claim as made by the owners of the vessel against the owners of the cargo, which I determine to be invalid and disallow.

Case No. 5,646.

The GOVERNOR CUSHMAN.

[1 Abb. U. S. 14;[1] 1 Biss. 490; 5 Am. Law Reg. (N. S.) 286.]

District Court, D. Wisconsin. Sept. Term, 1865.

VIOLATION OF REVENUE LAWS—FORFEITURE.

1. The fact that prohibited articles are secretly introduced on board a vessel by persons employed as hands (such as a cook or waiter) at the will of the master merely, does not necessarily expose the vessel to forfeiture under a statute, such as the act of March 2, 1799, § 103 (1 Stat. 701), which imposes, as the punishment for importing specified articles, a forfeiture of the ship in which they have been imported; provided the articles in question are brought on board without the knowledge or consent of the master or owners, and in defiance of reasonable regulations prescribed on board the ship for securing conformity to the law.

2. If the master connives at such acts of the hands on board the vessel, she may be rendered liable to forfeiture; as the owners are liable for the acts of the master in the discharge of his duties as such. But they are not necessarily liable for the acts of all persons employed by the master on board the ship.

3. A vessel is not liable to forfeiture for every apparent violation of a revenue law, although the law imposes forfeiture as the punishment for a breach of its provisions. Evidence of a violation throws the burden of proof upon the claimant to show innocence. But accidental mistakes may be explained; and the existence of an intent to defraud the revenue may be the subject of inquiry, and the claimant may show the act complained of to have been innocent.

Information for a breach of the revenue laws. The libel was filed against the propeller Governor Cushman, for smuggling distilled spirits in violation of section 103 of the act of March 2, 1799 (1 Stat. 703).

John B. D. Cogswell, Dist. Atty., for the United States.

Emmons & Van Dyke, for respondent [cited Taylor v. U. S., 3 How. [44 U. S.] 197, as to intention to evade the revenue laws, and knowledge and privity on the part of claimants; also, U. S. v. Breed [Case No. 14,638]; U. S. v. Riddle, 5 Cranch. [9 U. S.] 311; U. S. v. Nine Packages Linen [Case No. 15,884.][2]

MILLER, District Judge. This propeller was seized by the collector at the port of Milwaukee, on the seventh day of August, 1865. The information alleges and propounds, as causes for the seizure:—1. That distilled spirits in jugs and bottles, and not in casks or vessels of the capacity of ninety gallons wine measure and upwards, said jugs and bottles containing less than ninety gallons wine measure each, were imported and brought in the propeller, not being for the use of the seamen on board, from the port of Sarnia, in Canada, to Big Summer Island and Fox Island, in the United States, contrary to section 103 of the act of congress, approved March 2, 1799. 2. That brandy contained in jugs and bottles, and not in casks or vessels of the capacity of fifteen gallons and upwards, was imported and brought in said propeller to the port of Milwaukee, in the United States, from the port of Sarnia, in Canada, the same not being for the use of the seamen on board. 3. That no manifest containing the said jugs and bottles of distilled spirits was exhibited at the first port in the United States, as required by law. The vessel was seized in pursuance of information from one Royall Campbell, who had been employed as mate, and was discharged for drunkenness and incapacity for duty.

From the opening of navigation, in the spring of 1865, until seized, the vessel was running between Green Bay and Sarnia, Chicago and Milwaukee and Buffalo, touching at Sarnia.

The cook and a waiter, on May 12, 1865, secretly, in the night time, at Sarnia, purchased and had brought on board the vessel, three gallons of whiskey, three gallons of brandy, and three gallons of gin. On the 23rd of the same month, at Sarnia, they secretly, in the night time, purchased and had brought on board, three gallons of whiskey. And on the 1st of June, at Sarnia, they, in the same manner, and at night, pur-

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

[2] [From 1 Biss. 490.]

chased and had brought on board three gallons of whiskey. It was a standing rule of the vessel that no distilled spirits should be brought on board at Canadian ports, by employees. And the cook and waiter, being aware of the rule, and also of the positive orders of the captain to that effect, in purchasing ship stores at Sarnia, requested that the jugs containing spirits purchased of a grocer there, should be secreted in barrels under the stores. They deposited the jugs of spirits in a state room occupied by the waiter, and in a pantry adjoining the kitchen, out of view. Distilled spirits were purchased at Chicago and Milwaukee by officers and men, in the several trips of the vessel. Whiskey was delivered to workmen at Summer Island and Fox Island. And at these places men drank on board secretly, and carried, in bottles placed in their pockets, some of the spirits smuggled at Sarnia, with some purchased at American ports. The cook received payment for those spirits so sold. The clerk and the owner of the pier at Fox Island settled for whiskey which some of the men had purchased of the cook, by crediting the amount on a bill of wood supplied to the vessel, under the belief that the liquor had been brought from Chicago or Milwaukee. The captain and clerk drank liquor handed them by the cook, without compensation. They had no knowledge that any distilled spirits had been brought on board at Sarnia or any other Canadian port, by any of the hands, except a case of gin ordered by the captain, until the vessel was seized.

By section 103 of an act of congress approved March 2, 1799 (1 Stat. 701), no distilled spirits (arrack and sweet cordial excepted) shall be imported or brought into the United States, except in casks or vessels of the capacity of ninety gallons wine measure and upwards, on pain of forfeiture of the said distilled spirits imported contrary to the provisions described, together with the ship or vessel in which they shall be so imported: "provided, that nothing contained in this act shall be construed to forfeit any spirits for being imported, or brought into the United States, in other casks or vessels as aforesaid, or the ship or vessel in which they shall be brought, if such spirits shall be for the use of the seamen on board such ship or vessel, and shall not exceed the quantity of four gallons for each seaman." And by section 1 of an act approved March 1, 1827 (4 Stat. 235), brandy may be imported into the United States in casks of a capacity not less than fifteen gallons.

It is conceded that the owners of a ship or vessel are liable for the acts of the captain, as their agent, in the discharge of his official duties, but that the cook and waiter are mere employees, as hands on board under the control of the captain, and may be discharged at his will, subject to provisions of law and the terms of their employment. A cargo of a vessel is the lading of a ship or vessel; the merchandise or wares contained and conveyed in a ship or vessel.

A vessel is not liable to forfeiture for every apparent violation or breach of the revenue laws, in regard to the cargo. Accidental mistakes may be accounted for and explained. Where actions, suits, informations are brought for penalties or seizures, and the government makes out a prima facie case, section 71 of the act of March 2, 1799 (1 Stat. 678), throws the burden of explanation upon the claimant. The Luminary, 8 Wheat. [21 U. S.] 407. And by section 67 of the same act, the officers of the customs, after entry made of goods, wares, or merchandise, may, on suspicion of fraud, open and examine the packages; and if any of the packages so examined shall be found to differ in their contents from the entry, then the contents of such packages shall be forfeited, provided, that the said forfeiture shall not be incurred, if it shall be made to appear to the satisfaction of the officer, or the court in which a prosecution shall be had, that such difference proceeded from accident or mistake, and not from an intention to defraud the revenue.

In the case of U. S. v. Nine Packages of Linen [Case No. 15,884], it is decided that when goods are libeled, under the said section 67, for disagreeing with the entries, and the claimant sets up mistake as an excuse, the circumstance that probable cause of seizure has been made out, does not impose on the claimant the necessity of making out an unusually clear case of mistake. All he has to do is to produce ordinary proof. It was there holden, as sufficient and legal excuse for an incorrect entry of goods, that they were entered from an invoice made out in great hurry and agitation, while the goods were packed at Caen, in the absence of the owner, in order to secure them by removal from an apprehended pillage by Prussian soldiery which occupied the place.

It seems to be the policy of the law, that intention to defraud the revenue may be a proper subject of inquiry, and to allow the claimant to show an accidental omission or neglect. U. S. v. The Margaret Yates, 22 Vt. 663.

The distilled spirits mentioned in the information having been received on board secretly by employees or servants of the vessel, without the knowledge of the captain or clerk, and in violation of a standing rule and positive order, the owners of the vessel would not be liable for their loss. They formed no part of the cargo, to be placed in the manifest as such, nor should the vessel be subject to forfeiture, under the circumstances. The spirits, or such portion as the cook and waiter were not allowed by law, might be liable to seizure.

In the case of Phile v. The Anna, 1 Dall. [1 U. S.] 197, it appeared in evidence that the captain of the vessel had only exhibited twenty hampers of porter in his official

manifest, while a much greater quantity was found on board the ship, besides forty-two hampers landed and deposited in the store of one Smith, and twenty-four hampers actually delivered on shore to the captain himself, agreeably to his order given for that purpose, in the store of claimants. It was known likewise that a considerable number of hampers of porter had during the passage been removed from the hold and stored away in state-rooms, filling them from the floor to the ceiling. And it appeared that the owners and their agents had been on board before the removal of the hampers from that situation, and must have seen them. The gross number of the hampers discovered by the informants was computed at a little over eighteen tons. The vessel was rightly condemned, but the charge of the court is instructive in the following remark: "The case in Bunbury is the single one that reaches the point before us. There the question arises whether goods put on board secretly, and unloaded without the knowledge of the captain, would occasion a confiscation; and the judges agreed that if it was a small matter, and no part of the cargo, it would not. The claimants, therefore, to have the benefit of this case, should show, 1st, that the subject of the present prosecution is a small matter; 2nd, that it was no part of the cargo; and, 3rd, that it was smuggled without the knowledge of the captain."

All these positions are satisfactorily established in favor of the claimant. The distilled spirits, taken on board, in the darkness of the night, at Sarnia, on the three several occasions by the cook and waiter, were no part of the cargo, were smuggled without the knowledge of the captain or clerk, and were a very small matter—not deserving the seizure of the vessel by the collector, in the strict enforcement of the revenue law according to its requirements.

The law under which the information is brought allows to each seaman a quantity of distilled spirits for his use on board, not exceeding four gallons. The cook, steward, and waiters in lake vessels are considered and classed as seamen or mariners. They are a necessary part of the crew. They frequently assist in the navigation and care of the vessel at times of pressing necessity. They are allowed a lien in the admiralty for their wages, in common with the sailors. Fland. Mar. Law, §§ 438–440, and notes.

On the 12th of May, the cook and waiter brought on board nine gallons of spirits. On the two subsequent occasions they brought on board three gallons. If, by the law, these men were entitled to bring into the United States four gallons for each, to be used on board, upon every trip of the vessel, then they only exceeded their allowance as to quantity on one occasion to the amount of one gallon.

The policy of the law will not allow seamen to smuggle on board even their own allowance of distilled spirits. The captain is responsible for the acts of the seamen in this particular, in all cases coming to his knowledge. If he consents to such traffic, or connives at it, he may subject his vessel to seizure.

The captain and clerk may have drunk of these liquors without knowledge or suspicion of their having been brought on board at Sarnia, secretly, or that the cook and waiter were making merchandise of them. Distilled spirits having been brought on board on all the trips of the vessel at American ports, and freely used and disposed of, the captain and clerk might not suspect that Canadian liquors were either drunk or purchased at Big Summer and Fox Islands by persons not belonging to the vessel. The spirits smuggled at Sarnia being of small bulk, and stored away in disregard of the captain's orders and a standing rule of the vessel, the testimony of the captain and clerk that they had no idea that the spirits which they drank on board, or which were drunk by others, had been smuggled at Sarnia, is entitled to favorable consideration. It is not probable that this traffic in foreign distilled spirits on board the vessel would be allowed. Domestic spirits may be drunk and sold on board, without risk of forfeiture of either the spirits or the vessel. And it is no cause of forfeiture, under the act, for a seaman to extend the courtesy of his bottle of foreign spirits to an officer without compensation, in the absence of knowledge on the part of the officer that such spirits had been smuggled.

The captain had a legal right to order on board the case of gin, not exceeding four gallons, which he used on board. The distilled spirits, mentioned in the information, not having been received on board as part of the cargo, they were not placed in the manifest. The vessel, therefore, is not liable for not exhibiting a manifest containing it, at the first American port touched at after leaving Sarnia. I am satisfied that the information should be dismissed. Decree accordingly.

GOVERNOR OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the states; e. g. "Governor of the State of Arkansas v. Ball. See Case No. 530."]

GOVERS (BARCLAY v.). See Case No. 973.

Case No. 5,647.

GOYON et al. v. PLEASANTS.

[3 Wash. C. C. 241.] [1]

Circuit Court, D. Pennsylvania. April Term, 1814.

MARINE INSURANCE—DEVIATION IN ROUTE.

Insurance was effected on goods on a voyage at and from Guadaloupe to a port in France, on the Atlantic. The vessel, instead of going direct to France, stopped at Santos two or three days, which was proved to be the safest and most usual route in time of war. If the vessel went to Santos with the honest intention to avoid British cruisers, and remained there no longer than was necessary, the deviation was excusable.

[This was an action on an insurance policy by Goyon and Efrin against Pleasants.] The policy, subscribed by the defendant, was on goods on board the Elizabeth, on a voyage at and from Guadaloupe to a port in France, on the Atlantic; premium 50 per cent.; to return 20, if the risk should end without loss. The vessel sailed from Point Petre, on the 10th of March 1809, and proceeded to the Saints, where she stopped for three or four days, to make observations if there were any enemy's cruisers in the offing; and then proceeded on her voyage, by a route, not in the direct course of her voyage, but such as was proved to have been the most safe, and such as three-fourths of all vessels going from Point Petre to France, usually pursued during war. It was proved, that after the capture of Marigalante, an island in the direct route to France, by the British, in 1806, the ocean, surrounding that island, was much infested with British cruisers; and that an attempt to proceed that way would have been attended with great danger;—that the safest plan was to sail from Point Petre, at night, to the Saints, (islands distant about fifteen miles from that port,) and from the high grounds on the island, to ascertain whether it would be safe to proceed. The vessel was captured, some days after she left the Saints, by a British cruiser, and was regularly condemned.

It was contended, by Chauncey and Binney, for defendant, that the vessel, by going out of the direct route to France, and touching at the Saints, was guilty of a deviation; and that the custom attempted to be set up by the plaintiffs, is neither ancient nor uniform. Park, Ins. (6th Ed.) 309; Marsh. Ins. 185; Martin v. Delaware Ins. Co. [Case No. 9,161], in this court.

WASHINGTON, Circuit Justice (charging jury). We do not understand the ground taken by the plaintiff's counsel, to excuse a deviation from the direct route from Point Petre to France, to be confined to the proof offered by him to establish a usage to touch at the Saints, and to proceed on from thence. But the real and substantial justification of the deviation, is, that it was more safe to pursue the course which this vessel took, than the direct route by Marigalante. And, if you are of opinion that this vessel went out of her way, and touched at the Saints, with the honest intention of avoiding British cruisers, remaining there no longer than was necessary, then the deviation is excusable, and the plaintiffs are entitled to a verdict.

Verdict for plaintiffs.

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

GOZZLER (COYLE v.). See Case No. 3,312.

Case No. 5,648.

GRACE et al. v. AMERICAN CENT. INS. CO.

[16 Blatchf. 433; 8 Reporter, 771; 8 Ins. Law J. 731.] [1]

Circuit Court, E. D. New York. June 26, 1879.[2]

POLICY OF INSURANCE—CANCELLATION—NOTICE TO AGENT.

1. G. instructed N., an insurance broker, to procure fire insurance. N. employed another insurance broker, A., who procured a policy from the defendant, and it passed to G. The policy, in clause 8, provided, that the policy might be terminated at any time, at the request of the assured, and also at the option of the insurer, on giving notice to that effect, and that any person other than the assured, who "may have procured" the insurance to be taken, should be deemed to be the agent of the assured and not of the insurer, "under any circumstances whatever, or in any transaction relating to this insurance." Afterwards the defendant notified A. of its election to then terminate the policy. A. accepted the notice and promised to return the policy. The next night the property insured was burned. G. had no knowledge, then, of the notice of termination. In a suit by G. on the policy: *Held*, that the policy was terminated by the notice.

[Cited in Adams v. Manufacturers' & Builders' Fire Ins. Co., 17 Fed. 632; Chadbourne v. German-American Ins. Co., 31 Fed. 534.]

[Cited in Insurance Co. v. Brecheisen, 50 Ohio, 548, 35 N. E. 53; Indiana Ins. Co. v. Hartwell, 100 Ind. 568.]

[See note at end of case.]

2. By the terms of the policy, A. was the agent of G. for the purpose of accepting notice of the termination of the insurance.

[See note at end of case.]

3. It was competent for the defendant to show a universal custom for the insurer desiring to terminate a risk to give notice to the broker who procured the risk.

4. The evidence in relation to such custom being positive and uncontradicted, it was not error for the court not to submit to the jury the question as to whether the existence of such a custom had been proved.

5. It was not competent for the plaintiff to show a usage that a notice to the broker did not take effect until a reasonable time had elapsed.

6. The plaintiff, by accepting the policy, ratified the employment of A., so as to make A. the person who procured the insurance.

[See note at end of case.]

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 8 Reporter, 771, contains only a condensed report.]

[2] [Reversed in 109 U. S. 278, 3 Sup. Ct. 207.]

At law.

Winchester Britton, for plaintiffs.
George W. Parsons, for defendant.

BENEDICT, District Judge. This case comes before the court upon a motion for a new trial. The action is brought upon a policy of insurance, to recover for the destruction, by fire, of certain lumber belonging to the plaintiffs [William R. Grace and others]. A trial was had before the court and a jury, when a verdict was rendered for the defendant. [Case No. 5,649.] The plaintiffs now move for a new trial, upon exceptions to certain rulings of the court made at the trial.

The evidence shows, that the plaintiffs had instructed one Noyes, an insurance broker in New York, to procure for him insurance, to a large amount, upon a quantity of lumber. Noyes employed F. H. Anthony, also an insurance broker, to effect insurance in Brooklyn; and, accordingly, Anthony procured several policies in the name of the plaintiffs. Among them was the policy in suit, which, when procured, was passed to the possession of the plaintiffs. This policy contained the following clause: "8. This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium, for the unexpired term of the policy. It is a part of the contract, that any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." A few days after the delivery of this policy, the defendant notified Anthony of its election to terminate the policy at that time. Anthony accepted the notice, and promised to return the policy. On the following night a fire occurred, by which the property insured was destroyed. At the time of the fire, the plaintiffs had no knowledge of what had taken place between the defendant and Anthony, in regard to terminating the insurance. Upon these facts the plaintiffs requested the court to instruct the jury to find a verdict for the plaintiffs, for the amount of the policy, $5,447 37. The request was refused, and the plaintiffs excepted. This exception presents, for determination, the main question in dispute between these parties, viz.: whether the notice of termination of the insurance given by the defendant to the broker, Anthony, and accepted by the latter in behalf of the plaintiffs, had the legal effect to terminate the insurance. If such was the effect of that notice, the ruling in question was right. If such was not its effect, a verdict for the plaintiffs for $5,447 37 should have been directed, as requested by the plaintiffs.

Upon this question my opinion is, that the insurance was terminated by the notice of termination given to the broker, Anthony, and that the ruling excepted to was right. The contention on the part of the plaintiffs is, that Anthony was not the agent of the plaintiffs for the purpose of accepting notice of termination of the insurance, and, therefore, the notice given to Anthony could not affect the plaintiffs' rights under the policy. The contention on the part of the defendant is, that the effect of the 8th clause of the policy, above set forth, was to enable the insurer to terminate the insurance at any time, by giving notice to the person who procured the insurance to be taken; and that Anthony was such person. The determination of this question depends upon the effect to be given to the 8th clause of the policy, above set forth. In considering this clause, it will be observed, that the apparent object of the clause is to provide a method of terminating the insurance. No other subject is specifically mentioned in it. It contains a specific provision for a termination of the insurance by the insured, which is followed by a specific provision for a termination of the insurance on the part of the insurer, by giving notice to that effect; and then follows the provision, that, in case the insurance has been procured by a person other than the insured, such person shall be deemed to be the agent of the assured, "in any transaction relating to this insurance." That terminating the risk is a transaction relating to the insurance cannot be denied; and, inasmuch as the method of conducting such a transaction is the subject to which the prior portion of the clause is devoted, the natural inference is, that the subsequent general phrase, "any transaction relating to this insurance," was intended to cover the transaction provided for in the former part of the clause, viz., a termination of the risk by means of a notice to that effect. No language is to be found in any part of the policy indicating an intention to give a limited effect to the phrase, "any transaction relating to this insurance;" and, in the absence of language indicating such an intention, it is difficult to find ground on which to deny to the words used their natural significance and scope. The position taken by the plaintiffs is, that the words, "relating to the procurement of," must be supplied, and the phrase construed as if it read, "any transaction relating to the procurement of this insurance." The only ground upon which such a material addition is based is, that, without some such limit, results clearly never intended would follow from the phrase, such as, permitting the broker to cancel the policy, or, under clause 11, bind the insured in the matter of repairs by the insurer. I think

reason can be found for denying to the clause in question any effect in the cases suggested and for limiting the effect of the phrase, "any transaction relating to this insurance," to the subject-matter of the clause of which it forms a part; but, however this may be, still the fact that the language, if given its ordinary significance, will work hardships under some circumstances, is no good reason for adding words of limitation not used by the parties. Provisions in policies, which are intended to, and do, render the contract of little value to the insured, are common enough. If it had been the intention of the parties that the phrase under consideration should be limited to acts relating to the procurement of the insurance, it would have been easy to say so; and no reason has been assigned for an omission to disclose such an intention by the language employed. In truth, an intention to refer to acts done subsequent to the procurement of the policy is affirmatively indicated by the words, "who may have procured this insurance." My conclusion, drawn from the language employed in the policy is, that these parties intended to agree, that, in case of an election by the defendant to terminate the risk, such termination might be effected by notice given to the broker who procured the insurance to be taken. This conclusion is strengthened by the evidence introduced by the defendant, showing a universal custom, in cases where the insurer intends to terminate a risk, to give the notice of termination to the broker who procured the risk. The admission of this evidence was objected to by the plaintiffs, but the evidence was competent, not, indeed, to make thereby a contract for the parties, or to alter the contract that was made, or to show authority in Anthony, but to show the circumstances under which the contract was made, for the purpose of throwing light upon the intention of the parties in using the language which they employed. For this purpose, the evidence in regard to custom was competent. The fact that the language employed in clause 8, as I have understood it, tends to render the policy a contract in harmony with the usage of the trade, goes to confirm the correctness of that understanding. But, it is said, that the court erred in not submitting to the jury the question whether the existence of such a usage had been proved. The evidence in relation to the custom was positive and wholly uncontradicted. It permitted but one conclusion, namely, that the custom contended for did exist. There was nothing, therefore, for the jury to pass on, and the court had a right to treat the custom as a fact proved, and to construe the contract in the light of that fact.

Evidence of the practice in regard to giving notice of termination of the risk having been admitted, the plaintiffs offered to show, that when, in accordance with that practice, notice is given to the broker, the understanding is, that the notice does not take effect until a reasonable time has elapsed. This offer was rejected, and the correctness of that ruling is also called in question upon this motion. The reason for the rejection of the plaintiffs' offer was, that it was an attempt, by evidence of usage, to change the contract which the parties had made. The agreement in the policy is, that the insurance is to be terminated when notice to that effect is given. The policy does not provide for any lapse of time after the giving of the notice, during which the insurer is to be bound. On the contrary, the contract states that the insurance terminates on giving the notice. The evidence offered by the plaintiffs was, therefore, immaterial, and the plaintiffs take nothing by their exception to the exclusion of their offer.

There remains the question, whether the evidence shows Anthony to be the person who procured the insurance to be taken, within the meaning of the 8th clause of the policy. As to this, there is no room for doubt. The only person known to the defendant, as the person procuring the insurance, was Anthony. The principals never met. Anthony procured the insurance, the policy was sent to him, and his name was endorsed upon it as the agent procuring it. The plaintiffs received the policy so procured, and are now suing upon it. It is true, the plaintiffs did not employ Anthony directly, but he employed Noyes, who, in turn, employed Anthony, and the plaintiffs, by accepting the policy procured by Anthony, ratified the employment of Anthony. They have adopted as their own the act of Anthony in entering into a contract in their behalf, one provision of which contract is, that notice of termination of the insurance, given to Anthony, should be equivalent to notice given to them.

My conclusion, therefore, is, that none of the exceptions taken at the trial afford ground for setting aside the verdict, and that judgment must be entered for the defendant.

[NOTE. On writ of error sued out by the plaintiffs, the judgment of the circuit court was reversed in an opinion by Mr. Justice Harlan (109 U. S. 278, 3 Sup. Ct. 207). The words quoted from clause 8 of the policy, in their natural and ordinary signification, import nothing more than that the person obtaining the insurance was to be deemed the agent of the insured in all matters immediately connected with the procurement of the policy. When the contract was consummated by the delivery of the policy, he ceased to be the agent of the insured. If the clause was doubtful, then, as the words of an instrument are to be taken most strongly against a party employing them, they are therefore most favorable to the insured.]

Case No. 5,649.

GRACE et al. v. AMERICAN CENT. INS. CO.

[7 Reporter, 388;[1] 8 Ins. Law J. 95.]

Circuit Court, E. D. New York. Oct., 1878.[2]

INSURANCE—OPTION TO CANCEL—NOTICE BY AGENT.

Where a policy authorized the company to terminate it at any time by giving notice of cancellation: *Held*, that a statement made by the agent of the company, that upon return of the policy he would cancel it, or a mere wish expressed to have it cancelled, was not a sufficient notice of cancellation; but if the agent by words or acts conveyed to the insured a knowledge of a cancellation at the time, there was a sufficient notice.

Action [by William R. Grace and others against the American Central Insurance Company of St. Louis] on a policy of insurance for loss by fire. The policy contained a clause authorizing the company to terminate the policy at any time by notice of cancellation. A written notice was not required, nor was it necessary that the policy should be returned in order to effect a cancellation. The question in the case was one of notice.

W. Britton, for plaintiffs.

G. W. Parsons, for defendants.

BENEDICT, District Judge (charging jury). By this contract the parties have agreed that a notice of cancellment shall put an end to it. The question of fact is, whether there was notice of the cancelling of the policy given by Carroll, who acted for the company, to Anthony, who for the purposes of this question must be taken to be the agent of the plaintiffs. Counsel on the part of the plaintiffs insists that I should decide, as matter of law, that there was no notice given; but it seems to me that it is proper for the jury to consider what was said and done by Mr. Carroll and Mr. Anthony in regard to cancelling the policy, and say as a matter of fact whether or no Mr. Carroll gave Mr. Anthony notice that that was the end of that policy. If you should come to the conclusion that what Mr. Carroll said amounted to this, that upon returning the policy he would cancel it, then that would not be a notice of cancellation sufficient to terminate the contract. Cancellation can be effected without returning the policy, but if all that Mr. Carroll did was to express a wish to have the policy cancelled, that would not be cancelling the policy. The question is, whether he did or said what conveyed to Anthony knowledge of a cancellation of the policy by him at that time. If he gave such notice, then the defendants are entitled to a verdict. If he did not, then the plaintiffs are entitled to a verdict.

[The jury rendered a verdict for the defendants, and the plaintiffs moved for a new trial, which was denied. Case No. 5,648. The judgment of the circuit court was reversed in 109 U. S. 278, 3 Sup. Ct. 207.]

[1] [Reprinted from 7 Reporter, 388, by permission.]

[2] [For subsequent proceedings in supreme court, see note at end of case.]

GRACE (BOND v.). See Case No. 1,622.

Case No. 5,650.

GRACE v. EVANS.

[3 Ben. 479.][1]

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

ARREST IN ADMIRALTY—BAIL—ATTACHMENT.

1. The proper form of stipulation to be given for the discharge of a party arrested in a suit in admiralty, is for the appearance of the party to abide by the decree of the court in the cause, and not for the payment of the sum decreed.

2. Where a warrant of arrest was issued, with a clause directing the marshal, if the respondent could not be found, to attach his property, and the marshal returned that he had arrested the respondent, and had attached his property: *Held*, that the attachment must be set aside.

In this case, a libel was filed [by William L. Grace against Joseph Evans], alleging that the defendant, a master of a vessel, had sold cargo on board her belonging to the libellant, and had brought the proceeds to this port, and had refused to pay them over to libellant. On this, an order was made that the respondent be arrested and held to bail. A warrant was accordingly issued against him, with a clause providing that, if he was not found, the marshal was to attach his property or credits and effects. The marshal returned that he had arrested the respondent, and had also attached his credits and effects. The respondent thereupon tendered a stipulation, with sufficient surety, conditioned that the respondent should appear in court, to abide by the decree of the court in the cause. Objection was taken, on behalf of the libellant, that the stipulation ought to be, that the respondent should pay the amount decreed against him. The respondent also claimed that the attachment should be set aside, on the ground that the process only directed the service of the attachment, in case the respondent could not be found, and that, inasmuch as the marshal had arrested the respondent, and held him in custody, he had no authority to attach his property.

T. Scudder, for libellant.

C. Van Santvoord and R. D. Benedict, for respondent.

THE COURT (BLATCHFORD, District Judge) held, that the libellant had no right to any further security than that which was offered by the respondent; and, on the filing of the stipulation offered, ordered the arrest and the attachment to be discharged.

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

GRACE BROWN, The (BEAN v.). See Case No. 1,171.

Case No. 5,651.

The GRACE DARLING.

[2 Hask. 278.][1]

District Court, D. Maine. Nov., 1878.

MARITIME LIEN — WAGES — MINOR SEAMAN—EXEMPTION OF VESSEL FROM ARREST—APPLICATION OF ACTS OF CONGRESS.

1. The crew of a steamer, comprised of sharesmen and strikers engaged in porgy fishing, have a maritime lien upon the vessel for their wages, but the master does not.

2. Such crew, upon being refused payment for their services at the time agreed upon, may enforce their lien upon the vessel before their term of service has expired.

3. The ten days' exemption from arrest of a ship under Rev. St. §§ 4546, 4547, is waived by appearance, claim and answer without protest, after that time has elapsed.

4. Semble, that the objection should be taken by special plea.

5. The provisions of Rev. St. §§ 4546, 4547, apply only to merchant ships and their masters and crews.

6. Title 51, Rev. St., does not apply to vessels and crews engaged in porgy fishing.

7. The crew of a fishing vessel, not having signed shipping articles as required by title 51, Rev. St., may collect their shares or wages.

8. Title 53, § 4612, Rev. St., applies only to merchant vessels.

9. A minor may recover his wages as seaman upon a libel promoted by his father as prochein ami, where the father has agreed that the son may receive his own wages.

In admiralty. Libel in rem by the master and crew of a porgy steamer to recover their shares or wages. The owners filed claim and answer and evidence was taken.

Enoch Knight, George F. Holmes, and A. A. Strout, for libellants.

Washington Gilbert, for claimants.

FOX, District Judge. The libel is in rem, against a steamer employed in porgy fishing the past summer on the coasts of Maine and Massachusetts, and was filed on the seventh of October by the master and crew, to recover for their services, the steamer being then in this port for repairs on her boiler. The crew commenced their services about May first, and continued them until October fifth. The claimants are Messrs. H. & G. W. Lord of Boston, by virtue of sundry mortgages from Luther Maddox, on all but 14-130ths of the steamer, for which interest there is no appearance.

Maddox was engaged in the manufacture of fish oil from porgies, at Boothbay, and had the control and use of the Grace Darling, as her general owner, receiving from her, her entire fares, excepting when sold for bait. He contracted with the master for his employment, and authorized him to engage his crew. Some of the crew were sharesmen; others were known as strikers; the former were more experienced hands, and by usage were entitled to half the proceeds of the catch if made into oil, and to one third of the proceeds realized from sales for bait. From the amount thus coming to the sharesmen were paid the strikers and cook, who were hired by the master at fixed rates of wages, and also the cost of victualling the ship.

The master and mate were each to receive a share, and in addition, the master, in the present instance, by virtue of a written contract with Maddox, was entitled to a commission of eight cents per barrel; the mate's commission was one cent per barrel; and these commissions were to be paid from the owners' moiety. The master and crew were engaged verbally to serve on board the steamer in their several capacities during the entire fishing season, and which had not terminated at the institution of this process; by the terms of the agreement, the crew were to be paid on the first of August all then due to them, which had been done, with the exception of the mate; after that time, they were to be paid monthly; these payments had not been made, although repeatedly demanded from Maddox; and, just prior to the filing of the libel, he was notified by the crew that they were ready to continue their employment on being paid the amount to which they were then entitled, and, if this was not done, they should institute process for their recovery.

The first objection made by the claimants is that, for the services thus rendered by the crew of this steamer, there was no lien upon the vessel. In the case of The Helen M. Pierce [Case No. 6,332], this court had occasion to examine this question; and it was then decided that strikers, for their services while on board a porgy steamer, acquired a maritime lien; whether the sharesmen had or not a similar lien was not then decided, as the question did not arise in that case; but on further reflection, there is not apparent any reasonable ground for any distinction between the two cases; and no such distinction is anywhere referred to in any decision within the knowledge of the court. Whether a lien on the vessel, in behalf of her crew, does or not attach, depends on the nature of the services and the locality in which they are rendered, and not upon the method of ascertaining the amount of compensation to which the party may be entitled.

In the earliest periods of maritime commerce, a common method of compensating the mariner was to allow him a share in the profits of the voyage. These vessels are, for nearly the whole of the season, employed in cruising about on the high seas, upon the coasts of Maine and Massachusetts, taking the fish in immense seines, and only returning to the shore to discharge at the oil factories the fish they may have caught. These services are, in the opinion of the court, clearly mari-

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

time; and until instructed to the contrary, I must hold that, whether they are rendered by the sharesmen, or by others of the crew who may be entitled to a fixed amount as wages, they have in each case acquired the usual and ordinary maritime lien of the seaman upon his vessel for his wages.

In The Hibernia [Case No. 6,455], Judge Sprague decided that the crew of a whaling ship, who were to be paid by shares of the catch, had a lien upon the ship for their wages; and the same principle was recognized by Betts, J., in the Sarah Jane [Id. 12,348], which was a proceeding in rem by the crew of a vessel employed in the seal fishery, who were to receive a share of the proceeds of the sealing voyage; and also by Ware, J., in The Lucy Anne [Id. 8,596], where a seaman of a fishing vessel, in a proceeding in rem, recovered his wages in proportion to his catch, and also his share of the fishing bounty.

It is further claimed that the libellants had not completed their contract, which was, to serve the entire fishing season, as the libel was filed before the season had terminated; but, when it is remembered that it was also one of the terms and conditions of the contract, that the crew should receive their wages monthly, after the first of August, and that they had served two months without payment, although repeatedly demanded, it is quite apparent that the breach of the contract in a most material matter was first committed by the owner, and that, after notice to him by the crew that they should insist on payment or would no longer continue in his employment, they were justified in attempting to enforce their claims on the vessel.

It is insisted, that the arrest of the ship was premature, and can not be sustained. The original libel was filed October seventh; the same day a warrant of arrest issued, and she was seized thereon, process being made returnable October fourteenth. October seventeenth, claimants appeared and filed their claim, and gave bond for costs. October eighteenth, some of the crew, who had not joined in the libel originally, petitioned for leave to become parties, and were permitted so to do. October seventeenth, an answer was filed by the claimants, requiring proof of services, and pleading that no lien therefor existed against the vessel. October eighteenth, an amendment to the libel was filed and allowed, correcting certain errors in the credits and amounts of the claims of the respective libellants. On the same day, the day of hearing, an amended answer was filed, pleading the minority of one of the libellants, Wm. E. Baker, and also that, when the libel was filed and process issued, ten days had not elapsed from and after the end and completion of the entire voyage or service for which the libellants contracted and shipped, nor from the time when they were entitled to payment; that their contract was for the entire fishing season, which would not terminate until November fifteenth or thereabouts; that said steamer had not left her port of delivery where the voyage ended, nor was she about to proceed to sea within ten days, and therefore the court has not jurisdiction. The claimants having on October seventeenth filed their answer, contesting the claims on their merits, by an amendment filed at a subsequent day attempt to invoke the exemption of a vessel from arrest for the ten days provided under sections 4546, 4547, Rev. St.

In reply, it may well be argued with great force, that such an exception being of a merely dilatory nature, not touching the merits of the claims, should have been presented by a special dilatory plea before any general answer upon the merits was made. Such appears to have been the opinion of Betts, J., in The Edward [Case No. 4,289], which was a libel in rem for wages. An objection similar to the present was presented in the answer; and in his opinion that learned judge on page 288, remarks: "The claimant, by appearing and contesting the claim upon the merits, must be deemed to have waived all right of exception to the regularity of the proceedings." See, also, The William Harris [Id. 17,695].

In Certain Logs of Mahogany [Case No. 2,559], Story, J., says: "The objection is in its own nature a mere declinatory or dilatory objection in the nature of a plea in abatement; and not peremptory, as a bar on the merits. It being preliminary in its character, it should have been taken, if at all, by a special plea in the nature of a plea in abatement, known in the practice of the ecclesiastical and admiralty courts by the appellation of a dilatory or declinatory exception, which is always brought forward before the contestatio litis, or general defence in bar or general answer upon the merits."

The filing of the libel within the ten days is not prohibited by the act. Process only is suspended for that period. When that time has elapsed, a new warrant for her seizure could issue, and the vessel be then taken thereon, and if the claimant then appears in the cause and without protest or objection asserts his right to the property, and makes full answer upon the merits, it may well be argued that he thereby submits to the jurisdiction of the court and waives all further objection to process against the vessel, and by so doing, relieves the court from the necessity of dismissing the suit or vacating the arrest of the ship, and compelling the libellants to institute anew their process against her.

The libel itself was within the jurisdiction of the court at the time it was filed; but, for a limited time only, the res was not subject to seizure; and if so taken, the party might or not, as he thought for his interest, demand its release; but, if after the limitation has expired and he, by his plea, sees fit to call on the court to pass upon the merits of the cause, is it not too late for

him, at a day subsequent, to withdraw his concession and waiver of objection of which, at an earlier day, he could have availed himself? Having made his election, and interposed a full defence on the merits by formal answer, the irregularities of service may be regarded as waived, and the cause may proceed, as if the proper seizure had been had before the answer was filed.

In Granon v. Hartshorne [Case No. 5,689], Judge Betts, very forcibly, presents similar views, in a case strongly analogous to the present. I am, therefore, inclined to the opinion, that, if this vessel had been an ordinary merchant ship, within these sections of the Revised Statutes referred to by the claimants, on these pleadings, they should not be permitted, at this stage of the cause, to avail themselves of this objection.

In the case of The David Faust [Case No. 3,595], Judge Blatchford says: "It has always been held in this court, that, when a seaman was discharged from a vessel after his arrival, either arbitrarily or with his assent, the discharge terminated the contract, and the provision for ten days' delay after delivery of the cargo is released, and the seaman may proceed at once for his wages. The shipmaster or owner may waive the statutory provision in regard to the ten days' delay, and is held to have done so, in case he discharges a seaman without paying him his wages."

If sections 4546, 4547, are to receive a similar construction in the present instance, the ship owner violated his contract by nonpayment of the crew's wages as agreed; and they were thereby discharged from further liability to continue their employment, and could at once seek redress against the vessel. The language of section 4546 is somewhat different from that in section 6 of the act of 1790 [1 Stat 133], and may require a different construction; as by the latter, process might issue if the wages were not paid within ten days after the discharge of the cargo; while by section 4546, process could issue, if the wages are not paid within ten days after the time when the same ought to be paid according to the provisions of the statute.

I am not able to find in title 53 any provision fixing the time of payment of wages to a seaman engaged on a fishing cruise, and who has not signed any agreement; and if this is so, then the case is not affected by sections 4546, 4547; but the party may proceed in rem to recover his wages to which he is entitled by his parol agreement. In The Waverly [Case No. 17,301], Judge Dyer holds that the variance between the two statutes are of phraseology only, and that title 53 treats exclusively of cases where seamen had entered into employment under a written contract.

In the opinion of the court, a conclusive reply to this ground of defence is, that these provisions of the law are not applicable to this class of vessels and their crews, but are to be restricted to merchant ships and those employed thereon. This provision is found in title 53, "Merchant Seamen," and, so far as the court can discover, it has always been confined to the crews of merchant vessels. These sections were substantially re-enactments of section 6, c. 29, Laws 1790, the title of which chapter is: "An act for the government and regulation of seamen in the merchant service."

In 1792 [1 Stat. 229], by an act entitled "An act concerning certain fisheries of the United States and for the regulation and government of the fishermen employed therein," congress provided that there should be a written agreement with the skipper and crew of vessels over 20 tons burthen, employed in the banks and other cod fisheries, setting forth the terms of shipment, &c., and that, whenever such agreement shall be so made and signed, a lien shall be created on the vessel for the shares of the skipper and other fishermen for the term of six months after the fish shall be sold, whenever they shall have been delivered to the owner or his agent for sale. This act was temporary, but was afterwards continued in force, and its provisions were extended to vessels engaged in the mackerel fishery by act of 1865, and were re-enacted in the Revised Statutes, tit. 51, "Regulation of Fisheries."

It is manifest, that congress did not consider these provisions relative to enforcing the liens of merchant seamen on their vessels as applicable to the crews of fishing vessels; but, that it deemed it necessary, by express legislation, to provide therefor, and, by specific and definite provisions, recognize the lien of the fishermen upon the vessel for the amount they are entitled to for their services, limiting the duration of such lien for such length of time as was deemed reasonable for them to avail themselves of this security.

The only enactments to be found, regulating fisheries and the right of the crew to a lien for the proceeds of their catch, are those referred to in title 51; and these are restricted to certain kinds of fisheries, and are not general in their application. Those engaged in cod and mackerel fishing can avail themselves of these provisions in title 51, and of no others. Whalemen are not within this title, as in the whale fisheries, no statute has fixed any of the rights of those engaged in such adventures, or required the contract of the crew to be in writing. Curt. Merch. Seam. 60; The Atlantic [Case No. 620].

In Flaherty v. Doane [Case No. 4,849], it was held that seamen who had served on a cod fishing voyage, at monthly wages, had a lien on the remnants saved from the wreck for their wages, thus applying the general principles of the maritime law to the crew of a cod fishing vessel. Whether the pro-

visions of sections 4546, 4547, as they are found in the act of 1790 were or not applicable to the crew of a fishing vessel was in fact decided by Judge Ware in the case of The Ianthe [Id. 6,992]. This was a proceeding in rem, and the learned judge on page 127, says: "The fishing trade of the country is, and always has been regulated by its appropriate and peculiar system of laws"; and, on page 129, says as to the act of 1790, "Nor can it be made to reach an ordinary fishing voyage without doing violence to the language, or interpolating words, which the legislature have not seen fit to use."

The remedies provided for certain classes of fishermen, being restricted and not general, cannot be held to include those who may be employed in other fisheries which were never followed when the law was originally enacted. Long since was it decided that the provisions of the law applicable to cod fisheries and licenses for that pursuit could not be made to include those who were following the mackerel fishery. Such was the opinion of Mr. Justice Story; and although an opinion of Mr. Justice Woodbury in U. S. v. The Reindeer [Case No. 16,145], might, perhaps, occasion some doubts upon this point, they are forever disposed of by the opinion of Judge Clifford in U. S. v. The Paryntha Davis [Id. 16,003], and for like reasons, the regulations in behalf of the crews of cod and mackerel vessels can not reach and protect the crews of steamers engaged in porgy fishing.

If by any forced construction, porgy fishermen could be deemed to be included within the regulations of title 51, the libellants could not be bound thereby, as the shipping articles required by this title were never executed by one of them. They are, therefore, in the same position as the libellants in the case of The Ianthe [supra], and must depend on their contract and such remedies for its enforcement as upon general principles of maritime law they are entitled to.

It has not escaped the attention of the court that section 4612, in title 53, declares "that, in the construction of this title, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the master thereof, and every person, apprentices excepted, who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman.'" This is a reenactment of section 45, c. 322, Act 1872 [17 Stat. 271].

If this language is to be taken literally, it is clear that the construction given by the court to sections 4546, 4547, is erroneous. That a literal construction was not the intent of congress is demonstrated from the fact that such an interpretation would necessarily include the vessels employed in cod and mackerel fishing, which congress had previously specially provided for in title 51; some restriction therefore, must be placed on the broad general language found in section 4612; and as the title of the act indicates the class of vessels to which it is applicable, those in the merchant service, it is not a forced construction of the language employed in the latter section, to construe its general provisions as limited to merchant vessels; especially, as in one or two instances, when congress intended that vessels, not falling within the description of merchant vessels, should be made subject to certain particular provisions of the title, they have manifested such intention by express mention of such vessels; as for instance, in section 4569, they require vessels engaged in whale or other fisheries, or in sealing, to be provided with lime juice or other anti-scorbutics; and in section 4576, the master of every vessel bound on a foreign voyage, or engaged in the whale fishery, is required to give bond to produce a list of his crew, on return to the United States; such specific enactments would hardly have been necessary if the general provisions of the act were intended to include vessels of every description.

The master of the Grace Darling claims a lien for his services, and relies upon section 4593, which confers on the skipper of a vessel employed in the cod or mackerel fishery the same lien for his wages or share of the catch, as the crew are entitled to when the written agreement required by the statute has been executed. This steamer was not thus employed, and such an agreement was never executed; and the master, therefore, can only avail himself of the general provisions of the maritime law; and by these, it is admitted that he is debarred from any lien on the ship for his services.

One of the libellants is a minor, prosecuting his claim by his father as pro. ami. It is objected, that the father was entitled to his son's wages, and should, therefore, have instituted the libel in his own behalf. In the opinion of the court, by an agreement with the father, the son was entitled to his earnings on this vessel; and any judgment which may be recovered therefor in the present suit, in the name and by the authority of the father as pro. ami, will afford entire protection against any suit which may be hereafter instituted by the father, for the recovery of these earnings of the son, for his own personal benefit. Decree for libellants with costs, excepting the master. Libel as to him, dismissed without costs.

GRACE GIRDLER, The (LOCKWOOD v.). See Case No. 8,450.

Case No. 5,652.

The GRACE GREENWOOD.

[2 Biss. 131.] [1]

District Court, N. D. Illinois. April, 1869.

MARITIME LIENS — DISTRIBUTION OF PROCEEDS—MORTGAGE—RECORDING—PRIORITY.

1. In the distribution of proceeds after the sale of a vessel under a decree of this court, parties having liens under state laws are entitled to payment in preference to the owner.

2. The meaning of the first section of the act of July 29, 1850 [9 Stat. 440], is that any mortgage upon a vessel, recorded as therein prescribed shall take effect and be binding upon all parties.

[Cited in The Illinois, Case No. 7,005; The E. A. Barnard, 2 Fed. 722; The General Burnside, 3 Fed. 230; The Canada, 7 Fed. 733.]

3. Such a mortgage properly recorded becomes a binding security, and material-men claiming liens under state laws are bound to respect it.

4. The mortgage being prior in point of time should be first paid in full from the proceeds.

[Disapproved in The St. Joseph, Case No. 12,229. Cited in The Skylark, Id. 12,928; The Favorite, Id. 4,699; The Kate Hinchman, Cases Nos. 7,620 and 7,621; The William T. Graves, Id. 17,758 and 17,759; The Alice Getty, Case No. 193; The Theodore Perry, Id. 13,880; Baldwin v. The Bradish Johnson, Id. 798; The Josephine Spangler, 9 Fed. 775; The Madrid, 40 Fed, 678; The J. E. Rumbell, 148 U. S. 5, 13 Sup. Ct. 502.]

In admiralty. This case was submitted to the court upon the following statement of facts: On the 28th day of December, A. D. 1868, the barque Grace Greenwood was arrested by monition issued out of this court at a suit prosecuted for mariners' wages. On the 22d day of February, A. D. 1869, the barque was sold by the United States marshal, and brought the sum of seven thousand, three hundred and seventy-five dollars. After paying admiralty liens there remained in the registry remnants and surplus. Against these remnants and surplus mortgagees filed a petition claiming the funds by virtue of two mortgages, amounting in all to some three thousand four hundred dollars ($3,400). There were also petitions of material men filed against the same funds. There was not a sufficient sum to pay all. The mortgagees claimed priority over the material men. The mortgages were made and executed in Chicago, where the mortgagees and mortgagors then resided, and were recorded at the office of collector of customs, and nowhere else. The mortgages were due and unpaid. All the petitioners were residents of the state of Illinois, except F. W. Myers, Stephen B. Grunmer, E. D. Trotridge, Thomas Adams and Samuel C. Carter. The vessel was owned, enrolled and licensed in the state of Illinois, and registered in Chicago. The claim of Doolittle and Alcott, shipwrights, was for articles furnished on or before April 18, 1868; of the claim of Finny and Lyons, ship chandlers, $861 was furnished prior to April 25, 1868, the balance running up to October, 1868. The mortgages were all recorded before the date of furnishing the supplies. The question submitted was: Whether the mortgagees had priority and preference over the material-men who resided at the time of funishing the supplies in the state of Illinois.

Rae & Mitchell, for petitioners.
Barker & Tuley, for mortgagees.

DRUMMOND, District Judge. The mortgages were made and executed in Chicago, where the mortgagors and mortgagees resided, and were recorded in the office of the collector of customs, but nowhere else. They were all recorded, as I understand, before any of the supplies were furnished, and the controversy arising between the parties is as to the priority of these claims upon the proceeds—whether the material men should be first paid or the mortgagees.

None of these material-men have maritime liens, but as this court and other admiralty courts have decided, although they might not have maritime liens, they could come in and ask for a distribution of the proceeds in preference to the owner; that is to say, before the owner could receive payment of any proceeds remaining in court, those persons who had liens under the state laws, although they might not be of a maritime character, should be paid. The point is whether the mortgagees are in the same position as the owner of the vessel, or whether we are to take up these liens or claims in the order of their date, and direct payment according to their priority.

It is to be observed that, in all these cases, the mortgage is given as a security to the party. The mortgagor ordinarily remains in the possession of the vessel. Through him the various claims arise against the vessel. It is so in the case of the owner where there is no mortgage whatever, and, in such case, it seems equitable that the claims which exist against the vessel, and which arise in consequence of his own act, should be paid before he is, when the vessel is sold and the proceeds remain in court. But it seems to me that the same rule cannot hold in the case of mortgagees. Their equity is just as strong as the equity of the material-men, provided it is not an equity which attaches to the thing itself and becomes paramount, both against the owner and against any one who may have a mortgage or other similar claim upon the vessel.

The attention of the court was directed to the case of Aetna Ins. Co. v. Aldrich, 26 N. Y. 92, which seems to proceed upon the ground that the act of congress of July 29, 1850, providing for the conveyances of vessels and for other purposes, is not operative as against the creditors of the vessel, where

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

the mortgage has not been recorded in conformity with the law of the state.[2]

But it would seem to follow, as a necessary consequence, from the power of congress over this species of property, that it could provide for the sale and disposition of it, and for encumbering it, and could declare what would be the effect of a bill of sale, or of a mortgage, hypothecation or conveyance. Otherwise, of course, there would be no meaning in this subsisting right of congress, neither would there be any in the act of congress in relation to the mortgage or hypothecation of vessels.

As I understand from the first section of the act of July 29, 1850,[3] declaring "that no bill of sale, mortgage, hypothecation or conveyance of any vessel or part of any vessel of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the collector of customs, where such a vessel is registered or enrolled," it seems that if a mortgage is made and so recorded, it shall take effect and be binding as to other parties. Of course, a mortgage as between the mortgagor and the parties connected with him, and parties having actual notice, would be good; but this law declares that it shall not only be good as to them, but as to other parties, and there can be no object whatever in requiring it to be recorded at all, unless it was for the purpose of giving it effect. So it seems to me, the mortgagors and mortgagees living in Chicago, and the res, the property, being here, and the mortgage being executed and recorded here with the collector of the port of Chicago, this must give it effect as a valid, binding security upon the property, and one which the claims of the material-men, under the state law, and presented as these are, cannot supersede or override.

In this case these material-men have not made their liens available under the state law. They have only declared that if the barque had remained in its original form, unaffected by the proceedings in this court, they could have attached it under the state law, and made their claims effectual against the barque. They come here now and ask that the proceeds shall be treated as the barque itself.

The question is whether in so treating it we are to postpone other subsisting liens upon the vessel, such as these mortgages would be, and such as they were. I think not. It seems to me that we must take up, in their proper order, these claims or liens upon the vessel. Admit that these material-men have a valid claim upon the proceeds, it is no stronger than that of the mortgagees, and inasmuch as theirs is prior in point of time, it is not in fact so strong, and must yield to the claim of the mortgagees, upon the principle that that which is first in time is stronger in right. In this case I shall direct a distribution to be made in conformity with that principle, the mortgagees to be first paid.

NOTE. This is believed to be the first case giving the mortgagee's lien a preference over domestic material-men, the practice having been previously the other way. Reeder v. George's Creek [Case No. 11,654]; 2 Pars. Shipp. & Adm. 149, and notes; also, Francis v. The Harrison [Id. 5,03.]. A similar question soon afterwards arose in the Northern district of Ohio,—Scott's Case [Id. 12,517],—where it is held that a statutory lien for supplies cannot relate back, so as to take priority over a mortgage recorded prior to the creation of such lien. The Illinois supreme court follows this case of The Grace Greenwood, The Great West No. 2 [57 Ill. 168], and The Hilton [62 Ill. 230], both recently decided, and to appear in 57th or 58th Illinois. The New York court of appeals holds that the statutes of that state for the enforcement of liens against boats and vessels, are unconstitutional and void. In re Josephine, 39 N. Y. 19; Sheppard v. Steele, 43 N. Y. 52; Brookman v. Hamill, Id. 558; Vose v. Cockcroft, 44 N. Y. 415. If a vessel be sold and the proceeds brought into court, a mortgagee may apply by petition for his distributive share of the proceeds. Schuchardt v. The Angelique, 19 How. [60 U. S.] 239. Mortgagee entitled to payment as against owner. Remnants in Court [Case No. 11,697]. Surplus distributed among lien-creditors. Brackett v. The Hercules [Id. 1,762]. Creditors who could not sustain an original action in rem may be paid out of surplus in court. The Boston [Id. 1,669]; Harper v. The New Brig [Id. 6,090]. Though barred by lapse of time. The Stephen Allen [Id. 13,361]. Mortgagees are to be paid in priority to material-men, who, at the time of supplying materials, are not in such actual possession of the ship as to give them a possessory lien. The Scio, L. R. 1 Adm. & Ecc. 353. By the admiralty law all maritime claims upon a vessel extend equally to proceeds arising from its sale, and are to be satisfied out of them. The Siren, 7 Wall. [74 U. S.] 152. Consult, also, The Skylark [Case No. 12,928]; The Lady Franklin [Id. 7,983]. A claimant for materials or repairs furnished to a vessel in her home port is not entitled to share in the proceeds arising from sale of the vessel in admiralty, as against a mortgagee or assignee in bankruptcy. The Edith [Id. 4,282]. Since the above decisions, the amendment of May 6th, 1872, to the 12th rule of admiralty gives material-men the right to proceed in rem against the ship and freight, but its effect upon conflicting claims has not yet been passed upon by the courts.

Case No. 5,653.

The GRACE LOTHROP.

[Holmes, 342; 1 Cent. Law J. 189; 8 Am. Law Rev. 620.][1]

Circuit Court, D. Massachusetts. March, 1874.[2]

AGREEMENTS OF SEAMEN—SHIPPING COMMISSIONER—ACT OF JUNE 7, 1872.

1. Section 13 of the act of June 7, 1872 (17 Stat. 262), requiring agreements of seamen

[2] Taken by writ of error to the U. S. supreme court, and overruled. Aldrich v. Aetna Co., 8 Wall. [75 U. S.] 491.

[3] 9 Stat. 440.

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission. 8 Am. Law Rev. 620, contains only a partial report.]

[2] [Affirmed in 95 U. S. 527.]

to be signed in the presence of a shipping commissioner, refers only to the agreements mentioned in section 12 of that act.

[See note at end of case.]

2. The second clause of section 14, which provides for penalty for receiving to be entered on board a merchant-ship any seaman engaged or supplied contrary to the provisions of the act, does not refer to seamen who have agreed to make a voyage not mentioned in section 12, and have not signed the agreement in presence of a shipping commissioner.

[Cited in U. S. v. The Thomas W. Haven, 3 Fed. 349.]

3. Section 8 authorizes the master, owner, or consignee of a ship about to make a voyage not mentioned in section 12, to be his own shipping commissioner; and this provision is not affected by sections 13 or 14.

In admiralty.

E. L. Barney, for the United States.

S. J. Thomas, for the ship.

LOWELL, District Judge. This libel s brought by the district-attorney in behalf of the United States, to enforce a penalty not exceeding $1,000, for five seamen alleged to have been engaged or supplied contrary to the provisions of the act for the appointment of shipping commissioners, approved June 7, 1872 (17 Stat. 262), and to have been knowingly received on board by the master of said vessel, at Boston, on the eighteenth day of December last. The particular charge is, that the agreement with the men was not signed in the presence of a shipping commissioner, although there was such an officer at Boston, duly qualified and ready to act. The voyage was from Boston to one or more ports in the West Indies, and back to Boston. The answer admits the shipment of the men, but denies that the voyage was one within that part of the statute requiring agreements to be signed before a shipping commissioner. The first section of the shipping act which mentions agreements is section 12, which prescribes a particular form of agreement to be entered into by the master with his crew before he proceeds on any foreign voyage, or on one from the Atlantic to the Pacific coast, or vice versa. This section was amended in January, 1873 (17 Stat. 410), so as to remove from its scope voyages to the West India Islands or to Mexico. Section 13 of the principal act then goes on to require that all agreements shall be signed in the presence of a shipping commissioner. Section 14 makes the ship liable to penalties: First, if any person shall be carried to sea as one of the crew on board of any ship making a voyage as before specified "without entering into an agreement with the master in the form and manner and place and times hereby in such cases required;" and, secondly, if any master, mate, or other officer of any ship, knowingly receives to be entered on board of any merchant-ship, any seaman who has been engaged or supplied contrary to the provisions of the act. The argument for the United States is, that the language of section 13 is very broad, and is intended to include not only the agreements mentioned in the act itself, but all those which may be made under the act of 1790 [1 Stat. 131], which takes in all voyages of any importance, excepting in the fisheries; that the first penal clause of section 14 punishes a non-compliance with the act of 1872 by carrying seamen to sea who have not signed an agreement in all respects as required by section 12; and the second penal clause, punishing the taking on board seamen illegally engaged or supplied, must refer to something, and why not, then, to seamen who come within the act of 1790, and have signed an agreement as required by that act, but not before a shipping commissioner? I shall presently show that neither of these sections has the meaning contended for; but my decision is chiefly based upon section 8, which provides, in so many words, that nothing in the act contained shall be construed to prevent the owner, master, or consignee of any ship, except as described in section 12, from performing himself, so far as such ship is concerned, the duties of shipping commissioner under this act. This is a controlling section, which governs sections 13 and 14, and all others, and explicitly declares that nothing contained in them, or any of them, shall be construed to prevent the master, in such a case as this, from shipping his own crew. Granting, therefore, that the construction of sections 13 and 14, contended for by the prosecution, is sound, then all agreements not mentioned in section 12 must be signed in the presence either of the official commissioner or of the master, owner, or consignee; and the libel in this case does not allege any thing except the absence of the duly qualified official. It does not say that the master, owner, or consignee did not act as shipping commissioner, and act fully and with all due form in that capacity. This was the point relied on in argument; but there are others of considerable force. Recurring now to section 13, it is as follows: "The following rules shall be observed respecting agreements: First, every agreement (excepting in such cases of agreement as are hereinafter specially provided for) shall be signed by each seaman in the presence of a shipping commissioner;" secondly, they are to be signed in duplicate, one part of which shall be retained by the shipping commissioner, and the other shall contain a special form or place for the description and signatures of persons engaged subsequently to the first departure of the ship; thirdly, there is to be an acknowledgment and certificate under the hand and official seal of the commissioner, indorsed on the agreement, testifying to all the acknowledgments, and to the intelligent and sober appreciation by the men of the contract they have signed. And it is tolerably clear, I think, that all this apparatus was not intended to be brought into operation four times a week, for voy-

ages between this port and New York. This I say merely by way of illustration. It must apply to all coasting voyages, if it applies to any voyages not mentioned in section 12. I am not sure that I can express my opinion as clearly as I hold it; but it does seem to me that sections 12 and 13 are one enactment, concerning one and the same subject-matter, and no other; that the former requires agreements to be made in certain cases, and the latter provides how they shall be signed and acknowledged. It is said that the expression "every agreement" is broad enough to cover all those required in coasting voyages by the act of 1790. This is true. But it is much broader than that. It will cover every agreement made by a seaman for any voyage, or, indeed, for any thing else; there is nothing in section 13 to limit it to any subject-matter. It is, simply, every agreement shall be signed by the seamen in the presence of a shipping commissioner. It is confined to seamen signing agreements, and that is all. Of course it must be limited, and by the context; and the only context is section 12. The well-known statute of 20th July, 1790, § 1 (1 Stat. 131), requires the master of every ship or vessel bound on any sort of a voyage, coasting or other, with very trifling exceptions, before he proceeds on the voyage, to make an agreement in writing or print with every seaman, under a penalty of twenty dollars. This has been held not to include whaling and fishing voyages. The argument for the United States, as I have said, imports this statute into section 13 of the act of 1872, by the words "agreements" and "every agreement." Another objection to this construction is, that under it, if a master, about to proceed on a coasting, or Mexican, or West Indian voyage (which is admitted to come under the act of 1790, and not under section 12 of the act of 1872), makes no written agreement with any of his crew, he is liable to a penalty of twenty dollars for each seaman carried to sea, while if he makes one in strict and careful conformity with that statute, but not in presence of a shipping commissioner, the penalty is $200 for each seaman. For it has not been contended, and cannot be successfully maintained, that the act of 1872 punishes the neglect to make any written agreement at all, except as required by section 12. Nay, more, the act of 19th June, 1813 (3 Stat. 2), requires a written agreement for the cod fishery, and imposes no penalty for a breach; whaling voyages and those for mackerel are always made under written agreements, though no statute requires it. All these agreements are within section 13, if those under the statute of 1790 are included; for an agreement is an agreement. If this be the true construction of the act, it holds out a strong inducement against making written contracts in any of these cases, because the whole real and actual contest is a question of the fees of the shipping commissioner, and the trouble and formality attending the shipments before such an officer. It is said that it would operate beneficially if all agreements were signed before a commissioner. That may be so. As regards foreign voyages, I agree to it most heartily. But the protection which the commissioner would afford is of comparatively little importance in the coasting trade, in which the crew have frequent opportunities to obtain redress of any wrongs they may suffer; because they are never many days' sail from a home port, and in which they seldom suffer any wrongs. It is a fact well known to all judges in commercial ports, that there is very little complaint or litigation between officers and men growing out of the voyages not mentioned in section 12. Scarcely a term passes that I do not try several indictments for offences said to have been committed on foreign voyages; and I can recall but one criminal case that I ever tried in which the complaint related to a coasting voyage. [I doubt whether the supposed advantages of applying this section to coasting voyages would make up for the expense incurred by such a practice.][3] The same sort of protection which would be afforded by shipping seamen for the coasting trade in presence of a commissioner would be derived by discharging them before that officer; and the commissioner's services are more necessary at this time, because most of the disputes concern the perquisites and charges rather than the contract; but the necessity for this is expressly negatived by section 22. I shall speak in a moment of the suggestion that there is no such express exception in section 13. To me it is plain that congress, as shown by sections 8, 12, 22, and many others, did not intend to hamper our enormous coastwise trade, with its constantly recurring voyages, by the burden of paying the fees of shipping commissioners; and I see good reason for the exception. And some one has prevailed on the legislature to class West Indian and Mexican voyages with the coasting trade in this respect. It is said that if it was intended to limit the broad and general language of section 13, it would have been easy to say so in the section itself. It appears to me that the limitation is plain enough. But, if not, the remark is quite as pertinent, and more so, that if congress intended to include in section 13 agreements which are not mentioned in the act, it was not only easy, but highly necessary, to point them out. I do not mean to be understood that section 13 is free of difficulty. The main question of its construction is now pending before the supreme court, on a certificate of division of opinion from this circuit and district, and with whatever decision is made I shall not only be bound to be, but shall be, entirely content.

The next point is whether the second clause

[3] [From 1 Cent. Law J. 189.]

of section 14 punishes the taking on board ship a seaman who has signed such an agreement as is required by the act of 1790, but has not signed it before a shipping commissioner. We here concede, of course, for the purposes of the argument, that section 13 requires such signing. I consider it tolerably certain that this part of section 14 has no such intent. The offence is receiving on board seamen who have been engaged or supplied contrary to the provisions of the act. Now there is nothing in the act, or in any other that I know of, which regulates the engaging or supplying of seamen before they are taken on board ship. The acts of 1790 and 1872 require certain agreements to be made before the voyage is begun; but it is entirely consistent with these laws, and is the practice in some trades, to make the agreements on board the ship, after the seamen have been orally engaged. How, then, can this offence be committed? I do not know. But I do see that there is nothing in the act of 1872 contrary to which seamen can be received on board a merchant-ship. This penal clause, excepting in the amount of penalty, and the person who is to pay it, is taken literally from the merchant shipping act of Great Britain of 1854, § 147, in which it has a totally different sense from that now proposed for it. That statute provides not only for shipping commissioners (called in that act "shipping masters"), before whom agreements are to be signed and men discharged, &c., but also that a certain number of persons may be licensed in a certain way to procure and supply seamen for merchant-ships, that is to say, to make the original and general oral engagement with them; and there is a penalty on any unlicensed person who shall procure or supply seamen; and a penalty on the master who receives on board persons so unlawfully engaged or supplied, which is the clause now under review. Its intent is plain and intelligible, and has nothing to do with the written agreement one way or another. Now I admit that our act does not provide for any such license, and therefore cannot have the meaning given it in England, and I admit we must try to give a meaning to every part of every act of congress; but I cannot admit that I ought to exercise a great deal of ingenuity to find a secondary or conjectural sense for a set of words which has been taken bodily from a place where its intent is obvious, and put into one where there is no apparent meaning for it. I know, in point of fact, that it must have been adopted for what it might turn out to be worth in its new quarters. I agree, further, that the word "engagement" might include a written agreement. But when the defined offence is the receiving on board a ship seamen not duly engaged or supplied, and there is no law regulating their supply, and no law which requires the written engagement, if we choose to call it so, to be made before they are received on board; and when the natural and obvious and historical meaning of the word does not refer to any written agreement, and if it be construed to mean any written agreement, the offence must depend on whether the master chooses to make the written agreement on shore or on board, —I conclude that "seamen engaged or supplied" does not mean seamen who happen to have signed one sort of contract or another before the time when there is any necessity for them to sign any thing.

I have seen copies of the judgments of the district and circuit courts for the Eastern district of New York in the case of The City of Mexico [Case No. 2,756], which sustain the position of the prosecution. It is hardly necessary for me to say that these judgments have received my most careful and respectful consideration. Were it not for that decision I should not consider this case a very doubtful one. I venture to say, however, that, as far as may be gathered from the opinions of the judges, the case was very imperfectly presented by the defence, and what argument there was, took up the wholly untenable ground that the act of 1790, so far as Mexican voyages are concerned, had been repealed; and a great part of the opinions is taken up in a convincing refutation of that argument. No allusion is made to section 8, nor to any of the arguments which seem to me to have force in construing sections 13 and 14. It is impossible for me, therefore, to ascertain whether these arguments might not have had some weight, and even a controlling weight, in the case, if they had been presented or suggested. Sitting here under a responsibility which I cannot transfer except when a decision of binding authority upon this court has been made, my best judgment is: 1. It is doubtful whether section 13 refers to any agreements not mentioned in section 12. In my opinion it does not. 2. It is doubtful whether section 14, second penal clause, has any reference to the signing of written agreements. In my opinion it has not. 3. Section 8 expressly declares that on a voyage of the kind now in judgment the master may be his own shipping commissioner, and this libel does not negative the master of the Grace Lothrop having acted as such commissioner on this occasion. Libel dismissed.

[NOTE. Upon argument in the supreme court (95 U. S. 527), Clifford, J., was of the opinion that, under the Revised Statutes, vessels engaged in trade between the United States and the West Indies are not subject to the regulations enacted with respect to vessels engaged in foreign commerce not falling within the exceptions mentioned. The provision in the old acts, under which this suit was brought, requiring the agreements to be signed in the presence of a shipping commissioner, it was decided, referred only to the agreements described in section 12, and does not include the exceptions. The position of the circuit court upon all points was explicitly affirmed.]

GRACE MEADE, The (UNITED STATES v.). See Case No. 15,243.

GRACE'S EX'RS (MAHON v.). See Case No. 8,967.

GRACEY (FORBES v.). See Case No. 4,924.

GRACIE (PALMER v.). See Case No. 10,692.

GRACY (CALBREATH v.). See Case No. 2,296.

Case No. 5,654.

In re GRADY.

SHUMATE et al. v. HAWTHORNE et al.

[3 N. B. R. 227 (Quarto, 54).] [1]

District Court, D. South Carolina. 1870.

VOLUNTARY BANKRUPTCY — MEMBERSHIP IN TWO FIRMS—WHEN JURY TRIAL AWARDED.

1. Bankrupt was a member of two copartnerships, and without notice to his other copartners, filed his individual petition in voluntary bankruptcy, showing in his schedules assets and liabilities of the two firms. He was adjudicated a bankrupt individually, and assignees were appointed who petitioned that the court adjudge the two firms respectively bankrupt, as being insolvent, in order to the administration of their assets in the bankruptcy court. The remaining copartners answered, denying the commission of any act of bankruptcy by either firm, and demanded a trial by jury. *Held*, the assignees had properly instituted and could maintain the said proceedings.

[Cited in Re Leland, Case No. 8,228; Hudgkins v. Lane, Id. 6,827; Crompton v. Conkling, Id. 3,407.]

2. The bankrupt could not be properly discharged unless the assets of the insolvent firms should be so administered.

3. If the respondents denied the insolvency of the firms, jury trial would be granted; but not being denied, the said firms would be respectively adjudged bankrupt.

[Cited in Re Webb, Case No. 17,317.]

These cases involved the same principle, and presented the same state of facts, and were argued together.

John W. Grady, being a member of the firm of Grady & Hawthorne, and of Grady, Hawthorne & Turbyfill, by his attorney, Gov. B. F. Perry, filed his petition for voluntary bankruptcy in December last; and in his schedules showed assets and liabilities in behalf of each of these firms as well as for himself individually. His copartners [David O. Hawthorne and Sidney H. Turbyfill] were not served with a copy of the petition, or in any wise made parties to the proceedings. The petitioners, in the present cases [Wiliam T. Shumate and A. Blythe], were appointed his assignees, and filed their petition by William E. Earle, their solicitor, alleging the bankruptcy of Grady, the copartnerships, and the insolvency of the copartnerships respectively, and prayed that the firms might be respectively adjudicated bankrupts, and the assets be administered in the bankruptcy court. Gov. Perry also answered these petitions, denying that the parties had committed any act of bankruptcy, and moved that the rule to show cause should be dismissed on the ground that the firms could not be forced into bankruptcy unless they had done something which the act declared to be an act of bankruptcy; that the assignees of Grady could not maintain these proceedings against his late copartners, and that they were unnecessary for the administration of the bankrupt's estate, and that the bankrupt could be discharged from his individual debts without the firms going into bankruptcy.

Capt. Earle, for assignees, replied at considerable length, adducing a great number of authorities from the reports and bankrupt authors, to sustain the position that Grady could not be discharged from any of his debts until the copartnership debts were paid, or the copartnership assets were administered in bankruptcy; that a copy of Grady's petition should have been served, ab initio, on his copartners, as these were copartnership assets; that this not having been done according to the prescribed practice, the assignees had become the only parties who could proceed to heal the omission; and that, as the agents of the creditors generally, it was their duty to institute these proceedings in order that the estate might be administered according to the bankrupt act [of 1867 (14 Stat. 517)], and the individual assets be applied to individual debts, and the copartnership assets to the copartnership debts, and that it was unnecessary to allege or prove that the respondents had committed any act of bankruptcy, but that their copartner, Grady, having asked for benefit of the act, it became necessary, if the firms were insolvent, that the assets of the firms should be administered in the court of bankruptcy. Gov. Perry then asked for an order for trial by jury, and read the form of demand for trial by jury, and argued that the parties were entitled to a trial by jury if they desired, and could not otherwise be adjudicated bankrupts. The court refused the motion.

BRYAN, District Judge, reviewed the law analytically, and with great clearness, deciding substantially that the bankrupt, John W. Grady, could not be discharged of a portion of his liabilities merely, but that, if at all, it must be of all of them, and that this could not be unless the firm debts were paid, or the firm assets administered in the bankrupt court; that as Grady's petition had not been served on his copartners, it had become necessary and proper that the assignees should institute these proceedings to bring them in, in conformity to general orders No. 18; that the estate had to be administered according to section 36 of the act, and that this could not be done otherwise in the present state of the case than by the proceedings now instituted by the assignees, who are, under the law, the agents of all the creditors;

[1] [Reprinted by permission.]

that, if the respondents denied the insolvency of the firms, they were entitled to have that issue tried by a jury, but that it was wholly unnecessary to show any act of bankruptcy on the part of the respondents—the copartnerships being respectively insolvent, and one member of each of them having asked the benefit of the bankrupt act, the question before the court became purely a legal one, and that the firms of Grady & Hawthorne, and Grady, Hawthorne & Turbyfill, must, of necessity, be adjudged bankrupt.

GRAEFF (RIGGS v.). See Case No. 11,826.

GRAFF (KEIME v.). See Case No. 7,650.

GRAFF (UNITED STATES v.). See Case No. 15,244.

Case No. 5,655.

The GRAFTON.

[1 Blatchf. 173.] [1]

Circuit Court, S. D. New York. Oct. Term, 1846.[2]

APPEAL — PREPONDERANCE OF EVIDENCE—DELIVERY OF CARGO.

1. In order to warrant a reversal by this court upon a mere question of fact, on an appeal from the decree of a district court, in admiralty, the preponderance of the evidence should be of a somewhat decided character; such as would justify the granting of a new trial in a court of common law, on the ground that the verdict was against the weight of evidence.

[Cited in Egbert v. Baltimore & O. R. Co., Case No. 4,305; The Juniata, 93 U. S. 339; The Maggie P., 25 Fed. 206; The Parthian, 48 Fed. 564; The Albany, Id. 565; Re Hawkins, 147 U. S. 486, 13 Sup. Ct. 527.]

2. The consignee of a vessel has authority to arrange with the owner or consignee of her cargo in respect to the time and manner of its delivery, and an agreement for that object is not an independent agreement or a mere personal matter between the parties.

[Cited in Sprague v. West, Case No. 13,255; Salmon Falls Manuf'g Co. v. The Tangier, Id. 12,266; Irzo v. Perkins, 10 Fed. 780; Devato v. Eight Hundred and Twenty-Three Barrels of Plumbago, 20 Fed. 516.]

3. Where B., the consignee of a vessel, not owning any part of her, commenced discharging a quantity of hemp consigned to H., and, before its discharge was completed, agreed with H. to stop discharging, because the weather was bad, but violated his agreement and discharged all the hemp upon the wharf, where so much of it as had not been removed by H. was damaged by rain: *Held*, on a libel in rem against the vessel, filed by H., that he was entitled to recover the loss occasioned by such damage.

[Cited in The Surrey, 26 Fed. 794.]

[Distinguished in Crawford v. Clark, 15 Ill. 565; McAndrew v. Whitlock, 52 N. Y. 51.]

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

Heran, Lees & Co., of New-York, filed a libel in rem, in the district court, against the ship Grafton, to recover the loss on one hundred and sixty-two bales of hemp, alleged to have been damaged by rain while being discharged from the vessel and through the fault of those having the management of her. The cause was heard in the district court upon proofs taken on both sides. The facts as found by the court were these: The ship took on freight, at New Orleans, two hundred and sixty-seven bales of American hemp consigned to the libellants at New-York. She was moored at her dock in New-York on the afternoon of the 6th of June, 1844, and notice was given by her factors or agents in the public papers of the next and following days, that she would begin unlading her cargo on the 7th of June. The libellants had engaged storage for the hemp at a distance of from a mile and a half to a mile and three-quarters from the vessel. It rained on the morning of the 7th of June, but the rain ceased by or before 9 o'clock a. m. The ship began discharging her cargo about 9 o'clock a. m., and the hemp, lying uppermost, was first discharged. Personal notice was given to the libellants about 9 o'clock a. m., at their counting-house, that the ship had commenced discharging the hemp, but they refused to accept the hemp because the weather was unfavorable. At 10 a. m., the libellants sent a cart to the ship to ascertain if she was discharging the hemp. The cartman returned with a load, and reported that there was enough unloaded for three or four carts. At a quarter before 12 o'clock the libellants sent notice to Bucklin & Crane, the agents of the vessel, that they would not receive the hemp because of the bad weather, as it had the appearance of rain, and the agents then agreed to stop discharging the hemp and to send that notice to the ship, if the libellants would remove what had been discharged. The day was sultry and occasionally cloudy with appearance of rain, and after 3 o'clock p. m. a violent gust of rain came on suddenly. The unlading of the hemp continued till about 3 o'clock p. m., by which time it was all discharged from the ship. Notice was given at the ship at 12 o'clock by the libellants' cartmen that the agents had agreed to stop unlading at that time, and that the libellants would receive no more hemp than was then discharged. Two carts were put at work by the libellants before 12 o'clock, four more at 12, and one after 1 o'clock. More hemp was taken away from the wharf by the libellants than had been discharged at 12 o'clock, but it did not appear clearly whether the libellants succeeded in securing in store as many bales as were on the dock at 12 o'clock. The carts removed one hundred and sixty-three bales, one hundred and five of which were safely stored. Fifty-eight bales were injured by the rain in front of the store house, and one hundred and four bales were left at the dock where they were landed, and were

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

[2] [Affirming Case No. 5,656.]

there damaged by the rain. Nothing was done by the ship to protect the hemp after it was landed. It is the established course and usage of the coasting trade at New-York to deliver goods on freight on the wharf.

The district court decided that in a well settled course of trade, such as existed in New-York, in relation to coasting vessels, the delivery of a cargo on the dock, with notice to its owners of the time and place of unlading, placed the cargo at their risk and discharged the vessel from liability; but that in case the cargo was addressed to a mere consignee, the vessel would be under the further obligation to secure the property after it was unladen, if no consignee appeared or if he refused to accept the goods; that independently of any special arrangement or agreement with the libellants in respect to the landing of the hemp, the law justified the method pursued by the ship; that the libellants had received as duly delivered all the hemp removed from the dock by their carts; but that under the agreement made by Bucklin & Crane with the libellants, the hemp damaged on the wharf was not delivered to the libellants so as to exonerate the ship, and they were entitled to recover the loss on that hemp. [Case No. 5,656.]

Upon the question of the agreement between the agents and the libellants, the opinion of the district court, delivered by Betts, District Judge, was as follows:

"As to the agreement of the agents not to unlade, the proof is that they agreed at a quarter before twelve o'clock to stop discharging the hemp and to send notice to the ship, if the libellants would remove what had been discharged, and it is proved that more was taken away by the libellants than had been discharged at twelve o'clock. The testimony on this point is not so certain as to enable the court to say that the libellants succeeded in securing in store as many bales as were on the dock at twelve o'clock.

"The argument for the vessel is that the agents had no authority to bind the ship by such an agreement. The evidence does not disclose clearly what was the exact character of the agency. It appears however that the agents represented themselves to be and acted as the consignees of the ship, announced the time and place of her unlading, collected the freight, and assumed to direct in the delivery of the cargo. The owner had it in his power to show what limitation, if any, there was to the authority of the consignees; and, in the absence of evidence qualifying their powers it must be assumed that they stood in the place of the owner, and were clothed with the direct and incidental authority of ship's-husband in respect to the delivery of the cargo and the collection of freight. A ship's-husband is ordinarily a part owner. Abb. Shipp. 69. But there is nothing in the character of his duties or the rules of the maritime law, limiting the office to an owner. Whatever may be the appropriate appellation of such agent, it is manifest, upon the authorities and the reason of the thing, that the party to whom a ship is consigned for the purpose of her proper entry and unlivery, and the collection of her freight, must have, as incident to that trust, the power of arranging, with consignees of the cargo, the time, place and manner of its delivery, and that, accordingly, his engagements to that end must be as obligatory as if made by the owner himself. Story, Ag. § 35, note; Story, Partn. § 418.

"The law assumes to regulate the mode of delivery, only when it is not stipulated by contract. Abb. Shipp. 248; Syeds v. Hay, 4 Term R. 260. It construes bills of lading which engage a direct and personal delivery of the goods, to mean that the delivery shall be according to the customs and usages of the trade; but it does not prevent the parties putting a different interpretation upon the obligation of affreightment by their own acts or stipulations.

"If, then, it was the right of the owner of the ship in this case to discharge the hemp at the ship's berth, immediately on giving notice to the consignees of the time and place of unlivery, yet it was equally competent for him to engage not to unlade before a particular day, or not faster than it was convenient for the consignees to receive it, or to stop the discharge at any period of the day; and a delivery in disregard of such engagement, left the ship still liable on the original shipment. The engagement of the agents was of the same efficacy as though it had been made by the owner himself. It was the right, then, of the libellants, under the agreement made with the agents of the ship, to refuse to receive more hemp than had been unladen at twelve o'clock. (The court then examined the evidence, which was conflicting, as to the number of bundles of hemp discharged by noon, the cartmen testifying to one hundred, and the stevedores to over two hundred. The court, after deciding that the true number was probably one hundred and twenty-five or one hundred and fifty, proceeded as follows:) But if only one hundred bales were unladen at the time, the libellants could waive the stipulation releasing them from receiving more than that quantity, and, in judgment of law, they are to be regarded as accepting, as properly delivered, all they took from the wharf." [Case No. 5,656.]

After a final decree in favor of the libellants, the claimant appealed to this court. The evidence here was substantially the same as in the court below.

Luther R. Marsh, for libellants.

Francis B. Cutting and Jesse C. Smith, for claimant.

NELSON, Circuit Justice. This case involves two questions of fact: First, wheth-

er the consignees of the ship agreed with the respondents to suspend any further discharge of hemp from the ship beyond the amount which had been discharged before noon. On the part of the libellants it is insisted, that the proofs establish the agreement, and on the part of the claimant that the proofs fall short of this. Most of the damage was done to the hemp which was discharged after one o'clock, it having been drenched by a shower between three and four o'clock p. m. The second question relates to the quantity of hemp discharged after the time when, as is alleged, the further discharge was, by the agreement, to cease. Both questions strike me as being exceedingly close upon the evidence, and are so nearly balanced that it would be wrong for an appellate court to interfere. According to the impression which the examination of the proofs has left upon my mind, I should not feel justified in disturbing the conclusions of the court below, whether for or against the appellant, in respect to either question, as I think different minds might very well arrive at different conclusions. To warrant a reversal upon a mere question of fact, the preponderance of the evidence should be of a somewhat decided character; such as would justify the granting of a new trial in a court of common law, on the ground that the verdict was against the weight of evidence. It seems to me that this principle should govern this court in reviewing a question of fact determined by the district court.

I cannot doubt that the consignees of the ship had authority to arrange with the owner or consignees of the cargo in respect to the time and manner of its delivery, and that the arrangement thus entered into for general convenience and the better security of the cargo, was not a personal matter between the parties to the agreement. The consignees of the ship had the control of her for the purpose of delivering the cargo, and could modify and regulate such delivery in any way consistent with the rights of those interested in the cargo. The case does not stand upon an independent agreement, speaking in a technical sense, but upon an understanding between the parties in respect to the delivery, on which the respondents had a right to rely, and the breach of which occasioned the damage. The decree must be affirmed, with costs.

Case No. 5,656.

The GRAFTON.

[Olc. 43.] [1]

District Court, S. D. New York. Nov., 1844.[2]

DELIVERY OF CARGO—USAGE—RESPONSIBILITY OF MASTER—INJURY TO CARGO.

1. By the established course and custom of the coasting trade in New-York, goods on freight may be delivered at the wharf, and need not be tendered personally to consignees. The ship cannot abandon goods on the wharf, because of the inability or refusal of the consignee to receive them.

2. A delivery of a cargo on the wharf, in New-York, with notice to the owners of the time and place of unlading, places the goods at their risk, and discharges the ship from liability.

3. The master's responsibility in delivering cargo is measured by the practice and usage of the place. A ship cannot be compelled to lay idle, because some consignees apprehend bad weather, and decline to receive their cargo, if the time be reasonably favorable for unloading. All the shippers of cargo have a right to require dispatch in the unlivery of the cargo, that their goods need not be detained.

[Cited in The Boskenna Bay, 22 Fed. 665.]

[Cited in Michigan, etc., R. R. Co. v. Bivens, 13 Ind. 271.]

4. Although the consignees give notice to the ship that they will not receive the cargo because of the unfavorable state of the weather, or other reason, but do accept and remove it in part as delivered from the ship, they cannot claim indemnity from the ship for injury to the cargo by a storm to which it was exposed whilst on conveyance to its place of storage.

[Cited in Gronstadt v. Witthoff, 15 Fed. 268.]

[Distinguished in McAndrew v. Whitlock, 52 N. Y. 51.]

The following summary of facts and testimony, connected with the comments thereon in the opinion of the court, present the main points bearing upon the question in dispute in this cause. The ship Grafton, a general vessel, took a freight at New-Orleans, 267 bales of American hemp, consigned to the libellants at New-York. The vessel was moored at Pike-street dock on the afternoon of the 6th day of June last, (1844,) and notice was given by her agents, in the public papers of the next and following days, that she would begin unloading her cargo on the 7th June. The libellants' place of business is in Broad-street, and they had engaged storage for the hemp at No. 14 Water-street, a distance of one and a half to one and three fourths of a mile from the slip. It rained on the morning of June 7th, but the rain ceased by or before 9 a. m. The ship began discharging cargo between 9 and 10 a. m., and the hemp, lying uppermost, was first discharged. The libellants' cartmen, (under previous general directions to attend to this ship and another,) at 10 a. m. sent up a cart to the ship to ascertain if she was discharging cargo. The cartman returned with a load, and reported there was enough unloaded for three or four carts. Libellants sent notice to the agents of the vessel that they would not receive the hemp in that state of the weather, as it had the appearance of rain. This notice was given a quarter before 12. The day was sultry, and occasionally cloudy, with the appearance of rain. Other vessels at different wharves took in and discharged cargo during the day

[1] [Reported by Edward R. Olcott, Esq.]

[2] [Affirmed in Case No. 5,655.]

till after 3 p. m., when a violent gust of rain came on suddenly, by which the hemp landed on the pier was wet and greatly damaged. The usual notice was given the libellants at their counting-house, June 7, at 9 a. m., that the ship had commenced discharging the hemp; they at this time refused to receive a delivery on the wharf, because the weather was unfavorable. The witnesses of the libellants testify that notice was given to the agents of the ship, at a quarter before 12, that the hemp would not be received because of the bad weather, and that the agents agreed to stop unloading if the libellants would take away what was then discharged. The agents both deny that any such agreement was made, and that any notice was given them by the libellants that the hemp would not be accepted. The libellants' witnesses testify that not over 100 bales had been discharged at 12 o'clock, and that the vessel continued discharging till between three and four o'clock p. m., and just as it was beginning to rain. The claimant's witnesses testify that only about 50 bales were discharged after four o'clock, and that these were unladen within an hour. Other circumstances corroborate the charge of the libellants, that the unlading continued as late at least as three p. m. One of the cartmen swears that drops of rain began to fall as he was taking on his last load; another cartman testifies that the rain overtook him soon after leaving the ship; and all the witnesses agree in their testimony that it did not commence raining till after three o'clock. Another circumstance corroborating the assertion of the libellants is, that the stevedores and the mate, testifying for the claimant, state that only 50 bundles remained in the ship when the men knocked off for dinner, at noon, and that it took about an hour after dinner to discharge those 50 bundles. It can hardly be supposed, therefore, that the residue, 217 bales, had been discharged before 12 o'clock, at most three hours, and, according to some of the witnesses, two hours' work.

L. R. Marsh, for libellants.
F. B. Cutting, for claimant.

BETTS, District Judge. Upon a careful consideration of the very extended evidence and the circumstances of the case, I am satisfied that the unlading of the ship commenced between nine and ten a. m., and continued at a rate of discharge which would complete the delivery of the hemp on the wharf at about three p. m. Notice was given at the ship about noon, by the cartman, that the agents of the ship had agreed with the libellants to stop unlading at that time, and that they would receive no more hemp than was then upon the wharf. Two carts had been put to work by the libellants before noon, and another after one o'clock. The cartmen removed one hundred and sixty-three bales, one hundred and four of which were safely put under cover; the residue were injured by the rain after arriving at the warehouse, and before they were stored. The remaining part of the cargo was left on the wharf, where it was landed by the ship, and there received serious damage from the rain. Nothing was done by the officers or agents of the ship to protect the hemp after it was unladen.

It is proved to be the established course and usage in the coasting trade at New York, to deliver goods on freight upon the wharf, at the port of destination. Upon these facts, the question of law arises, whether the ship had fulfilled her contract of carriage by such delivery of this shipment to the consignees. This point will be considered, upon the assumption that due notice was given the consignees by the ship of the time and place of unlading; for, without reasonable notice, it is clear the ship would not be discharged of her responsibility by placing the hemp on the wharf. Gibson v. Culver, 17 Wend. 305; Mayell v. Potter, 2 Johns. Cas. 371; Smith, Merc. Law, 361; 2 Kent, Comm. 604.

A carrier by water cannot leave or abandon, in an unprotected state, goods under his charge, even though there be an inability or refusal of the consignee to receive them. 2 Kent, Comm. (5th Ed.) 605, and cases cited; Ostrander v. Brown, 15 Johns. 39; Kohn v. Packard, 3 La. 224. In a case of transportation of goods coastwise, when the master of the vessel had notice that the consignee was not the owner of them, the supreme court of this state decided that landing the cargo on a wharf at the port of destination was no delivery, nor would a tender of them to the consignee, without his acceptance, constitute a delivery—a delivery implying mutual and concurrent acts of the carrier and consignee, equivalent to tender and acceptance. Ostrander v. Brown, 15 Johns. 39. In Massachusetts a distinction is recognised between the obligation of a consignee and owner, ordering goods to a particular port, where he would be bound to make provision to receive them. In such case the rule is assumed to be that the vessel is only under obligation to land the goods and give the owner notice of the time and place, and place them at his risk; but if addressed to a mere consignee, who refuses to receive them, the vessel is bound to see that the cargo is properly secured or taken care of. Chickering v. Fowler, 4 Pick. 371.

There is nothing in this case in conflict with the doctrine declared in Ostrander v. Brown above cited. The supreme court of Pennsylvania hold, that with respect to vessels in the foreign trade, a delivery of the cargo at the wharf, with notice to the consignee, acquits the vessel. No distinction is made between the rule governing foreign or coasting vessels, and it seems conceded that a well-established usage or custom of the trade or port may determine the law of the particular case. Without any usage to control the rule, the decision plainly implies that the law in re-

spect to coasting vessels would be the same. In England great weight is given to the custom of the place or trade on a question of due delivery. It is allowed to control the construction of the bill of lading. Per Tindal, C. J., in Gatliffe v. Bourne, 4 Bing. N. C. 314. The like doctrine is recognised in the supreme court of this state, on a review of the English decisions. A deposit of goods by a carrier, conformably to the well-known usage in his line of business, is held to be equivalent to a personal delivery, and that without any actual notice to the party. Gibson v. Culver, 17 Wend. 305. In the case of Kohn v. Packard, 3 La. 224, Judge Porter, with his usual clearness and ability, discusses the doctrine of a constructive notice. He adverts to the rule as laid down by Chancellor Kent, that there must be a delivery on the wharf to some person authorized to receive the goods, or some act which is equivalent to or a substitute for it. The essence of the contract of affreightment is an engagement to deliver the goods to the consignee. A constructive delivery cannot be set up as a substitution for an actual one, without proving a notice to the consignee, equivalent to direct information. If that is not furnished, the carrier cannot be regarded as having performed his contract. It is not necessary now to inquire how far usage and custom may give notice. The law exacts no more, than that notice be brought home to the party sought to be affected by it, and custom may be admitted as a guide to determine whether the acts done effect that end.

In the early and strongly contested case of Hyde v. Trent & M. Nav. Co., 5 Term R. 394, upon a full consideration by the judges of the liability of common carriers, it was held, that by the general custom, their liability is at an end, when the goods are landed at the usual wharf. I think that the result of the cases is, that in a well-settled course of trade, as it is in this port in relation to coasting vessels, a delivery of a cargo on the dock here, with notice to the owners of the time and place of unlading, places the goods at their risk, and discharges the ship from its liability as a common carrier (2 Kent Comm., and Story, Bailm., before cited), although, in a case of a naked consignment, the ship might be under the further obligation to secure the property after it was unladen, if no consignee appeared, or if he refused to accept the goods (15 Johns. 39; 4 Pick. 374).

The unlading, in the present case, was made by the ship in the usual manner, with only one set of falls or tackle. The hemp was deposited by itself on the wharf alongside the ship, at her mooring, disconnected from other goods, and perfectly accessible to the consignees. The ship was compelled to seek her berth a distance of one and a half miles from the warehouse of the libellants, and of all these facts they had knowledge. Had she moored at a wharf directly in their vicinity, the hemp would in that way have been discharged no faster than it could have been removed or stored with ordinary diligence. The great distance at which the ship lay from the storehouse, rendered that despatch in receiving the cargo much more difficult, and probably impracticable in the use only of the drays or means of transportation ordinarily employed by merchants in removing a cargo. This, however, was in no way the fault of the ship. She would not be justified in precipitating a cargo ashore with extraordinary haste, by the application of unusual means, but she had a right, and it was her duty towards all her shippers, to employ all reasonable diligence in unlading, and when such a course is adopted, it belongs to the consignees to make provision for receiving and securing the cargo as it is discharged. There might be a good deal of inconvenience in so doing, in the present case, but it is clear, upon the proofs, that it was in no respect impossible for the libellants to have saved the hemp in the vicinity of the ship, or by the employment of additional drays, to have removed it to the libellants' warehouse as fast as it was discharged. It must be borne in mind, that the master's responsibility as to the mode of delivery is essentially measured by the practice of the place. He is acquitted by landing his cargo at a proper wharf. After that, the cargo is at the risk of the consignee.

Independent of any special arrangement or agreement with the libellants in respect to the landing of the hemp, I consider the law justified the method pursued by the ship; and the question is then to be considered, whether her condition was varied by act of the parties. I do not discuss the point debated at the hearing, as to the liability of the ship if she discharges perishable goods in hazardous or improper weather against the consent of the owners. The court of Pennsylvania intimates that such a circumstance might take a case out of the ordinary rule, and fasten the loss on the vessel. Cope v. Cordova, 1 Rawle, 203.

The preponderance of evidence in this case shows that the day was one of good working weather after nine a. m.; that there were clear indications of rain about noon, and that the storm in the afternoon came on abruptly, with but a few minutes previous warning. A ship cannot be compelled to lay idle when prepared to unload, because consignees apprehend there may be a storm in the course of the day. Sultry days in summer are liable to vary from extreme heat to showers within a period of a few hours. But a shipmaster could not protect himself against shippers in retaining their goods and closing his hatches because some consignees, whose goods were first discharged, feared a change of weather, and were unwilling theirs should be removed, or refused to receive them until every chance of storm should be dispelled. It is enough if, in view of all the circumstances, reasonable discretion was exercised

in unlading, and I cannot say, upon the proofs, that any thing short of that was manifested on this occasion. Upon the allegation of an engagement by the agents of the ship not to unlade that day, the proof is, that they agreed before noon to stop discharging the hemp and to send notice to the ship so to do, provided the libellants would receive what had then been discharged; and it is proved that more was taken away by the libellants than had been discharged at 12 o'clock. But the testimony is not so certain to this point as to enable the court to say that the libellants succeeded in securing in store as many bales as were on the dock at 12 o'clock.

The argument for the claimant is, that the agents had no authority to bind the ship by such an agreement, if proved to have been made by them. The evidence does not disclose clearly what the exact character of the agency was. It appears, however, that the agents represented themselves to be, and acted as the consignees of the ship; announced the time and place of her unlading; collected the freights, and assumed to direct in the delivery of the cargo. The owner had it in his power to show the limitation, if any there was, to the authority of the consignees; and, in the absence of evidence qualifying their powers, it must be assumed they stood in place of the owner, and clothed with the direct and incidental authority of a ship's husband in respect to the delivery of the cargo and collection of freights. A ship's husband is ordinarily a part owner (Abb. Shipp. 69), but there is nothing in the character of his duties, or the rules of the maritime law, limiting the office to an owner.

Judge Story enumerates very fully the duties and authority ordinarily exercised by that species of agent. Story, Ag. § 35; Story, Partn. § 418, collects the American and foreign authorities bearing upon the subject. See notes to section 35. Whatever may be the appropriate appellation of such agents, it is manifest, upon the authorities and the reason of the thing, that the party to whom a ship is consigned, for the purpose of her proper entry, unlivery and the collection of her freights, must have, as incident to the trust, the power of arranging with consignees of the cargo the time, place and manner of its delivery, and that accordingly his engagement to that end must be equally obligatory as if made by the owner himself.

The law only assumes to regulate the mode of delivery when it is not stipulated in the contract. Abb. Shipp. 248; Syeds v. Hay, 4 Durn. & E. [Term R.] 260. It construes bills of lading, which engage a direct and personal delivery of goods, to mean, that the delivery shall be acording to the customs and usages of the trade or place. Jac. Sea Laws, 17; Holt, Shipp. 359; 1 Rawle, 203; 2 Kent, Comm. 605; 3 La. 224. But it does not prevent the parties putting a different interpretation upon the obligation of affreightment by their own acts or engagements. If, then, it was the right of the owner in this case to discharge the hemp at the ship's berth immediately on giving notice to the consignees of the time and place of unlivery, yet it was equally competent for him to engage not to unlade before a particular day, or not faster than it was convenient for the consignees to receive it, or to stop the discharge at any period of the day; and a delivery in contravention of such undertaking would leave the ship still liable on the original shipment; and the agreement of his agents is of the same efficacy as if made by the owner himself.

It was the right, then, of the libellants, under the arrangement entered into with the agents of the ship, to refuse receiving more hemp than had been unladen at twelve o'clock; and if they seek to enforce the agreement, it belongs to them to establish, by proof, what that quantity was. The bales were not counted, and, to determine the amount discharged on the dock, they rely upon the judgment and estimates of cartmen, who merely looked at the pile. The opinions are in contradiction with those of the mate and stevedores employed in discharging the ship. The former class of witnesses rate the quantity at not exceeding a hundred bales, whilst the latter assert that all the hemp, except about fifty bales, was then out of the ship and on the wharf. The collateral facts before adverted to in my judgment show that both estimates are wrong, and that there were probably a hundred and twenty-five or a hundred and fifty bales discharged at noon; and this is so near to the quantity actually removed, that the court would not, in the absence of evidence, which the libellants ought to have supplied, assume that any more had been discharged than was taken away. But if only a hundred bales were unladen at the time, the libellants could waive the stipulation releasing them from receiving more than that quantity, and in judgment of law they are to be regarded as accepting, as properly delivered, all they took from the wharf. They are not entitled to charge to the ship the surplus over the agreed quantity as received for her benefit. No such understanding existed between the parties; and I shall accordingly decide, that the libellants have received, as duly delivered, all the hemp removed from the dock by their carts.

I further decide that the hemp damaged on the wharf was not delivered to the libellants so as to exonerate the ship, and that they are entitled to recover, in this action, its value. Testimony as to value was reserved at the hearing until the principles involved in the controversy should be settled. An order of reference to the clerk will be entered, when evidence can be adduced on both sides, on the questions of quantity and value of the hemp left on the wharf by the side of the ship.

GRAFTON (UNITED STATES v.). See Case No. 15,245.

Case No. 5,657.

Ex parte GRAHAM.

[3 Wash. C. C. 456; 4 Wash. C. C. 211.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1818.

HABEAS CORPUS.

1. The petitioner was arrested by the marshal of the district of Pennsylvania, under an attachment from the circuit court of Rhode Island, for a contempt; in not appearing in that court, after a monition served upon him in the state of Pennsylvania, to answer in a prize cause, as to a certain bale of goods condemned to the captors, and which had come into the possession of Peter Graham, the relator.

2. The circuit and district courts of the United States, cannot, either in suits at common law or equity, send their process into another district; except where specially authorized so to do, by some act of congress.

[Followed in Picquet v. Swan, Case No. 11,134; Wilson v. Pierce, Id. 17,826. Approved in Paine v. Caldwell, Id. 10,674. Cited in New England Mut. Ins. Co. v. Detroit & C. Steam Nav. Co., 18 Wall. (85 U. S.) 306; Atkins v. Fiber Disintegrating Co., Id. 304; Re Hodges, Case No. 6,562; Re Manning, 44 Fed. 276; Walker v. Lea, 47 Fed. 649; Re Boles, 1 C. C. A. 48, 48 Fed. 76.]

[Cited in Turrill v. Walker, 4 Mich. 180.]

3. The same restrictions as to proceedings in prize causes exist, not only by the express provisions of law, but also by the principles which apply to prize causes in this country, in England, and elsewhere.

At law.

Chauncey and Binney, for Graham.

Charles J. Ingersoll, against discharge.

WASHINGTON, Circuit Justice. To the writ of habeas corpus, issued by this court, upon the petition of Peter Graham, the marshal has returned, that he arrested the petitioner under the authority of a warrant of attachment, issued from the circuit court of the United States, for the district of Rhode Island, to him directed, and which is annexed to the return, and is in the following words, to wit:

"United States of America. (L. S.) Rhode Island District—ss. The President of the United States of America, to the Respective Marshals of the Respective Districts of Rhode Island, New-York, and the Eastern and Western Districts of Pennsylvania, Greeting: Whereas, a certain bale or box of merchandise, marked, and numbered 97—imported into the United States in the ship Francis, and condemned to the captors, in the case of the libel of Oliver Wilson and others against the ship Francis and cargo [The Francis, Case No. 5,032], in the circuit court of the United States, for the Rhode Island district, at the June term of 1813 of said court. And whereas, the said bale or box of merchandise was delivered to one James Stewart, by the inspectors of the district of Bristol, by mistake, who took and carried away the same; and whereas, a representation to the said circuit court, at their November term, 1813, by the said Oliver Wilson, in behalf of the said captors, and on their petition therefor, the said court granted a monition to said James Stewart, to show cause, why he should not bring said bale or box of merchandise, or the proceeds thereof, into the said court,—which monition was duly served upon the said James Stewart; and whereas, the said James Stewart neglected to appear to said monition, and was, and ever since has been, in contempt therein; said court, upon petition therefor, in behalf of the said captors, granted a writ of attachment against the said James Stewart, which he hath avoided by absconding and departing from the United States; and whereas, afterwards, at the November term, 1816, of said circuit court, it was represented to said court, by the proctors of the said James Stewart, that said bale or box of merchandise, or the proceeds thereof, were in the hands of one Peter Graham, of Philadelphia, merchant, and praying process against him; and whereas, said court, at said term, granted a monition to the said Peter Graham, to bring said bale or box of merchandise, or the proceeds thereof, into said court, or, in default thereof, to appear, to show cause, why an attachment should not issue against him; and whereas, the said monition was duly served upon the said Peter Graham, and he hath neglected to appear thereto, and was and is in contempt therein; and whereas, application hath been made to the said court, at their June term, 1818, in behalf of said captors and said James Stewart, for further proceedings against the said Peter Graham, in the premises; and the said court, at the said term last mentioned, at the instance of the said applicants, did order a writ or warrant of attachment to issue against the said Peter Graham, for said contempt; and, in case the said Peter Graham could not be found, did further order, that the same writ or warrant of attachment should contain a clause, in that event, to seize, arrest, and sequester the goods and effects of the said Peter Graham, to the amount and value of two thousand dollars, wherever the same might or could be found within the United States, and the same safely to keep, to abide the further orders of the said court,—you are, therefore, hereby commanded, in the name of the president of the United States, that you do attach and arrest the said Peter Graham, if he may be found in your district, and to hold him in close custody, to answer the said court for his contempt aforesaid. And if the said Peter cannot be found within your district, then that you do seize, and arrest, and sequester the goods and effects of the said Peter, if the same may be found in your district, to the amount and value of two thousand dollars, the same safely to keep,

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

to abide the further orders of said court, in the premises. Hereof fail not, but true return make of this warrant, with your doing thereon, to the next term of the said circuit court, to be holden at Providence, within and for the said Rhode Island district, on the fifteenth day of November next.

"Witness, the Honourable John Marshall, Esq. our Chief Justice, this ninth (L. S.) day of July, in the year of our Lord, one thousand eight hundred and eighteen. Signed, Benjamin Cowell, Clerk."

The question turns upon the authority of the district or circuit court of one district, to issue its process into any other district, to compel the appearance of a person residing or found within the latter jurisdiction, before the court from which the process issued; or to stand committed, for any alleged contempt of that court. It is admitted, that these courts, in the exercise of their common law and equity jurisdiction, have no authority, generally, to issue process into another district, except in cases where such authority has been specially bestowed, by some law of the United States. The absence of such a power, would seem necessarily to result from the organization of the courts of the United States; by which two courts are allotted to each of the districts, into which the United States are divided; the one denominated a district—the other a circuit court. This division and appointment of particular courts, for each district, necessarily confines the jurisdiction of the local tribunals, within the bounds of the respective districts, within which they are directed to be holden. Were it otherwise, and the court of one district, could send compulsory process into any other, so as to draw to itself a jurisdiction over persons, or things, without the limits of the district, there would result a clashing of jurisdiction between those courts, which could not easily be adjusted; and an oppression upon suitors, too intolerable to be endured. But the legislature of the United States, from abundant caution, as it would seem, has not left this subject to implication. After conferring upon those courts, respectively, the portion of jurisdiction which congress intended they should exercise, the 11th section of the act of 24th September, 1789, c. 20 [1 Stat. 73], declares, "that no person shall be arrested in one district, for trial in another, in any civil action, before a circuit or district court; nor can a civil suit be brought before either of those courts, against an inhabitant of the United States, by any original process, in any other district, than that whereof he is an inhabitant; or in which he shall be found, at the time of serving the writ." These provisions appear manifestly to circumscribe the jurisdiction of those courts, as to the person of the defendant, by the limits of the district where the suit is brought; and that the process of those courts, was considered by the legislature, to be bounded by the same limits, is obvious from the subsequent acts passed; the one on the 2d of March, 1793 (chapter 22, § 6 [1 Stat. 335]), authorizing subpoenas for witnesses, to attend the courts of one district, to run into any other district, not exceeding, in civil cases, one hundred miles from the place of holding the court; and the other, on the 3d of March, 1797 (chapter 74, § 6 [2 Bior. & D. Laws, 594; 1 Stat. 515, c. 20]), which authorizes writs of execution upon judgments obtained, at the suit of the United States, in any of their courts, in one state, to run and be executed in any other state or territory. It would seem, that these provisions were made, not because they were supposed by congress to be necessary, in consequence of the 11th section of the judiciary law; but because the jurisdiction of the courts, was essentially confined, by their organization, within the limits of their respective districts; for, it is to be observed, that that section applies exclusively to original suits, and to the parties in those suits; and therefore imposed no restraint, in respect to writs of execution, and subpoenas for witnesses, which could render the above provisions at all necessary.

But it has been argued, that these restraints are incompatible with the essential jurisdiction of an admiralty court, more especially in prize causes. That the laws of the United States authorize the distinction which is contended for, between the courts of common law and equity; and the admiralty jurisdiction in prize cases, has not, and it is confidently believed, cannot be shown. It is true, that the 9th section of the judiciary act, gives to the district courts, exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, without limitation; and it is not less true, that the 11th section gives to the circuit courts, original cognizance of all suits of a civil nature, at common law and in equity, where an alien is a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state, equally unlimited, except as to the amount. But the jurisdiction of these courts, though unlimited as to the subject matter of which they have cognizance, by any express declaration of the legislature, is nevertheless limited, in point of locality, as well by the general principles of law, which our courts acknowledge as rules of decision, as by the express provisions of the 11th section of the judiciary law before mentioned. As to the first, it will be acknowledged, that there is no law of congress which limits the jurisdiction of the courts, by the nature of the suits of which they have cognizance. By what law, then, is it, that actions of ejectment, dower, and trespass, in relation to real property, can be brought only in the district where the land lies?

If the defendant be served with process in the district where the suit is brought, neither the 11th section, nor any other provision in

the act of congress, has restrained the jurisdiction of the court in the supposed cases. The only answer to the question is, that the want of jurisdiction is the result of certain general principles of law, acting upon the particular subject. In like manner, the jurisdiction of these courts, when sitting in an admiralty or prize cause, is limited by those general principles which apply to courts of admiralty in England and the United States, as well as in other countries. Though bounded only by the nature of the causes over which they are to decide, and not in any respect by place; it is nevertheless essential to the exercise of this jurisdiction by any particular court, that the person or thing against whom or which the court proceeds, should be within the local jurisdiction of such court. Such was the jurisdiction of the several vice-admiralty courts of Great Britain, in America, and the West Indies, until the statute of the 41st of George III., which, whether sitting as instance or prize courts, were confined to breaches of the revenue laws, committed within their local jurisdictions, and to cases of vessels, &c., brought within their local jurisdiction. The only exception to the general rule above stated, applicable to the court of admiralty, in prize causes, is that of a vessel lying in the port of a neutral country, most unwillingly assented to by Sir W. Scott, under the sanction of precedents, but powerfully opposed by the reasons urged against it by that distinguished judge. But even in that case, it was never pretended that the process of the court, could go into the neutral country, to compel an appearance, or to enforce the execution of the sentence.

But secondly, the jurisdiction of these courts in prize causes, is limited, as to persons, by the express provisions of the 11th section of the judiciary law before referred to. Prize proceeding against an inhabitant of the United States, is unquestionably a civil suit; and if it be against the person, instead of the thing, the jurisdiction is excluded, unless it be instituted in the court of the district whereof he is an inhabitant, or is found at the time of serving the process. The manifest policy of the judicial system of the United States, was, to render the administration of justice as little oppressive to suitors and others as possible; and it corresponds entirely with that construction, which confines the process of the courts within the limits of the district in which the court sits, and from which it issued.

In the exercise of a jurisdiction over persons not inhabitants of, or found within the district where the suit is brought, there are difficulties, which, in the opinion of the court, nothing but an act of congress can remove. In what manner, for instance, is the marshal to dispose of the person? He has no authority to conduct him beyond the limits of his district, nor to deliver him over to the marshal of an adjoining district, for that purpose. Can he commit him to the gaol of the district where the arrest was made? If he can, the case would present a very extraordinary novelty in jurisprudence—that of a defendant, imprisoned in one district, to answer to a suit depending against him in another, how great soever the distance of the one place might be from the other. In criminal cases, where the offender is arrested in one district, for trial in another, the 33d section of the judicial law has provided, not only for the removal of the offender and witnesses, but also for the transmission of the process and recognizance, taken in the case, to the proper court. In like manner, should it be the will of congress to vest in the courts of the United States an extra-territorial jurisdiction in prize causes, over persons and things found in a district other than that from which the process issued, it would seem to be proper, if not absolutely necessary, at the same time to prescribe the mode of executing the process. Upon the whole, we are of opinion, that the petitioner ought to be discharged.

Case No. 5,658.

Ex parte GRAHAM.

[See Case No. 5,657.]

Case No. 5,659.

In re GRAHAM.

[8 Ben. 419] [1]

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

WITNESS—PRIVILEGE—CRIMINATION.

It having been testified in bankruptcy proceedings, that the bankrupt had lost a large sum of money, a short time before his bankruptcy, in a gambling-house kept by B. and M. at No. 16 West 24th street, New York, B. and M. were summoned to appear before the register for examination. The question was put to B.: "What year was it you removed from No. 16 West 24th street?" B. refused to answer, on the ground that the answer to the question would tend to criminate him. The question was put to M.: "Did you ever reside at No. 16 West 24th street?" M. refused to answer on the same ground: *Held*, that the witnesses were privileged from answering the questions.

[Cited in U. S. v. M'Carthy, 18 Fed. 88.]

In this case the register certified that a witness had testified before him that one Samuel E. Briggs and one Charles N. Moody were the keepers of a gambling-house at No. 16 West 24th street, in the city of New York; that the above named bankrupt [William M. Graham] had lost at gaming, in said house, over $30,000, which he had paid to Briggs and Moody a short time before the adjudication of bankruptcy; that thereafter a summons was issued by the register requiring Briggs and Moody to come before him for examination; and that, they having been

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

sworn, the following question was put to the witness Briggs: "What year was it you removed from No. 16 West 24th street?" who answered, that, from the previous examination of witnesses, he perceived that he was charged with participation in a gambling transaction, which, if true, exposed him to a criminal prosecution under the laws of the state of New York, and he declined to answer any question on the subject, on the ground that the answer to the question now put might tend to expose him to such criminal prosecution and criminate him. The register further certified, that the following question was put to the witness Moody: "Did you ever reside at No. 16 West 24th street?" that he made the same answer as the witness Briggs; and that the register thereupon, on request, certified to the court the question, whether the witnesses should answer, with his opinion that the witnesses should be required to answer the questions.

BLATCHFORD, District Judge. I think that the witnesses were privileged from answering the questions.

Case No. 5,660.

In re GRAHAM.

[2 Biss. 449; 4 Alb. Law J. 49.] [1]

District Court, W. D. Wisconsin. Feb., 1871.

EXEMPTIONS—NONE IN PROPERTY FRAUDULENTLY CONVEYED.

1. A family sewing machine is properly exempt under the 14th section of the bankrupt act [of 1867, (14 Stat. 522)].

2. A watch, not being exempt by the statute of the state, does not properly come within the discretionary articles contemplated by that section.

[Cited in Re Steele, Case No. 13,346.]

[Cited in Stewart v. McClung, 12 Or. 431, 8 Pac. 447.]

3. In property conveyed by the bankrupt in fraud of creditors prior to the filing of the petition against him, and afterwards recovered to the estate, he cannot claim any exemptions. The sale is good as against him. In attempting to place his property beyond the reach of his creditors he has placed his exemptions beyond his own reach.

4. In the list of exemptions the value of the articles set apart should be stated, so that it may be seen whether they come within the limitations of the act.

In bankruptcy. Petition by the bankrupt for an order directing the assignee to add to the list of exempt property set off to him, one family sewing machine, one silver watch, one single sleigh, one harness, one manufacturer's sewing machine, one horse and one buggy.

S. J. Todd, for assignee.

A. L. Sanborn, for bankrupt.

HOPKINS, District Judge. I think that the family sewing machine is exempt, and the assignee should set it off to the bankrupt. Section 1, c. 192, Laws Wis. 1860. The watch is not exempt by the state law, and does not properly come within the discretionary articles contemplated by section 14 of the bankrupt act. The bankrupt, it appears, had disposed of the sleigh, harness, and manufacturer's sewing machine to one Hanlon, before the filing of the petition in this case, and it was not claimed that he had re-purchased them, so that he clearly has no right to them.

The bankrupt, about the 12th of September, 1870, sold all his stock in trade and tools as a harness maker, three horses, three buggies, and a lot of cattle and other property, to one Hanlon, at the price of $3,684, for which he took his notes in equal amounts at one, two, and three years. A detailed bill of sale was made of the articles and price of each, in which the manufacturer's sewing machine was valued at $100, netting machine $300, and other tools $175, in all $575, all of which he now claims as exempt as mechanic's tools. By the state statute a mechanic's exemptions of tools is limited to $200 in value, so that if there was no question as to his right to the exemption to the amount allowed by the statute, he would not be entitled to the netting machine, for that alone exceeds in value the amount allowed; nor would he be entitled to the sewing machine, unless he gave up about $75 worth of his other tools, for together they exceed the statute allowance by that sum.

But I think the proof clearly shows that these articles were all sold by the bankrupt to Hanlon before filing the petition in bankruptcy, and he is not, therefore, entitled to them, whether exempt or not. That sale was unquestionably made to hinder and delay creditors, and was void, but the bankrupt is not permitted to impeach it; the sale as to him is good, and by it he parted irrevocably with all his interest in the property covered by the bill of sale.

The bankrupt claims that he bought back the horses, buggies and cattle before the filing of the petition in bankruptcy, or that the trade, so far as they were concerned, was abandoned, and that he allowed $1,600 upon the note for the purchase price. These articles were sold to Hanlon for $1,195, and why he should have taken them back at $1,600 is not explained. The re-sale of this property is attempted to be sustained by Graham's and Hanlon's testimony taken before the register. They agree as to the terms and circumstances of the sale, and show the transaction to have been a gross fraud upon the creditors. They agree substantially, also, as to the fact of the re-sale, but no explanation is given of the discrepancy between the price they were sold for, and taken back at on the day following the sale; their notes are not produced to show whether they were indorsed or not, and Hanlon swears that he told the marshal and one Dewey the day he took the property that the horse was his.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 4 Alb. Law J. 49, contains only a partial report.]

After a careful examination of their testimony I am forced to the conclusion that the part relating to the re-sale of the property (and in which was included the horse and buggy) is not entitled to credit, and is not true. The property was found in the possession of Hanlon by the marshal, and he claimed to own it then under his fraudulent purchase. They had no doubt conspired together to place the possession and apparent title to it in Hanlon, to defraud Graham's creditors, and were in the execution of that dishonest scheme when they were arrested by the proceedings of this court. And if the bankrupt has by his fraudulent acts deprived himself of the benefit of the exemption laws, it is a just retribution upon him. A debtor not unfrequently cheats himself in trying to cheat his creditors, and this bankrupt furnishes a striking example of such a case. In his anxiety to place his property beyond the reach of his creditors, he placed his exemptions beyond his own reach.

I therefore deny the prayer of the petitioner, so far as he asks to have the assignee set off the horse, buggy, harness, sleigh, watch and manufacturer's sewing machine as exempt to him, but direct that the assignee set off to him the family sewing machine, as prayed.

I also direct the assignee to strike out of the list of exemptions the "tools as harness maker, including netting machine, straw cutter, and miscellaneous tools," for the reasons:

First. That their value is not stated as required by the 19th general order in bankruptcy, so that it can be seen whether the articles embraced in that designation exceed in value $200; and

Second. That the evidence clearly satisfies me that the bankrupt had parted with all his interest in them before the commencement of these proceedings, and that they are not now, and were not then, his property, but as between him and Hanlon, they belonged to Hanlon; that the creditors alone can impeach the title of Hanlon for the fraud. The bankrupt cannot. The assignee will correct the list of exemptions in conformity with this opinion, and file the same without delay.

That a bankrupt cannot claim as exempt, property conveyed by him in fraud of his creditors and recovered by the assignee, see, also, Keating v. Keefer [Case No. 7,635].

Case No. 5,661.

In re GRAHAM.

[5 N. B. R. 155;[1] 28 Leg. Int. 317.]

District Court, D. Minnesota. 1873.

BANKRUPTCY—ASSETS—DISCHARGE.

When the assets of a bankrupt, after the payment of valid liens, do not equal fifty per cent. of the claims proved against him contracted subsequently to January first, eighteen hundred and sixty-nine, on which he was liable as principal debtor, and he fails or neglects to file the consent of a majority in number and amount of those creditors, he can only be discharged from debts contracted prior to January first, eighteen hundred and sixty-nine.

[Cited in Re Kahley, Case No. 7,594; Re Van Riper, Id. 16,874 Re Vinton, Id. 16,951; Re Waggoner, 5 Fed. 917.]

[In bankruptcy. In the matter of W. H. Graham.]

NELSON, District Judge. The report of the register upon the application of the bankrupt for a discharge, shows that the assets received by the assignee amounted to the sum of nine hundred and eighty-eight dollars and ninety-six cents. This sum was received from the sale of property encumbered by liens, prior to January first, eighteen hundred and sixty-nine, to nearly the full amount realized. The assignee sold the property by order of the court freed from the encumbrances, the liens being transferred to the fund in court realized upon the sale. The surplus, after discharging the liens, does not equal fifty per cent. in value of the proved debts contracted subsequent to January first, eighteen hundred and sixty-nine, on which the bankrupt was liable as principal debtor.

The question presented is, whether a full discharge can be granted to the bankrupt from all debts contracted as above stated after January first, eighteen hundred and sixty-nine. Section 33, as amended July twenty-seven, eighteen hundred and sixty-eight [15 Stat. 227], declares that "in all proceedings in bankruptcy commenced after the first of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, unless the assent in writing of a majority in number and value of the creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, be filed in the case at or before the time of the hearing of the application for discharge." I had occasion to pass upon this clause of section thirty-three, as amended, and held that a fair construction of it would require that, before a discharge could be granted, the proceeds of the debtor's property in the hands of the assignee, and subject to be divided among his creditors, must be equal to fifty per centum of the proved debts, upon which he was liable as principal debtor, unless an assent of his creditors was filed in accordance with the terms of the section. In re Freiderick [Case No. 5,092].

It is conceded in the case now under consideration, that the amount realized by the assignee upon the sale of the encumbered property was equal to fifty per cent. of all

[1] [Reprinted from 5 N. B. R. 155, by permission.]

the debts against the bankrupt, secured and unsecured, and a discharge would be granted had not the law been changed by the act of July fourteenth, eighteen hundred and seventy [16 Stat. 276], viz.: "That the provisions of the second clause of the thirty-third section of said act, as amended by the first section of an act in amendment thereof, approved July twenty-seven, eighteen hundred and sixty-eight, shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the first day of January, eighteen hundred and sixty-nine." That is, the restriction still remains upon the bankrupt in regard to debts contracted since January first, eighteen hundred and sixty-nine, and the proceeds of the debtor's property applicable to the payment of those debts, must equal fifty per cent. in value, etc., before he can obtain a discharge from them. The amount of the debts proved upon which this restriction operates are more than fifty per cent. of the moneys in the hands of the assignee, after paying the liens, within the saving clauses of sections fourteen and twenty, and the bankrupt is therefore unable to meet the requirements of the act. Inasmuch as he has also failed to file any assent of creditors, which would relieve him from this restriction, a discharge only from debts contracted prior to January first, eighteen hundred and sixty-nine, can be granted. An order will be entered for such a modified discharge.

Case No. 5,662.

GRAHAM v. ALEXANDER.

[5 Cranch, C. C. 663.] [1]

Circuit Court, District of Columbia. March Term, 1840.

SLAVE—CHILD—FREEDOM.

If a female slave be sold in Alexandria county, "she to be free at thirty-one, and her children then born, and those afterwards to be born, at the same age," a child afterwards born of such slave, before her age of thirty-one, is entitled to freedom when arrived at the age of thirty-one years.

The jury found the following special verdict: "We find that the petitioner [Moses Graham] is the son of Milly, who was the slave of Miss Brown, who resided in Georgetown about the year 1790; and for two or three years afterwards, with her sister Mrs. Magruder. That she afterwards lived with the same sister in Maryland; and afterwards, but not before 1806, with her sister, Mrs. Alexander, in Alexandria county. That during all this time, the petitioner's mother and grandmother belonged to Miss Brown, who some time about the year 1813, while she was living with Mrs. Alexander, brought Milly from Washington county, where she had been living hired out by her mistress for one or two years, to Mrs. Alexander's, in Alexandria county. That Milly then had two female children, and that the petitioner was born afterwards, and while Milly was at Mrs. Alexander's. That Miss Brown, on bringing her to Mrs. Alexander's, sold Milly and her two children to Mrs. Alexander; she to be free at thirty-one, and her children then born, and those afterwards to be born, at the same age. That the petitioner was held by Mrs. Alexander during her life, and by her administrator, the present defendant, since; not as a slave for life, but as entitled to freedom at thirty-one years of age. That Miss Brown died in 1825, making her last will and testament as follows:" (In this will she says: "Whereas I have sold to my sister Alexander a negro woman called Milly, and her two children Ann and Rachel, since which time the said Milly has had two other children, Jenny and Christy; and whereas the term for which the said Milly was sold, has expired, and her said children are bound to serve till they shall have attained the age of thirty-one years respectively. Now it is my will and desire, that the time of the said four children of Milly, shall be purchased by my executor, and that they shall be forthwith emancipated by him; and I do hereby authorize him to make such purchase out of the estate I shall leave. But as the amount for which I sold the said Milly and her two children, has never been paid to me, it is my desire that that debt shall be applied, if practicable, towards the said purchase.") "That Miss Brown, by her will, recognized the terms of sale of said negroes, to her sister, to be, that they were to be free at thirty-one years of age. That the petitioner will be, on the 25th of December, 1839, twenty-six years of age. That Miss Brown sent an officer for Milly to Georgetown, where she (Milly) was then residing, and from whence she was brought, in 1813, to her sister's, with the intention to sell her and her children to her sister, and did thereupon, sell her as before stated, on the terms and conditions stated in her will; and that the said Milly was kept in Alexandria county from the time of her said importation, till she became thirty-one years of age, when she was suffered to go free, and is free now; and the petitioner was so kept in the said county, till the filing of this petition. That Miss Brown, when she had the said Milly and her two children brought into Alexandria county, or at any time before or afterwards, did not take the oath required by the fourth section of the Virginia act of 17th December, 1792. And if, upon the facts aforesaid, the law be for the petitioner, then we find for the petitioner, and if otherwise, for the defendant."

Swann & Swann, for defendant, contended that the petitioner had no claim to freedom under the will of Miss Brown, as he was not named nor referred to therein; and there was no evidence of his emancipation under any other instrument in writing, under hand and seal, and acknowledged, or proved as required by the Virginia law of December 17,

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

1792, c. 103, § 36, p. 191, and that no parol evidence is sufficient to prove emancipation in any other manner. Rob. Wills, 26.

But THE COURT (mem. con.) made the following order: "Upon consideration whereof," (that is, of the special verdict,) "THE court is of the opinion that the petitioner will be entitled to his freedom on the 26th of December, which will be in the year 1844, and not before; and therefore that the judgment at law, upon the said special verdict, must be for the defendant. But, inasmuch as the said petitioner has filed his bill in equity, stating his fears that the said defendant, Richard B. Alexander, will remove the petitioner from the District of Columbia, under the laws whereof his claim for freedom has accrued, and from the jurisdiction of this court, before the said 26th day of December, 1844, whereby he may be deprived of the means of establishing his right to freedom when it shall have become absolute: It is this 18th day of February, 1840, ordered that the said defendant Richard B. Alexander, shall not be permitted to take the said petitioner into his possession, (the said petitioner being now in the custody of the marshal for safe keeping, and for the protection of the rights of the said petitioner,) until he, the said Richard B. Alexander, shall have given bond to the United States with good security in the penalty of $1,000, with condition to be void, if he shall have the said petitioner forthcoming, and produce him to this court, or to the marshal of this district on the aforesaid 26th day of December, 1844; the said bond and security to be approved by this court, or one of the judges thereof: provided, however, that the said petitioner, Moses Graham, shall have first given security to the said Richard B. Alexander by bond with good security, to be approved by this court, or one of the judges thereof, in the penalty of $800, conditioned that he, the said Moses, shall continue faithfully in the service of the said Richard B. Alexander, in the District of Columbia, until the said 26th of December, 1844. And upon the said bonds being given and approved as aforesaid, and filed in this court, or in the clerk's office, the said petitioner shall be delivered up to the said Richard B. Alexander, upon demand."

GRAHAM (BENJAMIN v.). See Case No. 1,301.

Case No. 5,663.

GRAHAM v. COLLECTOR.

[Cited in Kennedy v. Hartranft, 9 Fed. 19, 25, note. Nowhere reported; opinion not now accessible.]

Case No. 5,664.

GRAHAM v. DOMINGUEZ.

[1 Am. Law T. Rep. U. S. Cts. 70.]

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

ARREST—FALSE REPRESENTATIONS—AGENT—BAIL.

The principle that governs a preliminary investigation as to bail, is, that if a reasonable cause of action is shown the defendant is held to bail.

At law.

Cram & Seward, for plaintiff.

Doolittle, Davis & Wyman, for defendant.

BLATCHFORD, District Judge. The written documents and affidavits in this case seem to me to put the propriety of the arrest and holding to bail of the defendant beyond any question. Exhibit No. 4, on the part of the plaintiff, is a contract signed by the plaintiff and Antonio Millan, and witnessed by the defendant, dated October 3, 1867, but shown to have been executed October 10, 1867, whereby Millan agrees to pay, or satisfactorily secure to be paid, to the plaintiff, within seventy-five days from October 3, 1867, the sum of 1,800,000 silver dollars, or soles de plata, or equivalent, and the plaintiff agrees to deliver at any place Millan may name, between certain parallels of latitude and longitude, as soon as practicable, the monitor Agamenticus, over 1,500 tons, with two turrets and four guns, fully armed and equipped in every respect for an engagement of four hours, in conformity to the regulations of the navy of the United States. Millan agrees to purchase the monitor at said price and upon said conditions, and also agrees to pay to the plaintiff a further sum of $40,000 in gold, or its equivalent, when the monitor is delivered. The contract further states that Millan has deposited with the plaintiff "the sum of $500,000 in bonds issued by Peru and Chili as collateral security for the faithful performance of his part of this contract, which collateral security shall be returned to him when his part of it has been fulfilled." The contract also states that "for the true and faithful performance of all and every of the covenants and agreements herein mentioned, the parties to these presents bind themselves each unto the other in the penal sum of $500,000, as fixed and settled damages to be paid by the failing party."

Simultaneously with the execution of the contract, Exhibit No. 4, that is, on the 10th of October, 1867, another paper was signed by Millan and delivered to the plaintiff, also dated October 3, 1867, which paper is Exhibit No. 7, on the part of the plaintiff. That paper is as follows: "It is hereby understood and agreed between John Graham and Antonio Millan, that in case of the nonfulfillment of a contract made and entered into this day, Millan will only receive $400,000 of bonds of Chili and Peru out of the deposit made this day of $500,000 by Millan; but if Millan's contract is carried out, Graham will return in the stipulated time the aforesaid bonds, amounting to $500,000." This expression, "return in the stipulated time," is explained by three other papers. One is Exhibit D, on the part of the defendant, dated October 3, 1867, and signed by the plaintiff. It reads thus: "Received from Go. Dominguez, by order of Dn. Antonio Millan, $270,000 in Chili and Peru bonds, in the following numbers, viz." Another is a

second Exhibit D, on the part of the defendant, dated October 9, 1867, and signed by the plaintiff. It reads thus: "Received from W. G. Dominguez, for order and account of Antonio Millan, Esq., $230,000 in bonds of Chili and Peru, which, with the $270,000 received by me on the 3d instant, complete the amount of $500,000, the numbers of which are as follows." After these bonds had been received by the plaintiff, the second instalment of them having been received on the 9th of October, the plaintiff gave to Millan an obligation, Exhibit C, on the part of the defendant, dated October 3, 1867, signed by the plaintiff, and reading as follows: "Seventy-five days after date I promise to return to Antonio Millan or order $500,000 in Chili and Peruvian bonds, intrusted to me, the description of which are described and inserted in the next page." The expression, the "stipulated time," in Exhibit No. 7, is thus shown to be seventy-five days from October 3, 1867. This was the same period of time as that named in Exhibit No. 4, as the time within which Millan was to pay, or satisfactorily secure to be paid to the plaintiff, the $1,800,000. All the papers which have been referred to must be construed together as furnishing a single transaction. The effect of them is that on a failure of Millan to pay or satisfactorily secure the $1,800,000, the plaintiff is to return to Millan $400,000 of the bonds, and is to retain $100,000 of them. Millan did fail to pay or secure the money. The bonds were put into the plaintiff's hands. He has returned $100,000 of them to Millan under an order dated February 4, 1868, signed by Millan and addressed to the plaintiff, and reading as follows: "Please deliver to Mr. Go. Dominguez 100 bonds of $1,000 each of the $500,000 you hold as a deposit for a certain contract." The $100,000 of bonds were delivered by the plaintiff to the defendant for Millan, and the defendant gave to the plaintiff a receipt for them, signed by the defendant, written on the order from Millan. It therefore appears that the plaintiff has the $100,000 of bonds, which he was to receive, and became entitled to retain. But those bonds, he alleges, are worthless in his hands. An official notification from the consul of Peru is put into the case, dated December 28, 1867, stating, under instructions from the Peruvian minister at Washington, that certain bonds (which, it is conceded, embrace the bonds in question) were delivered by the financial agents of Peru in New York, pursuant to instructions received by them from the legation of Peru in Washington, "to a certain party who was to hold them on deposit only, but who, in violation of good faith and of the confidence reposed in him, has improperly disposed of the same," and that "capitalists and all others are consequently cautioned against negotiating or purchasing the above-described bonds, and notified that the interest coupons attached thereto will not be paid, and holders of any of said bonds must look for indemnity to the party from whom they may have received them." The "party" referred to was Millan. Prima facie, therefore, and for the purposes of this motion, the title of the plaintiff to the bonds, and the right of Millan to turn them over to him, fail.

The only question therefore is, whether the defendant ought to be held to bail by reason of having made any false representations to the plaintiff in regard to the title of Millan to the bonds and the right of Millan to dispose of them. The written papers already referred to, and the affidavits on both sides in the case show that the defendant had the management and conduct, on the part of Millan, of all the transactions between the plaintiff and Millan, and that nothing ever transpired between the plaintiff and Millan except through the intervention of the defendant. The claim on the part of the defendant is that he was present at every interview which took place between the parties, and that he was the interpreter of everything that passed between them, for the reason that the plaintiff could not speak or understand Spanish, and could speak and understand English, and that Millan could speak and understand Spanish, and could not speak or understand English, and that the defendant could speak and understand both Spanish and English. The mere fact of depositing the bonds with the plaintiff by Millan as security to the purport stated, was a declaration and representation by Millan that the bonds were valid in his hands and that he had a right to make such a disposition of them, and the only question for consideration is whether the defendant joined in making such representation, knowing it to be untrue.

I think the connection of the defendant with Millan and with the plaintiff, and with the business transactions between them, as disclosed by his own affidavit and by the affidavit of Millan, was such as to show, prima facie, that he had all the knowledge which Millan had in regard to the bonds, and that he knowingly joined Millan in making to the plaintiff the false representation in regard to the bonds which is the foundation of the plaintiff's action. The principle that governs a preliminary investigation as to bail, is that if a reasonable cause of action is shown, the defendant is held to bail. Paraszet v. Gautier [Case No. 10,709]. My only difficulty is as to the amount of the bail. The right of action which the plaintiff has, on the papers, is to recover what the $100,000 of bonds would have been worth if they were recognized as valid by the governments issuing them. What that value is, is not shown on either side, that I have been able to find in the mass of papers. All that the plaintiff says in his affidavit is, that the whole half a million of bonds would have been, if valid, a sufficient collateral security for $141,280; and although Messrs. Leavitt and Sarsar state that the bonds turned over to the plaintiff have no market value, and that they are familiar with the bonds of the same issue, and have dealt in them and know their value, yet such value is not stated.

The application to discharge the defendant from arrest is therefore suspended to allow the parties to produce evidence as to what $100,000 of bonds of the same issue, the title to which in the hands of the holder was undisputed by the issuing governments and the interest on which they paid, were worth in the market, and for that amount the defendant must be held to bail.

Case No. 5,665.

GRAHAM v. DUDLEY.

[Brunner, Col. Cas. 228; [1] Cooke, 353.]

Circuit Court, W. D. Tennessee. 1813.

LAND—ENTRY—WHEN TAKES EFFECT — CALLS IN ENTRY, REPUGNANCE BETWEEN.

1. An entry takes effect from its date, and not from its place on the entry taker's book.

2. Of two calls in an entry repugnant to each other, and both equally notorious, the general call must give way and the locative call be adhered to.

In support of the title of the lessor of the plaintiff he produced a grant from the state of North Carolina to William Mebane, dated the 14th day of March, 1787, for seven thousand two hundred acres of land, and a deed from Mebane to him dated the 1st day of October, 1790. The defendant claimed under a grant from the state of North Carolina dated 31st day of December, 1793, and an entry made the 20th day of December, 1783, in the name of John Read, calling for "three thousand eight hundred and forty acres lying on Little Harpeth, beginning above Absalom Tatum's line, and up said river on both sides for complement." The entry is No. 160, and stands on the seventh page of the entry book. The plaintiff then produced an entry, alleging it to be the one upon which his grant issued, dated the 7th day of February, 1784, calling to lie "on Harpeth, adjoining Absalom Tatum's line above." This entry was for five thousand two hundred acres, and stands on the first page of the entry taker's book. It appeared in evidence that in the month of February, 1783, Absalom Tatum, Isaac Shelby, and Anthony Bledsoe, did, in pursuance of an appointment by the state of North Carolina, run the military line, and that for this service they were entitled to receive five thousand acres of land. That the commissioners kept a record of their proceedings in a book in which was entered the claims of the guards as well as their own, under a belief at that time that no other entry need be made; and that this book remained in this country, where a general knowledge existed that it contained such entries, for several years, when it was burned by the Indians. It also appeared that Tatum, when he run what is called the western line, the commissioners having divided into three parties, made known his intention to locate his five thousand acres at or near the ten-mile tree, where the line crosses West Harpeth. The claim was notorious at and before the 20th day of December, 1783, as any object in the country. At that time also West Harpeth was notorious, and so was Little Harpeth. Tatum had no other claim in the country. In the spring of 1783 the legislature of North Carolina made provision that the commissioners, guards, etc., should make their entries in the pre-emption office of Davidson county, in pursuance of which Tatum, on the 5th day of February, 1784, entered his five thousand acres, calling to begin "west of the ten-mile tree, and to run south and north and east for quantity, so as to include the creek," meaning West Harpeth. Evidence was introduced to prove that the entry thus made was a copy of the one previously made in the commissioner's books.

In the progress of the cause three questions arose:—First. Whether the entry took effect from the date, or from the time it was put upon the books. In the latter case the plaintiff had the oldest entry. Second. Whether the call for Little Harpeth could be rejected as surplusage. Third. Whether a call for Tatum's line before it had any legal existence was a good call.

Whiteside, Beck & Haywood, for plaintiff.
Dickinson & Cooke, for defendant.

BY THE COURT. By a law which passed in the spring of 1783 the holders of warrants were authorized, after the first day of the following October, to make their locations. At that time no book was required to be kept in which the entries were to be made; nor did any law pass making it necessary until some time in June, 1784. In the mean time a great many locations were made and deposited with the surveyor. When the law passed requiring a book to be kept, these locations were forwarded in the lump by the surveyor to the person whom he had appointed to keep the books. They were then entered in the entry book without any regard to their respective dates; so that he who made the first location, and deposited it first with the surveyor, may stand second on the entry book. We consider it a matter of fair legal inference that the date of the location is the time it was placed with the surveyor; and that it takes its effect from that time, and not from its place on the book of the entry taker. If, then, the entry of Read is good in other respects, the defendants must prevail. Read's entry calls for Little Harpeth and Tatum's line. It is impossible to comply with both these calls, as they are utterly repugnant to each other. Which then shall be rejected? We conceive that where there are two calls in an entry repugnant to each other, the one general and the other locative, and both equally notorious, that the general call ought to be rejected as surplus-

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

age, and the locative call adhered to, under a well-known principle that such a construction ought to be given to an entry, that, if possible, it may live rather than perish. We are, therefore, of opinion that the call for Little Harpeth may be rejected. The principal difficulty, however, is about the call for Tatum's line, even although the other call be rejected. At the time Read made his entry Tatum had no legal claim anywhere. A general knowledge that Tatum had a claim somewhere in the neighborhood would not be giving sufficient locality to it to authorize a man to call to adjoin it. If a particular spot becomes notorious as the claim of Tatum, so that it can be certainly identified, although in fact he has no claim there, then a call to adjoin it will be good, and special enough; but we do not conceive that a call to adjoin a claim, the lines of which cannot be identified, or a line which has no legal existence, notwithstanding these uncertainties may be removed before the making of the adversary entry, will be sufficient. If the jury should be of opinion that Tatum's claim as to locality and identity was notorious in the country before the 20th day of December, 1783, the time when Read made his entry, they will find for the defendant; otherwise they will find for the plaintiff.

Case No. 5,666.

GRAHAM et al. v. The ESCORIAZA.

[N. Y. Times, Nov. 16, 1852.]

District Court, S. D. New York. 1852.

MARITIME LIENS—SUPPLIES—HOME PORT.

[There is no lien for supplies procured from another state by a vessel lying in her home port.]

Before BETTS, District Judge.

In admiralty. Suit in rem to recover value of a suit of sails furnished the bark. Adjudged that a vessel owned in one state, and receiving supplies in her home port, from a different state, is not chargeable therefor in admiralty out of her domestic port. The credit is personal to her owner or master. Decree for claimants, and costs.

Mr. Hasket, for libellants.

F. R. Sherman, for claimants.

Case No. 5,667.

GRAHAM et al. v. The EXPORTER.

[21 Int. Rev. Rec. 110.]

District Court, S. D. Ohio. March, 1875.

WAGES OF SEAMEN—AGREEMENT IN WRITING.

The shipment of the libellants having been from a port in one state to a port in another than an adjoining state, and being without a contract or agreement in writing or in print, made and signed by them, such shipment was contrary to the acts of congress, and the seamen had a right to leave the service at any time, and recover for the time they actually served wages at the highest rate paid on the voyage or the price agreed upon.

[Cited in The Pacific, 23 Fed. 155.]

[In admiralty. This was a libel for seamen's wages brought by Henry Graham and others against the steamboat Exporter, her engines, etc.]

Richard Dyer, for libellants.

D. H. Humphrey, for respondents.

SWING, District Judge. The proof in this case shows that libellants were shipped at the port of New Orleans by the master of the steamboat Exporter, for a voyage ending at the port of Cincinnati, Ohio, and that they left the vessel at Cairo, Ill., before the ending of the voyage; and that before said voyage was proceeded upon no agreement in writing or in print was made by said master with said seamen. The seamen claim that they left the vessel by the consent of the master; this is denied by the respondents, and whilst there is a conflict in the evidence upon this point, the weight of the evidence indicates that they left the vessel without the consent of the master. There is also some question as to whether any detriment resulted to the vessel from their leaving, but in the view which I entertain of the case, this is not material. Upon these facts the libellants ask a decree for the wages due them up to the time they left the service of the boat, and the respondents deny the right to any compensation, because of their leaving the service of the boat before the completion of the voyage.

The determination of this question depends upon the construction of the statutes of 1790 and of 1840. By the first section of the act of 1790 (1 Stat. 131), it is provided that "every master of any ship or vessel of the burthen of fifty tons or upwards, bound from a port in one state to a port in any other than an adjoining state, shall, before he proceeds on such voyage, make an agreement in writing or in print with every seaman or mariner on board of such ship or vessel (except such as shall be apprentice or servant to himself or owners), declaring the voyage or voyages, term or terms of time for which such seaman or mariner shall be shipped. And if any master or commander of such ship or vessel shall carry out any seaman or mariner (except apprentices or servants as aforesaid), without such contract or agreement being first made and signed by the seamen and mariners, such master or commander shall pay to every such seaman or mariner the highest price or wages which shall have been given at the port or place where such seaman or mariner shall have been shipped for a similar voyage, within three months next before the time of such shipping, provided such seaman or mariner shall perform such voyage; or if not, then for such time as he shall continue to do duty on such ship or vessel; and shall more-

over forfeit twenty dollars for every such seaman or mariner—one-half to the use of the person prosecuting for the same and the other half to the use of the United States, and such seaman or mariner not having signed such contract shall not be bound by the regulations nor subject to the forfeitures and penalties contained in this act." The 10th section of the act of 1840 (5 Stat. 394) provides that "all shipments of seamen, made contrary to the provisions of this and other acts of congress, shall be void; and any seamen so shipped may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at his shipment." Construing these statutes together, there would seem to be no doubt but that the seamen in this case having been shipped without the signing of the written or printed agreement provided for by the statute, had the right to leave the ship and recover for the time of their service the highest rate of wages paid any seamen on the voyage or the sum agreed upon. But it is claimed that these seamen being unarticled were not within the provisions of the statute, but that their rights must be determined by the general maritime law, and by it desertion forfeited the accrued wages, or at least having made a contract for a certain voyage no recovery could be had unless the contract had been fulfilled by the completion of the voyage.

Several authorities have been brought to the attention of the court upon this point. The case of Jameson v. The Regulus [Case No. 7,198]; the case of The Rovena [Id. 12,090]; the case of The Crusader [Id. 3,456]; and that of Cloutman v. Tunnison [Id. 2,907], would seem to sustain the doctrine contended for. But it must be borne in mind that each one of these cases was before the passage of the act of 1840. They were under the act of 1790, which contained no provision making void the shipments of seamen without the agreement in writing or print, and authorizing the seamen to leave the service and permitting them to recover. We have however been referred to cases which have been decided since the passage of the act of 1840, which it is contended sustains the same doctrine. In the case of Gifford v. Kolloch [Id. 5,409], and that of Coffin v. Shaw [Id. 2,952], it appears that the seamen were regularly shipped by their fathers, and in one case at least the agreement was signed also by the son. In the case of The Philadelphia [Id. 11,084], the question is not made as to whether the agreement was in accordance with the terms of the statute; but it is very evident that it must have been so, for the whole decision proceeds upon the idea of a statutory forfeiture, and there could have been no such thing without a compliance with its terms by the master of the vessel. In the case of The Hudson [Id. 6,831], it does not appear whether the shipment was for any particular voyage nor whether it was from a port in one state to a port in a state not adjoining. It only appears that it was for general employment upon a vessel which may have been engaged in trade upon waters within the boundaries of a single state or adjoining state; and so with the case of Coffin v. Jenkins [Id. 2,948], the facts of which do not bring the case within the present case, and cannot therefore be relied upon as establishing the doctrine contended for. On the other hand, the right of a seaman to leave the ship or vessel, when no agreement in writing or in print has been made and signed, is clearly recognized by Justice Curtis in Snow v. Wope [Id. 13,149]; in Page v. Sheffield [Id. 10,667]; by Judge Ware in The Ianthe [Id. 6,992]; and by Judge Miller in The Fremont [Id. 2,746]. The shipment of these seamen having been from a port in one state to a port in another than an adjoining state, and being without a contract or agreement in writing or in print, made and signed by the seamen, such shipment was contrary to the acts of congress, and the seamen had a right to leave the service at any time, and recover for the time they actually served wages at the highest rate paid on the voyage or the price agreed upon.

Case No. 5,668.

GRAHAM v. GAMMON et al.

[7 Biss. 490; 3 Ban. & A. 7; 9 Chi. Leg. News, 370; 4 Law & Eq. Rep. 261.] [1]

Circuit Court, N. D. Illinois. July 10, 1877.

PRIOR PATENT—SUGGESTION—MOWERS.

1. It is a well-settled principle of patent law, that the mere suggestion that a given result may be obtained, is not patentable, and does not anticipate a patent by another, but a mechanism or device must be described by which the suggested result is obtained.

2. Where a patent is for mechanism by which a particular result is produced, a prior patent, in order to anticipate it, must contain more than a mere statement that the result may be accomplished. It must contain a description of the mechanism by which it is accomplished.

[Cited in Graham v. Geneva Lake Crawford Manuf'g Co., 11 Fed. 139; Graham v. Plano Manuf'g Co., 33 Fed. 917.]

3. The invention claimed in the first and second claims of letters patent No. 74,342, granted to Alvaro B. Graham, February 11th, 1868, for a device for rocking or rolling sickle bar or finger beam of a harvester, is novel, and is not anticipated by the patents granted to Dolph, Zug, Ball, Bartlett and Dodge, or Wemple.

4. The vibratable link in the Sprague mower is an infringement on the Graham patent, as it is an equivalent mode of producing the same result.

[1] [Reported by Josiah H. Bissell, Esq., and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here compiled and reprinted by permission. The syllabus is from 3 Ban. & A. 7, and the statement and opinion are from 7 Biss. 490. 4 Law & Eq. Rep. 261, contains only a partial report.]

This is a bill in equity to restrain the alleged violations of a patent [No. 74,342] issued by the United States government to Alvaro B. Graham, dated February 11th, 1868, for an improvement in harvesters. The title of the complainant [Hugh Graham] to the patent is not disputed, and the proof shows that complainant is the assignee of the patentee; but the defendants [Elijah J. Gammon and others] deny, first, the novelty of Graham's device; and secondly, that they infringed the patent.

Ephraim Banning and Haines & Tripp, for complainant.

West & Bond, for defendants.

BLODGETT, District Judge. This patent contains eleven distinct claims, but the controversy in this case is confined to the first two claims.

The feature of the machine covered by the two claims in controversy, is the device for rocking or rolling the sickle bar—or "finger beam," as it is called by the patentee. This finger beam is so arranged that it may be rocked or tipped upward or downward so as to incline the teeth or fingers up or down, so that it may be passed over a stone or down into a hollow.

This is accomplished by joining the sickle bar, or "finger beam," as it is called, to what the patentee calls a "vibratable link," which is a link extending from the finger bar backward to a bracket which is fastened to the frame of the machine, so that the finger beam may be raised or lowered, and through its connection with this vibratable link it can be regulated, or tilted either up or down, the tilting being accomplished by means of the vertical arm which extends up from the vibratable link, and a lever attached to the top of the arm, reaching forward to a point convenient to the seat of the driver, so that the driver readily works or controls the rocking movement as occasion requires. The mechanism by which the rocking is produced consists of a swivel joint "M," at the point where the vibratable link is attached to the bracket, and the swivel joint "N" which connects the vibratable link with the draught rod, so that the cutting mechanism is drawn or impelled forward by this draught rod, connected as it is by the swivel to the link, thereby permitting the motions that are required for the purpose of the action of the finger bar without interfering with the rocking or rolling motion. There are also other devices in the machine intended to raise or lower the sickle bar, but those are not in controversy. The machine which is shown in the drawings by the patentee in this case is known to farmers and manufacturers as a "rear cut machine," but the patentee provides in his specifications, or suggests that the device is equally applicable to a forward cut, where the cutting apparatus is forward of the axle and wheel, and to accomplish this change he suggests that the draught rod would become a push rod, and would become subject to a pushing strain or force instead of a tensile or drawing strain.

The claims under consideration and in controversy in this case are as follows: "The combination as set forth in a harvester of the finger beam with the gearing carriage, by means of the vibratable link, and the draught rod and swivel joints, M and N, so that the finger beam may both rise and fall at either end, and rock forward or backward." Second: "I also claim the combination as set forth in a harvester of the finger beam, gearing carriage, vibratable link, draught rod, swivel joint and arm, by which the rocking of the finger beam is controlled." The last claim is, in one sense, a repetition of the other, that is, he claims the whole of this mechanism in combination.

The defendants insist that the idea of rocking the finger beam is old; and have put in evidence several prior patents issued by the United States to different patentees older than the patent in question, the most important of which are the Dolph patent, issued in 1857, the Zug patent, issued in 1859, the Ball patent, issued in 1859, the Bartlett and Dodge, issued in 1862, and the Wemple patent of 1867. The defendants insist that these various patents contain the principle or idea involved in the complainant's patent, so far as the rolling or rocking of the finger bar is concerned. It is contended, for instance, that in the model of the Zug patent, which is put in evidence, there is a provision for the rocking or rolling of the finger bar; but I must say that I can find no such feature either in the specification or model. It is true that he suggests that it may be tilted, but I think when you take his description of the construction, the only tipping he refers to is the lifting of the finger bar by means of a lever, and not the tilting or rocking motion provided for by Graham. There is a link extending back and fastened to the frame, but there is no swivel joint, and no provision for rocking or rolling the finger bar by means of a swivel joint. And even if he had a swivel joint at the point where the link is attached to the frame, the long shoe proceeding forward from the vibratable link or the connecting link, would effectually prevent or interfere with the rocking motion which the patentee, Graham, has accomplished; so that I do not find the mechanism in this patent.

The same may be said of the Ball patent. Ball has the finger beam attached firmly to the shoe. It is also steadied by a rod which reaches back to a bracket attached to the gearing carriage, and there is apparently a swivel or loose joint by which it is attached; but there is no joint forward, and no means by which the mechanism—the finger bar, as such, can be rolled or tipped in the manner provided by the Graham patent.

So, too, in the Bartlett and Dodge mechanism. We find this same long shoe extending

forward with no device for rocking or rolling; and the same may be said of the Zug patent. There is no possible device in the patent for the rocking, and no device or means by which the finger beam can be rolled or tilted in the manner provided in the Graham patent.

In the Dolph patent it is equally difficult to find any mechanism which was intended to secure the peculiar motions which I find in the patent to Graham. And it may be said, in reference to all these prior patents, that while they speak of rocking, or tilting, or tipping the finger beam, they, none of them, describe any mechanism by which it can be accomplished. It is a well settled principle of patent law, that the mere suggestion that a given result can be obtained is not patentable, and does not anticipate a patent by another, but a mechanism or device must be described by which the suggested result is attained.

The mere saying, for instance, as was done a century, or two or three centuries ago, that vessels could be propelled by steam, did not deprive Fitch or Fulton of their right to a patent on the mechanisms by which they accomplished that result. The mere idea that intelligence could be communicated by electricity, did not deprive Morse of his patent upon his mechanism. So the suggestion by these various inventors who antedated Mr. Graham in various improvements upon the harvester, that the finger beam may be tipped or may be rocked, does not deprive Graham of his right to a patent upon his mechanism by which he did so, as long as they did not show a mechanism by which they accomplished the same result.

The other patent put in evidence, and the one which to my mind comes the nearest to anticipating this plaintiff, is the patent to A. Wemple, of 1867. Mr. Wemple shows in his specifications and drawings a device by which he does produce a tilting motion of the finger beam; but his device is so different—his mechanism by which he accomplishes the result so unlike that of Graham, that I think the two patents may possibly both stand. At any rate I do not think that the device of Wemple anticipates the much more simple device of Graham. It is not necessary for me to go into an extended discussion or analysis of the peculiar mechanism by which Mr. Wemple proposed to secure this rolling or tilting motion in the finger beam. It is enough to say that I find it sufficiently different from that of Graham, to justify my conclusion that he has not so far anticipated Graham in the art as to defeat the Graham patent.

With these views, therefore, I must hold that the defense that the complainant's patent is void for want of novelty, is not sustained. On the contrary, I think that the evidence shows Mr. Graham to be the first who has really accomplished this desirable tilting or tipping motion successfully, by the simple mechanism which he shows in his drawings and patent. The only other question left in the case then, is the question whether the machine of the defendant's infringes complainant's patent. The model of defendant's machine which is put in evidence—known as the "Sprague Mower," shows a vibratable link to which the finger bar is connected by precisely the same mechanism—that is, a swivel joint—that connects the finger bar of Graham's machine to the vibratable link. The vibratable link in the Sprague mower is not constructed precisely, so far as the shape is concerned, like the vibratable link of Graham, but it reaches back—is fastened firmly to the gearing carriage, or to a bracket which is connected with the gearing carriage by a swivel joint, and is worked by a lever—not a vertical lever, but a lever which secures the motion of tilting up and down, in the same manner as the Graham patent. It does not roll or tip so much as Graham's finger bar, but it is the same motion, although less in degree, and I am very clearly of the opinion that the device is essentially the same. It has been urged, and was very earnestly contended at the trial, that this device lacks the swivel joint M, and that it therefore does not contain all the elements of Graham's device.

Here we have a draught rod connected by a hook joint to a vibratable link, and extending forward and fastened to the frame. But it is contended that the swivel joint is not there. I must say that I think the patentee, or whoever prepared the specifications in the Graham patent is a little unfortunate in the choice of terms by which he describes his mechanism. In one sense there is no swivel joint here in the defendant's machine. That is, it is not technically a swivel joint, and especially the draught rod is not connected to the vibratable link by what is strictly called a swivel joint. It is a mere hook, but it performs all the functions of Graham's draught rod and swivel joint, and must be considered the equivalent of Graham's device in that particular. It is nothing after all but an equivalent mode of producing the same result.

There is a draught rod hooked to the vibratable link, and extending forward and passing through the gearing carriage so as to secure a steady uniform draught of the cutting apparatus in a forward direction. It is equally true that the lever by which the vibratable or tilting motion is secured, is not a vertical lever, but that makes no difference, whether the lever lies down horizontally or stands up. It performs the function or office of vibrating and tipping this finger bar. The result is precisely the same in both cases.

I am therefore of the opinion that an infringement is shown by the proof and that the patent is not void for want of novelty so far as the evidence in this case enables me to judge. The case will therefore be sent to

the master to assess the damages, unless the parties stipulate that no damages need be assessed.

[I perhaps ought to say in addition to what I have already said in regard to the Wemple patent, that I do not think the Graham a very broad patent. I do not think it is as broad as it would be if the idea had not already been worked out of tilting or tipping the finger beam by other inventors prior to this one. I think however that his patent is to be sustained for this specific device. I do not concur in the idea that it will cover all equivalents.] [2]

Case No. 5,669.

GRAHAM et al. v. HOSKINS.

[Olc. 224.] [1]

District Court, S. D. New York. Nov., 1845.

CHARACTER OF TESTIMONY—FOREIGN COURTS—WAGES OF SEAMEN.

1. The testimony of the libellants themselves in an action in rem, the one for the other, although legally admissible, ought to be narrowly scrutinized and received with caution.

2. Courts of a foreign power will take cognizance of the claims of seamen for their wages, only in cases of flagrant wrong or suffering on their part, but not upon an alleged breach of contract, much less to decide upon a quantum meruit. They should seek redress from their own consul.

[Cited in The Hermine, Case No. 6,409.]

3. Services rendered on board a ship while at the dock in Liverpool, do not give to the demand for wages a maritime character, of which an admiralty court can take cognizance.

This is an action in personam against the master of the steamship Great Britain, a British vessel, to recover wages for services by the libellants on board that ship from New York to Liverpool and back to New York. The libel alleges that the libellants are mariners and firemen by trade and profession, and that they shipped, on the 30th of August last, on board the Great Britain, as firemen, to perform the voyage aforesaid, at the rate of £4 sterling each per month; that they continued with the vessel, performing services until her return to this port, when they were both discharged, leaving due to Graham $20 and upwards, and to Currie $14 and upwards, which the master refuses to pay. The answer denies the agreement set up by the libellants, and avers that Currie alone hired on board the ship from the port of New York to Liverpool, and at the rate of £4 per month wages, and that Graham was received on board, with the privilege to work his passage out to Liverpool without pay. It further denies that the libellants did duty on board as they allege; and charges that Currie having received an injury in Liverpool upon his discharge from the ship, was admitted on board at his urgent request, to be brought back to this port; and that he was unable to do duty during the return voyage; that after Graham had been discharged at Liverpool, he earnestly solicited to be permitted to come on board and work his passage back to New York, and was so received; but that on the voyage back he refused to do such reasonable duty as was required of him, and denies that any wages are due to either libellant. The answer admits the charge in the libel that no written or printed agreement was signed by the libellants, but avers that the ship is a British vessel, and denies the jurisdiction of this court over the subject matter.

A. Nash, for libellants.

G. B. Butler, for respondent.

BETTS, District Judge. The two points of law presented by the pleadings, and one of which was the position most strongly urged on the hearing, I shall pass over as not necessary to be decided in this case. For, first, if the libellants could establish their position, that foreign vessels come within the act of congress of July 20, 1790 [1 Stat. 131], requiring the masters of vessels on foreign voyages to enter into written or printed articles with their seamen, or else to pay them the highest wages allowed at the port of shipment within the preceding three months; or if the jurisdiction of the court is unquestionable, neither point decided in the affirmative would aid the libellants, because they fail to prove any ground of claim to wages in the case.

The only testimony offered by the libellants in support of their claims is that of each libellant swearing for his co-libellant. This species of evidence, though legally admissible in actions in rem by seamen for wages, is always admitted with great caution, and necessarily with very considerable distrust. The temptation to indulge in strong statements in their own favor is exceedingly pressing, and the inducement operating upon the mind of each witness from his personal interest in the subject matter of the suit, is enough to put to the severest test the veracity of suitors. For the persuasion is constantly before their minds, that the testimony they are giving will, to a greater or less degree, influence the judgment which is to be pronounced upon their own case. It is by no means clear, that when seamen unite in actions in personam, they are not subject to the common law rules, applicable to joint parties, or if they are permitted to sue for and recover on distinct and independent claims, that they should then be competent witnesses, each for the other, in such actions. Waiving this matter, however, as an objection not raised on the part of the respondent, and receiving the evidence of the parties as legally admissible, it does not establish any contract of hiring made with them by the respondent, or any agent of the vessel. They did not

[2] [From 9 Chi. Leg. News, 370.]

[1] [Reported by Edward R. Olcott, Esq.]

ship the same day, and were not together when the bargain was made upon the subject. Currie testifies that Graham was on board and did duty as a fireman, and was to have £4 per month, but he does not state any person with whom the agreement was made. Graham states that he saw Currie's name on the chief engineer's book for £4 per month, but does not know what he agreed to take; heard the chief engineer say that they were to have £4 per month. This testimony is clearly insufficient to make out the case set up by the libellants. It does not appear but that these men are British seamen, and residents of Great Britain, nor that they were discharged at the instance of the respondent, without being permitted to return with the vessel to her home port. If they were so discharged, their proper course would be to seek redress from their own consul. Courts of a foreign power would take cognizance of their claim to wages only in case of flagrant wrong or suffering on their part, but not upon the ground of a breach of contract, much less to decide upon a quantum meruit for services rendered in a British vessel.

The case upon the libellants' own showing would not, therefore, justify a decree in their favor, while the evidence of the respondent clearly shows that there is no color of equity in their demand. Clements, the chief engineer, says, that Currie applied to him to be shipped as a fireman to Liverpool, where he was to be discharged, and he was so hired and paid in full, and discharged on the arrival there of the ship. Graham solicited a passage out to Liverpool, with the privilege of working his passage. He was received on that request, but a fireman becoming disabled on the passage, the engineer put Graham in his place, and allowed him his wages subsequently. He was paid off in full, and discharged upon the arrival of the vessel at Liverpool. Afterwards both men were employed on board by the chief engineer, who hired them as day laborers, in port, to work in the engine-room. Currie received an injury by a fall on the morning the ship was to sail from Liverpool, and after that solicited, as an act of charity, to be brought back to New York in the ship, and the respondent consented thereto, and he was so brought back, and attended by the surgeon of the ship, free of expense, not being able to do any duty. Graham, the day previous to the ship's leaving England, also applied for leave to work his passage back to the United States, to which the respondent consented, and he was received on board upon those terms. This evidence being uncontradicted in any particular, is conclusive upon the merits of the cause. It takes away all ground of an implied assumpsit to pay these men at the same rate as on the outward voyage, and clearly establishes an agreement to bring them back without wages, the one being a disabled seaman, and the other willing to give his services in compensation for his passage. If there remains any thing due to them for their labor on board the ship at the dock in Liverpool, it is not in respect to them, a demand of a maritime character, of which this court can take cognizance, so that under any aspect of the case, upon the evidence before me, the libellants have totally failed to make out such a case as would entitle them to a decree in their favor. Their libel must be accordingly dismissed, with costs.

Case No. 5,670.

GRAHAM v. KONKAPOT.

[1 Cranch, C. C. 313.] [1]

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

AFFIDAVIT TO HOLD TO BAIL—FORM.

An affidavit in the form of that required by the act of Maryland of 1729 is sufficient to hold the defendant to bail.

[Cited in Smith v. Watson, Case No. 13,124.]

Mr. Jones, for defendant, moved to reconsider the order for ruling him to bail. The words of the affidavit are the same as those required by the act of 1729, and therefore within the rule of the court. THE COURT were also moved to reconsider the case of Smith v. Watson [Case No. 13,124], which they did, and unanimously affirmed the former decision.

Case No. 5,671.

GRAHAM et al. v. MASON.

[4 Cliff. 88; 5 Fish. Pat. Cas. 1.] [2]

Circuit Court, D. Massachusetts. May Term, 1869.

LETTERS PATENT—INFRINGEMENT—ISSUE—PLEADINGS—DEFENSE.

1. In a suit for infringement of letters patent, the issue tendered by the responding party must be clear and unconditional.

2. The pleading at law or in equity in such cases must be clear, single, and free from evasion.

3. More than one defence may be presented in an answer in equity, but each should be separately and clearly alleged without condition or qualification.

[Cited in Woodbury Patent Planing Mach. Co. v. Keith, Case No. 17,970; Stow v. Chicago, 104 U. S. 550.]

4. The burden is on the complainants, in a suit for infringement of letters patent, to show the infringement.

5. Persons charged as infringers may set up the defence that the patentee was not the original and first inventor of the alleged im-

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

[2] [Reported by William Henry Clifford, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 4 Cliff. 88, and the statement is from 5 Fish. Pat. Cas. 1.]

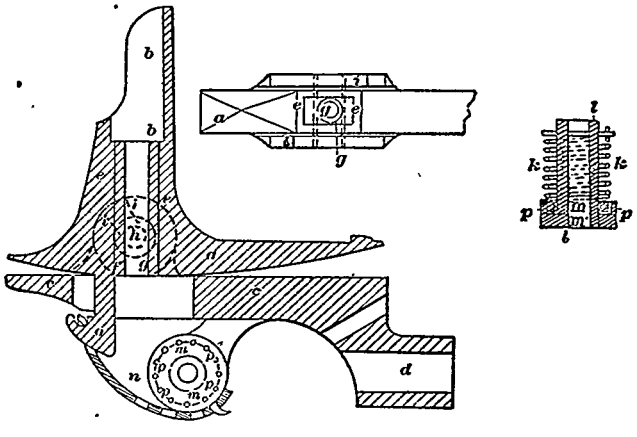
provement; but, if the suit is in equity, they must allege in the answer the names and places of residence of those whom they intend to prove have possessed the prior knowledge of the thing, and where the same has been used.

6. Such notice is required for the benefit of the complainant to prevent surprise; but an answer does not meet that requirement if it furnishes to the complainant no means of knowing the respondent's theory of the construction of the patent.

Final hearing upon pleadings and proofs. Suit brought [against William Mason] upon letters patent [No. 30,441] for an "improvement in picker-staff motion for looms," granted Edmund H. Graham, October 16, 1860, and reissued October 2, 1866 [No. 2,367]. An undivided half having been assigned to Wanton Rouse, the letters patent were again reissued to complainants May 28, 1867 [No. 2,626]. The object of the improvement was to produce an accurate and sure motion for picker-staffs, by a combination of devices which, while giving great accuracy of motion, so guides and holds the picker-staff as to cause it to operate with the least possible friction and lateral disarrangement or wabbling.

In the accompanying drawing, the left hand figure represents a vertical central longitudinal section through so much of a picker-staff and its appurtenances, embracing said improvements, as is necessary to illustrate the invention.

i i, formed in the bed-piece c c. By this arrangement the rocker (in its reciprocating movement) is kept perfectly true in its bearings by the arm or bar g g, which holds the rocker a a truly in position, in consequence of its long bearing therein; and as the arm or bar g g also oscillates freely upon its journals, h h, which further serve to steady the rocker laterally, the rocker moves with the least possible friction, and with the greatest accuracy, so that the wear and tear is necessarily but very slight. The eyes or bearings i have inclined slots (shown in dotted lines in Fig. 1) cut in them, so as to form ears or open boxes, in which the journals h h are inserted when the parts of the picker-motion are put together. By this means the shaft or arm g, and its journals h, can readily be removed and replaced, and are free to play without liability to work out of their bearings. The rocker a a is retracted by means of a spiral spring, k k, wound loosely around a short shaft, l, and attached at one end to a plate, m, which turns freely on the shaft, l. A strap, n, attached to the plate m, fits over a hook, o, on the under side of the rocker a a. As the spring k k is liable to partially lose its force by the motions of the rocker a a, this contingency is provided for by forming in the plate m a series of holes, p p, into which successively one end of the spring k k is set, as fast as it loses its elastic force, whereby the spring can be set



The right hand figure represents a central longitudinal horizontal section through the retracting spring of the picker-staff and its cylinder. The middle figure is a plan or top-view of Fig. 1. In these figures, a a represent a curved rocker, in the socket b b, of which the picker-staff is to be fastened. The rocker a a plays upon a horizontal bed c c, having a socket, d, through which the shaft of the loom passes in the usual way. The shank e e of the rocker a a is made hollow, or with a suitable box or bearing, f f, into which a shaft-arm or bar, g g, is inserted, which arm, by means of journals projecting each side thereof, has a bearing in the eyes

up at pleasure, and its force graduated, without the necessity of frequent repairing or renewals.

The claims of the original and reissued patents were as follows: Original patent: "The arrangement of the rocker a a, and guiding shaft or bar g g, traveling in suitable journals or bearings, h h, and operating together, substantially as described." Reissue of 1866: "Steadying the rocker of the picker-staff on its bed, by journals, at a right angle to the picker-staff, which journals form its center of motion substantially as described. Also, the journal boxes, with open ears, in combination with the journals that steady the

rocker on the bed." Reissue of 1867: "1. The combination of a rocker of a picker-staff with its bed, by loose journals, projecting each side of the picker-staff, and arranged beneath the picker-staff, substantially as described. 2. In combination with the rocker, the bed, and the journals, the open boxes, substantially as and for the purpose described. 3. In combination with the rocker and its bed, the journal-bearing arm, operating substantialy as and for the purpose specified."

J. E. Maynadier, for complainants.
Benjamin Dean, for defendant.

CLIFFORD, Circuit Justice. Letters patent were granted to the first-named complainant, October 16, 1860, for a new and useful improvement in pickerstaff motion for looms, and the proofs show that the patentee, on February 26, 1861, assigned, set over, and conveyed one undivided half part of his right, title, and interest in the invention to the other complainant. Possessed of the entire interest in the invention, and holding the same jointly, the complainants, on October 2, 1866, surrendered the original letters patent, because the specification was defective, and new letters patent were issued to them, as they allege, for the same invention. Defects still existing in the description of the invention, the complainants, on May 28, 1867, surrendered the letters patent for a second time, and new letters patent were again issued to them for the same invention, but upon an amended specification. Based on these allegations as to the validity of the patent, the charge of the bill of complaint is that the respondent, since the date of the last reissued letters patent, has manufactured, used, and sold, and still continues to manufacture, use, and sell, their patented improvement, as described in the claims of their amended specification. Respondent admits that the original letters patent were granted as alleged, and that they were twice surrendered and reissued, but he denies that they were surrendered on either occasion for the reasons assigned by the complainants. On the contrary, he charges the fact to be that both reissues were obtained with a view to claim what was never invented by the original patentee, and what he never intended to include in the original letters patent.

The answer contained the further allegation: "That if the claims of invention in the specification of the said last reissued letters-patent, bearing date the 28th day of May, 1867, in the bill of complaint recited, shall be so construed as to cover any device or combination found in any of the shuttle motions heretofore made, used, or sold by this respondent, such device or combination so claimed, and each and every of them, were known and used before the alleged invention thereof by the said Edmund H. Graham, and that the following persons had knowledge of the prior use thereof at the places named, viz." Then followed the names and places of residence of several persons alleged to have possessed the prior knowledge.

Express allegation of the bill of complaint is that the original patentee was the original and first inventor of the improvement in question; and strong doubts are entertained whether the answer is of a character to allow the respondent to introduce proofs to controvert that allegation.

Statement of the answer is to the effect that if the claims of the reissued letters patent shall be so construed as to cover any device or combination found in the shuttle motions made, used, or sold by the respondent, they, and each of them, were known and used before the alleged invention of the complainants. Persons sued as infringers are allowed to put in issue the novelty of the alleged invention; but the issue tendered, whether in a suit in equity or an action at law, ought to be clearly expressed and unconditional, as the letters patent, when introduced in evidence, are presumed to be valid till the contrary is shown, and if their validity is not denied in the answer or notices of special matter, the complainant or plaintiff, as the case may be, if he proves infringement, is entitled to recover. Conditional denials in such cases are not regular, but if the respondent intends to contest the novelty of the invention, his denial in that behalf should be explicit and unqualified.

Pleadings in equity, as well as in actions at law, should be single, clear, and free of evasion. More than one defense may be presented in the answer, but each should be separately and clearly alleged, without any conditions or undefined qualifications. Before it can be ascertained whether the claims of the patent in any given case cover what was made, used, and sold by the respondent, it always becomes necessary to construe the letters patent, and to ascertain what the respondent did make, use, and sell, within the period laid in the bill of complaint.

Persons charged as infringers may set up the defense that the patentee was not the original and first inventor of the alleged improvement, but in that event they must allege in the answer, if the suit is in equity, the names and places of residence of those whom they intend to prove to have possessed a prior knowledge of the thing, and where the same had been used. 5 Stat. 123; Teese v. Huntington, 23 How. [64 U. S.] 10. Such notice is required for the benefit of the complainant, to prevent surprise; but if the answer may properly be framed, as in this case, it will not serve any useful purpose, as the complainant is furnished with no means of knowing what the theory of the respondent is, as to the construction of the patent. Objections, however, on account of such defects in the answer, ought, in general, to be taken by exceptions, as they are the proper subjects of amendment, under special orders; and, in

view of that circumstance, the court has concluded, in this case, to examine the defense upon the merits.

Granted, as letters patent are, by authority of law, they afford to the party holding the legal title a prima-facie presumption that the patentee was the original and first inventor of what is therein described as his improvement. Picker-staffs for looms must vibrate rapidly, in order to drive the shuttles with the requisite frequency; and to avoid, as far as possible, the derangement of the machinery, and the consequent necessity for frequent repairs, it is essential that the vibrations of the picker-staff forward and back should be in a defined plane, without wabbling or lateral oscillation.

Statement of the patentees is that the means employed for that purpose, prior to the invention described in their letters patent, were very defective in the latter particular, and that the object of their improvement is to produce an accurate and sure motion of the picker-staff, by a combination of devices which will so hold and guide the same as to cause it to operate with entire accuracy, and without lateral oscillation, and with the least possible friction. Some reference to the elements of the patented invention must be made, in order that the characteristics of the improvement may be understood. Among other things, the device has a horizontal bed, constructed with a socket, through which the shaft of the loom passes in the usual way. Besides the horizontal bed, it also has a curved rocker and a picker-staff of the description set forth in the specification. The curved rocker also has a socket, and the representation is that the picker-staff is fastened in that socket, but the rocker plays on the bed, and is kept in place in part by the socket in the bed, and in part by the groove formed by the elevations in the sides of the bed opposite the socket. Connected with the rocker, and constituting a part of it, is a shank, which is made to secure the shaft-arm, which is inserted therein, and rests by means of journals projecting on each side of the same in bearings formed in the elevations of the bed as constructed on each side of the socket. By this arrangement, the rocker is kept in its bearings by the shaft-arm, and moves without much friction and with great accuracy. Inclined slots are cut in the bearings, so that the shaft and its journals can be easily removed and replaced, and are free to play without liability to work out of their true position.

Description is also given of the means employed to retract the rocker, but it is not necessary in this investigation to enter into those details. Based on the description of the invention, as more fully given in the specification, the patentees make three claims, in substance and effect as follows: 1. The combination of the rocker of a picker-staff and its bed by loose journals, projecting on each side of the picker-staff, and arranged beneath the picker-staff, substantially as described. 2. In combination with the rocker, the bed, and the journals, the open boxes, substantially as described. 3. In combination with the rocker and its bed, the journal-bearing arm operating substantially as and for the purpose specified.

Evidently, the first claim is merely for a combination, and the court is of the opinion that the other two must be construed in the same way. Suggestion is made by the complainants that the journal-bearing arm is new, but it is not described as such in that part of the specification to which reference was made, and the concluding portion of specification supports the conclusion that the patentees never intended to set up any such pretensions.

They state that the first part of the invention relates to the position of the journals, and that it consists in placing the journals near the socket of the picker-staff, and as near the level of the bed as practicable, because the journals, when placed in that position, will perform their functions to the best possible advantage, and they add that no rocker, so far as they know, was ever before combined with its bed by means of such journals. In describing the second part of the invention, they say it consists in forming the bearings for the journals with such an opening that the journals may be laid in them without liability to work out in the operation of the rocker. Nothing is said about having invented any one or more of the elements of the combination, and it is not perceived that there is anything in the testimony to justify any such theory. Four patents were introduced by the respondent, as showing that the first named complainant was not the original and first inventor of the improvement described in the patent on which this suit is founded, and they will be separately considered in the order in which they were presented at the argument.

Reference is first made by the respondent to the patent of Benjamin Lapham, as supporting the defense that the improvement in question was known and used prior to the alleged invention of the complainant, but it is evident that the two are substantially different in the most essential features of the improvement. Lapham's invention has a bed and a rocker, and they are combined by means of a journal projecting from each, but the respective journals project only from one side, instead of projecting from both sides, as in the complainants' device. Besides, the journals in the former are much shorter than in the latter, and the arm is farther from a horizontal plane. These differences are palpable and substantial, and show that the defense of want of novelty in the complainants' patent is not sustained by anything contained in the Lapham patent. Strong doubts are entertained whether the Lapham invention is operative for any practical purpose; but it

is unnecessary to express any decided opinion upon that point, as it is clear that the two inventions are substantially different in their characteristic features. Next patent introduced by the respondent is that of Daniel Barnum, which was for an improvement in power looms. Like the patent first examined, it had a bed and a rocker, but it has neither journals nor boxes, nor a journal-bearing nor box-bearing arm. Instead of journals, it has a pin projecting from each side of the picker-staff; but it does not turn, and can not, in any legal sense, be regarded as a substitute for the loose journals in the complainants' invention. Stearns' patent, which is the next one to be considered, is substantially the same as that of Barnum, except that he has provided a friction roller to prevent the wear of the pin; but the rocker may move without moving the roller. The pin can not properly be considered a journal, while the friction of the rocker upon the roller is greater than the friction of the roller upon the pin. The latter, to a certain extent, may perform the office of a journal, but the proofs tend to show that the reverse is true after a short use of the mechanism. Properly considered, it has no journals, open boxes, nor a journal-bearing arm, and consequently lacks one of the elements of each of the respective combinations in the patent on which the suit is founded. Extended remark in respect to the patent of Rensselaer Reynolds is unnecessary, as he connected the rocker and the bed by means of a strap, one end of which was attached to the under face of the rocker, and the other in the groove of the bed-piece, in which the rocker plays when the mechanism is in motion. Reynolds' patent also contains a suggestion supposed to embrace the complainants' invention, but it is too ambiguous to be reliable, and if it were less so, it would be insufficient to support the issue presented by the respondent, as there is no proof that any such device was ever made before the original letters patent were granted in this case.

Argument for the respondent also is that the reissued letters patent are not for the same invention as that described in the specification of the original letters patent. Fraud in procuring the reissues is not alleged, and the rule is that, in the absence of fraud, such a defense is not open to one charged as an infringer, except in cases where it appears, by a comparison of the two patents, as matter of law, that the reissued and original patents are not for the same invention. Nothing of the kind appears in this case, and therefore that defense must be overruled.

Complainants allege infringement, and the burden of proof is upon them to sustain the allegation. Witnesses were examined as experts by both parties, but their opinions are opposed in respect to every issue involved in the pleadings. Respondent admits that he has made and sold picker-staff motions for looms, and that he has made and sold looms containing picker-staff motions within the period laid in the bill of complaint, but he denies that he has made or sold any such, within that period, in imitation or infringement of what is described and claimed in the complainants' reissued letters patent.

Practically, the only question in the case as to infringement is, whether the model exhibited in the proofs as representing the picker-staff motions made and sold by the respondent, is substantially the same, or substantially different, from the mechanism described and claimed by the complainants as their reissued patent, as the respondent concedes that he has made and sold picker-staff motions, so called, corresponding with that exhibit.

Doubtless the main purpose of the mechanism described in the reissued patent was to compel that part of the picker-staff which strikes the shuttle to move in the required plane without wabbling or lateral oscillation; and it is obvious that the device made and sold by the respondent was constructed to accomplish the same purpose in substantially the same way. Attempt is made to show that the means employed are substantially different, but that the court is not able to concur in that proposition. On the contrary, we find that the mechanism of the respondent's device is substantially the same as that described in the specification of the reissued patent, and we are unable to see that the mode of operation is different in any material respect. Some of the elements of the device are different in form, but they are not new, and it is clear that they perform the same functions as the corresponding parts do in the complainants' device.

Both devices have a curved rocker, in which the picker-staff is fastened, and both have a horizontal bed, having a socket through which the shaft of the loom passes in the usual way. In both, the shank of the rocker is made hollow to receive the shaft-arm, and the rocker plays upon the horizontal bed, and the rocker is combined with bed by loose journals, different in form, but performing the same function, in substantially the same way. Arranged, as they are, beneath the picker-staff and each side of the shank, into which the picker-staff is inserted, they prevent the staff from wabbling in the same way, and as effectually as the journals described in the complainants' patent. But the respondent denies that the device made and sold by him contained loose journals, or that he employs such means to combine the curved rocker and the horizontal bed. He admits that he employs the rocker and a bed, and that they are connected or combined; but he insists that he does not employ loose journals to accomplish that purpose.

Supported, as that theory is, by the testimony of the learned and experienced witness, it has received the attentive consideration of the court, but, in our opinion, it can not be sustained, as it is clear that the com-

bination is the same as that described in the complainants' specification; and the particular device in question, although different in form, yet performs the same function as the device employed in the complainants' invention. Infringement depends not so much upon the form of the particular device in question, or upon the name given to it in the specification by the construction, as upon the functions it performs, and it is well-settled law that if one device is employed in a similar combination as another, and performs the same function in the same way, the two are substantially the same, although they may be different in form, and may be known among mechanics by different names.

Much of the difference of opinion between the expert witnesses may be explained by the proper application of this principle; and without pursuing the subject further, suffice it to say that by a careful comparison of the exhibits one with another, aided by the proofs in the case, our conclusion is that the charge of infringement is sustained, and that the complainants are entitled to an interlocutory decree for an account and an injunction.

[For an account of the report of the master, the opinion of the court thereupon, and the entry of the final decree, and appeal therefrom, see Case No. 5,672.]

Case No. 5,672.

GRAHAM et al. v. MASON.

[5 Fish. Pat. Cas. 290; Holmes, 88; 1 O. G. 609.] [1]

Circuit Court, D. Massachusetts. Jan. 10, 1872.

PATENTS—INFRINGEMENT—PROFITS—DEDUCTION.

1. Where the patented invention consisted of a "bridle-motion" attachment for looms: *Held*, that the complainants had no right to any portion of the profits which the defendant made upon the looms to which the infringing mechanism was attached.

2. Where a patentee is entitled to profits, he is entitled to any profit the infringer has made by the unlicensed use of the contrivance included in the monopoly, and of that alone without regard to profit or loss on the whole structure or machine of which such mechanism forms a part, and without recoupment for losses on other infringing mechanisms made or sold.

3. Where the infringer has made a profit on one fraction of the mechanisms made and sold, but has met with losses on a larger fraction, so that a correct account of the whole operation would show a loss on the total manufacture; in such case, if the patentee, with a full knowledge of all the facts, should bring his bill declaring specifically for the infringement by the manufacture only of those specified mechanisms, in the making and selling of which the infringer had made profits, he would certainly be entitled to recover the profits thus made.

4. He is also entitled to such profits on a bill counting generally against the infringer, without offset or deduction for losses made in the manufacture and sale of other infringing mechanisms.

5. Where the infringer made a part of the mechanism after a pattern of his own, which pattern, however, was an infringement of the patent: *Held*, that the question of profits was not affected by the fact that he could make the infringing contrivance cheaper than he could make the contrivance in the exact form and shape described in the patent.

6. The rule with regard to the renovation and repair of licensed machines does not apply to cases of infringement.

7. Where the defendant had sold repairs upon infringing mechanisms previously made and sold by him: *Held*, that he must account for profits on the repairs, as well as upon the original machines.

8. Where the defendant had given to complainants a valuable consideration, in full satisfaction of their rights, as against the parties who had purchased infringing machines from said defendant, but without prejudice to their rights as against the defendant himself: *Held*, that the amount thus paid was not a legitimate charge against the manufacture, and could not be deducted in accounting for profits.

Exceptions to the master's report of profits made by the defendant [William Mason] from his infringement of reissued letters patent [No. 2,626] granted Edmund H. Graham and Wanton Rouse, May 27, 1867. The original patent [No. 30,441] was granted to Graham October 16, 1860.

J. E. Maynadier, for complainants.
Benjamin Dean, for defendant.

SHEPLEY, Circuit Judge. The master reports in this case that since the date of the last reissue of the plaintiffs' letters patent, May 28, 1867, the defendant "has manufactured certain 'bridle-motions,'" being the same mechanism pronounced by the court to be an infringement of the plaintiffs' patent in this case; and he annexes an account of the profits resulting from this manufacture, in a schedule marked A, making a part of his report. The master further reports that the defendant made and sold said "bridle-motions" after said reissue, with and as a part of looms manufactured in his establishment; that the profits resulting from the manufacture of said "motions," so sold, have mingled with the profits of the manufacture of said looms. The cost of making said looms during the time under inquiry was $59.63, including said "bridle-motion." The cost of making said motions was forty-five and one-half cents each, or ninety-one cents for each loom. The profit resulting from the manufacture of said looms complete with said "bridle-motion" was $5.64 for each loom.

Defendant contended that the plaintiffs were entitled to claim, as profit resulting from the manufacture of said "bridle-motions" when sold with the looms and as a part thereof, only a sum that would bear the same proportion to said sum of $5.64, the whole profit, that ninety-one cents, the cost of the pair of "bridle-motions," would bear to $59.63, the cost of the whole loom, which would be eight and six-tenths (8 6-10) cents. The master declined to adopt that rule, and

[1] [Reported by Samuel S. Fisher, Esq., and by Jabez S. Holmes, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 5 Fish. Pat. Cas. 290, and the statement is from Holmes, 88.]

on that ground the defendant excepts to his report.

In the opinion of the court, the rule contended for by defendant was clearly erroneous. The complainants had no right to any portion of the profits which the defendant made upon the looms to which the infringing mechanism was attached. Although in the case of Seymour v. McCormick, 16 How. [57 U. S.] 480, the court was called upon to adjudicate upon the question of damages in an action of law for the infringement of the patent, much of the reasoning of the court, and many of the distinctions there laid down, are equally applicable to the determination of questions of profits, recoverable by bill in equity. Especially applicable are the two illustrations adverted to by the distinguished justice of the supreme court of the United States, who delivered the opinion in that case. The unauthorized use of Stimpson's patent turnout on a railroad would not involve a liability to account for the profits of the road; nor could the profits made by the railroad in the case of the infringing turnout be measured by any ascertained ratio of the profits on the road. The patentee of a steam-whistle or a cut-off is not entitled to all the profits made on the manufacture of a locomotive engine by one who may have used his improvement without his license. So, if the manufacturer of the locomotive engine has sold it at a higher price than he would without the addition of the patented cut-off or whistle, or if he has in any way made a saving of expense or a profit to himself by the piracy of the patented improvement, the patentee is entitled to recover that profit without regard to the fact that the infringer has made no profit on the manufacture and sale of the whole machine to which he has attached the patented contrivance or mechanism.

In making up the account of profits, the master sometimes takes into account the cost of the whole number of infringing mechanisms or contrivances made by the defendant, and the proceeds of all the sales, and gives the patentee the net profits on the whole amount manufactured. This would be a correct rule in some cases, but it would not be just to the patentee in cases where the infringer had made profits on one fraction of the whole number made and sold, and, through defective manufacture or unskillful management of his business, had met with losses on a larger fraction, so that a correct account of the whole operation would show a loss on the total manufacture. In such a case, if the patentee, with a full knowledge of all the facts, should bring his bill declaring specifically for the infringement only by the manufacture of those specified mechanisms in the making and selling of which the infringer had made profits, he would certainly be entitled to recover the profits thus made. It is not easy to see why he is not entitled to such profits in a bill counting generally against the infringer without offset or deduction for losses made in the manufacture and sale of other infringing mechanisms.

It must be apparent to the most superficial observer of the immense variety of patents issued every day, that there can not, in the nature of things, be any rule of damages or any rule for estimating profits which will equally apply to all cases. The mode of estimating profits or damages must necessarily depend on the peculiar nature of the monopoly granted. Seymour v. McCormick, before cited. Where the patentee is entitled to damages, the rule must be so modified as to afford him indemnity and give him the actual damage he has suffered by the infringement. Where he is entitled to profits, he is entitled to any profit the infringer has made by the unlicensed use of the contrivance included in the monopoly, and of that alone, without regard to profit or loss on the whole structure or machine of which such mechanism forms a part, and without recoupment for losses on other infringing mechanisms made or sold. The mode of computation adopted by the master in this case appears to have been correct and just; and the exception to his report, because he did not adopt the rule contended for by the defendant, is overruled.

Exception is also taken to the master's report because he reported $451.56 as the profits on 414 "bridle-motions," sold separately from looms, while defendant contends that a portion of those profits were due to the defendant's use of a pattern of his own making; also, because he reported as profits the sums of $218.89 and $576.75 on parts of "bridle-motions" sold to repair and restore other "bridle-motions," once estimated by the master, and also for the reason that the profits were increased by the use of a pattern made by the infringer. As the motions and parts of motions were all infringements, and the pattern made by the defendant was an infringement, the profits allowed were only on infringing mechanisms. It does not affect the question of profits because the infringer could make his infringing contrivance cheaper than he could make the contrivance in the exact form and shape described in the patent. Nor does the rule with regard to the renovation and repair of licensed machines apply to cases of infringement. The report of the master as to these items is sustained, and the exception overruled.

The remaining exception of the defendant to the master's report is because the master refused to allow, in reduction of the defendant's profits, the sum of one thousand dollars, paid by the defendant according to the terms of a paper annexed to the report, and marked "D." It appears that the patentee, being about to proceed against the persons and corporations who were using the "bridle-motions" purchased of Mason, the defendant; to prevent them from being harassed by such

suits, the defendant paid, and the complainants received, the sum of one thousand dollars in full satisfaction of the complainants' right to recover against the persons and corporations who were using the "bridle-motions" purchased of the defendant, and as a tariff for the future use of such motions. But it was expressly stipulated and agreed, in the paper marked "D," "that this settlement does not affect in any manner our (the complainants') right to recover profits or damages from Mr. Mason for his infringement of said patent, and that the suit of Graham v. Mason shall proceed precisely as if this settlement never had been made." The master was correct in refusing to deduct this sum, received under this agreement, from the profits, or adding it to the cost of manufacture. The exception is therefore overruled. The complainants' exception to the master's report is also overruled for reasons already stated.

The master's report is approved. Final decree to be drawn up and submitted to the court for the amount of profits ($3,329.40), according to schedule "A," annexed to the master's report, with costs. Decree accordingly.

[NOTE. See Case No. 5,671.

[A final decree having been entered in accordance with the opinion of the court as above expressed, an appeal therefrom was taken to the supreme court. Strong, Justice, in an opimon filed,—23 Wall. (90 U. S.) 261,—affirmed the principles enunciated in the court below concerning the validity of the patent and the fact of its infringement.

[The decree of the court below was reversed, however, on the ground of errors in the accounting. It was held that, as the defendant had cheapened the cost of producing the picker-staff motion by an invention of his own, he was entitled to a corresponding credit in the ascertainment of the profits which the master had not allowed him. Where he had sold the infringing picker-staff motion, both separately and in a form where they were attached to looms, it was held that the true measure of damages should be the price of those sold separately, and not a price proportioned to the increased value of the loom and attachment combined.

[The amount of the decree was fixed as follows:

Profits on bridle-motions sold on looms	$1,819 50
" " 414 pairs sold separately	243 26
" " 297½ " " "	175 52
" " beds sold	168 68
" " rockers sold separately	471 49
	$2,877 45]

GRAHAM (MASSIE v.). See Case No. 9,263.

Case No. 5,673.

GRAHAM v. MEYER.

[4 Blatchf. 129;[1] 15 Leg. Int. 25.]

Circuit Court, S. D. New York. Jan. 13, 1858.

TORT—RATIFICATION BY PARTNER—LIS PENDENS.

1. A tort committed by one partner will not bind the partnership or the other copartner, unless it be either authorized or adopted by the firm, or be within the proper scope and business of the partnership.

2. If a conveyance of property be made to a partnership, composed of two persons, as security for a usurious loan of money made by one of the partners, without the knowledge of the other, such loan being made in the state of New York, and such loan and conveyance being unlawful and void by the laws of the state, the loan and conveyance cannot be regarded as within the proper scope and business of the partnership, so as to make the ignorant partner liable, in an action of tort, for the violation of law by his copartner.

3. To make him liable, it must appear that he authorized or ratified the transaction.

4. When a suit in equity and a suit at law are pending between the same parties for the same matter, one cannot be pleaded in abatement or in bar of the other; but the court of equity will sometimes order a stay of proceedings in one, until the other is determined.

[Cited in Seymour v. Malcolm McDonald Lumber Co., 7 C. C. A. 593, 58 Fed. 961.]

5. In this case, the defendant in the suit at law was not a party to the suit in equity, both suits being in this court; and this court denied a motion made by the defendant in the suit at law, to compel the plaintiff to elect which suit to pursue.

[Cited in Seeley v. Missouri K. & T. Ry. Co., 39 Fed. 255.]

This was an action of trover, to recover the value of certain steamships claimed to have been wrongfully converted by the defendant [Lewis H. Meyer] to his own use. The amount demanded as damages was $400,000. An order was made holding the defendant to bail in the sum of $360,000, and he was held for that amount. The plaintiff [John Graham], in his affidavit, upon which the order to hold to bail was founded, set forth the following facts: that the plaintiff, on the 5th of December, 1855, was the owner of the steamships Ocean Bird and St. Lawrence, and of one undivided third part of the steamship United States [or Mexico],[2] all of the value of $400,000; that, on the last-mentioned day, the plaintiff bargained and agreed with the firm of Meyer & Stucken, of which firm the defendant was a member, to loan to the plaintiff $100,000, for the space of four months, for the loan and forbearance of which the plaintiff agreed to give to Meyer & Stucken, and they agreed to receive from the plaintiff, the sum of $20,000; that, to secure them for the proposed loan, the plaintiff conveyed to them the steamships, by bills of sale absolute on their face; that, in pursuance of said agreement, the plaintiff received from them about $80,000; that, although the plaintiff, frequently, before and after the expiration of the four months, offered to pay to Meyer & Stucken the sum so received from them, and the sum so agreed to be paid for the loan and forbearance thereof, and demanded a reconveyance of said steamships, yet they had refused to reconvey and deliver up the same to the plaintiff, and had converted the

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

[2] [From 15 Leg. Int. 25.]

same to their own use. A motion was now made by the defendant, to be discharged on common bail, or for a mitigation of the amount for which he was held. The plaintiff had also brought a suit in equity, to which the defendant in this suit was not made a party, against Stucken, (the defendant's partner in said firm of Meyer & Stucken,) and others, to recover said vessels, or the value thereof, and the defendant in this suit now made a motion, to compel the plaintiff to elect whether he would prosecute this suit or such suit in equity, and that, on such election, all proceedings be stayed in the other suit, until the final determination of the suit elected to be prosecuted.

Charles O'Conor, for plaintiff.

James T. Brady and Gilbert Dean, for defendant.

INGERSOLL, District Judge. The transaction out of which this suit arose is said to have taken place in the city of New York; and as, by the laws of the state of New York, all conveyances for the security of a usurious loan of money are absolutely void, and the party making a conveyance of personal property for the security of a usurious loan of money has a right to proceed, in an action of trover, against the party receiving the property as security, if he converts it to his use, it follows, as the defendant is charged in the affidavit with making the usurious loan, with receiving the steamships as a security for such usurious loan, and with refusing to deliver them up to the plaintiff, upon a demand being made for the same, that there is a good cause of action shown in the affidavit; and, if the allegations in the affidavit are true, the plaintiff has a right to require that the defendant be held to bail. An order was thereupon made to hold him to bail; and, as disinterested witnesses swore that the steamships were worth the sum of $360,000, the defendant was ordered to be held to bail in that amount.

The facts upon which the motion now made in respect to bail is founded, admit of little or no doubt. On the 5th of December, 1855, the defendant and one Stucken were in partnership, under the name of Meyer & Stucken. They have ever since been, and now are, in partnership. At the last-mentioned date, the defendant was in Europe. For some considerable time before then he had been in Europe, and he continued to be there from the 5th of December, 1855, to about the middle of October, 1857. On the 5th of December, 1855, Stucken advanced to the plaintiff a sum of money amounting to at least $80,000. On the same day, he took an absolute bill of sale of the ships in question, in the name of Meyer & Stucken, and took possession of the same, with the consent of the plaintiff. The transaction purported to be an absolute sale of the steamships, upon a valuable consideration paid. The plaintiff insists that it was, in reality, a usurious loan of money, and that the ships were transferred as a security merely for such usurious loan of money. Stucken insists that there was no loan, and that the transaction was an absolute sale of the ships, for a valuable and adequate consideration paid. In considering the motion now made, I will assume that the transaction between the plaintiff and Stucken was a usurious loan of money; that the transfer of the steamships was, in reality, merely a security for such loan of money; and that Stucken would be liable to the plaintiff, in action of trover, for the value of the ships. I do this merely for the purposes of this case, and without intending to intimate what, in my opinion, was the true nature of the transaction between the plaintiff and Stucken, as there is no necessity for me to determine what its true nature was, to dispose of the motion now under consideration. The question then is presented—would the defendant, upon this assumption, upon the facts as they now appear, be liable to such action?

The ships were sold by Stucken in the month of May, 1856, for $180,000, he before that having been obliged to pay about $70,000 to satisfy certain liens upon them. Up to the time of the commencement of this suit, the defendant never, to his knowledge, saw the plaintiff, and never personally made any loan of any kind to him, or had any transaction or dealing with him. No demand has ever been made personally on the defendant to deliver the steamships to the plaintiff, or to account for the same to the plaintiff, or to pay the value of the same to him. The defendant was not consulted in reference to the transaction between the plaintiff and Stucken, and the contract between them was negotiated and concluded when the defendant was absent in Europe, and he had no knowledge in reference thereto. The defendant knew nothing of any usurious transactions between the plaintiff and Stucken, if any took place. There is no evidence that, prior to the commencement of the plaintiff's suit, the defendant was ever informed that the plaintiff claimed that the transaction between him and Stucken was a usurious one. The defendant never authorized any usurious transaction between his partner, Stucken, and the plaintiff; and, as he knew nothing of any usurious transaction between the plaintiff and his partner, Stucken, at the time it took place, and, as there is no evidence that he ever was, prior to the commencement of the plaintiff's suit, informed of any such usurious transaction, it cannot with truth be said that he ever ratified any such usurious transaction, if, in point of fact, it ever existed.

What the particular terms were of the articles of copartnership between the defendant and Stucken, does not appear. We know, however, that it was a partnership for a lawful purpose. It is to be presumed, therefore,

that the articles were such as ordinarily exist between partners engaged in lawful business. By such articles, one partner does not authorize the other to engage in unlawful business. The law of New York makes it unlawful to loan money at a usurious rate of interest. The law declares that all conveyances made to secure any usurious loan shall be absolutely void, and that no title shall be transferred by any such conveyance. It also declares, that when the party borrowing goes into a court of equity, to recover back the property conveyed as security for the loan, he shall not be obliged to tender or pay the actual amount received, and that he may ask for equity, without offering to do equity. The transaction, as claimed by the plaintiff, between him and Stucken, was, therefore, an unlawful one, disastrous in its consequences, and highly prejudicial to the interest of the defendant, if he is to be bound by it; and the partnership articles cannot be invoked to authorize Stucken to make the defendant liable for a tort committed by Stucken, either in his own name individually, or in the name of the copartnership.

A tort committed by one partner will not bind the partnership or the other copartner, unless it be either authorized or adopted by the firm, or be within the proper scope and business of the partnership. Story, Partn. § 168. A tort, an act in violation of a particular statute law, and attended with a forfeiture, is not within the proper scope and business of a partnership entered into for lawful purposes. Therefore, to make the defendant liable in an action of tort, for this violation of law on the part of Stucken, it must be made to appear, by some other evidence, that he either authorized it or ratified it. It has already been shown that he never authorized it; and as, up to the time of the commencement of this suit, there is no evidence that he was informed of any violation of law, he could not have ratified any violation of law. Collyer, in his treatise on Partnership, (page 252, Ed. 1854), says, that if one of two bankers in partnership commits usury, the innocent partner should not be liable to an action for penalties or damages. By the laws of New York, a usurious loan is unlawful, and the penalty of the forfeiture of the goods attempted to be conveyed as security therefor, is prescribed as a consequence. Where one having an apparent right to convey personal property executes a conveyance of it to a partnership, and the same is taken possession of by one of two partners, a demand by the true owner having the right of possession, upon one of the copartners, and a refusal by him, is evidence of a conversion by the other copartner. Nisbet v. Patton, 4 Rawle, 120; Mitchell v. Williams, 4 Hill, 13. But such a demand and refusal is not a conversion by the other copartner. It is only evidence of a conversion, not conclusive evidence, but prima facie merely, which may be rebutted by other evidence; and, when it is rebutted, it will not be effective to show that there has been a conversion by such other copartner.

This view of the motion now under consideration settles the question, that the defendant should not be held to bail, to answer the demand in this suit. An order must, therefore, be entered, vacating the order heretofore made, holding him to bail in the sum of $360,000, and that he be discharged on common bail.

In June, 1856, the plaintiff brought his suit in equity against Stucken and other parties, for the recovery of the ships in question, or the value thereof. The defendant was not made a party to that suit in equity. He was out of the country when it was instituted, and could not be served with the subpoena. There was a prayer, however, in the bill, that he might be made a party, should he return to this country. He has never been made a party.

A motion is now made by the defendant, that the plaintiff be compelled to elect which suit to pursue, whether the suit in equity or the suit at law; and that all proceedings in the other be stayed, until the final determination of the suit elected to be pursued. When a suit in equity and a suit at law are pending between the same parties, for the same matter, cause and thing, one cannot be pleaded in bar or in abatement of the other. But, notwithstanding this, the court of equity will sometimes order a stay of proceedings in one, until the other is determined.

The defendant in this suit is not a party to the suit in equity. His interest cannot be affected by the determination in that suit. A determination against the plaintiff in that suit will not deprive him of the right to pursue the defendant in this. The determination in that case can have no effect upon this. The motion to compel the plaintiff to elect which suit to pursue, and that the proceedings in the other may be stayed, must, therefore, be denied.

[The proceedings upon the bill in equity were heard before Nelson, Circuit Justice, and relief was decreed the plaintiff in the sum of $200,000, with interest. Case No. 5,675. During the progress of these proceedings a writ of ne exeat was applied for against Stucken, but refused. Id. 5,677.]

GRAHAM (MORGAN v.). See Case No. 9,801.

GRAHAM (PEARPOINT v.). See Case No. 10,877.

Case No. 5,674.

GRAHAM v. PENNSYLVANIA INS. CO.

[2 Wash. C. C. 113.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1807.

INSURANCE—PRIZE—CONSTRUCTION OF TREATY—EVIDENCE—INVOICE.

1. Insurance on goods on board the Concord, at and from her port or ports, place and places of loading in Honduras, to Liverpool; warranted free from loss in consequence of, or detention on account of, any illicit or prohibited trade. The vessel was captured in the Bay of Honduras, by a British vessel, as prize; on the allegation that she was taking on board mahogany of larger dimensions than was allowed to American vessels; and while on her passage to Jamaica, she, with the capturing vessel, was lost.

2. Privileges given to vessels to cut mahogany, under the treaties between Spain and England, of 1762 and 1783. What is the proper construction of those treaties, and of the proclamations and laws relative to the trade under them, which have been issued or ordained by the English government.

3. It is no objection to giving in evidence a bill of loading and invoice, which have been made out after the usual and regular time, if the circumstances under which the vessel and master were, prevented their being made out at the common period.

4. The invoice of the cargo is, against the general principles of evidence, uniformly admitted as prima facie evidence of the value of the cargo; and no more. It is not necessary to show its correspondence with the books of the party producing it.

This was an action upon an open policy, dated the 16th of February, 1805, underwritten by defendants for 10,000 dollars, on goods on board the Concord, at and from her port or ports, place or places of loading, in Honduras, to Liverpool; warranted by the assured free from any charge, damage, or loss, which may arise in consequence of a seizure or detention of the property, for or on account of any illicit or prohibited trade. The insurance was declared to be on mahogany and dye-woods. The vessel was American, chartered in Philadelphia, in September, 1804, for this voyage, by the plaintiff, a British subject, resident within the limits of the British settlement in Honduras. She arrived at Honduras in November, 1804, and proceeded to Bellize, within the British settlement, where she took in a quantity of logwood, and then fell down to the Rio Grande, without the English limits, and within those of Spain, carrying a sworn measurer from the Bellize; and there took in more than half her load of mahogany, which generally exceeded twenty inches diameter, in its largest dimensions. Before she had completely taken in her load of mahogany, and whilst engaged in doing so, she was, on the 27th of January, 1805, captured by a British vessel, as prize; the alleged reason was, that she had on board mahogany of a larger size than was permitted to be exported by the regulations of the British settlement at Honduras. After the seizure, there being a part of the mahogany alongside for completing of the loading, it was taken in, by permission of the captor. The prize was first carried to Bellize, and thence proceeded with the capturing vessel to Jamaica; but on her passage thither, both vessels were lost on the Florida coast, on the 6th of March, 1805.

Some evidence was given of a usage for the settlers within the British part of Honduras, to cut and export mahogany from the Spanish territory, sending cutters and sworn measurers to aid in the business. When the Concord first left the Bellize, she received, from the superintendent there, a clearance for the logwood, and for a blank number of feet of mahogany, (for at that time she had none on board;) with a permit to carry the same to Liverpool; and a certificate, that bond had been given by the said Graham that he was a British subject, and would carry his said cargo to Liverpool, and not land it in the United States. By the treaty of 1762, between Spain and England, the former ceded to the latter the right of cutting and exporting logwood from a certain district of country on the Bay of Honduras; and, by the treaty of 1783, the limits of this settlement are fixed, extending from Rio Hondo on the north, and Sibor on the south, including the Bellize within those limits. The convention of 1786, between these powers, extends the privileges before granted to the cutting of all other woods within that settlement, and gathering the natural fruits of the earth; but not to the cultivation of the land, or the erecting of manufactories. The treaty of 1783, contained an express reservation of the sovereignty of Spain over this territory; and the convention of 1786 stipulates, when wood should become scarce within the British settlement, that the settlers may cut it without their limits, paying a just price therefor.

The government of the British settlements is vested in a superintendent, appointed by the crown, who appears to unite legislative, judicial, and executive powers within the same; but who acts under instructions from the king in council, previously given, or by his approbation, afterwards given, to his acts. On the 14th of July, 1804, the superintendent issued his proclamation, reciting that mahogany exported from that settlement to America, is limited, by instructions of his majesty, to seventeen inches diameter, and that an application had been made to him, by the magistrates of the settlement, and a committee, to extend the permission to the diameter of twenty inches. He therefore declares, that all vessels trading from any place in the Bay of Honduras, where British settlers are permitted to cut mahogany, to any part of the United States, may take on board

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

and carry away mahogany, not exceeding twenty inches; such vessels coming to, and clearing out from the Bellize, and the owner or consignee entering into bond, not to cut or carry away any mahogany to the United States, exceeding the size thereby allowed. On the 11th of October, 1804, the superintendent issued a second proclamation, reciting, that by his former proclamation of the 14th of July, mahogany, not more than twenty inches, was permitted to be shipped on board American or foreign bottoms, which permission had been highly disapproved by the commander-in-chief of Jamaica and its dependencies; therefore it is ordered, that mahogany, measuring more than seventeen inches, will not be permitted to be exported from this settlement in any American or foreign vessel.

It appeared by the depositions of a number of witnesses, then resident in the British limits of Honduras, and who had long resided there, that they knew and had heard of no act of parliament, orders or instructions of the British government, forbidding the exportation of mahogany of any size from that settlement to Great Britain; and many of them stated, that such were their situations, that had any such ever issued, they must have known it; and that in that trade, and in this respect, they knew of no difference between British and foreign vessels.

The right of the plaintiff to recover, was opposed upon two grounds: first, that the warranty was not complied with; and secondly, that a deviation was committed. On the first, it was argued, that though in fact the mahogany, the article prohibited on account of its size, was taken in without the British limits, yet the vessel, having received her regular clearances and permit from the superintendent of the settlement, and having given bond to carry it to Liverpool, it must be considered as an exportation from that settlement, by a British subject, resident there. If so, it was clearly prohibited by the general and unqualified expressions of the second proclamation; which interdicts the exportation of mahogany, above seventeen inches, from that settlement, in foreign vessels. But, even if the exportation should not be considered as from that settlement, the having on board papers to show that this was the fact, was as much a breach of the warranty, as if the fact had been so. It would equally have led to a condemnation. If the trade was prohibited, the license of the superintendent and the clearance at Bellize, will not legitimate the transaction; since no part of the mahogany was on board when these papers were made out; and it is to be presumed, that when the wood should be taken in, it was to be of the size permitted to be exported.

Secondly, there was a deviation. On this point it was insisted, that from the circumstance of the insured being a British subject, resident in the British settlement at Honduras, who could not legally trade with the enemies of his country; (for on the 11th of January, 1805, war was declared by England against Spain,) and if there had not been war, who was prevented by the treaties subsisting between those powers, from cutting wood without the British settlement; it must have been understood between the plaintiff and defendants, when this policy was made out, that the risk was to commence from the loading of the vessel at a port in the British settlement in Honduras, and not Honduras generally, as expressed in the policy.

Thirdly, it was contended that the defendants, at all events, are not liable to pay for the mahogany taken in after the capture. It was answered by the counsel for the plaintiff, first, that if the exportation had been from the British settlement at Honduras, yet there was no law or proclamation which forbid foreign vessels from carrying mahogany of any size to England. The policy of the British government, which was to procure for the mother country the best wood, whilst that of inferior quality was allowed to be transported to other nations, will throw light upon the construction of the proclamations. The first is confined, exclusively, to mahogany, to be exported to the United States in any vessel. It was this permission which was disapproved by the commander-in-chief at Jamaica, and it was on this account that the second proclamation was issued, reducing the size to seventeen inches, as it stood before the first was issued. The second proclamation, then, ought to be construed so as merely to operate as a repeal of the first, and not to be more extensive than it. Upon the second point, they relied upon the words of the policy, which extend to every part of Honduras, and which cannot be restricted now. Third; it was insisted that the captain was not prevented by the capture from taking in a full cargo purchased, and lying alongside of the vessel when the seizure was made; and this was done with the permission of the captor.

Hare, Ingersoll & Tilghman, for plaintiff.
Rawle & Lewis, for defendant.

Washington, Circuit Justice, asked the plaintiff's counsel, if the relation back of the property to the capture by the abandonment, did not furnish an argument against the claim of the plaintiff to an indemnity for the cargo taken in after the capture?

WASHINGTON, Circuit Justice (charging jury). This is a case of some difficulty, and of considerable interest. It deserved and has received an able discussion at the bar, and a patient examination by the court and jury. Thinking that the cause must turn entirely upon the warranty, we will at once clear it of the other subjects which have been presented to our consideration. It has been in-

sisted, that the policy was avoided by a deviation from the voyage insured. This point is not to be maintained. The words of the policy are plain, general, and unqualified. The places at which this vessel was to take in her load, are stated to be in Honduras. All parties knew that this expression comprehended the whole of the Spanish possessions on the Bay of Honduras, as well as the small portion on the bay possessed by the British. Had they intended to confine it to that part, nothing could have been more easy or more natural, than to have inserted words to express such intention. There is nothing on the face of instrument itself, or in the evidence, which can warrant the position, that they meant differently from what their language declares; and it would be a dangerous experiment, in such a case, to leave a certain and safe guide, with which the language of the parties furnishes us, to wander in the unsatisfactory field of conjecture, as to their probable meaning. No aid can be drawn from the situation of the plaintiff, or from that of his country, in relation to Spain. Though a resident in the British settlement, it did not follow that if others took wood from the Spanish port, he should not do so: and indeed it appears, that it was common for vessels to fall down from the Bellize, and to take in their mahogany at Golden River, or Rio Grande, as was done in this case. This custom, if it is sufficiently proved to your satisfaction, ought to have been known to all parties, and not being excepted against, affords a strong reason for believing that they did not mean to restrict the places of loading.

The next question is, has the warrant been complied with? It struck the court during the trial, and we have hinted it to the bar, that this might probably be objected to as an illicit trade, being repugnant to a general principle of English law, if carried on by a British subject, with a dependency of Spain during war, or repugnant to the treaties between England and Spain, if it took place during a time of peace; for, as war was declared on the 11th of January, 1805, and she took in part of her load before, and part after that period, it might be well to consider the relative situation of the two countries at those periods. But, upon reflection, there does not appear to be much weight in those objections. There was in fact no trading with the Spanish part of Honduras; but the wood was cut and taken, so far under the authority of the superintendent of the English settlement, that wood-cutters and sworn measurers were sent down with the vessels. If then the wood was taken in time of peace, it was permitted by an article of the convention of 1786, when wood should become scarce in the British settlement; and as it appears by the evidence, that the Concord did no more than had been practised before, it is fair to presume that the event had taken place on which this right might be exercised, and that it was tolerated on the part of Spain. And this is in no small degree strengthened by the circumstance mentioned at the bar, that this conduct of the British settlers is not to be found in the list of complaints, set forth in the manifesto issued by Spain, on the breaking out of the war. If, on the other hand, the wood was taken during the war, it was no more than the exercise of a belligerent right, and therefore not within the words of this warranty.

We come now to the point of real difficulty. Was the trade in which the vessel was concerned, prohibited by any regulations of the British government, or of this settlement at Honduras? To get regularly at this question it will be necessary to settle what is the true meaning of the engagement, which, by this warranty, the assured takes upon himself. We think it quite clear, that he takes upon himself the risk of losses which arise from illicit or prohibited trade, and seizure or detention made or caused on that account. An illicit trade, unaccompanied by a seizure, or an unfounded seizure for a supposed illicit trade, where none took place, will not affect his right to indemnity. The clause respecting illicit trade, varies in different policies. In Church v. Hubbart [2 Cranch (6 U. S.) 188], the warranty was against seizures by the Portuguese for illicit trade with them. In this, it is more general; but in both, the two circumstances of seizure and illicit trade must concur. In the general plunder of neutral commerce, which has taken place during the late and present wars, where seizures have been made upon the most frivolous pretences, no person wishing to be protected by a policy, would be satisfied with an indemnity to depend upon the fact of a seizure for the alleged cause of being engaged in a prohibited trade, if in fact the trade was fair; and though it should be illegal, still, if this was not the cause of the loss, there can be no good reason why the insurer might not agree to indemnify. In this case, however, the Concord was seized and detained on account of a prohibited trade, and the question will be, was the trade prohibited? Upon what footing did this trade stand, at the time when the proclamation of the 14th of July was issued? So far as we can judge from the evidence laid before us, no vessel, either foreign or British, could export mahogany more than seventeen inches in diameter to the United States, though it might be exported of any size, and in any vessel, to Great Britain. The recital of his majesty's instructions in the first proclamation, must be considered as evidence of the first part of this position; and the latter seems to result from the following considerations. It may, in the first place, be presumed, because no regulation to the contrary, either by act of parliament, instructions from the king, or regulations of the superintendent, has been even stated; and it is admitted that the navigation laws of England do not ex-

tend to this settlement. Secondly; this distinction between the exportation of mahogany to England and to other countries, seems to be perfectly consistent with a sound policy, and particularly with the policy of England, a manufacturing nation. For, though she would, in order to give a preference to her own manufactories, permit only wood of an inferior quality to be exported to the United States, she would, for the same reason, encourage that of a large size to be sent to Great Britain, without regarding the character of the vessel in which it was brought; unless, indeed. it had been prohibited altogether in foreign vessels, which was not the case.

But, thirdly, we have the declaration of many witnesses, who have long resided in that settlement, that they never knew or had heard of any law or regulation, which made a difference between foreign and British vessels exporting mahogany to England; and that if any such had existed, they must, from their situations, have known it. This evidence is very strong indeed, and, being unopposed, seems to warrant us in believing, that the exportation of mahogany of any size was permitted in any vessel, if carried to England. But there was an express prohibition to carry mahogany, exceeding seventeen inches, in any vessel, to the United States. This, by the by, proves that it was not the character of the vessel, but the place to which the wood was carried, which entered into the policy of the government on this subject. This being the state of the trade in July, 1804, the superintendent, on the 14th of that month, issued his proclamation, and in opposition to his instructions, permitted the exportation of mahogany, not exceeding twenty inches, in any vessel of the United States. On the 11th of October, 1804, he issues his second proclamation, misreciting the purport of the first, as if it had extended only to foreign vessels, going with wood to any part of the world; and stating the disapprobation of his government of the permission granted by that proclamation, he forbids the exportation of mahogany, above seventeen inches, from that settlement, generally; without confining the exportation to any particular place. It is the generality of the expressions in this proclamation, which creates difficulty in the cause. It must be admitted, that, taking the words literally, they comprehend an exportation in a foreign vessel to England, as well as to the United States; and the question is, whether the instrument ought, upon legal and rational principles, to be so construed. The difficulty is increased by the misrecital of the first proclamation, so as to induce an argument that it was not the proclamation, but the recited permission, which was disapproved. But there are nevertheless, the strongest reasons to conclude, that the reference was intended to be the proclamation. The date of the first proclamation is correctly stated, and it does not appear that any other of that date, or indeed of any prior date, had been issued respecting this trade. It is, therefore, rather to be presumed, that he mistook the purport of that proclamation, than that he had in view any other permission granted by him, except what that proclamation contained. The second professes to recite the first, and by stating the disapprobation which the first had received, it affords the true cause for making the second. If the latter be construed as going no farther than to repeal the former, it will reach exactly as far as the mischief, and no farther. If it be taken literally, it will go beyond the mischief, without an apparent cause for it, as well as against the policy of the British government, in respect to this trade. Besides, a literal construction will have the effect to set up the proclamation, and to make it paramount to the existing law of the settlement; which, as has been stated before, tolerated the exportation of mahogany of any size, and in any vessel, to Great Britain; whereas the words used would interdict such exportation in foreign vessels.

Another strong reason against the construction was mentioned at the bar, viz., that the bond, which was directed to be given under the first proclamation, was conditioned that the mahogany should not exceed twenty inches, permitted by the proclamation to be exported to the United States; but no stipulation in it extended to mahogany of any size, if exported to England. On the other hand, the bond actually given by the plaintiff in this case, is silent as to the size of the wood, but contains an express obligation that the wood is to be exported to Liverpool, and shall not be landed in the United States; thus showing the sense of the government as to the policy, as well as to the true import of the regulations on this subject. Upon the whole, then, it seems to us, that the second proclamation does not make this exportation illicit, and of course that the warranty has not been violated.

As there is some little diversity of opinion in the court respecting the third point, and it is of no great consequence as to the value, that point will be left to the jury.

In the opening, on the part of the plaintiff, his counsel offered a bill of lading, signed by the captain on the fifteenth of February, 1805, eighteen days after the capture, but before the loss, and before the vessel left Honduras. This was objected to. The court admitted it to go to the jury, observing that though, according to the regular course of doing business, the bill of lading is given on taking in the cargo, and in general, if given so long after, as in this case, would create a suspicion of fraud, so as to invalidate it; yet, that if a fair reason can be assigned, there can be no ground for a charge of fraud. Such a reason appears in this case. The capture having taken place whilst the vessel was

taking in her load, it could not be given in a regular way. The handwriting of the captain is proved, and as there is not such a ground in law, to induce a suspicion that it was made to serve a purpose, it ought to go to the jury, and the credit due to the paper to be left to them. Afterwards the invoice, bearing date the 17th of February, was offered, and objected to. It appeared that the paper was enclosed by the plaintiff to his correspondent in this city, in a letter dated the 20th of February, 1805. It was argued in support of the objection, that it ought to be proved to agree with the entries in the plaintiff's books; or by some person, that the value is truly stated.

BY THE COURT. According to the general rules of law in other cases, an invoice by itself, would be inadmissible; and we cannot admit that its accordance with entries in the plaintiff's books, would be sufficient to make it evidence within these rules. But in commercial cases, it is uniformly admitted, if it carries with it the proof of its fairness: it is not known to have ever before been questioned. It is prima facie evidence of value, and no more. Like the bill of lading, it is regularly made out, when the cargo is completed; but it could not be in this case, any more than the bills of lading, since the capture was made whilst the vessel was loading, and that too at a considerable distance from the Bellize. It came to the agent of the plaintiff, in a letter dated after the capture, but before the vessel had sailed from Honduras. This also ought to be left to the jury.

Verdict for plaintiff.

Case No. 5,675.

GRAHAM v. SHEKEN.

[16 Leg. Int. 324; 18 How. Pr. 322.]

Circuit Court, D. New York. Oct. 1859.

BILL OF SALE OF VESSEL—USURIOUS CONTRACT—EQUITABLE RELIEF.

[1. The circuit court will administer equitable relief in a case where it is sought to recover back interests in vessels conveyed under a usurious contract.]

[2. Where the reconveyance of the interest itself is impossible, the court will award complainants the value of the same.]

[This was a suit by John Graham against Edward Sheken, impleaded, etc., with Charles R. Poillon.]

NELSON, Circuit Justice. First: The court holds that the complainant was the owner of the steamship St. Lawrence, and of the one-third part or share of the steamship United States, and was the equitable owner of the steamship Ocean Bird, the legal title being in the defendant Richard Poillon (held as security for certain charges and claims of C. & R. Poillon), at the time of the execution of the bills of sale of these vessels from Graham and C. & R. Poillon, on the 5th December, 1855, to the defendants Sheken and Meyer, as set forth in the pleadings.

Second, that although these bills of sale are absolute on the face of them, they were executed and delivered as a security for a loan of $100,000, made by Sheken and Meyer to Graham upon a usurious contract, in which was secured more than 7 per cent. for the forbearance of the loan, and that the contract and bills of sale executed in pursuance thereof are void in law, and must be set aside.

Third, that the said Graham is entitled to be restored to his interest in and possession of the said vessel, including the Ocean Bird, as it appears the incumbrance on the same to C. & R. Poillon has been discharged.

Fourth, but, inasmuch as it appears that the said Sheken and Meyer have sold and disposed of all their interest in the said vessels, and the said Sheken is hereby unable to restore them to the complainant, the said Graham is entitled to the value of the same.

Fifth, it having been agreed by the counsel of the respective parties to use the evidence taken on the trial at law in the case of Graham v. Meyer [Case No. 5,673], involving the validity of these bills of sale of the title of the complainants to these vessels, and that the transactions generally, out of which the present suit has arisen as the proofs of the present case, we shall adopt the amount of the verdict of the jury in the case at law as the proper value, after the payments of advances and deductions voluntarily assented to, be made by the complainant, and thus avoid the delay and expense of a reference to a master. The amount of that verdict is $200,000, with interest from the 4th of May, 1856.

Sixth, that a court of equity has jurisdiction to administer the relief sought in this case.

[The proceeding at law was an action of trover against Meyer, who was liberated on common bail by Ingersoll, District Judge. Case No. 5,673. During these proceedings a writ of ne exeat was applied for before Nelson, Circuit Justice, against Sheken, but the application was refused. Id. 5,677.]

Case No. 5,676.

GRAHAM v. STARK et al.

[3 Ben. 520;[1] 3 N. B. R. 357 (Quarto, 93); 2 Chi. Leg. News, 73.]

District Court, N. D. New York. Nov., 1869.

FRAUDULENT PREFERENCE — MORTGAGE—AGENT—INSOLVENCY.

1. A debtor, who is unable to meet his engagements and pay his debts in the ordinary course of business, as persons in trade usually do, is insolvent within the meaning of the bankruptcy act.

[Cited in Re Bininger, Case No. 1,420.]

2. When a creditor accepts a security for his debt, he is conclusively presumed to know what appears upon its face, and to have reasonable

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cause to believe it was intended to accomplish what must be its ordinary and necessary effect.

[Cited in Singer v. Sloan, Case No. 12,899.]

3. Securities given for the purpose of giving a preference, are none the less void under the bankruptcy act [of 1867 (14 Stat. 517)] because they were given in pursuance of a previous promise, made when the debt was contracted, to give security for it.

[Cited in Hubbard v. Allaire Works, Case No. 6,814; Ex parte Ames, Id. 323; Hall v. Wager, Id. 5,951; Goodenow v. Milliken, Id. 5,535; Re Montgomery, Id. 9,732; Re Jackson Iron Manuf'g Co., Id. 7,153; Lloyd v. Strobridge, Id. 8,435.]

[Cited in Cook v. Whipple, 55 N. Y. 156; Sartwell v. North, 144 Mass. 194, 10 N. E. 827.]

4. Where a married woman, engaged in business, gave the management of her affairs to her husband, and was afterwards adjudged bankrupt: *Held*, that his acts, knowledge and intentions in reference to the business must be held to be her acts, knowledge and intentions.

[Cited in Re Goodman, Case No. 5,540.]

5. Where a mortgage was given by such bankrupt to secure a debt, but without the creditor's urging its execution or asking for security, but the mortgage covered the whole of the bankrupt's personal property, and was not given in the ordinary course of business, and other mortgages to another creditor were executed at the same time: *Held*, that this mortgage was fraudulent and void under the bankruptcy act.

[Cited in Martin v. Toof, Case No. 9,167; Walbrun v. Babbitt, 16 Wall. (83 U. S.) 581.]

[See Babbitt v. Walbrun, Case No. 695.]

6. The other mortgages, which were on the stock and real estate, and were taken at a time and in a form which must necessarily break up the bankrupt's business, to secure a debt which had been overdue for a year and a half, were also fraudulent and void.

[Suit in equity by Lewis B. Graham, assignee of Caroline A. Martin, a bankrupt, against Oliver Stark and Elizabeth B. Savage.]

Charles G. Judd, for assignee.

D. Morris, for Stark.

D. B. Prosser, for Mrs. Savage.

HALL, District Judge. This is a proceeding by the assignee of Mrs. Martin, to set aside certain mortgages, executed by her prior to the filing of the petition on which she was adjudged a bankrupt. The creditor's petition, on which such adjudication was made, was filed on the 5th day of November, 1868; and she was adjudged a bankrupt on the 2d day of February, 1869.

Mrs. Martin, a married woman, had, by her husband, De Lancey Martin, as her general agent, carried on the business of buying and selling hats, furs, gloves and furnishing goods, in her own name, and, professedly at least, on her separate account, for some years prior to May 28th, 1868. Her husband, in the conduct and management of this business, acted according to his own discretion, without any active interference or controlling supervision of the bankrupt. Indeed, the husband testified that the business was left wholly to him; that she knew nothing about the state of affairs in the store, except what he communicated to her; and she testified that he had the sole charge of the business.

The stock kept on hand was generally worth from $10,000 to $15,000, and the annual sales were ordinarily from $15,000 to $20,000. In the course of this business Mrs. Martin contracted debts from time to time; and, on the 28th of May, 1868, such debts, including those secured on real estate, exceeded $10,500, and De Lancey Martin testified that such debts might have been nearly $12,000. At that time the stock of goods on hand was probably worth about $7,000, and she had a few dollars in cash, and notes and accounts worth in all about $1,500. She had, besides, a house and lot in Penn Yan, worth from $3,000 to $3,500, on which were two mortgages amounting to $1,600 or $1,700, both of which were overdue. Among her debts, owing to more than twenty different parties, (the larger portion of which debts was overdue,) was the debt due to the respondent, Elizabeth B. Savage, of $4,804.27, for money borrowed in 1865, and in the spring of 1866. It was borrowed to pay debts in New York, and was used for that purpose.

There was also among such debts a debt of $1,111.63 to the respondent, Oliver Stark; $1,000 of which was owing upon a note which he had discounted for her, and on which one Bridgen, a brother-in-law of the bankrupt, was an accommodation endorser, and which note was to become due June 22d, 1868. The original discount had been made two or three years before; and it had been renewed, from time to time, on notes payable in sixty days or three months, until the then existing note was given about the 20th day of March, 1868. The remaining $111.63 was for an overdraft by the bankrupt, which had occurred about a month before.

On or about the 28th of May, 1868, the bankrupt gave her promissory note of that date to the respondent, Savage, for $4,804.27, payable one day after that date; and, at the same time, executed to her a chattel mortgage of that date, upon the bankrupt's whole stock of goods, conditioned for the payment of $4,804.27, according to the terms of such note.

In addition to this chattel mortgage, the bankrupt also executed a mortgage upon her house and lot, to secure $1,000 of such debt, payable one day after date, as collateral security to said chattel mortgage. This mortgage, though executed at the same time with the chattel mortgage, was dated on the 30th day of May, 1868. At the same time the bankrupt executed to the respondent, Stark, another chattel mortgage, on the whole of her stock of goods, to secure to him the payment of $111.63, one day after date, and the

payment of the above mentioned note of $1,000, on which the brother-in-law of the bankrupt was an accommodation endorser.

After the execution of these instruments, and about the 2d of June, 1868, the bankrupt went to the Western states, and remained absent from this state until the 15th of October of that year, and until after an attachment had been levied upon her property at Penn Yan. A day or two before her return, she executed a deed in fee of her house and lot at Penn Yan, to one Blackman, without consideration paid at the time. Blackman had, however, sent her small sums of money for her expenses, at three or four different times, while she was absent from the state, but the amount he had so sent does not appear.

After the execution of the mortgages to the respondents, De Lancey Martin, as the agent of the bankrupt, continued in the possession of the stock of goods mortgaged, with the knowledge and assent of the mortgagees; and he continued to sell the goods mortgaged, at retail, as usual, until the 6th of October, 1868. He also bought new goods, defrayed current expenses, including payments for his own board, paid small debts to various persons, and kept the books of the establishment, and otherwise carried on the business of the bankrupt, the same as before the mortgages were given.

On the 6th of October, the respondents took possession of the goods mortgaged and turned De Lancey Martin, the bankrupt's husband and agent, out of the store. They then, by their own agent, continued the business and sold at retail, for three months, or thereabouts; and then sold the remainder of the goods to De Lancey Martin for $1,000; and four notes of $250 each, payable at 4, 6, 8, and 10 months, were given for the price of such goods.

The change of possession on the 6th of October, was made in the morning of that day; just before an attachment, which had been issued against the bankrupt, was levied on such of the notes and accounts, which had belonged to her, as yet remained on hand.

For some years prior to May, 1868, Mrs. Savage, the respondent, had lived in the bankrupt's house as her tenant; and Mr. and Mrs. Martin had boarded with Mrs. Savage—the amount charged for board and for rent being nearly equal. Mrs. Savage continued to occupy the house, and Mr. Martin continued to board with her, until after possession was taken under the chattel mortgages on the 6th of October, 1868. In July, 1868, Mrs. Savage purchased a mortgage of $600, and interest on Mrs. Martin's house and lot; and in November she purchased the other mortgage on the same, of $1,000, and interest. Both these purchases were made with the proceeds of the sales of the property mortgaged to her by the bankrupt on the 28th of May, 1868. In March, 1869, Mrs. Savage commenced an action to foreclose these mortgages, and the $1,000 mortgage executed to her as before stated; but her proceedings in that action were stayed by injunction.

It appears from the testimony of De Lancey Martin, that when the money was borrowed from Mrs. Savage, and when Mr. Bridgen endorsed the $1,000 note, it was agreed that they should be secured; that Mrs. Savage had asked for security for her debt one or two months before the bankrupt went west, and that she spoke about it, and asked for such security several times before it was given,—urging that she wanted the bankrupt to give her security before she went away.

Bridgen had also frequently urged that the $1,000 note should be paid; and he had asked in the spring of the same year that security should be given in case it was not soon paid.

Having thus given the more prominent and undisputed facts of the case, the controverted questions of fact and law will now be discussed; and in doing this, further reference to the evidence bearing upon these questions of fact will necessarily be made.

Upon the question of the actual and hopeless insolvency of the bankrupt, at the time the mortgages to the respondents were given, there can be no well founded doubt. The apparent denials of the knowledge of this insolvency on the part of the bankrupt and her husband, must, in charity, be ascribed, so far as the husband is concerned, to a misapprehension of the legal definition of that term, as used in the bankruptcy act—a misapprehension quite likely to arise from the not uncommon misunderstanding of that term; and, so far as the bankrupt is concerned, to a similar misapprehension, or to the fact that her actual financial condition had been carefully concealed from her by her husband. There is no pretence that she had met with any considerable loss or that her pecuniary circumstances had materially changed between the 28th of May, 1868, and the time the respondents took possession of her stock of goods on the 6th of October thereafter, and upon the whole evidence it is entirely certain that Mrs. Martin was then wholly unable to meet her engagements and pay her debts in the ordinary course of business as persons in trade usually do;—and she was therefore insolvent within the meaning of the bankruptcy act. 2 Kent, Comm. 389; Thompson v. Thompson, 4 Cush. 127; Lee v. Kilburn, 3 Gray, 594; Spratt v. Hobhouse, 4 Bing. 173; Buckingham v. McLean, 13 How. [54 U. S.] 150; Merchants' National Bank v. Truax [Case No. 9,451]; In re Black [Id. 1,457]; In re Gay [Id. 5,279]; In re Louis [Id. 8,527]; Morgan v. Mastick [Id. 9,803].

That De Lancey Martin, the agent of the bankrupt, and who had the entire management and control of her business, well knew

that she could not meet her engagements, as persons in trade ordinarily do, is entirely clear; indeed he must have known that there was no probability that she would be able to continue her business and pay her debts in full; and, when the chattel mortgages were given upon her whole stock in trade to secure nearly $5,000, payable in three or four days thereafter, and $1,000 more in less than thirty days, he must have contemplated the entire breaking up of the bankrupt's business, as a thing of course, whenever the pressure of other creditors who had no security—several of whose debts were then past due—should induce the mortgagees, for their own security, to take possession of the property mortgaged.

And he must also have foreseen that the fact, that Mrs. Martin had thus incumbered her whole property, by these mortgages, would cause her unsecured creditors to endeavor to procure payment of their debts, or force Mrs. Martin into bankruptcy, very soon after they obtained a knowledge of the existence of such mortgages.

In the directions for and in the preparation of these mortgages—indeed in everything except the mere formal execution of the mortgages—De Lancey Martin acted for the bankrupt; and his acts, his knowledge and intentions, for the purposes of this case, are, in law, the acts, knowledge and intentions of his principal, the bankrupt. Story, Ag. §§ 140, 140d, 451.

That he, as such agent, intended that these mortgages should secure the payment of the debts of the respondents in preference to the debts of other creditors; and that he procured their preparation and execution in contemplation of the bankrupt's insolvency, is beyond question; and it hardly can be doubted that he then contemplated the subsequent bankruptcy of Mrs. Martin, and actually intended (as the law under such circumstances presumes he intended), to defeat the ordinary operation and effect of the bankrupt law, which secures a pro rata division of a bankrupt's property to and among his or her creditors. In short, in view of the special provisions of the bankruptcy act presently to be noticed, and of its general policy and provisions, as well as of the rule of law that every one must be presumed to intend the natural and usual consequences of his voluntary acts, it must be considered as entirely certain that the execution of the three mortgages to the respondents were acts of bankruptcy and fraud, so far as the bankrupt herself is concerned, and contrary to the provisions of the bankruptcy act.

The 29th section of the bankruptcy act provides, among other things, that no discharge shall be granted to a bankrupt if he has given any fraudulent preference contrary to the provisions of that act, or made any fraudulent payment, gift, transfer, conveyance or assignment of any part of his estate; or if he has in contemplation of becoming a bankrupt made any pledge, transfer, assignment or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under any liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under the act in satisfaction of his debts; or if he has been guilty of any fraud whatever contrary to the true intent of the act.

The thirty-fifth section provides, among other things, that if any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object, or in any way impair, hinder, impede or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer or conveyance, shall be void; and the assignee may recover the property or the value thereof as assets of the bankrupt; and that if such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud.

The thirty-ninth section provides in substance, among other things, that it shall be an act of bankruptcy if any one, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, sale, conveyance or transfer of money or other property, rights or credits, with intent to give a preference to one or more of his creditors, or with the intent, by such disposition of his property, to defeat or delay the operation of the bankruptcy act; and that if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned or transferred contrary to that act; provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, and that the debtor was insolvent; and such creditor shall not be allowed to prove his debt in bankruptcy.

Having already determined that the securities given by the bankrupt must be considered as fraudulent and void under the provisions of the bankruptcy act, provided the parties accepting the same had reasonable cause to believe Mrs. Martin was insolvent, and that a fraudulent preference or other fraud on the bankruptcy act was intended, or that it was intended thereby to defeat

the object of or evade any of the provisions of the bankruptcy act, it becomes necessary to decide whether the respondents had such reasonable cause to believe at the time they took these mortgages; and the question of the existence of this reasonable cause is the most serious and important of those litigated in the present case.

It must be observed that the question is not as to the actual belief of the creditors, but whether they had reasonable cause for the belief specified in the statute; such reasonable cause as would induce the belief in the mind of an intelligent, capable business man.

In respect to Mrs. Savage, there is abundant proof of such reasonable cause. She had, as she herself testified, loaned to the bankrupt, in the fall of 1865, a part of the sum for which the mortgages to her were given, and the greater part in the spring of 1866; taking care to provide that she should have security whenever she required it. Although she could not remember when that loaned in 1865 was agreed to be paid, she testified that it was all to be paid in the fall of 1866, or the early part of the succeeding winter, or before. The evidence shows that no part of it was paid when due, or afterwards, prior to the execution of these mortgages; and the whole had been overdue, without any actual extension of the time of payment, for some eighteen months before the mortgages were given. She understood that payment was not made, because the bankrupt had not the money necessary to make the payment. She frequently asked for payment or security, and, in the spring of 1868, a month or two before the mortgages were given, and after she had learned that the bankrupt was going west, on a visit, she not only asked for, but insisted upon, having security. She took a mortgage upon the whole of the bankrupt's stock of goods, being all the personal property she had, except some $1,500 worth of accounts, &c.; and another upon all her real estate, for as much as such real estate would be likely to sell for, subject to incumbrances, at a forced sale; and the amount secured was, by the terms of these mortgages, to be paid in less than five days afterwards. She lived in the same house with the bankrupt, and was frequently in the bankrupt's store, and, doubtless, saw that the stock on hand was light; and she, or the person who acted for her, knew of the Stark mortgage; and she not only took the mortgage on the stock, but also required one on the real estate also, as further security.

She did this, knowing that the bankrupt had not made any payments upon her debt during the year and a half it had remained overdue, and having good reason to believe that she had not been able to make any considerable reduction in the amount of her debt during that period; and she took these securities on such time, and in such form, as must necessarily break up the bankrupt's business; and must, if her mortgages were valid, give her a secured preference, to the almost entire exclusion of all the bankrupt's creditors, except herself and Stark and those who had their debts secured on the bankrupt's real estate.

The natural, and, indeed, the inevitable effect of thus encumbering the bankrupt's whole property, for the security of the debts of two favored creditors, under the circumstances already stated, was to give such creditors a fraudulent preference; and the creditors were bound to presume, as the law presumes, that the bankrupt intended the natural consequences and effect of her acts.

The facts already stated must be held sufficient to show that Mrs. Savage had reasonable cause to believe that these mortgages were executed with intentions, and under circumstances and conditions, which rendered them fraudulent and void under the bankruptcy act, without aid from the provision of the statute which makes them prima facie void, because not made and executed in the ordinary course of business. This prima facie evidence was alone sufficient to put the party on inquiry, and, taken with the other facts before referred to, must be held conclusive against the validity of these securities. See Haughey v. Albin [Case No. 6,222]; Foster v. Hackley [Id. 4,971]; Grow v. Ballard [Id. 5,848]; In re McDonough [Id. 8,775]; Ahl v. Thomer [Id. 103].

If De Lancey Martin must not be considered as having acted as the agent of Mrs. Savage and the respondent Stark, as well as of the bankrupt, in the giving and receiving of the mortgages in controversy, (which is a question not free from doubt,) there is, perhaps, more difficulty in regard to the mortgage executed to the respondent Stark.

In the case of Stark, the mortgage was given without his urging its execution, or even asking for security; and, as he testifies, and all the evidence shows, it was given mainly for the benefit of the brother-in-law of the bankrupt, who was liable, as endorser, for nearly the whole of Stark's debt; and this brother-in-law, it is shown, had been urgent in endeavoring to procure security against his endorsement.

Stark was a banker, and had, for some years, received from time to time a note of the bankrupt, for $1,000, in renewal of a note, of the same amount, previously discounted by him, properly taking care to have its ultimate payment secured by the endorsement of the brother-in-law, Bridgen, who was considered responsible. The bankrupt kept her bank account with Stark, and that account had been overdrawn, for a short time, to the extent of $111, and upwards. Demands against the bankrupt had been sent to Stark's bank for collection, and some had been returned unpaid. The mortgage was executed to him, and, apparently, for his security; but, regarding himself as entirely secure, by reason of

Bridgen's endorsement, he seems to have given the matter but little thought. He, however, testifies, that he supposed the real object in giving the mortgage was to benefit Mr. Bridgen, as he (Stark) had no fears about his debt; that he supposed he authorized Mr. Brown, who drew the mortgage, to draw it; and that he gave him the amount of his account. He swears he did not, at that time, know that Martin was giving security to Mrs. Savage; but Brown, who acted for him, and took the particular security, under such general authority or instruction as he had given him, knew it was to be, or had been given. He also testifies, that he made no inquiry of Mr. Martin, in respect to the state of the bankrupt's affairs; and that he understood the mortgage was taken for the benefit of Mr. Bridgen, so far as the note of $1,000 was concerned.

The mortgage was given nearly a month before the $1,000 note was due, without Stark having asked for such security; it covered the whole of the bankrupt's personal property; it apparently transferred the whole legal title of that property to the mortgagee, leaving only an equitable right of redemption, which right of redemption the creditor could foreclose by a sale after the forfeiture, which took place the day after its execution; it was not given in the ordinary course of business, and was, for that reason, presumed to be fraudulent and void, under the provisions of the 35th section of the bankruptcy act.

The respondent, Stark, is, I think, chargeable with notice of the mortgages to Mrs. Savage, executed at the same time with his own; and these mortgages, taken together, were fraudulent, and an act of bankruptcy on their face. They were, in substance, conveyances of the whole property of the bankrupt, and, if enforced according to their terms, nothing was likely to be left for her unsecured creditors. In respect to the property of an insolvent, it may properly be said—to use the language of Lord Mansfield, in Worseley v. Demattos, 1 Burrows, 467:—"A conveyance of a part may be public, fair and honest, but a conveyance of all must either be fraudulently kept secret, or produce an immediate absolute bankruptcy." This language is strictly applicable to the present case, and the language of the same judge, in Wilson v. Day, 2 Burrows, 827, might, with slight variation, be used in this case. Lord Mansfield there said: "This deed is an act of bankruptcy itself. It defeats the whole bankrupt law: nothing remains for the creditors in any shape, but the whole property is put into the hands of his own trustees; therefore, of course, he is a bankrupt the moment he has executed the deed; for there is nothing at all left for his creditors." See Grow v. Ballard [supra], and authorities there cited.

The utility and the justice, not to say the necessity, of the provision which renders securities, &c., given out of the ordinary course of business, prima facie fraudulent, is well illustrated by the present case. This prima facie evidence is present to every creditor who accepts a security in any case to which the provision is applicable; and, unless the creditor has evidence sufficient to repel this legal presumption, he has reasonable cause to believe that the security is fraudulent and void under the bankruptcy act. This will necessarily prevent any security, voluntarily given by an insolvent to a favored creditor, from being held valid, simply because it proceeded from the voluntary act of the debtor, and was prepared and delivered without any previous communication with the creditor, either in regard to the giving of the security, or the financial condition of the debtor. If a debtor can effectually secure any favored creditor by this one-sided and unusual mode of proceeding, it is likely to be resorted to in every case where the creditor (in consequence of a previous understanding with his debtor, or of the debtor's known disposition to secure him against loss, to the prejudice of his other creditors,) is willing to rely upon the favorable disposition of his debtor, and to be willfully ignorant of his financial condition; and the salutary provisions of the bankruptcy act, which were intended to invalidate the unjust preferences, and to prevent all the other frauds growing out of the validity of general or partial assignments, for the benefit of particular creditors, would be evaded and defeated with ease and certainty. This case shows the propriety of the provision, and it is the manifest duty of this court to give to it the effect which it was the intention of congress should be given to it.

A creditor cannot, by shuttting his eyes when this statutory prima facie evidence of fraud is placed before him, escape the consequences of this provision. When he accepts a security, he is conclusively presumed to know what appears upon its face, and to have reasonable cause to believe it was intended to accomplish what must be its ordinary and necessary effect; and no "masterly inactivity," no self-imposed ignorance of what the circumstances call upon him to ascertain, however intense and however closely guarded and carefullly cherished that ignorance may be, can make fraudulent preferences, like those attempted to be given in this case, valid and binding, as against the assignee of a bankrupt, while the 35th section of the bankruptcy act remains in force.

Independent of the provisions of that section, the circumstances of the case were sufficient to put Stark upon inquiry (In re Hunt [Case No. 6,881]; In re Wright [Id. 18,071]) and such circumstances and such provisions must be held to render his mortgage invalid.

But it was urged that these securities were not void, because the bankrupt, long before the securities were given, and at the time of the loans by Mrs. Savage, and of

Bridgen's endorsement, promised to give security when required, and executed the mortgages, in fulfillment of such promises, under pressure from the mortgagees.

This position cannot be maintained. The provisions of the bankruptcy act embrace payments, for the purpose of giving preference, as well as the giving of securities, &c., and it would hardly be contended that a preference, by way of payment, otherwise invalid, could be valid because the debtor had agreed to pay the debt at the time it was contracted. Besides, the maintenance of the doctrine contended for would defeat the purposes of the bankrupt act. It would be easy, in every case where it was desired to give a fraudulent preference to a relative, or other favored creditor, to make such a contract for security, when called for; and such agreements would be, in effect, secret liens upon the property of the debtor, and enable him to effect the objects generally effected before the bankruptcy act, under promises to secure relatives and endorsers against loss in any event, by assignments made for the benefit of such favorite creditors. A preference gained by a creditor, through the acts and co-operation of his debtor, is no less fraudulent and invalid because it was strongly urged upon his debtor. See Atkinson v. Farmers' Bank, [Case No. 609]; Shawhan v. Wherritt, 7 How. [48 U. S.] 641.

In addition to the objections to these chattel mortgages, which have already been stated, it was insisted that they were fraudulent and void under the laws of this state. There was no immediate or continued change, or, indeed, any change, of possession, for some four months after their execution; and the circumstances of the case tend rather to support than to repel the legal presumption of fraud afforded by the continued possession of the mortgagor. But the conclusions already reached render it unnecessary to decide whether these mortgages were void under the laws of the state, or whether the assignee in bankruptcy, appointed under proceedings commenced after possession of the mortgaged property was taken by the mortgagees, can avail himself of the fact that there was no such immediate or continued change of possession.

A decree must be entered for the petitioner [unless the matter is otherwise arranged by the parties; and the terms of the decree must be settled on the application of the petitioner, after eight days' notice to the respondents' attorneys of the time and place when and where a draft decree will be presented for settlement; and a copy of the decree proposed must be served with such notice].[2]

GRAHAM (STATE v.). See Case No. 13,323.

[2] [From 3 N. B. R. 357 (Quarto, 93).]

Case No. 5,677.

GRAHAM v. STUCKEN et al.

[4 Blatchf. 50.][1]

Circuit Court, S. D. New York. April 27, 1857.

JURISDICTION—FOREIGN CONSUL—WRIT OF NE EXEAT—USURIOUS CONTRACT.

1. This court has jurisdiction of a suit against a foreign consul.

[Cited in State v. Lewis, 14 Fed. 68; Bors v. Preston, 111 U. S. 259, 4 Sup. Ct. 410; Ames v. State, 111 U. S. 468, 4 Sup. Ct. 446.]

2. A demand must, in order to be a foundation for a writ of ne exeat, be an equitable debt or pecuniary claim, and be certain or capable of being reduced to certainty.

3. Where a bill was filed to set aside a bill of sale of a vessel, on the ground that it was made in execution of a contract void for usury, and for a return of the vessel, or the payment of her value, and an account of her earnings: *Held*, that the claim was not one on which a writ of ne exeat could be issued.

In equity. This was an application [by John Graham] for a writ of ne exeat against the defendant [Edward] Stucken, founded upon the allegation, supported by affidavit, that he was about to break up his residence in New York and remove from the country. The papers read in opposition to the application admitted that Stucken was about to embark for Europe; but it was insisted that this was only for a temporary residence, and that it was not designed to close his business establishment in New York. It was not stated, however, when he expected to return, and it was admitted that he had offered his house and furniture for sale, but with the intention of making other arrangements for a residence in New York. It also appeared, that Stucken was consul-general, in the United States, for the kingdom of Hanover, and consul for the Duke of Saxe-Weimar, for the state of New York. The bill was filed to set aside bills of sale of two steamers—the Ocean Bird and the St. Lawrence—and also of one-third of another steamer—the United States—the whole claimed to be of the aggregate value of about $400,000, and prayed that the vessels might be restored to the plaintiff, or, in lieu thereof, that their value might be paid to him by the firm of Meyer & Stucken, to whom the bills of sale were executed by the plaintiff. The bill charged that the transactions arose out of a loan of money upon usurious interest; that the loan was of $100,000, for four months; that $126,000 was agreed to be paid for the same; that the vessels were pledged as collateral security for the payment; and that the form of bills of sale was adopted for the purpose of covering the usurious loan. The defendant Stucken insisted that, although there was an application by the plaintiff for a loan of money upon the ships, it was refused; that the transaction resulted in a purchase of them

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

by his firm for $105,000, without any condition or qualification; that the purchase money had been paid; that the vessels had since been sold at Cuba for $191,376 85, and were out of his possession and out of the jurisdiction of the court; and that he had been obliged to make large advances, over and above the $105,000, to third persons, to remove liens upon the vessels existing at the time of the purchase. Meyer, the other member of the firm, was abroad, out of the jurisdiction of the court, and, therefore, could not be made a party to the bill. The defendants other than Stucken had no direct interest in the controversy. There had been a demurrer to the bill, admitting the facts stated, but presenting certain legal objections to the right of the plaintiff to the relief claimed.

Charles O'Conor and Francis B. Cutting, for plaintiff.

James T. Brady and Gilbert Dean, for Stucken.

NELSON, Circuit Justice. The first question presented on this application is, whether the court is without jurisdiction of the case, for the reason that the defendant Stucken is a foreign consul; for then, of course, no order for the writ sought to be obtained can be granted. The question has not been decided by any judicial authority, and was, it seems, purposely waived by the supreme court in the case of U. S. v. Ortega, 11 Wheat. [24 U. S.] 467. See, also, note to that case, 469–475; 1 Kent, Comm. 315; Curt. Comm. § 108. But, notwithstanding this apparent doubt, it is certain that the framers of the judiciary act of 1789 [1 Stat. 73] understood the constitution as admitting jurisdiction over foreign consuls to be vested in other federal courts besides the supreme court. The argument against the jurisdiction of this court is, that the constitution has vested exclusive jurisdiction in the case in the supreme court of the United States, and that this suit should have been commenced in that court. The last clause of section 2 of article 3 of the constitution declares, that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." Congress, in distributing and regulating this grant of jurisdiction, provided, in section 13 of the judiciary act, that the supreme court should have exclusive jurisdiction in all cases against ambassadors, &c., and original, but not exclusive jurisdiction in cases "in which a consul or vice-consul shall be a party," thus clearly rejecting the idea that the grant in the constitution in respect to consuls was exclusively to the supreme court.

Again the grant of original jurisdiction to the supreme court is the same in the cases (mentioned in the previous clause of the constitution) "in which a state shall be a party," as in the case of a consul. Those cases are controversies—1. Between two or more states; (2) between a state and citizens of another state; (3) between a state and foreign states; and, (4) between a state and citizens or subjects of a foreign state, that is, aliens. Now, if the grant of original jurisdiction be exclusive in the supreme court in the case of a consul, it is equally exclusive in the four cases above enumerated; for the grant is in the same clause and on the same terms. And yet, in the 13th section of the judiciary act, already referred to, it is provided that the supreme court shall have exclusive jurisdiction, &c., where a state is a party, &c., except between a state and citizens of other states, or aliens, in which latter case it shall have original, but not exclusive jurisdiction. According to the argument, the whole of this exception would be unconstitutional, as the cases mentioned should have been vested exclusively in the supreme court.

And, again,—what is still more explicit in respect to the practical construction of the framers of the judiciary act, many of whom were eminent members of the convention that formed the constitution—the 9th section provides that the district courts of the United States shall have jurisdiction, exclusive of the courts of the states, of all suits against consuls or vice-consuls, &c. In the face of all this legislative interpretation by the fathers of the constitution, and all this acquiescence therein since 1789, I cannot say that the jurisdiction in this case is exclusively in the supreme court, but am satisfied that it may be conferred upon the inferior tribunals of the federal judiciary. Being pressed for time, I have stated simply the grounds of this conclusion, without giving more at large the reasons in support of it.

It has been also objected that, admitting that the jurisdiction is not exclusive in the supreme court, still it has not been vested in the circuit courts of the United States. The 11th section of the judiciary act provides, that the circuit courts shall have original cognizance, concurrently with the state courts, of suits between a citizen of the state where the suit is brought and a citizen of another state. The case before me falls directly within this provision. It is said, however, that the jurisdiction cannot be concurrent with the state court, as that court has no jurisdiction of the case, it having been excluded by force of the 9th section, already referred to. But the answer to this suggestion is, that the phraseology is designed simply to save the jurisdiction of the state court where it exists, in other words, to exclude a conclusion.

It has been said, also, that if the jurisdiction of the case is not in the supreme court, and may be vested in inferior courts, it has been expressly vested in the district court, which is true. But there is nothing in the provision conferring it upon that court, that excludes the jurisdiction of the circuit court.

I am satisfied, therefore, that this court has jurisdiction to hear and decide this motion, and also the case out of which it has arisen.

The next ground taken in resisting the motion is, that the demand in this suit is not one in respect to which, according to the usage and practice of the court, a writ of the kind in question will be granted. The demand must be an equitable debt or pecuniary claim, and be certain, or capable of being reduced to certainty. A general unliquidated demand, or one in the nature of a claim for damages, which cannot be regarded as a debt until the decree, will not lay a foundation for the writ. In the case of Flack v. Holm, 1 Jac. & W. 404, where goods had been consigned for sale, and the bill, among other things, claimed a recovery for fraudulently delaying the sale of the goods, whereby a loss accrued, and a motion for a ne exeat was made, and bail marked at £3,600, Lord Eldon observed: "My difficulty is whether that is not too large a sum. The writ only goes where the debt is sworn to. If damages only are to be recovered at law or in equity, that will not do. You cannot have it for any loss which may have accrued by keeping these goods out of the market." Again, he remarked, that the writ "is only applied to that which is really a debt, and not to that which may become a debt, when a recovery in damages shall have ascertained what is due." Now, within this principle, I am of opinion, that the present case is one in which it would not be proper to grant the writ. I can see no debt or pecuniary demand set up against the defendant. The foundation of the bill is that he has got possession of the ships under a contract void on the ground of usury, and that, under the law of New York, which, I admit, must govern, the plaintiff is entitled to set this contract aside, and to have a return of the property, or in lieu thereof, damages to the extent of its value. The plaintiff also claims an account of the earnings of the vessels; but this is simply a mode of arriving at the damages sustained from the wrongful possession and detention of them. The claim is, in substance, that the defendant is a wrongdoer, in taking the property and converting it to his own use. There is no debt or duty set forth in the bill but that which exists in every case of a wrongful conversion of another man's property. This is not a debt, or duty, or pecuniary demand, within the meaning of the rule. One arising upon contract, express or implied, between the parties, is, I think, essential to lay a foundation for the proceeding. I agree that a case is made out which would justify this somewhat extreme remedy, if the nature of the demand in controversy were such as warranted its application. But as, in my judgment, it is not, the motion must be denied.

[NOTE. The original proceeding in this case was by bill in equity heard before Nelson, Circuit Justice, in which relief was decreed the complainant in the sum of $200,000, with interest. Case No. 5,675.

[An action of trover was also begun against the copartner, Meyer, in which the court (Ingersoll, District Judge) discharged the defendant upon common bail, but, as he was not a party to the suit in equity, refused to order the plaintiff to elect as to which action he should prosecute. Case No. 5,673.]

GRAHAM (UNITED STATES v.). See Case No. 15,246.

GRAHAM (WILSON v.). See Case No. 17,804.

GRAHAM v. WOODWARD. See Case No. 5,253.

Case No. 5,678.

GRAHAME v. COOKE.

[1 Cranch, C. C. 116.] [1]

Circuit Court, District of Columbia. March Term, 1803.[2]

OYER—PLEADING.

After plea of condition performed, replication, rejoinder, and special demurrer to the rejoinder, the defendant is not entitled to oyer of the plaintiff's letters of administration, nor to plead that the plaintiff is not administrator.

Debt on bond [by Grahame's administrator] with collateral condition. After plea of condition performed, and replication, rejoinder, and special demurrer to the rejoinder, Mr. Simms, for the defendant, prayed oyer of the plaintiff's letters of administration.

E. J. Lee, contrá, cited 4 Bac. Abr. 113, 114, tit. "Pleas and Pleadings," I. 12, 2; 5 Com. Dig. 478, 479,—that oyer cannot be demanded, after plea, nor after imparlance. And Roberts v. Arthur, 2 Salk. 497,—that upon the profert of a deed, it remains in court all that term, but no longer, unless it be controverted; but letters testamentary, or of administration, do not remain in court, for the party may have occasion to produce them elsewhere. 36 Hen. VI. 30. THE COURT refused to grant oyer.

Mr. Simms, for the defendant, then asked leave to file a plea in bar that the plaintiff was not administrator, which THE COURT also refused.

[NOTE. This case was appealed to the supreme court, and reported in 3 Cranch (7 U. S.) 229, where the proceedings are given at length. There is no mention of oyer of letters testamentary, or of the plea in bar, but the decision of the lower court was reversed, and judgment entered for the defendant upon the demurrer in a brief opinion by Marshall, Chief Justice, to the following point: The suit was an action of debt upon a bond stated, in the declaration, to be dated October 3, 1799, but which, upon oyer being demanded, appeared to be dated January 3, 1799. It was held that this variance, even at this early stage, was fatal to the plaintiff's case; hence the reversal.]

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

[2] [Reversed in 3 Cranch (7 U. S.) 229.]

Case No. 5,679.

GRAIGHLE v. NOTNAGLE et al.

[Pet. C. C. 245.] [1]

Circuit Court, D. Pennsylvania. April Term, 1816.

FOREIGN ATTACHMENT—PROCEEDINGS UNDER, IN PENNSYLVANIA.

1. A foreign attachment may be laid on property in the hands of the plaintiff in the attachment.

2. Form of proceedings under the foreign attachment law of Pennsylvania; and an examination of the practice under the same, and of the principles by which it is regulated.

3. When the garnishee is plaintiff, there is no necessity for a summons, scire facias, interrogatories, or any coercive process, against himself.

[Cited in Smith v. Miln, Case No. 13,081.]

4. Lands are subject to a foreign attachment, in Pennsylvania.

[Cited in Beach v. Fairbanks, 52 Conn. 172.]

5. Mode of proceeding, where there is no garnishee, or when lands are attached.

6. Quaere. Whether under the foreign attachment law of Pennsylvania, it is necessary, that the plaintiff who has attached the property of the defendant in his own possession, should obtain a judgment, that he retain the property in satisfaction of his debt.

At law.

Lewis Ingersoll, J. R. Ingersoll, and C. J. Ingersoll, for plaintiff.

Mr. Rawle, for defendants.

WASHINGTON, Circuit Justice. This is an action of debt, to recover the amount of a promissory note. The defendants plead, that since the last continuance of this action, a writ of foreign attachment had issued out of this court, against the plaintiff, a subject of France, at the suit of Frederick Montmollin, a citizen of Pennsylvania, assignee of Joseph Coulon, also a citizen of the same state; to answer on a plea of trespass on the case; which writ, was laid and served, on all the goods and chattels, monies and effects of the plaintiff, in the hands and possession of the defendants; with an averment, that the said John J. Graighle, in the said writ of attachment mentioned, and the plaintiff in this cause, are one and the same, and not other or different persons; and, that the said writ of attachment remains in full force, and undetermined. The plea concludes with an averment, and prays judgment of the writ issued in this case, and that the same may be quashed. To this plea there is a general demurrer, and the only question that can arise, is upon the validity of the plea.

The question argued at the bar was, whether a creditor can lay a foreign attachment in his own hands. This question however does not arise on these pleadings, since it does not appear from them, that the Frederick Montmollin, who was plaintiff in the action, and the defendant F. Montmollin are the same persons. In order to have brought this question forward, the plaintiff should have replied to that fact. Nevertheless as it is high time, it being upwards of a century since the foreign attachment law past, that this question should be put to rest; the court deems it proper to express an opinion upon it, at this time. The ordinary proceedings in a foreign attachment, commence with the writ of attachment; which is to be served on the goods and chattels of the debtor, in whosever hands or possession the same may be found; or upon any person, who may be indebted to the defendant in the attachment. Upon the return of the writ, the garnishee is to enter an appearance, which is generally by attorney, unless, under the provisions of the act of assembly of Pennsylvania, a clause of capias is inserted in the writ; in which case he must give bail for his appearance. Judgment by default is then entered against the defendant, as a matter of course, at the third court after the writ issued; unless he puts in bail. After this, a scire facias issues against the garnishee, to show cause, why the plaintiff should not have execution against him, of the defendant's property attached in his hands. To this writ the garnishee may plead the general issue, nulla bona; or any special matter, tending to show, that the effects in his hand, or the debt due by him to the defendant, ought not to be condemned. If the issue is found against the garnishee, or if he should not appear and plead; judgment is rendered against him, upon which an execution will issue. In aid of this process, the plaintiff may compel the garnishee to answer, on oath, to interrogatories, to be propounded to him; calculated to draw from him a discovery of all the property of the defendant, which he has in his hands, and of the debts which he may owe him. The absurdity of process issuing against the plaintiff in the attachment, at his own suit, his answering his own interrogatories, and being subject to execution, for a debt due to himself; are strongly relied upon to prove, that an attachment cannot be laid, in the hands of the plaintiff in that suit.

There is certainly at first view, great weight in this argument; and unless the difficulties upon which it is founded, can be removed, by a fair and reasonable construction of the acts of assembly, it must prevail. It may however be observed, that there are strong reasons for believing, that the exclusion of a creditor holding in his hands the property of his debtor, from the benefit of the attachment law, was not in the contemplation of the legislature. The law is remedial, and the words of it general, extending the remedy to all creditors, without distinction; and it would seem strange, that the only person who cannot obtain justice, against a non-resident, should be one, who has in his hand, the funds out of which that satisfaction may

[1] [Reported by Richard Peters, Jr., Esq.]

be had. There would seem to be a manifest injustice, that the plank upon which he might save himself, and upon which he may probably have relied, should be taken from him, and given to other creditors. If, however, such be the necessary construction of the law, the court must decide in conformity with it, however they may regret it. Generally speaking, there are three parties to a writ of foreign attachment. The plaintiff, or creditor, the defendant, or debtor; and the garnishee, who, in relation to the controversy between the plaintiff and defendant, stands very much in the situation of a stake holder. Between either of those parties, and himself, there is nothing adverse, unless he makes it so by his own conduct. It is perfectly immaterial to him, which of the parties succeeds. He is only to act bona fide, by discovering what property of the defendant is in his hands; and as he cannot himself, decide between the contending parties, he cannot deliver over the property to either, without the judgment of the court. The proceedings therefore against him, are merely auxiliary to the principal suit, and are intended to secure the end for which it is instituted. But if, from the nature of the case, the end can be obtained, without the use of all the means provided by the law; there would seem to be no impropriety, in employing such of them only, as would be necessary to arrive at the proposed object. Because the effect of the suit might be defeated, unless the plaintiff were armed with coercive measures against the garnishee; he certainly cannot be required to use those measures, whether they are necessary or not. The garnishee, therefore, being himself plaintiff in the writ of attachment, there can be no necessity for a summons, scire facias, interrogatories, or any other coercive process against him. If the officer returns, that he has attached the defendant, by certain property, which is specified; no reason is perceived, why the plaintiff may not proceed to obtain judgment, against the defendant, and after that, an execution, to be levied on the property attached; upon the plaintiff giving security, according to the requisitions of the law, to restore the same, if the defendant should, within the time prescribed, disprove or avoid the debt. If the plaintiff, instead of having property in his own hands, belonging to the defendant, is indebted to him, no necessity is perceived, for any further proceedings; since the money is already in his own hands, and the judgment against the defendant has ascertained the amount of his debt; unless, perhaps, it may be proper to enter a judgment, that the plaintiff have execution of the sum attached, and retain the same in his hands, as in the precedent, which will presently be referred to.

The mode of proceeding above suggested, where the plaintiff, in the attachment, has goods or effects in his hands, belonging to the defendant; seems to be fully warranted by the practice under the custom of London, where there is no garnishee, the effects not being in the actual possession of any person. In such a case, the plaintiff obtains a judgment against the defendant, by default, and an execution against the effects, upon which the attachment was laid. If the attachment be laid upon the lands of the defendant, which it is admitted may be done in this state, no other mode of proceeding can be pursued, there being in such case no garnishee. That a creditor may lay a foreign attachment, in his own hands, according to the custom of London, is clearly established, by the cases which will hereafter be referred to; and yet, the proceedings under the custom, are so nearly analogous to those provided by the laws of this state, that the objections stated at the bar, must equally exist there, as well as here. To the laudable industry of one of the plaintiff's counsel, Mr. Lewis, the court is indebted, for the gratification it has received, in inspecting the pleadings in a case, where a foreign attachment was laid in the hands of the plaintiff in the attachment, and the judgment pleaded in bar, to an action brought by the defendant in the attachment against the plaintiff.[2] It is to be found in Rast. Ent. p. 156, and is referred to by

[2] Paramore v. Pain, Cro. Eliz. 598. Copy of the record in the above case, taken from Rast. Ent. 156b, and referred to by Sergeant Danvers in his second volume, p. 313:

"And the said W., by T. C. his attorney, comes, &c. and says, that the said J. A. and M., their action ought not, &c., because he says, that the city of London is an ancient city, within which there is, and from the time whereof the memory of man runneth not to the contrary, there hath been a custom, that if any bill of debt is levied, or affirmed by any persons in the court of the lord the king, before the mayor and aldermen of the city of London for the time being, in the chamber of the guildhall of the said city, according to the custom of that city; so that by virtue of that bill, any serjeant at mace of the said mayor, within the said city, and officer of the said court, do summon the persons named in the said bill, as defendants, to appear at the next court of the lord the king, in the chamber of the said guildhall, before the mayor and aldermen for the time being, there to be held, to answer the plaintiffs in the same bill, in the plea therein contained; and such serjeant shall certify to the court, there before the said mayor and aldermen, in pursuance of the said command, that the defendants in the said bill, have nothing within the liberty of the said city whereby they can be summoned; and such defendants shall make default in the said court, and thereupon it shall be alleged in the same court, before the said mayor and aldermen, by the plaintiffs in the same bill, that they themselves are, from any cause whatever indebted to such defendants in the sum of money in the said bill or plaint mentioned, or any part thereof; then on the prayer of the plaintiff in the said bill, such serjeant or minister of the said court, shall be commanded by the said court to attach the defendants in the said bill named, by the said sum of money in the hands and custody of them, the said plaintiffs, to be and appear at the next court of the lord the king in the hall aforesaid, there to be held before the mayor and aldermen of the said city, to answer the plaintiffs in the said bill, of the plea therein

Sergeant Danvers (volume 2, p. 313) as the pleadings in the case of Paramore v. Pain, Cro. Eliz. 598. See, also, Coke, Ent. 139b.

The plea in Paramore v. Pain, was, that the plaintiff was indebted to the defendant, in a sum equal to that for which this suit was brought; that he sued a plaint in London, and that this debt was attached in his hands, and so he pleads the said foreign attachment, and the judgment thereon, in bar. It appears by the pleadings above referred to, that the judgment so pleaded, was "that the plaintiff in the attachment should have execution of the sum so attached in his hands, as the same was attached, and that he should absolutely retain the same in payment and satisfaction of his debt, upon his giving security, &c." Whether such a judgment be necessary in this state, may be doubted, since there is no judgment rendered against the defendant in the attachment, according to the custom of London, and in this state there is. As to this, however, I give no opinion at present.

In the case of Coke v. Brainforth, Cro. Eliz. 830, the practice of attaching in the hands of the plaintiff, was again recognized; and the authority of these two cases, received the countenance of the court of king's bench, in the cases of Morris v. Ludlam, 2 H. Bl. 362. See, also, 3 East, 367; Law of Corporations, 226, 243; 4 Rolle, Abr. 554; 1 Com. Dig. 442; 7 Vin. Abr. 236; 2 Lutw. 1052, 4.

It is not perceived, that any injustice is done to the defendant in the attachment, or that the laws of the state of Pennsylvania or any general principle of law, are violated by this mode of proceeding. It is of no con-

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contained; and if the said serjeant shall certify to the court there, before the mayor and aldermen of the said city for the time being, that he hath attached the defendants by that sum of money in the hands and in the possession of the plaintiffs of the plea in such plaint contained; and such defendants shall not appear, but make default at that court, and three other courts of the lord the king, before the mayor and aldermen of the city for the time being, in the hall aforesaid, then next, that is to say, at four such courts separately held, the plaintiffs in the same plaint, appearing at each of the said courts; then, at the last of the said four courts, in a case in which any sum of money, in the hands of the plaintiffs in the said bill or plaint named, by which the defendants are attached, shall be defended in form aforesaid; and it shall, on the petition of the plaintiffs, be adjudged by the same court, that the plaintiffs shall have execution of the said monies in their own hands, so as aforesaid defended, and that they shall absolutely retain the same monies in full payment of the debt in the said bill specified, or such part thereof as the sum so defended shall amount to; on sufficient sureties or pledges being given by the plaintiffs in the same court, to be answerable for the same, in the said bill specified, if the defendants shall, within a year and a day then next following, appear and exonerate themselves of the debt, in the said bill specified, and against them the defendants demanded or any part thereof, then, &c. And he says, that all the customs of the said city, for a long time used, were by the authority of a parliament of the Lord Richard the II. late king of England, after the conquest, held at Westminster, in the seventh year of his reign, ratified and confirmed to the then mayor and commonalty, of the said city of London, and their successors. And the said W. says, that he and a certain J. G., by the names of J. G. and H. D. of London, skinners, on the 5th day of December, in the ninth year of the reign of the lord the king, that now is, in the chamber of the guildhall in the city of London, situate in the parish, &c. in the same city, before J. T., now mayor and his associates, then aldermen of the said city, affirmed on certain bill of debt, upon demand dictarii, of fifteen pounds, against the said J. A. &c. and a certain W. W. by the names of W. W. and J. A., averring that they, the said W. and J. owed to the said J. G. and W. D., the said fifteen pounds; for that on the 30th day of September, in the eighth year of the reign of the lord the king that now is, in the parish, &c. the said W. W. and J. A. bought divers merchandise of the said J. G. and W. D., for the said sum of fifteen pounds, to be paid by the said W. W. and J. A. to the said J. G. and W. D., when, &c. which said fifteen pounds the said W. W. and J. A., to the said J. G. and W. D. have not yet paid, although often required, &c., to the damage of the said J. G. and W. D., one hundred shillings, and thereof they brought pledges, R. H. and R. D., to prosecute the bill aforesaid; and they thereupon prayed process, according to the custom of the said city, to be granted to them; and thereupon a certain J. B. one of the serjeants at mace of the said late mayor, was then and there, according to the custom of the said city, in the same court, commanded by the said late mayor and aldermen, to summon, according to the custom of the said city, the said W. W. and J. A. to be and appear in the said court of the lord the king, in the said chamber of the guildhall aforesaid, on the said 5th day of December, then next following, to answer according to the custom of the said city, the said J. G. and W. D. in the plea aforesaid, &c.; and afterwards, on the same 5th day, in the said court of the said lord the king, according to the custom of the said city, &c., it was certified by the said late serjeant, that the said W. W. and J. A., had nothing within the liberty of the said city, whereby, &c.; nor were they found therein, &c.; whereupon, it was according to the custom of the said city, alleged in the said court, by the said J. G. and W. D., that they were at that time, indebted to the said W. W. and J. A. in fourteen pounds, and it was thereupon, then and there ordered by the same court, on the prayer of the said J. G. and W. D., that the said late serjeant should, according to the custom of the said city, attach the said W. W. and J. A. by the said fourteen pounds, in the hands and custody of the said J. G. and W. D., and the same fourteen pounds in their hands should defend, according to the custom of the said city, to be at the court of the lord the king, in the said chamber, before the said late mayor and aldermen, on the same 5th day to be held, to answer to the said J. G. and W. D. in the same plea, &c. according to the said bill, &c.; and that what he should thereupon do, he should, on the same fifth day, there certify; in pursuance whereof, the said late serjeant, the said W. W. and J. A., by the said fourteen pounds attached, and the same in the hands and custody of the said J. G. and W. D., defended according to the custom aforesaid, as he was commanded; and thereupon the said J. G. and W. D., on the said fifth day, in the said court of the said lord the king, in their proper persons, in the plea aforesaid appeared, and the said W. W. and J. A. to the same court did not come according to the custom of the said city, but made the first default; whereupon day was given to the said J. G. and W. D. in the plea

sequence to the defendant whether a trial be had or not, for the purpose of ascertaining what effects of his, the plaintiff has in his hands; or, what is the amount of debt he owes, or even what effects are in the hands of the garnishee, where there is one. For if in the latter case, the garnishee cannot controvert the debt claimed by the plaintiff, by confessing himself to be a debtor to the defendant, or to have effects of his, in his hands, (which there is no doubt he may do, without danger to himself,) judgment goes against him, as a matter of course; although, without such judgment, he cannot deliver over the property or pay the debt to the plaintiff. In the former case, the plaintiff, who is quasi a garnishee, confesses effects in his hands, which he retains, in consequence of the judgment to satisfy his own debt; but in this case, the defendant in the attachment is allowed, in an action against the plaintiff, to traverse the plea, and thus to contest the debt recovered in the attachment. In fact, the only protection of the defendant in either case, consists in the security to restore, which the plaintiff must give. Nor can it be said, that the law of this state is violated, because such of its provisions as are inapplicable to the case, are not pursued.

Upon the whole, this court feels itself authorized to sustain a foreign attachment, which is laid in the hands of the plaintiff; and I am satisfied, that in doing so, we not only fulfil the spirit and intention of the law, but sanction a practice both just and convenient. In this case, the demurrer must be overruled, and the plaintiff will be allowed to put in a replication, if he chooses so to do.

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aforesaid, according to the custom aforesaid, to be in the court of the lord the king in the chamber of the guildhall aforesaid, before the said late mayor and aldermen, on the sixth day of December then next following, to be held, and the same day was given to the said W. W. and J. A., to be then and there according to the custom aforesaid, to answer to the said J. G. and W. D., in the same plea, &c.; at which day, to the said court, &c., before the said late mayor and aldermen, on the sixth day of December, in the said chamber of the guildhall aforesaid held, the said J. G. and W. D., in their proper persons, in the same plea appeared, and the said W. W. and J. A., to the same court, according to the custom aforesaid, did not come, but made a second default."

(As the proceedings respecting the third and fourth default, are the same with those respecting the second, they are omitted in the translation, except the recording of the fourth default, and the proceedings thereupon, which are as follows:)

"And the said W. W. and J. A., at the same court, according to the said custom, being solemnly called did not appear, but made the fourth default, and did not permit themselves to be justified by the said foreign attachment, according to the custom of the said city; and that after the said fourth default, the said J. G. and W. D., according to the custom of the said city, in the said court of the lord the king, held before the said late mayor and aldermen, in the chamber of the guildhall aforesaid, on the 10th day of December, then next following, prayed execution of the said fourteen pounds, so as aforesaid in their hands and custody attached and defended, upon their finding sufficient sureties or pledges, according to the said custom, to answer to the said W. W. and J. A., if they should within a year and a day exonerate themselves of the said fourteen pounds, against the said J. G. and W. D., according to the custom of the city aforesaid; and because the said J. G. and W. D. then and there swore, that the said W. W. and J. A. were then indebted to them the said J. G. and W. D. in the said fifteen pounds, in the said bill mentioned, it was ordered by the said court, that the said J. G. and W. D. should have execution of the said fourteen pounds in their hands and custody, as the same were attached and defended; and that they should absolutely retain the said fourteen pounds, in part payment of the said fifteen pounds, and in full satisfaction of fourteen pounds, of the said fifteen pounds, upon the manucaption of J. S. and T. L. of the said city, to answer for the same, to the said W. W. and J. A., if within the said year and day, they should come and exonerate themselves of the said fifteen pounds against the said J. G. and W. D., by reason of whose default, the said J. G. and W. D., by the consideration of the said court, have execution of the said fourteen pounds attached and defended in their hands and custody, according to the custom of the said city, &c.; and the said W. D. says, that the said fourteen pounds, by the said J. A. and W. W., demanded as aforesaid, are the same fourteen pounds in manner aforesaid defended in the hands of the said W. D. and J. G. and not others or different; and that the said J. A. and W. W., in the bill aforesaid named, as well at the time of affirming the bill aforesaid, as at the time of issuing the said attachment, and also at the time of making the said attachment and of certifying the same, were indebted to the said W. D., and to the said J. G. in the said fifteen pounds, in the bill aforesaid mentioned, and that the said W. D. and the said J. G. are held and bound to the said J. A. and M., and to the said W. W. now deceased, in the said fourteen pounds, in the manner required of him, the said W., by the said writing obligatory here in court produced, and in the hands of the said J. G and W. D. as defendants aforesaid, upon which writing, the said J. A. and M. have declared against the said William, in form aforesaid, and which W. D., in the said bill named, is the same William, who is so bound by the said writing, and against whom and the said J., the said J. A. and M. have brought their aforesaid writ, and on the said writing have declared against each of them separately, demanding the said fourteen pounds, and declaring on the same writing, against them separately here in court; and that the said M., at the time of the making of that writing, was the wife of the said J. A.; and the said W. further says, that the judgment and execution aforesaid, yet remain in full force and effect, in no wise revoked by the said J. A. and W. W., or either of them, and this he is ready to verify, wherefore he prays judgment, if the said J. and M., their action aforesaid against him ought to have, &c."

(There is a long replication, not denying the above mentioned custom, but avoiding it by pleading another custom, permitting a traverse of the debt, and issue taken thereon. A certiorari issued to the mayor and aldermen, to certify if there was such a custom, but it does not appear that any return was made to it. As this custom is not introduced into the act of assembly of Pennsylvania, it is not copied.)

Coke, Ent. 139b. See another precedent, of an attachment laid in the hands of the plaintiffs, pleaded in bar.

Case No. 5,680.

In re GRAMBO.

[1 Wkly. Notes Cas. 64.]

District Court, E. D. Pennsylvania. Nov. 4, 1874.

CO-TRUSTEES—JURISDICTION OF BANKRUPT COURT OF QUESTIONS BETWEEN TRUSTEES—POWER OF CREDITORS OVER CUSTODY OF ASSETS.

[In bankruptcy. In the matter of Harrison Grambo.] A petition of Stephen A. Potter and William Wright, trustees of said estate, was filed, in which it was set forth that Samuel Wright, a co-trustee, had obtained possession of certain bonds, mortgages, and assignments from the fire-proof of the petitioners; that demand had been made therefor under a resolution of a meeting of creditors, and that all had not been returned; and praying relief.

Mr. Sutton, for trustees.

Chapman Biddle, for S. Wright.

THE COURT said, unless the proceedings in this case have been ratified by every creditor, they are of doubtful validity, and require judicial rectification; but that the question raised could not be litigated in the present crude form of the application. The petitioners might proceed by bill in equity in the circuit court of the United States for this district, if so advised, with or without other complainants, against the present respondent, and all other proper parties, to obtain such fundamental or incidental relief as may be considered proper. If such proceedings are instituted, the present application may stand over.

[A bill in equity was accordingly filed in the circuit court (Case No. 11,343) by the said trustees, praying for relief in the manner above set forth. The bill was dismissed, however, without prejudice, because, in the original transfer to the trustees, the approval of the court had not been obtained as directed.]

GRAMMER (BLAKE v.). See Case No. 1,496.

Case No. 5,681.

GRAMMER v. CARROLL.

[4 Cranch, C. C. 400.] [1]

Circuit Court, District of Columbia. Nov. Term, 1833.

BILLS AND NOTES—INTEREST—PROTEST — ACCEPTANCE.

1. The defendant, the acceptor of a bill payable to the plaintiff out of an expected particular fund, received the fund, but paid it to the holder of a subsequent draft by the same drawer; *held*, that the defendant was liable to the plaintiff in an action for money had and received to his use.

2. Interest may be given as damages for the non-payment of money received by the defendant to the plaintiff's use after demand and refusal.

Assumpsit for money had and received. R. G. Lanphier, Jr., having made a seal for the supreme court of the United States, of which court the defendant was clerk, and being indebted to the plaintiff, drew the following bill: "Washington, October 11, 1831. Mr. Carroll, Clerk of the Supreme Court of the United States. Pay G. C. Grammer, or order, on the 1st day of April next, the sum of $80, out of any money that may come into your hands as clerk, on account of a seal made by me for the office of said court. $80. R. G. Lanphier, Jr." Indorsed: "Accepted, William Thomas Carroll, C. S. C. U. S." Mr. Lanphier afterwards drew another bill on Mr. Carroll for $100, being the whole price of the seal, in favor of Mr. Middleton, Mr. Carroll's clerk, who was a creditor of Lanphier, and who was said to be insolvent. Mr. Carroll having certified on the bill, that the seal had been made, and that the money was due to Lanphier, Mr. Middleton took it to the marshal, and got his due-bill for the amount, payable in ten days, which he gave to Mr. Carroll, who received the money from the marshal, and paid it over to Mr. Middleton; but before he paid it, Mr. Middleton had notice of Mr. Carroll's acceptance of the draft in favor of the plaintiff.

Upon the trial, Mr. Coxe, for defendant, moved the court to instruct the jury, in substance, that the plaintiff cannot recover without satisfying them that the money came to the defendant's hands, as clerk.

But THE COURT (CRANCH, Chief Judge, contra) refused to give the instruction; because, if the defendant had a right to draw it from the marshal, the money was, in effect, in the defendant's hands.

THE COURT (THRUSTON, Circuit Judge, absent), at the prayer of the defendant's counsel, instructed the jury, that the plaintiff cannot recover in this action on the count for money had and received, unless the jury should be satisfied by the evidence that the defendant received the money to the plaintiff's use. Verdict for the plaintiff, $81.75, to bear interest from the 4th of April, 1832.

Mr. Coxe, for defendant, moved for a new trial, upon the ground that upon the count for money had and received, the jury had given interest by way of damages; and the cost of protest of the defendant's acceptance, which was not given in evidence upon the special counts, which were abandoned, and cited several cases.

But THE COURT said, that in this court, the jury had always been allowed to give damages for the non-performance of the contract; and that it was competent for them to make the interest the measure of their damages; and that interest may be recovered on money received to the plaintiff's use, after demand and refusal to pay.

Upon the plaintiff's remitting the cost of protest, THE COURT refused to grant a new trial.

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

GRANBERRY (HASTINGS v.). See Case No. 6,200.

Case No. 5,682.

GRAND v. The IBIS.

[3 Woods, 28.] [1]

Circuit Court, E. D. Louisiana. Nov. Term, 1876.

CHARTER-PARTY—FREIGHT.

1. Where a vessel is chartered for a voyage for a round sum, the charterer has the right to load the vessel himself, or allow others to do it under the contract with him. In the latter case, the goods placed on board by third persons, under such contract, are liable only for their own freight and not for the gross sum named in the charter-party.

2. This rule is not changed by the following clause inserted in the charter-party, viz.: "Bills of lading to be signed when presented without prejudice to this charter-party."

[Distinguished in The Peer of The Realm, 19 Fed. 217.]

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

On January 15, 1876, one J. M. Oriol, a merchant of New Orleans, entered into a contract of charter-party with A. N. Christensen, master, whereby he chartered the bark Ibis for a voyage from New Orleans to Liverpool, England, for the carriage of a full cargo of timber or other merchandise to be furnished by Oriol. In consideration whereof Oriol agreed to pay the gross sum of £1,150 sterling in cash, on right delivery of cargo at port of discharge, etc. The charter-party also contained this stipulation, "It is also agreed that this charter-party shall commence when the vessel is ready to receive cargo * * * and end on the right delivery of cargo and payment of freight at the port of discharge; bills of lading to be signed when presented without prejudice to this charter-party." Without any knowledge of the terms of this charter-party, the libelant [Leon Grand] contracted with Oriol, the charterer, for the carriage of a quantity of lumber, in logs, to Liverpool, at the rate of 60 shillings sterling per load of 50 cubic feet queen's calliper measure, and in pursuance of said contract sent to the bark lots of white ash, white oak, walnut and black walnut logs of the value of about $5,000, and the same were received and stowed on board. The libelant then caused bills of lading to be made out for the logs, according to his contract with Oriol, and sent them to the master of the bark for signature. He declined to sign the bills on the ground that he had chartered his vessel to Oriol for a round sum, and that he would not sign said bills unless they contained the clause "as per charter-party." Afterwards, libelant having been advised that he would only be liable for the freight on his lumber, agreed to accept the bills of lading with the clause above mentioned inserted therein; but the master of the bark then refused to give bills of lading unless they expressly stipulated that the vessel should have a lien upon libelant's said merchandise for any deficit that might remain unpaid of the round sum for which she was chartered by Oriol. The bark sailed with the merchandise of libelant on board, without having given any bills of lading. The merchandise of the libelant was conveyed to Liverpool by the Ibis, and arrived May 22, 1876, and was there sold for the freight due on the charter-party, and brought the sum of 1,032 pounds, 2 shillings and 7 pence sterling. The freight on the cargo, exclusive of the merchandise of libelant, amounted to the sum of 500 pounds, 14 shillings and 9 pence. The libel prayed for a decree against the bark for the value of the merchandise shipped by libelant.

Joseph P. Horner, for libelant.
Charles B. Singleton, for respondent.

WOODS, Circuit Judge. The question presented is whether, under the circumstances of the case, the respondent had a lien upon the merchandise of libelant for the payment of the gross sum mentioned in the charter-party, or whether it was only liable for its own freight. If the former, then the respondent is only liable for so much of the proceeds of libelant's merchandise as remained after satisfying the sum due on the charter party; if the latter, then the respondents are liable for the value of the merchandise in Liverpool, less the freight from New Orleans.

The general rule unquestionably is that, where a vessel is chartered for a voyage for a round sum the charterer has the right to load the vessel himself, or allow others to do it under contract with him, and the goods so placed on board by third persons under such contract, are liable only for their own freight, and not for the payment of the gross sum named in the charter-party: Perkins v. Hill [Case No. 10,987]; 1 Pars. Shipp. & Adm. 301, notes 1 and 2; Drinkwater v. The Spartan [Case No. 4,085]; Faith v. East India Co., 4 Barn. & Ald. 630. But it is claimed in this case, that the clause in the charter-party whereby the master agreed to give bills of lading "without prejudice to this charter-party," changes the general rule and implies that goods put on board not belonging to the charterer, shall be liable for the gross sum mentioned in the charter-party, and not merely for their own freight. I think the authorities are adverse to this construction of the charter-party. In the case of Paul v. Birch, 2 Atk. 621, it was held

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

by Lord Hardwicke that where the charterers had bound the goods for the payment of the hire or freight and afterwards become bankrupts, full effect should be given to that clause as against the assignees. But an attempt was made to charge the goods of third persons who were shippers under the charterers, with the full amount of the hire or freight. This last claim was resisted, and Lord Hardwicke held that these latter goods were liable only to the extent of the freight payable to the charterers by the shippers. So in the case of Kerford v. Mondel, 5 Hurl. & N. 931, the managing owner chartered his ship for a voyage to Central America, and return, at certain specified rates of freight, with a provision that the master might sign bills of lading without prejudice to the charter-party. And it was agreed that for the security and payment of all freight, dead freight and other charges, the master or owner should have a lien on the cargo or goods laden on board. On her homeward voyage one Larraondo shipped certain bags of sugar and cochineal, and took separate bills of lading whereby the goods were deliverable "on payment of freight and carriage as agreed." These bills of lading were signed by the master in pursuance of the charter-party. On tender of the amount due for carriage of the sugar and cochineal, the master refused to deliver, claiming a lien for dead freight under the charter-party. Trover was brought to recover the value of the goods. Watson, Baron, said: "The real question agitated between the parties is, whether there was a lien for dead freight under the circumstances. Now, in the original charter there was a lien for dead freight, but the master was to sign bills of lading for goods shipped on board the vessel, and the goods were shipped on board the vessel, and in the bill of lading there was no lien for dead freight, but merely for freight (i. e., freight for carriage) as agreed. It is perfectly clear that does not apply to dead freight. The price is for the carriage of goods. It would be a monstrous supposition that a man who shipped 100 pounds of goods on board a vessel should be held responsible for 1,500 pounds dead freight."

The fair construction of the clause in the charter-party under consideration, by which the vessel, her freight and appurtenances, and the merchandise laden on board, are bound to each other for the performance of the charter-party, and that "bills of lading, when presented, are to be signed without prejudice to this charter-party," is not that the goods of third persons shall be liable for the entire freight, but only for their own freight, and that the clause binding the cargo should only extend to the cargo of the charterer. In accordance with these views, there must be a decree in favor of libelant for the value of his logs in Liverpool, less the freight thereon from New Orleans, and the costs in both the district and circuit courts.

Case No. 5,682a.

GRANDE et al. v. FOY.

[Hempst. 105.] [1]

Superior Court, Territory of Arkansas. Jan., 1831.

EJECTMENT—HISTORY OF.

1. The action of ejectment was authorized by our laws as far back as 1807, and continued to exist without the fiction of "lease, entry, and ouster," until 1816, when the common law was adopted by positive enactment, and the action of ejectment introduced according to the forms of the common law.

2. History of the action of ejectment reviewed, and our legislation on the subject referred to.

Appeal from Crittenden circuit court. [Action by Saline Grande and others against Catharine Jane Foy.]

Before JOHNSON, ESKRIDGE, and CROSS, JJ.

CROSS, J. This was an action of ejectment, brought by the appellants against the appellee, in the circuit court of Crittenden county, for the recovery of a tract of land, containing five hundred and forty-four acres and forty-four hundredths of an acre. At the last May term of the circuit court of that county, a motion was made on the part of the appellee to dismiss this cause upon the ground that there was no law in force in this territory by which the title to real estate could be tried, and the possession recovered by action of ejectment. This motion was sustained by the court, and the cause dismissed accordingly. To this decision, the appellants by their attorney excepted, and prayed an appeal to this court.

The record presents but a single question, namely, whether the court below erred in sustaining the motion to dismiss upon the ground, that by the laws of this territory the action of ejectment could not be maintained. The action of ejectment is peculiar to the common law, and was invented in England during the reign of Edward II., or in the early part of that of Edward III. Adams, Eject. c. 1, pp. 7, 8. On its first introduction, it was a remedy afforded a lessee for a term of years, when he had been ousted by the lessor for the recovery of his term, or the remainder of it, with damages. 3 Bl. Comm. 199. During the reign of Henry II. it was converted into a method of trying titles to the freeholds, but did not assume its fictitious form until the exile of Charles II. From the period of its first having been used in trying titles to land, up to the time last mentioned, an actual lease, entry, and ouster, which, according to its present modification, constitutes the fiction, was necessary, and without it the action could not be sustained.

By a recurrence to the history of our laws, and an inquiry, first, as to the period when the common law was adopted in this country; and secondly, whether as it now stands, the action of ejectment is authorized, we shall be

[1] [Reported by Samuel H. Hempstead, Esq.]

enabled to arrive at a correct conclusion in regard to the question before us. In considering the first branch of the subject, it may be necessary to declare that by the treaty of cession in the year 1803, between France and the United States, the province, as it was then called, of Louisiana, was acquired; a portion of which now comprises Arkansas. At the first session of congress after the treaty, the president of the United States was authorized to take possession of the country, and a law was passed, entitled "An act erecting Louisiana into two territories, and providing for the temporary government thereof." By this act all west of the Mississippi river, and south of latitude thirty-three north, was called the "Territory of Orleans," and the residue the "District of Louisiana." The same act vested in the governor and judges of the territory of Indiana the power to make all laws which they might deem conducive to the good government of the inhabitants of the district, and declared that the laws then in force in the district, not inconsistent with its provisions, should continue in force until altered, modified, or repealed. Act 1804, 3 Bior. & D. Laws, 608, 609 [2 Stat. 283]. The succeeding session of congress in 1805, passed a law further providing for the government of the district of Louisiana, by which the name was changed from that of "District" to that of the "Territory" of Louisiana, and a different legislative power created and vested in the governor and three, or a majority, of the judges of the territory. A provision was also inserted continuing all such laws and regulations as were in force at the time of its passage until altered, modified, or repealed. 3 Bior. & D. Laws, 659, 660 [2 Stat. 331]. That act continued in force until December, 1812, when the organic law of Missouri took effect. By that law the name of the "Territory of Louisiana" was changed to that of "Missouri," and all laws and regulations in force at the time of its passage, and not inconsistent with its provisions, were declared to be in force, until altered, modified, or repealed. In March, 1819 [3 Stat. 493], the law was passed creating the territory of Arkansas, in the southern part of the Missouri territory, which continues in like manner all such laws and regulations as were in force at the time of its passage until modified or repealed. From this view it will be seen, that such laws and regulations as were in force at the time of the acquisition of Louisiana, were continued from time to time up to the date of our organic law in the year 1819, except such as were inconsistent with the constitution and laws of the United States, and until altered, modified, or repealed.

In 1816 the legislature of the Missouri territory passed a law, by which it is enacted, "that the common law of England, which is of a general nature, and all statutes of the British parliament in aid of, or to supply the defects of the common law, and of a general nature and not local to that kingdom, which common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with, the constitution and laws of the United States, shall be the rule of decision in this territory until altered or repealed by the legislature." Geyer, Dig. 124. By that act, which is still in force, the common law of England, of a general nature, is introduced, except where it conflicts with our statutes, or is repugnant to or inconsistent with the constitution and laws of the United States; and here, perhaps, the inquiry might be closed as to the period when the common law was adopted. To prosecute it further would be rather a matter of curiosity than necessity upon the present occasion. We are induced to believe, however, from the numerous common law phrases and terms used in our statutes anterior to the passage of the law of 1816, that it must have been adopted either by statutory provision or by common consent at an earlier day. As far back as the year 1807, we find most of the common law actions mentioned in the acts of the legislature of Louisiana, such as trespass vi et armis, ejectment, case, debt, covenant; also, the terms murder, presentment, and indictment. Demurrers, general and special, are spoken of, and pleas of various kinds known to be authorized by the common law. In using these terms, and recognizing such actions and pleas, did the legislature intend those only authorized by the laws and regulations in force at the time Louisiana was acquired? If so, it is doubtful whether the laws of France or Spain should have been resorted to, to find their definitions, and the manner of proceeding in them, inasmuch as the province of Louisiana had been acquired from the latter by virtue of the treaty of San Ildefonso, in October, 1800. It would certainly be conjectural altogether to say the laws of either of these governments were intended, and to say both would be absurd. To arrive at the conclusion, then, that the legislature intended actions, pleas, and terms defined by the laws of France or Spain or both, we have first to suppose their existence, and from this hypothetical existence the deduction must be made, that the legislature intended such actions, pleas, and terms, as were never known to their laws, or the laws of one of those governments. This would be a conclusion alike inconsistent with the rules of logic and law, and the legislature never so intended it. How then, it may be asked, are we to ascertain the meaning of the legislature in speaking of such actions, pleas, and terms, as are known to be sanctioned by the rules of the common law? Certainly, by referring to the common law itself, thereby avoiding the necessity of a hypothetical existence.

In corroboration of the opinion that the legislature alluded to the common law actions, pleas, and terms, is the fact, that all the proceedings had in the courts, immediately after the passage of the acts in which they are mentioned, were in accordance with the rules of the common law. The maxim, therefore,

applies with great force, "contemporanea expositio est fortissima in lege." The inquiry may be made, as to what has become of the laws and regulations declared to be in force by the act of congress, passed in 1804. We would answer, that many have been abolished, or superseded by our statutes, and others have shared the fate of all ancient customs, when there no longer exists any necessity for their observance. The conclusion, therefore, is well founded, that the common law was, at least partially, adopted as far back as the year 1807, and indeed prior to that time, and it is not very material whether by common consent or by statute.

The second branch of the subject to be considered is, whether, by the common law as it now stands, the action of ejectment is authorized.

It has been contended that the act of 1816, adopting the common law, did not introduce it, because a statute was then in force, passed by the legislature of Louisiana in the year 1807, which is contrary to, and inconsistent with, that portion of the common law which relates to it. The statute alluded to is in the following words: "In all actions of ejectment, the plaintiff shall declare in his proper name, and instead of the fictitious suggestion of lease, entry, and ouster, shall state that he is legally entitled to the premises," &c. Geyer, Dig. p. 176. The legislature, by the act of 1816, have certainly introduced no part of the common law inconsistent with statutory provisions in force at the time of its passage, and hence it is clear, that the fiction, invented, as we have shown, during the exile of Charles II., pertaining to the action of ejectment, was excluded, the act of 1807 then being in force. But this does not prove that the legislature, by the qualifications inserted in the act of 1816, intended to exclude it according to its ancient form. The argument on the part of the appellee, appears to be based upon an assumption, that the action could not, at the time of the passage of the law of 1816, be maintained, by the rules of the common law, without the fictions. This is untrue. The lessee in England, may still prosecute ejectment for the recovery of his term, where he has been ousted, without the fictitious suggestions of lease, entry, and ouster, in the same way he could have done before its enaction, and so in this country after the time of 1807. That the action of ejectment was authorized, at the time of the passage of that law, and afterwards, is as clearly indicated as it could be done without using express words for that purpose. It may be regarded as a negative statute, with an affirmative meaning. In 1823, the legislature of this territory passed an act, repealing the act of 1807, by which it evidently intended to revive the fiction.[2] But this does not change the matter in the slightest degree, according to the view we have taken, so far as the existence of the action itself is concerned. At the same session, and after the passage of the repealing act, just mentioned, an act was passed, regulating evidence in actions of ejectment; and if it should still be considered doubtful, as to the existence of the action under our laws, prior to 1816, and even afterwards, that act, we think, would settle the question. It is in these words: "Be it enacted, that the final certificate of any receiver of the United States land districts, in this territory, and certificates of confirmations of Spanish claims, shall be sufficient evidence of title, to commence and prosecute any action of ejectment," &c. This act clearly recognizes the existence of the action, and were we to say that it could not be sustained, we should virtually nullify the act, because, without the existence of the action, the evidence it authorizes could not be received. We are, therefore, of opinion that the action of ejectment was authorized by our laws, as far back as the year 1807; that it continued to exist without the fiction, until 1816, when the common law was adopted by positive enactment; that if it had not before existed, that act would have authorized it; that the act of 1823, repealing the act of 1807, did not affect its existence; and if we are deceived in all these positions, the act of 1823, regulating the evidence in ejectment, alone would introduce it. Judgment reversed.

[2] Note by the Judge: Judge Cross does not consider the question whether the fiction is authorized by the common law, as involved in the present case, and does not express an opinion on that subject.

GRAND ERA, The (HARP v.). See Case No. 6,084.

GRAND LODGE OF FREE & ACCEPTED MASONS (SECOND NAT. BANK OF ST. LOUIS v.). See Case No. 12,603.

GRAND STREET RY. CO. (MOWRY v.). See Case No. 9,893.

GRAND TRUNK RY. CO. (CUMMINGS v.). See Case No. 3,475.

GRAND TRUNK RY. CO. (HARVEY v.). See Cases Nos. 6,180, 6,181.

GRAND TRUNK RY. CO. (SAYLES v.). See Case No. 12,419.

GRAND TRUNK RY. CO. (WALKER v.). See Case No. 17,070.

GRAND TRUNK RY. CO. (WHITEHOUSE v.). See Case No. 17,565.

Case No. 5,683.

The GRAND TURK.

[1 Paine, 73.] [1]

Circuit Court, S. D. New York. April Term, 1817.

MARITIME LIEN—WAGES OF MASTER—DISBURSEMENTS.

1. The master of a ship has no lien on the vessel, for his wages or perquisites, which can be enforced in a court of admiralty.

[Cited in Drinkwater v. The Spartan, Case No. 4,085; The Santa Anna, Id. 12,325; The

[1] [Reported by Elijah Paine, Jr., Esq.]

Larch, Id. 8,085; The Eolian, Id. 4,504; Bartlette v. The Viola, Id. 1,083; The Imogene M. Terry, 19 Fed. 463; The M. Vandercook, 24 Fed. 475.]

2. And this difference between the remedies of the master and of the mariners for wages, has not arisen from any application of the common law doctrine of liens to the case of the master, nor from encroachments of the common law courts, but because the master contracts upon the credit of the owners and not of the ship; and such a lien would be attended with great inconvenience if the master could enforce it abroad for wages due him, and thus compel a sacrifice of the ship.

[Cited in Drinkwater v. The Spartan, Case No. 4,085.]

3. Whether a master can proceed in personam in admiralty for his wages? Quere.

[Cited in The Stephen Allen, Case No. 13,361; The Merchant, Id. 9,434.]

4. Whether disbursements made by the master for the ship would create a lien enforcible in admiralty? Quere.

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

John Carlton the respondent filed his libel against the ship Grand Turk, alleging that in December, 1815, he was employed by William and James Dunlap, the appellants, who were her owners, to go a voyage in her as master, from New York to Belfast and back. That in the course of the voyage he had expended various sums of money for repairs, ordinary charges, and the wages of the crew; and had received various sums on account. That he claimed a right to apply whatever money he had received, in payment of his own wages and perquisites, before any of it should be applied to extinguish the disbursements made by him on the voyage; and that the appellants were insolvent. By the account annexed to the libel, it appeared that the respondent had received money enough to pay him for all disbursements he had made, and that the balance due him was not so large as his claim for wages and perquisites. The appellants put in a claim admitting most of the facts stated in the libel, but denying the respondent's right to appropriate the monies, received by him, to pay his wages, &c. because he had received them expressly on account of the ship's disbursements, and had so accounted for them with the appellants; and insisting that they should be first applied to extinguish the charges for disbursements. The claimants also insisted that the respondent had no lien on the vessel for his balance of account, the master's wages and perquisites being a mere personal charge against the owners; and on this ground excepted to the jurisdiction of the court.

The court below decreed a condemnation. [Case unreported.]

W. Slosson, for appellants.

R. Sedgwick, for respondent.

LIVINGSTON, Circuit Justice. This is a libel by the master against the ship Grand Turk, for disbursements made by him while abroad, for wages paid by him to some of the mariners after her return home, and also for wages due to himself. The district court condemned the vessel, pursuant to the prayer of the libel, and ordered all these demands to be paid out of the proceeds. From this sentence an appeal has been taken to this court. It is denied by the appellant, and of that opinion is the court, that any thing was due to the master for disbursements at the time of filing his libel. He had received from the consignee in Belfast, enough to reimburse him for all these advances, and as the money was paid for the express purpose of such reimbursement, and so credited by the master at the time, as appears by his own account and receipt, he cannot now be permitted to say that it was a payment on account of his own wages, and thus revive a credit against the owners for these advances: on this point the evidence is conclusive. Nor is it less so that the sums paid by the libellant to two of the mariners, who sued him, and which constitutes another item of his demand, were also repaid by the owners previous to the commencement of this suit. The court is, therefore, relieved from the necessity of examining whether a vessel can in any case be libelled by the master for disbursements made by him while abroad; or for wages which he may have advanced the seamen. The naked question presented for its consideration, is whether a vessel can be proceeded against in the admiralty, for wages due to the master himself. It is not denied that in England this cannot be done; and that such has generally been regarded as the law of this country—but it is supposed. that it has been thus settled by some mistake, in testing a master's right to proceed against his vessel, by the rules which apply to him at common law, of which a party is deprived, as soon as he parts with the possession of the property—or by a series of improper encroachments by courts of common law, under a statute of Richard the Second, on the jurisdiction of the courts of admiralty. If this were really the origin of the rule, and the court were satisfied that it had proceeded from an incorrect course of reasoning, as applied to the case of liens, or from an unwarrantable issuing of prohibitions by common law courts, would it not be better for the legislature to apply a remedy to the evil, if it be one, than that a single judge should expunge from the commercial code of the United States, a principle which has been sanctioned by the practice of ages in Great Britain, and which has been regarded as the law of this country from its earliest settlement down to the present day? But it is not true that the courts of common law have proceeded on the sole ground, that because there was no possession in the master, there could be no lien—or seamen would not have been allowed to libel, which they rarely do until they have left the vessel. Nor could this reasoning have always applied to the master, who, to avoid

this technical difficulty, might have filed his libel while in actual possession of the vessel. The denial to a master of a remedy, which is every day resorted to by the sailors, must then be founded in some other reasons, and accordingly we find others assigned. One, is the inconvenience and expense to which owners would be subject, if on every dispute with the master, he could take their vessel out of their hands by process in the admiralty, and the power which would then be conferred on him of compelling them to submit to improper charges. The lien which he has on the freight which he is to receive, is given as another reason why he should be debarred of a remedy against the vessel herself; and as he is also supposed to contract personally with the owners, so it has been thought proper not to permit him to look elsewhere for satisfaction. Thus we see, that it is not merely because the contract of the master is made on land, or because some mistake has been made in applying to him the strict doctrine of liens as understood at common law, that he is not allowed to proceed against his own vessel, but for other reasons, which by many will probably be considered as founded in good sense, and fully to justify the conclusions which have been drawn from them. Sir William Scott, in the case of The Favourite, 2 C. Rob. Adm. 232, considers the inability of a master to sue in the admiralty as arising altogether from his being supposed to stand on the security of his personal contract with his owner, and not relating to the bottom of the ship; and in the case of Wilkins v. Carmichael,[2] Lord Mansfield refused to allow the master to retain the vessel, either for wages, stores, or repairs. This was a case in which the master had not parted with the possession, and where his owner had become a bankrupt, whose assignees were plaintiffs in an action of trover. The whole court of king's bench was of opinion, that there was no particular contract that the ship should be a pledge; that there was no usage of trade to that purpose, nor any implication from the nature of the dealing: that on the contrary, the law had always considered the master as contracting personally with the owner.—On this ground, it is added, prohibitions have been granted. Thus we see that this has been treated in England, not merely as a question of jurisdiction, but that it has long been considered by all the tribunals of that country, as a settled principle of law, that a right of proceeding in rem for a claim of this kind never did exist in the master. It has not been shown that such a proceeding was ever sustained by any English court of admiralty, even before the act of Richard the Second. But were it not so perfectly and well settled as it is, that the master never had this security for his wages, and the court was at liberty to adopt a rule of its own, it would hesitate much before it gave to him the remedy which is now sought. If he may thus proceed for wages after the return to the port where the owner resides, he must have the like privilege for wages which may become due in foreign ports, by which an opportunity would be afforded him of breaking up the voyage while abroad, for the purpose, sometimes, of becoming purchaser of the vessel, under a sentence founded on proceedings originating with himself, and where a condemnation might be had before the owner could possibly be apprized of the suit. Were this a proceeding in the admiralty in personam, it might then be worth while to consider whether, notwithstanding the prohibitions which have been awarded in England, and the consequent abandonment or loss of jurisdiction in many cases by the admiralty, this court would not maintain an action of that kind. If it decided in favour of its admiralty jurisdiction in such a case, it would be introducing no new rule of law, but enforcing one already established, and in a way which, although it may not, for a long time, have been resorted to, could work no injury to either party: but where a right to proceed in rem has been so long and so pertinaciously denied, and on grounds which, to say the least of them, are sufficiently plausible, and when it cannot be shown, with any certainty, ever to have existed, this court feels no inclination to interfere for the purpose of introducing a different rule. It is possible that the English common law courts have first granted prohibitions, on the ground that these being contracts upon land, the admiralty had no right, after the passing of the statute of 15 R. 2, c. 3, to take cognizance of them; but although this may have been deemed a sufficient ground for their interfering in this way, yet we find these courts invariably deciding, when it becomes necessary, that the master has no right by his contract to any remedy against the vessel, or even any lien on its proceeds, and so the whole court of king's bench certified their opinion to be to the lord chancellor in the case of Hussey against Chester and others. The judgment of the court is, that the sentence of the district court be reversed, and that the libel be dismissed with costs.

[2] [1 Doug. 101.]

GRAND TURK, The (McGINNIS v.). See Case No. 8,800.

Case No. 5,684.

In re GRANGER et al.

[8 N. B. R. 30.] [1]

District Court, E. D. Michigan. 1873.

BANKRUPTCY—UNSECURED DEBT—DISCHARGE OF ENDORSER.

A petition was made by the assignee to the bankruptcy court praying that the claim of a bank be expunged and that certain securities in

[1] [Reprinted by permission.]

its possession should be delivered up to him. The claim consisted of three notes, upon two of which the bankrupt was endorser; the third note had been extended by agreement between the maker and the bank. *Held*, that the first two notes were valid against the bankrupt's estate, but that his (bankrupt's) liability had been relieved in the third note by the agreement to extend the note, and was, therefore, not a valid claim, and must be expunged from the proof of debt, and that as the claim of the bank had been proved as an unsecured debt it must relinquish the securities held by it to the assignee. Ordered that the bank pay to the assignee the cost of this proceeding, including a solicitor's fee of twenty-five dollars, and authorizing the assignee to retain it out of any dividend going to the bank.

[In bankruptcy. In the matter of Granger and Sabin.]

This matter came to be heard and was argued and submitted upon the petition of John J. Speed, assignee, to expunge the claim of the Merchants' Bank of Canada, and to compel the delivery to the assignee of certain securities alleged to be held by the bank, and upon the answer of the bank and the proofs taken.

Mr. Speed, in person, Mr. Meddaugh (Meddaugh & Driggs), and Mr. Lothrop, for petitioner.

Mr. Douglass, opposed.

LONGYEAR, District Judge. The claim of the bank as proven is founded upon the endorsements by the bankrupts of three promissory notes, two for five thousand dollars each, made by Granger, Carter & Co., and one for two thousand dollars, made by one A. N. Sabin.

First. As to the two notes for five thousand dollars each. The objections to these notes, as stated in the petition, are: 1. That the notes were discounted by the bank for the benefit of the bankrupts and not of the makers, and that the makers received no consideration therefor. 2. That the notes, being payable in "gold or Canada currency," are not negotiable, and that therefore the bankrupts could not be charged as endorsers thereon. The first objection is clearly not well taken, and it was not insisted on upon the argument. As to the second objection, it clearly appearing from the proofs as well as from the allegations in the petition that these notes were negotiated to the bank by the bankrupts for a loan made to them and for their sole benefit, and that therefore they are liable to the bank for the amounts specified in the notes, whether they are liable as endorsers or not, and no objection being made to the amount of claim as proven, it was decided by the court, at the hearing, that the claim of the bank as proved, so far as it is based upon these two notes, should not be disturbed. The prayer of the petition to expunge as to the two notes for five thousand dollars each is therefore denied.

Second. As to the note for two thousand dollars: The only objection to this note insisted on the hearing is that the liability of the bankrupts, as indorsers had become discharged in consequence of a valid agreement between the bank and A. N. Sabin, the maker, for an extension of time for a definite period; and it is as to this point that the matter was held under the advisement by the court. The proof shows that the bankrupts were mere accommodation endorsers, and that the note was discounted by the bank for the sole benefit of the maker.

It is well settled, in fact, it was conceded on the argument, and needs no argument or citation of authorities to prove it, that a valid agreement for extension of time between a creditor and the principal debtor without reservation discharges the surety or indorser. It also seems to be well settled, and it was not seriously disputed on the argument, that if when such agreement for extension is entered into it is also expressly agreed between the creditor and the principal debtor that the former may and does reserve his rights and remedies against the surety or endorser, then the latter are not discharged. 1 Pars. Notes & B. 239, 241, and cases there cited. This is, no doubt, on the ground, and it is so stated in some of the authorities, that by such agreement the principal debtor remains liable to reimburse his surety at once, upon the payment of the debt by the latter, notwithstanding as between him and the creditor the time has been extended. The proof shows that when this note matured and after protest, the bank took a new note of A. N. Sabin, the maker, on three months' time, for the same amount, as a renewal of the note in question; and that Sabin paid the interest for the three months upon which the new note was given, in advance. Payment of interest in advance is sufficient consideration for an agreement for extension of time; and, under the rule of law above stated, and it is so conceded, the transaction clearly discharged the bankrupts from their liability as endorsers, and it must be so held, unless what is further shown relieves the transaction from that effect. It is contended, however, on the part of the bank, that at the time of taking the new note there was an understanding and agreement between the bank and A. N. Sabin, that the rights and remedies of the bank against the bankrupts, as endorsers on the old note, should remain and that the old note was retained by the bank uncanceled in pursuance of that agreement; and that, therefore, under the other rule of law above stated, the liability of the bankrupts as indorsers was not discharged. I will, therefore, now proceed to consider that question of fact as developed by the proofs. Before doing so, however, it is proper to remark that the bank in its answer sets up no such agreement. It simply contents itself with a broad, general denial of any extension of time whatever. If this point had been made, at the hearing, it would have been the duty of the court to have excluded all proofs outside of that one question; but as it was not made, and the matter was argued and submitted as if

the answer were broad enough to cover the claim set up, I shall so consider it in my decision.

The question is, then, do the proofs sustain the claim that there was an understanding and agreement as stated? A valid extension of time to the principal debtor having been shown, the burden was upon the creditor bank to prove the agreement alleged. The agreement to have the effect claimed must have been express, and made at the time of the extension, and as a part of the transaction. The court will not, in such a case, act upon any implications arising from the manner in which the business was transacted between the creditor and principal debtor, any further than as such implications bear upon and tend to corroborate other testimony tending to prove an express agreement, especially where, as in this case, there is no proof or pretense of an assent by the endorsers to remain liable as such, notwithstanding the extension. The proofs upon this point are confused, vague and uncertain, as the following statement clearly shows. Clement D. Grasette, who was agent of the bank, and with whom the business of taking the new note was transacted, was the only witness examined as to this point. After having been examined, before the register, he was called and re-examined, during the argument, before the court. In his testimony, on the first examination, he gives as a reason why the new note was taken, that the bank desired to continue to discount to A. N. Sabin, but could not do so while he was in default upon his paper, and the new note was taken to avoid that difficulty. He speaks of it as a renewal of the note in question in every instance, except once, when asked the direct question, he said it was taken as "collateral;" and he speaks of the note in question as having been "taken up" by the new note. He nowhere speaks of the new note as a mere extension of time upon the old note. He says, however, that the old note was retained by the bank for the purpose of "ranking on the estate" (to use his own language) of the bankrupts as endorsers; but on that examination he is entirely silent as to any express understanding or agreement on the part of A. N. Sabin, the maker, or any agreement whatever under or by virtue of which the old note was so retained. Thus far, then, the release of the bankrupts as endorsers, by the taking of the new note, was not rebutted.

The above testimony having been read at the hearing, counsel for the bank asked the privilege of recalling the witness Grasette for further examination, and as a foundation for the request, on the suggestion of the court, stated to the court in writing what he expected to prove, as follows: "We expect to prove by Mr. Grasette, that at the time of taking the new note of A. N. Sabin, for the amount of the old note endorsed by Granger & Sabin, it was understood and agreed between the bank and A. N. Sabin that the remedy of the bank against the endorsers of the old note, or their estate in bankruptcy, should be reserved, and also that the new note should be held collateral to the old." This appearing to be pertinent, the request was granted. The hearing was thereupon suspended, and Grasette was recalled and was further examined before a commissioner. On his re-examination, having repeated his statement that the bank retained the old note, Grasette was asked: "Was it the understanding between you and Mr. Sabin that the bank should retain it?" to which he answered: "It must have been so." This answer amounts to nothing whatever. It states no fact. It is argumentative merely—a mere opinion or conclusion of the witness. It is true, on a direct and leading question being propounded to him by the counsel for the bank, whether it was or was not the understanding between him and A. N. Sabin that the bank should retain or reserve all its rights against the bankrupts, as endorsers of the old note, he answered: "It was." But on his cross-examination he fails to recollect anything whatever that passed between him and A. N. Sabin upon that subject, but says: "I feel sure that it must have been to the effect that we retain possession of the old note in order to show that we had, under the advice of counsel, recourse against the endorsers, Granger & Sabin." Thus repeating, only with a little more amplification, his answer to the first direct question. It thus appears that the evidence as to whether there was such an agreement or not, rests solely upon the opinion of this witness, unaided by proof of a single fact other than the bare fact that the old note was retained by the bank. This is certainly not sufficient to save the liability of the endorsers, because, 1. It nowhere appears that the old note was so retained by the bank by A. N. Sabin's consent, or that it was left there by him by mere oversight or mistake so far as he was concerned; and, 2. It would not be sufficient to enable the endorsers to recover against the maker if they had paid the note after the new note was taken. In this connection it is a significant fact that A. N. Sabin, who certainly could have cleared the matter up by either denying that there ever was such agreement, or by admitting it have fixed his liability to his endorser, was not produced and examined as a witness, nor was the omission to call him explained. The fact that Grasette, as agent for the bank, was acting under advice of counsel, and intended, as he testifies, to follow that advice, does not help the case at all under the circumstances, because, first, it does not appear that Grasette's intentions in this respect were made known to A. N. Sabin and agreed to by him; and, second, it does not appear that the advice under which he was acting was, in fact, followed by him.

The advice under which he was acting, as testified to by the learned counsellor from whom he obtained it, was, among other things, as follows: "I told him that he couldn't take new paper and extend the paper without discharging the endorsers, unless there was a distinct agreement with the endorsers that they should not be discharged. If any new paper was taken it should be with that understanding." There is no proof whatever that any such agreement or understanding was had.

But there is one other fact developed by the testimony which, it seems to me, must, in any event, settle the question of the liability of the bankrupts, as endorsers against the bank, beyond all dispute. Grasette testifies that the new note was discounted by the bank and the amount thereof placed to the credit of A. N. Sabin, the maker of the note in question, and of the new note. Now, if the new note was a renewal of the note in question, or was taken as collateral to it—and that it was the one or the other there is no dispute—then the credit given on account of the new note was equally in lieu of the note in question, or collateral to it; and it is precisely the same in effect as if A. N. Sabin had deposited in the bank against the note in question the amount thereof in money. Assuming, then, for the sake of the argument, that there was, as claimed, an agreement between A. N. Sabin and the bank, that the rights and remedies of the latter against the bankrupts as endorsers should be reserved, the case assumes this shape: A. N. Sabin, the maker of the note in question, pays the amount thereof to the bank, to be placed to his credit, and the note to be retained by the bank to enable it to pursue the bankrupts' estate upon the endorsement. No such arrangement as that ever has been or ever can be tolerated by any court for a moment. Any amount the bank might be able thus to realize out of the bankrupts' estate would be, as to it, a double payment of the debt, or it must go directly to the benefit of A. N. Sabin, the only person ultimately liable to pay the same, and thus, in either event, operate as a fraud upon the bankrupts' estate. The fact testified to by Grasette, that whatever amount should be realized from the estate was to be applied upon A. N. Sabin's new note, does not help the case of the bank at all, because the bankrupts are in no manner liable upon that note. On the contrary, that fact substantiates what was said above—that whatever might be thus realized from the estate would go to the benefit of A. N. Sabin. I think the true view of the case is that the note in question was extinguished by the new note and the credit given on account of it. It results that the note for two thousand dollars must be expunged from the claim of the bank, as prayed in the petition, and the claim of the bank as proven must be abated accordingly.

Third. As to the collaterals held by the bank. It is admitted by the answer that the bank has in its possession four hundred and fifty dollars in United States currency, and a promissory note of one H. R. Stone for one thousand dollars, belonging to the bankrupts' estate which the bank claims to hold as collateral security for the indebtedness of the bankrupts' estate to the bank. The claim of the bank is proven in these bankruptcy proceedings as an unsecured claim, no reference being made in such proofs to any security whatever. It is now, I believe, pretty well settled that a creditor so proving his claim must be held to have thereby relinquished any and all security which he may have held for the same debt. But a resort to that legal proposition is unnecessary in this case, because it clearly appears from the proofs that the money and the note so admitted to be held by the bank are not held as collateral to the debt proven, or to any other existing indebtedness of the estate to the bank. The said sum of four hundred and fifty dollars, and the said promissory note of H. R. Stone for one thousand dollars, must, therefore, be paid over and delivered up by the bank to the assignee.

An order must be made in this matter: Denying the prayer of the petition as to the two notes for five thousand dollars each. Expunging from the claim of the bank the note for two thousand dollars, and for a correction and abatement of the claim of the bank accordingly. Requiring the delivery by the bank to the assignee of the promissory note of H. R. Stone for one thousand dollars, and directing the assignee to withhold all dividends going to the bank until the same is done. Requiring the payment by the bank to the assignee of the sum of four hundred and fifty dollars, and authorizing the assignee to retain that amount, if not paid, out of any dividends going to the bank. Requiring the payment by the bank to the assignee of the costs of this proceeding, including a solicitor's fee of twenty-five dollars, to be taxed, and authorizing the assignee to retain the same out of any dividends going to the bank. That the order be certified to the register, Hovey K. Clarke, Esq.

Case No. 5,685.

GRANGER v. SWART.

[1 Woolw. 88.] [1]

Circuit Court, D. Wisconsin. April, 1865.

BOUNDARY OF GOVERNMENT LANDS LYING ALONG LAKES AND RIVERS — MEANDERED LINE — ACCRETIONS—WASTE LAND—ADVERSE POSSESSION WHICH AVOIDS A DEED—COLOR OF TITLE.

1. The boundary to lands bordering on rivers and lakes is the meandered line established by the government surveyors.

[Cited in James v. Howell, 41 Ohio, 709.]

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

2. If, at the date of an entry of government land, one of the boundaries of which is such meandered line, the lake or river extends to, and borders on, such line, accretions afterwards formed belong to the party holding title under the entry.

[Cited in East Omaha Land Co. v. Jeffries, 40 Fed. 388.]

[Cited in Bissell v. Fletcher, 19 Neb. 725, 28 N. W. 304.]

3. But if, at the time the entry was made, between such line and the bank of the lake or river, there was a body of swamp, or waste land, or flats, on which timber and grass grew, horses and cattle fed, and hay was cut, such land was not included within the entry.

4. The adverse possession necessary to avoid the deed of a grantor, out of possession, must be under color of title.

This was an action of ejectment tried to a jury. Walker had entered certain lands, which at one time bordered on Lake Koshkonong and the Rock river. The government surveyor had run a meandered line. Afterwards, but before the entry, as the evidence tended to show, a considerable body of land was formed by accretions. This land was low and marshy, but at certain seasons of the year it became dry. Grass grew upon it; hay was cut; and horses and cattle were pastured there. Walker conveyed the tract as it was entered by him to the defendant, who, claiming that the entry covered this land formed since the survey, entered into possession. The plaintiff's title was derived from an entry made subsequent to the defendant's, which in terms covered the new land. He having made out a title, the defendant sought to avoid it by showing his prior entry and patent, claiming that they covered the premises in question.

MILLER, Circuit Justice (charging jury). The plaintiff produces in evidence patents from the United States to Gilbert and Finch for the land described in the declaration, a conveyance from Finch to Gilbert, and one from Gilbert to himself. He also proves the defendant in possession at the commencement of this suit. He has thus made out a title, and established prima facie his right to recover.

To defeat the case thus made, the defendant claims that he has a prior title to the same land, which he attempts to prove by three patents from the United States to Martin Walker, and a deed from Walker to himself.

The first and principal question to be determined by the jury is, whether these patents cover the land in controversy. The patents and deeds under which the defendant claims do not pass the title to the premises in question, unless, at the date of the entries on which they issued, the Rock river, where it is called a river, and Lake Koshkonong, where it is called a lake, extended to and bordered upon the meandered line which constitutes the boundary of the lands described in the patents. In other words, if, between the meandered line which by the government survey was made one of the boundaries of the land sold to Walker, and the bank of Rock river and shore of Lake Koshkonong, there was at that time a body of swamp, or waste land, or flats, on which timber and grass grew, and horses and cattle could feed, and hay be cut, then the patents to Walker did not cover this land, but were confined to the actual limit of said meandered line.

On the other hand, if, when the entries were made, the bank of the river and shore of the lake, at an ordinary stage of water, were where this meandered line was represented by the United States survey, and the land in controversy has since been formed by a receding of the water, or by accretion to the shore and bank, then it became the land of the defendant, or of Walker, as the title might be in one or the other.

If the first of these positions be found by you to be true, the defendant has no title to the land; if the second be true, he has title to the addition made by the accretion.

The defendant further relies upon the fact that, although the patents from the government to Gilbert and Finch may have conferred on them the legal title to the land in question, the deed from Gilbert to plaintiff was void, because the land conveyed was held adversely by the defendant.

In order to make this deed void, the defendant must have been in the actual possession of the land, claiming under a title adverse to that of Gilbert. The defendant says in his own testimony, that the only title under which he claimed the land was the patents to Walker, and the deed from Walker to him. If these patents and this deed did not cover the land in controversy, the mere claim or assertion that they did cover it, does not constitute a color of title which avoids Gilbert's deed.

The possession adverse to that of a grantor which avoids his deed must be under color of title; and when the paper, or deed, or document which is claimed to constitute this color of title is produced, it must embrace the land in question, or it cannot operate to avoid a deed from one holding the true title. Otherwise a man in possession of a lot of land, in town or elsewhere, might make void every sale of it by its true owner, by merely asserting that his deed of some other lot covered the one of which he claimed to hold possession.

We have already instructed you as to the rule by which you are to determine whether the patents to Walker covered the land in question. If you find that they did not, then they do not give color of title to make void the deed of Gilbert to the plaintiff. If the jury find a verdict for the plaintiff, they will find a general verdict. If they find for the defendant, they will say whether they find on the ground of the avoidance of Gilbert's deed by the defendant's possession, or on

the ground that the defendant has the better title to the land.

Verdict and judgment for plaintiff.

On meandered lines, see Johnson v. Pannell, 2 Wheat. [15 U. S.] 206; Littlepage v. Fowler, 11 Wheat. [24 U. S.] 215; Brown's Lessee v. Clements, 3 How. [44 U. S.] 650; Railroad Co. v. Schurmier, 7 Wall. [74 U. S.] 272. Effect of survey, Bates v. Illinois Cent. R. Co., 1 Black [66 U. S.] 204. Accretions, New Orleans v. U. S., 10 Pet. [35 U. S.] 662, 717; Jones v. Johnston, 18 How. [59 U. S.] 150.

Case No. 5,686.

The GRANITE CITY.

[Blatchf. Pr. Cas. 355.] [1]

District Court, S. D. New York. May, 1863.

PRIZE—SPOLIATION OF PAPERS.

Vessel and cargo condemned for an attempt to violate the blockade.

Violation of the blockade by the vessel on previous voyages.

BETTS, District Judge. This ship and cargo were captured at sea, March 22, 1863, in latitude 25° 30′ north, and longitude 75° 53′ west, by the United States gunboat Tioga, and were sent to this port for adjudication. They were here libelled for forfeiture, April 21, 1863. Process of attachment and monition were returned by the marshal as served, and, proclamation having been duly made in court, the default of all persons in interest was thereupon ordered, and the proofs in preparatorio were opened and the case was submitted to the court for decision. The papers produced from the ship by the prize-master were a certificate of British registry of her, dated at the port of London, December 24, 1862, to Edward Penbroke, of that place, as owner, which states that she was British built; a cocket ticket, a victualling bill, and two shipping bills, dated Glasgow, December 29, 1862, for Nassau, N. P.; a health bill, given at Funchal, for Nassau, January, 1863; a clearance of the vessel at Nassau, N. P., March 20, 1863, for St. Johns, N. B., with a cargo consisting of inward cargo, not landed,—10 packages of goods; a clearance and bill of health for the vessel, laden with a cargo of cotton, dated at Wilmington, N. C., in the Confederate States, March 10, 1863, for a voyage to Nassau, N. P.; a manifest of the same cargo, sworn to by the master of the ship, on the same day, at Wilmington aforesaid; and a shipping agreement, executed at Nassau, February 19, 1863, between John McEwan, master of the said steamship, and ten of her crew, for a voyage from Nassau to St. Johns, N. B., also back to the port of Nassau, or any port in the West Indies. McEwan, the master, Gibson, the cook, and Campbell, the chief steward, were examined in preparatorio in the suit, by the prize commissioners of this port, on the 30th and the 31st days of March, 1863. The master testifies that the Granite City was an English merchantman, owned in England, and was captured by the United States gunboat Tioga, March 22, 1863, about fifty miles to the eastward of Eleuthera island, because she was thought to be intending to run the blockade; that she was built in the Clyde, in December last, and called the City of Dunedin, until she began this voyage, when the name was changed to the Granite City; that the voyage began at Glasgow, in December, 1862, and was to be a round one, ending in any port of the United Kingdom; that she touched at the Isle of Man, Cork, Madeira, and St. Thomas, and thence went to Nassau, N. P., where she first broke bulk; and that, at the port she discharged part of her cargo, and then cleared for St. Johns, N. B. The record states that the witness, although admonished by the commissioners, declines to disclose to what ports or places the vessel was then bound. He says that Nassau was the last clearing port before her capture, and that the cargo was consigned to order; but, as the record shows, he again declines to answer to what port the cargo carried from Nassau was to be delivered. He says that various papers of the ship, on board when she left Nassau, were burned by his orders, during the chase of the vessel, and before her capture; and that he knew of the war, and that the Southern ports were under blockade by the United States government, before she left England. He then reiterates his refusal to state the port to which he was destined when he left Nassau, cleared for St. Johns. In answer to another interrogatory, he says that the Granite City, when she first came to Nassau from Glasgow, took her cargo to Wilmington, N. C., running the embargo, although fired at, and discharged it there, that place being blockaded; that she then took in there a cargo of cotton, and returned with it to Nassau, where it was discharged; and that she then took on board the lading captured with her. On the closing of the examination, he recalled his refusal to answer to what port the prize was destined on her first departure from Nassau, and made reply "that he was bound to run the blockade into some Confederate port, wherever he could get in, and if he could not get in, to go elsewhere." This testimony has been given in fuller detail than was strictly necessary, in order to show that the business of the vessel was the deliberate and persistent violation of a public blockade. Gibson, the cook, joined the vessel at Nassau only ten days before her capture. He says that he knew, and that every one else knew, that she was going somewhere else than to her declared place of destination, and was to return to Nassau. The steward, Campbell, gives no testimony having direct relation to the charge against the vessel.

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

The evidence very clearly establishes the culpability of the voyage. The destruction of the ship's papers when she was pursued by the capturing vessel, her plain purpose and attempt to carry out the voyage then undertaken by violating anew the blockade of the enemy's coast, and her having, as avowed by her master, effected that act in the preceding voyage, amount to complete proof of the criminality of the enterprise she was engaged in, as well as of the illicit character of her last voyage. A decree is rendered condemning the vessel and cargo to forfeiture.

Case No. 5,687.

The GRANITE STATE.

[1 Spr. 277.] [1]

District Court, D. Massachusetts. Jan. 1855.

MARITIME LIEN—MORTGAGE—PRIORITY.

1. A lien for supplies or repairs, upon a vessel under mortgage, and in possession of the mortgagor, is valid, and will be enforced after the possession is transferred to the mortgagee.

[Cited in The Norfolk, Case No. 10,297; Reeder v. The George's Creek, Id. 11,654; The Theodore Perry, Id. 13,879; The Trenton, 4 Fed. 659; The Guiding Star, 9 Fed. 524; The Charlotte Vanderbilt, 19 Fed. 220; The Young America, 30 Fed. 797.]

[Cited in Donnell v. The Starlight, 103 Mass. 233; Dunklee v. Crane, Id. 471; Jones v. Keen, 115 Mass. 181; Oliver v. Woodman, 66 Me. 58; Hammond v. Danielson, 126 Mass. 296; Smith v. Stevens, 36 Minn. 304, 31 N. W. 55.]

2. And this is true, notwithstanding the possession may have been given to the mortgagee, by a decree of a court of admiralty, in a suit for possession.

This was a suit in rem, promoted by James Reeder, Jr., of Baltimore, for repairs and materials furnished to the vessel in Baltimore, in September last. Richard F. Loper, of Philadelphia, intervened for his interest, as owner. The defence was, that at the time the supplies were furnished the vessel, she was mortgaged to the claimant, for her full value; and that after the supplies were furnished, and before this suit was brought, the vessel had been decreed by this court to him, upon a suit in rem, for possession, for condition broken.

R. H. Dana, Jr., for libellant.

L. Saltonstall, for respondent.

SPRAGUE, District Judge. A sale of a vessel by a decree in rem, in admiralty, gives a perfect title to the purchaser, and the holders of liens are remitted to the funds in the registry, which are substituted for the vessel. But the decree relied upon was not for a sale of the vessel. It only gave possession to the mortgagee. It did not even pass upon the general title. In a mere suit of possession, holders of liens are not required to come in and defend; nor is it apparent what defence to the transfer of possession could be made by them, if they were to intervene. The decree, therefore, does not bar the libellant.

It is contended, that the claim of the mortgagee, being prior in time to that of the libellant, and being duly recorded, must override it. But this is not a contest for priority between holders of liens. The mortgagee holds a title to the vessel, and is, ordinarily, unless by his own agreement to the contrary, entitled to possession. If he leaves the vessel in the possession and control of the mortgagor, the necessary repairs and supplies being for the benefit of the vessel, may be for the benefit of the mortgagee, as well as of the mortgagor. It would, moreover, deprive liens founded on the necessities of vessels abroad, of nearly all their value, if they were to be displaced by mortgage titles. Decree for the libellant, $139.78, and costs.

It has since been decided by the supreme court, in The John Jay, 17 How. [58 U. S.] 401, that courts of admiralty have no jurisdiction over questions of property, between the mortgagor and mortgagee of a vessel. See, also, The Angelique, 19 How. [60 U. S.] 240. Before these cases, this jurisdiction had been exercised both in Massachusetts and the Eastern district of Pennsylvania; but the cases were not published. It is now exercised by the court of admiralty in England, by St. 3 & 4 Vict. c. 65.

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

Case No. 5,688.

GRANNIS v. BEARDSLEY et al.[1]

District Court, D. Connecticut. June 24, 1874.

Circuit Court, D. Connecticut. May 27, 1876.

BANKRUPTCY—UNLAWFUL PREFERENCES.

[Notes and mortgage assigned by an insolvent debtor to a creditor about a month before an adjudication of bankruptcy, as security for pre-existing indebtedness and a small additional loan, *held* void under section 35 of the bankrupt act of 1867 [14 Stat. 534], as made with intent to create a preference.]

Before SHIPMAN, District Judge.

This is a bill in equity brought by Caleb A. Grannis, the assignee in bankruptcy of Chas. H. Fogg, to set aside the assignment by the bankrupt to the defendants, Beardsley, Wilson & Co., of two notes of $500 each and a mortgage securing the same, on the ground that said assignment was made in violation of the 35th section of the bankrupt act, and for a delivery of said notes and mortgage to the assignee.

The facts found upon the trial to be true are as follows: Chas. H. Fogg was adjudicated a bankrupt on January 6th, 1874, upon his own petition filed January 2d, 1874. The plaintiff and Anan Stillson, now deceased, were duly appointed assignees of the estate of said bankrupt, and received a deed of said estate from the proper officer. On De-

[1] [Not previously reported.]

cember 4th, 1873, said Fogg was indebted to the defendants in the sum of $500, evidenced by his promissory note for that sum, theretofore given, and maturing on that day; and also in the additional sum of $958.83, evidenced by book account, all of which was due for lumber sold by the said defendants to said Fogg. Said note had been discounted at bank for the benefit of the defendant. On said December 4th, 1873, said Fogg endorsed in blank, assigned and delivered to the defendants two notes made by William Annesley, payable to said Fogg or order, each for the sum of $500, and also assigned, by instrument in writing, and delivered to the defendants, a mortgage upon a parcel of real estate situate in Bridgeport, Conn., to secure the payment of said two Annesley notes, which mortgage and notes and assignment of said mortgage are correctly described in the petition.

Said Fogg at the time of said assignment informed the defendants of his inability to pay his $500 note which then matured, and, if they would loan him more money, offered to assign said two Annesley notes and mortgage as security for all his indebtedness to them. They thereupon did advance him $300, less $9 interest, took up at bank said $500 note, and received said assignment of said Annesley notes. The sole motive of their additional loan of $300 was to obtain said security for their pre-existing indebtedness. The said notes and mortgage were thereupon assigned and delivered as collateral security for all said indebtedness amounting to $1,749.83. Said Fogg was on said day insolvent, and made said sale and assignment of said two Annesley notes and mortgage to the defendants with a view to give a preference to said Beardsley, Wilson & Co., who were his creditors, and to prevent his property from coming to his assignee in bankruptcy, and to evade the provisions of the bankrupt act. Said Fogg was aware of his insolvency.

Said Beardsley, Wilson & Co. were aware of said insolvency, and had reasonable cause to believe that said sale and assignment was made by said Fogg in fraud of the provisions of the bankrupt act, and to grant them a preference, and to evade said provisions, and the defendants made said advance of $291 and received said assignment with a view to obtain a preference over the other creditors of said Fogg, and to obtain security for said pre-existing indebtedness. Said assignment was made within the period of four months before the filing of said petition in bankruptcy. The estate of said Fogg is deeply insolvent. Said Annesley notes and mortgage are now held by and are in the possession of the defendants. Prior to the issuing of the subpoena in this case, the petitioner made demand upon them for the same. Let a decree be entered, ordering said Beardsley, Wilson & Co. to deliver said notes and mortgage and a written assignment thereof to said assignee, and pay the taxed costs of said petition.

[On appeal the following opinion was rendered by the circuit court:]

JOHNSON, Circuit Judge. I have examined the testimony and the points made by the counsel since the conclusion of the argument, and am satisfied that the impressions which I received upon the hearing are correct. I entirely agree in the conclusions of fact arrived at by the learned district judge. The insolvency of Fogg is clearly made out, and, notwithstanding the denials of the parties concerned, the circumstances lead irresistibly, to my mind, to the conclusion that the defendants as well as Fogg were aware of it. That a preference was actually effected by the transfer of the Annesley notes and mortgage is clear. The evidence satisfies me that Fogg intended a preference, and that, to say the least, the defendants had reasonable cause to believe that such was the purpose of the transaction. Indeed, I cannot understand how the operation can have had any other purpose, in a business point of view, on their part, than to secure a preference. Entertaining these views, I must direct an affirmance of the decree of the district court, with costs.

Case No. 5,689.

GRANON v. HARTSHORNE.

[Blatchf. & H. 454.] [1]

District Court, S. D. New York. Dec. 7, 1834.

WAGES OF SEAMEN—SHIPPING ARTICLES—BURDEN OF PROOF—END OF VOYAGE.

1. In a suit for seamen's wages, the proctor for the libellant, though not legally incompetent as a witness for his client, has a bias which is to be regarded in weighing the credit to be given to his testimony.

2. A stipulation in the shipping articles, that the seamen shall not sue for wages until the vessel is unladen, is binding upon them, if it is fairly made.

3. Under such a stipulation, the libellant, in a suit for wages, has the burden of proving that the vessel was actually unladen when the libel was filed, or had then been moored fifteen days.

4. Where an action in personam for wages is brought prematurely, but becomes perfected before the stipulations and answer of the respondent are filed, and the answer, when filed, admits a right of action in the libellant, the court need not dismiss the libel; yet, if the suit is vindictive or unreasonably prosecuted, costs may be imposed on the libellant.

[Cited in The Grace Darling, Case No. 5,651.]

5. The case of The Cadmus [Case No. 2,280] considered.

6. The voyage ends when the vessel is safely moored at her port of final destination.

[Cited in The Annie M. Smull, Case No. 423.]

7. A stipulation in the shipping articles not to sue for wages until the vessel is unladen, is not an extension of the voyage; and, if a seaman

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

leaves her, without permission, after she is moored, but before her unlivery, that is not a desertion which works a forfeiture of wages under the act of July 20, 1790 (1 Stat. 131, 133).

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

This was a libel in personam, by a steward [Lewis Granon] against the master [Richard T. Hartshorne] for wages. The vessel reached New York harbor on the 14th of April, 1834, and got into her berth at the dock on the 15th. The libellant left her on the 16th, and on the 24th filed this libel. The answer admitted that $42 remained unpaid on his wages, after deducting credits claimed, but set up, as a defence on the merits, that the libellant had forfeited his wages, by deserting the vessel at New York. It also set up a dilatory exception, that the libellant's right of action had not matured when the suit was instituted, the vessel not being then unladen, and set forth an agreement in the shipping articles, signed by all the crew, that the mariners should not be entitled to wages until the vessel was unladen.

Elijah Paine, for libellant.

Thomas W. Tucker, for respondent.

BETTS, District Judge. This suit has been contested on both sides with great acrimony, and at an expense disproportioned to the amount in dispute or the importance of the case. The action is prosecuted for the recovery of wages alleged to be earned and due on a voyage from New York to Liverpool and back. The vessel was safely moored at her dock in New York, on the 15th of April, having come into the harbor the day previous. This was her port of final destination and discharge. The result of the rather confused testimony on both sides is, that the crew, with the exception of the libellant and one other person, were paid off, and permitted by the master to leave the vessel on the 15th, the day she was brought into her berth; but it does not clearly appear that an express discharge was given to any one. The evidence is conflicting as to whether the master prohibited the libellant from leaving the vessel with the rest of the crew. The libellant's proctor offered himself as a witness to prove declarations or admissions by the respondent, which, it was urged, amounted to proof of his assent that the libellant might leave the ship when the others did. The evidence of the proctor was objected to as inadmissible; and, if it stood alone, it certainly would command but slender credit. No court could receive it otherwise than with hesitancy and distrust. But, I do not find that the common law of England or of this country has declared an attorney an incompetent witness for his client in the particular suit in which he is acting as such attorney. This was the doctrine of the civil law—mandatis, cavetur ut praesides attendant, ne patroni in causa cui patrocinium praestiterunt testimonium dicant (Dig. lib. 22, tit. 5, § 25); and it is recognized in the French tribunals. Pothier asserts that, because of partiality, the testimony of an advocate or attorney is not admissible in favor of his client. Traité des Oblig. p. 619, pt. 4, 827, tom. 3. This might prove a wholesome rule of practice with the American courts, as tending to maintain the dignity and purity of the administration of justice. But the relation is not classed, by standard writers, with the legal disqualifications of a witness (1 Gilb. Ev., 6th Ed., 106–142; 2 Starkie, Ev., Bost. Ed., tit. "Interested Witnesses"; 3 Bac. Abr. "Evidence," B.; Esp. N. P. pt. 3); and the objection is discountenanced by adjudications of high authority in the United States (Brandigee v. Hale, 13 Johns. 125; Chaffee v. Thomas, 7 Cow. 358; Miles v. O'Hara, 1 Serg. & R. 32; Reid v. Colcock, 1 Nott & McC. 592; Phillips v. Bridge, 11 Mass. 242). In no way can such testimony be presented in a more exceptionable, not to say repulsive aspect, than in the present instance, where the statement of the master appears to have been drawn from him surreptitiously, as it were, by the contrivance and address of the proctor, with the intent, on his part, to volunteer as a witness to prove the declarations so obtained. The proctor testifies to answers to his interrogatories given by the respondent when under examination as a witness in another cause. It is not made to appear that the questions or answers were any way material in that case, nor that the attention of the respondent was drawn to the meaning put upon his statements by the attorney who examined him. A subtle and ambiguous interrogatory, propounded by an unscrupulous man, might entrap a party into statements to which the attorney could affix an import quite foreign from the intention and meaning of the witness. The temptation to practise such stratagems may be kept from reaching any member of the profession, if it becomes understood that he must be regarded in the position of a discredited witness, and can have no weight unless his testimony be supported. Admitting that the relation of a proctor to his client and the cause, and the slight chance of his securing a remuneration from a common sailor for services and advances in his suit otherwise than by securing a judgment against the other party, do not amount to a fixed pecuniary interest in the event of the cause, which disqualifies him from testifying for his client, still, the bias is so manifest and pressing, that small confidence can be placed in his representation or interpretation of declarations of the opposite party, either overheard or sought for and wormed out by him. The court is often pained to see petty actions taken up and managed by proctors with a rancorous and overreaching spirit, fully in keeping with that manifested by their clients; and, in order that this disposition may not be inflamed by mingling the proctor's evidence in the proceedings, I am anxious it should be understood, that the un-

supported testimony of a proctor for his client weighs very lightly in this court, and that the practice, on the part of proctors, of supporting, by their own evidence, cases they are conducting professionally, will be discountenanced by every means compatible with the law. In the present instance, the testimony of the proctor might be regarded as being corroborated by the facts, that the master paid wages to the other seamen and allowed them to leave the vessel, and that it does not appear there remained any ship's duty for the libellant to perform when he absented himself. In such case, it would be reasonable to imply that he was tacitly included in the permission to quit the vessel. The fact of a discharge need not be proved by any direct evidence, but may be inferred from circumstances; and, ordinarily, the payment of the other seamen, or permission to them to leave the vessel, will be regarded as a general discharge of the crew. Edwards v. The Susan [Case No. 4,299]; Dixon v. The Cyrus [Id. 3,930]. The presumption is, however, overborne, in the present case, by the testimony of the mates, who swear that the master refused to allow the libellant to go with the other men, and was not present at the time he departed after they had left. The stipulation in the shipping articles, postponing the right to wages until the vessel was unladen, cannot be pronounced unconscientious or circumventing in respect to the sailors. It has an immediate connection with their ordinary engagement to the vessel, and operates, in effect, but as a prolongation of their shipping term, and, as an incident thereto, delays the recovery of their wages until the vessel is unladen, or until the fifteen days allowed by the statute for that purpose have expired. The Martha [Id. 9,144]. Such a stipulation would probably not operate to their loss or disadvantage, for they might insist on remaining with the vessel during the time, and would thus be entitled to support and wages until its expiration.

The weight of evidence being, that the libellant was not discharged from the vessel, he was bound by the stipulation in the articles; and, as the libel was filed only nine days after the voyage was ended, the exception taken in the answer to the libellant's present right of action, becomes technically well founded. If this objection was supported by any show of reason for exacting from the libellant the delay of his suit, the respondent might, upon the strength of it, be entitled to turn him out of court, with costs. But the answer does not allege, nor does the proof show, that the master claimed any duty of the libellant on ship-board, or that the vessel required his services. The refusal to him of permission to go with the crew would, therefore, seem to have been arbitrary on the part of the master, and was probably vindictive and designed to coerce the libellant to pursue some course resisted by him, or to lead him to commit some act prejudicial to the ultimate recovery of his wages. The latter motive is inferable from the attempt of the master to fasten a forfeiture of wages on the libellant because of his leaving the vessel; and there is evidence in this case that the master was willing to consent to the libellant's leaving the ship upon condition that he would execute a release of all causes of action against him. This conduct of the master takes from him all claim to the favor of the court. He is entitled to the strict legal effect of his exceptions, and to nothing more.

The libellant only proves that the vessel was in process of unlading when his libel was filed. The respondent does not assert that she remained unladen when his answer was put in. If that was the fact, yet fifteen days had then elapsed, and it will be presumed, in the absence of clear proof to the contrary, that there was ample time, in that period, to discharge the cargo. The Martha [supra]. When the respondent, then, submits himself to the jurisdiction of the court, as he does by his stipulations and answer, and admits, in his answer, that a balance of wages is due the libellant, the court is relieved from the necessity of decreeing a dismissal of the suit and compelling the libellant to renew his action. It is clearly competent to an admiralty court, and it is believed to be a usual course of procedure in that tribunal, to act upon the merits of the case as it stands when the cause comes to contestation. See The Edward [Case No. 4,289]. To preserve order in its proceedings, and due respect to the rights of the suitors who are subject to its process, it will undoubtedly, by awarding or withholding costs, or by a summary discharge of the action, check the irregularity of commencing suits before the right of action is fully matured. To do that effectually, it is not necessary to surcease the consideration of the merits, when they are placed in issue upon the pleadings, and to turn the promovent out of court, merely to compel him to perform the ceremony of beginning his suit in due time. If, then, the question rested upon the fact that, on a peremptory refusal by the master to pay the wages which he admitted to be earned, the libellant unadvisedly and erroneously brought his action therefor nine days after the voyage was ended, when he ought to have delayed it six days longer, it would seem to be fit and appropriate, when the fifteen days have run out, or the cargo is unladen, to allow the action to proceed, as no wrong would be sustained by the respondent. And, ordinarily, this would be permitted without imposing costs because of an irregularity, merely technical, in commencing the action. The respondent, however, having given evidence that, after the libel was filed, but before the vessel was unladen or the fifteen days had expired, he offered to pay the wages, and that the proctor for the libellant refused to accept them because his libel was

already filed, entitles himself to an indemnity against the costs or the injury which he may have incurred because of the captiousness or precipitancy of the party in urging forward the action. Had application then been made by the respondent, to be discharged from the action, the court would no doubt have stopped the proceedings, with costs to him. But, since he elected to file stipulations sistere in judicio et solvere judicium, and to interpose a full defence by formal answer, after the fault was known to him, the irregularity in commencing the suit may be regarded as substantially waived, and the case be acted upon as if it was instituted at the time the defence was taken. Accordingly, the only redress the respondent can reasonably claim, is to be relieved of the costs improperly created previously to his offer to satisfy the demand. Those costs will be imposed upon the libellant.

The merits of the defence made by the answer are, that the libellant has forfeited his entire wages by desertion; and the respondent insists that the decision of the circuit court in the case of The Cadmus [Id. 2,280] has settled the law upon this point in his favor, and determined that every unauthorized abandonment of a vessel by a seaman is a desertion which necessarily works a forfeiture of wages. That case, as adjudged by the circuit court, must, until reversed by the supreme court, supply the rule of decision to this court. I am not in possession of the reasons upon which that judgment was based, but I am persuaded that the learned judge did not, as was urged on this argument, intend to abrogate the rule of the law maritime in respect to the constituents or consequences of the offence of desertion, nor to hold that every wilful and clandestine departure from a vessel by a seaman, proved by oral evidence alone, is the offence of desertion described in the act of congress of July 20, 1790 (1 Stat. 131, 133), and must incur the punishment therein prescribed. On the contrary, I conceive that admiralty courts can exercise a discretion in the punishment of the common law offence, so to term it, and are not obliged to impose the single penalty of forfeiture of wages and effects. See The Cadmus [supra]; The Martha [Case No. 9,144]; The Elizabeth Frith [Id 4,361]. The cases are clear to show that maritime courts have always claimed and exercised the power to graduate the abstraction or forfeiture of wages conformably to the character of the fault, and have never felt constrained to levy the absolute and extreme decree of entire confiscation for every wrongful abandonment of a vessel by seamen.

But, whatever may be the rule where the act is committed before the vessel arrives at her port of final discharge, the voyage, in this instance, had been already fully performed. The ship had reached her port of final destination, and was safely moored at her berth. This terminated the voyage and all sea services on board connected therewith. Such has been the rule in this court, and such, it is believed, is the sound interpretation of the law maritime. The Martha [supra]; The Cadmus [supra]; Brown v. Jones [Case No. 2,017]. The engagement to serve upon a vessel in port is not a contract maritime in its character, or clothed with the privileges or liabilities of one, without the element of being connected with a sea service; much less can it be claimed as appertaining to a past voyage. It is matter of personal agreement, and no more becomes part of the contract for the voyage, by being inserted in the shipping articles, than if it were made outside of that agreement. It is a common practice to engage mates, carpenters, and probably cooks and stewards, to remain with a vessel after the voyage for which they ship is terminated, pending her being repaired, or her relading, or her seeking a new voyage; and this duty may be incident to their shipping contract. The Baltic Merchant, Edw. Adm. 86. But there is no case intimating that their nonfulfilment of such subsidiary agreement will cause the forfeiture of their earnings during the concluded voyage.

The respondent relies upon parol proof alone to establish the desertion charged. He produces no entry in his log-book, nor does he attempt to show that the act of the libellant was entered there, or that it was complained of at the time as a fault. Indeed, it would appear, from the scope of the proofs, that no person was proposed to be retained in the vessel other than the libellant. Under these circumstances, the fault committed by him would be regarded as of the most venial character, and as justifying but a very moderate fine, if the respondent had made it appear that he was in earnest in refusing the man a discharge. But I am satisfied he was actuated by the purpose of obtaining from him a release or acquittance of the vessel or her officers from some prosecution threatened by the libellant, and by no desire to hold him to the contract set up. The subsequent offer by the master to pay the libellant's wages, imports that he was conscious he was acting unjustly and oppressively towards the libellant in withholding them and in endeavoring to exact a release from him. In my opinion, no legal cause is shown for claiming a forfeiture of the wages, and I shall decree that the libellant recover them in full. A reference may be had to the clerk, to ascertain the amount justly due. But for the offer to pay the wages, made by the respondent, in apparent good faith, before the suit was instituted, I should order each party to pay his own costs. But, as the libellant was irregular in bringing his suit in violation of his contract, and refused to accept his wages without litigation, I shall decree full costs to the respondent. The taxed bill is to be

deducted from the amount of wages reported due, and the balance, if any, is to be paid to the libellant. Decree accordingly.

Case No. 5,690.

In re GRANT et al.

[5 Law Rep. 303.]

Circuit Court, D. Massachusetts. 1843.

BANKRUPTCY—COLLATERAL SECURITY — SALE OF—JURISDICTION OF CIRCUIT COURT IN.

1. A creditor of a bankrupt, who holds collateral security for his debt, may, in the discretion of the district court, be permitted to take such collateral security at its value, to be ascertained under the direction of the court, and prove his debt for the residue.

2. Or the district court may order such security to be sold, or may ascertain its value by an appraisement, or in any other mode satisfactory to the court, or may allow the creditor to take it at its full nominal value.

[Cited in Re Bousfield, Case No. 1,702.]

3. The circuit court has no authority to entertain questions in bankruptcy, adjourned from the district court, unless they are distinctly raised.

[In bankruptcy. In the matter of Benjamin B. Grant and others.]

This case came up before the district court [case unreported] upon the report of a commissioner (William Gray) preparatory to a dividend, in which several questions were raised for the decision of the court. It appeared, that the American Bank held certain collateral securities, which the corporation desired to assume at their actual value, deducting the amount from their claim. At the coming in of the report, the district judge made an order, "that the questions submitted by the commissioner in the accompanying report, and also the questions, whether a creditor of a bankrupt who holds collateral security for his debt, may be permitted to take such collateral at its value, to be ascertained under the direction of the court, and prove his debt for the residue; or whether such collateral shall be sold for the benefit of the creditor, and he be permitted to prove for the residue, or in what manner such collateral shall be disposed of and to what extent such creditor shall be allowed to prove his debt, be adjourned into the circuit court, to be there heard and determined."

Mr. Parsons and P. W. Chandler, for the American Bank. No opposition was made on the other side.

STORY, Circuit Justice. The two questions, adjourned into this court, involve alternative views, and, therefore, may be conveniently considered together. The real point in both of them is, what is to be done in cases, where a creditor, who proves a debt, holds collateral securities therefor? Are those securities in all cases to be sold and the creditor to be permitted to prove for the residue of his debt? Or may the creditor under the direction and sanction of the court, be permitted to take the securities at their true value, that value being ascertained under the direction of the court; and to prove for the residue of his debt? Upon these questions, I do not profess to feel any real difficulty. The whole proceedings in bankruptcy are on the equity side of the court; and whatever a court of equity might do in the exercise of its general jurisdiction over subjects, requiring a like interposition, may properly be done by the district court, in cases of bankruptcy. There can be no doubt, that a creditor, holding securities, is enabled to prove his debt upon his offer to surrender and actually surrendering those securities, to be disposed of according to the order and direction of the court, and that he is entitled to prove his debt, deducting the true value of the securities therefrom, that true value when ascertained, being paid or applied by the court for the exclusive benefit of such creditor. How, then, is such value to be ascertained by the court? Must it be ascertained by a sale of the securities by the court in all cases? Or may it be ascertained by an appraisement, or by allowing the creditor to take the same at the nominal value, or in any other manner, which the court may deem for the true interest, and benefit of all concerned in the estate, if there is no objection by the bankrupt, or any of the other creditors, or other party in interest;—or in case of objections, if upon full notice and hearing of all parties, the court in the exercise of a sound discretion, deem the one or the other course most for the benefit of all concerned in the estate? My judgment is, that the whole is a matter resting in the sound discretion of the court, upon all the circumstances of each particular case. The court have full authority to ascertain the true value by a sale, or by an appraisement, or in any other mode, which it shall deem best for the interest of all concerned in the estate; or it may allow the creditor to take any one or more or all of the securities at their nominal value, if that is ascertained by the court to be the true and highest value of the security.

I am aware, that the usual course in England, under the bankrupt laws, is for the court to direct a sale of the collateral securities. So it will be found laid down by Mr. Eden, and Mr. Deacon, in their treatises on the bankrupt laws. Eden, Bankr. Laws, pp. 104–110, c. 7, § 3; 1 Deac. Bankr. (Ed. 1827) pp. 178–180, c. 2. But this, as I apprehend, is a matter in the mere discretion of the court, and is resorted to as generally the most safe, convenient, and satisfactory mode of ascertaining the true value. But it is by no means the only mode, which the court is authorized to resort to, in the exercise of its discretion. On the contrary, cases may, and indeed, do often occur, in which the resort to a sale would be injurious to the interests of all concerned in the estate, as tending to unnecessary delays and expenses. Suppose,

for example, a creditor holds negotiable paper alone as security, and he is ready and willing to take that paper, because he has confidence that the parties thereto are solvent, at its full nominal value. Surely it would be absurd to say, that nevertheless he should not be at liberty to take it, but it should be sold at auction, where it might possibly bring a less price, and at all events load the security with expenses to be deducted from its value. But if there were any practical difficulty in England, under their bankrupt laws, as to the jurisdiction and authority of the court to ascertain the value of collateral securities, otherwise than by a sale, there is not, in my judgment, the least doubt under our bankrupt act of 1841 [5 Stat. 440], to maintain the most ample jurisdiction and authority to order either a sale, or an appraisement, or any other satisfactory mode to ascertain the true value of the securities, or to allow the creditor to take them at their true nominal value. I shall direct a certificate to be sent accordingly to the district court. The argument on behalf of the American Bank, has presented some other points for the consideration of this court, growing out of the report of the master. But these points are not involved in the questions submitted to this court, and, therefore, I have no authority to entertain them.

The certificate was as follows:

"Circuit Court of the United States, Massachusetts District. In Bankruptcy. In the Matter of Benjamin B. Grant and others. It is ordered by the court, that the following answers be certified to the district court, upon the questions adjourned into this court, upon the petition of the American Bank, to be heard and determined. First, that a creditor of a bankrupt, who holds collateral security for his debt, may be permitted to take such collateral security at its value, to be ascertained under the direction of the district court, and prove his debt for the residue, if in the exercise of the discretion of the district court, it shall see fit so to order it as being for the benefit of all concerned in interest in the estate of the bankrupt. But not unless the court shall see fit so to order it. Second, the district court has authority in the exercise of a sound discretion, if it shall deem it for the best interest of all concerned in interest in the bankrupt's estate, to order such collateral security to be sold, or to ascertain the value by an appraisement, or in any other mode satisfactory to the court, or to allow the creditor to take the same collateral security, at its full nominal value if he shall elect so to do; and in all cases, where the collateral security shall be surrendered by the creditor, to be disposed of by the court for his benefit, and the benefit of the bankrupt's estate as aforesaid, the creditor shall be entitled to the true value of the security so ascertained as aforesaid, and shall have a right to prove his debt against the bankrupt's estate, after deducting the true value as aforesaid of such security. Joseph Story, One of the Justices of the Supreme Court of the United States."

Case No. 5,691.

In re GRANT et al.

[6 Law Rep. 158.]

District Court, D. Massachusetts. April, 1843.

PROMISSORY NOTE—DEMAND OF PAYMENT—INSOLVENT INDORSER.

1. On a note made payable "on demand after date with interest," there were demand and notice more than five years after date. *Held*, not within a reasonable time.

2. The mere fact that the indorser of a note is a member of the firm by which it is made, will not excuse a demand and notice, although the firm were insolvent when the note was given, and the indorser knew that it was not paid.

3. A member of an insolvent firm, in settling up their concerns, gave a note signed by the firm, payable to his own order "on demand after date with interest," and by him indorsed. No demand was made and notice given, until after five years from the date of the note. *Held*, that the private estate of the indorser, in bankruptcy, was not liable for the amount of the note.

In bankruptcy. This was a motion by the assignee to expunge a proof of debt, filed by the Globe Bank against the private estate of Benjamin B. Grant, as indorser of a note for thirty-six thousand dollars, signed by Grant, Seaver, & Co., a firm of which Grant was a member, and which was in bankruptcy. The Globe Bank also proved the same note against the copartnership estate of the bankrupts, as makers of the note, claiming a dividend on the balance due, about eighteen thousand dollars, against the separate estate of Grant, as indorser, and the joint estate of the partners, as makers, in accordance with Farnum's Case [Case No. 4,674]. The note in question was made on September 26, 1838, payable "on demand after date with interest." There was no demand on the makers, or notice to the indorser until February 19, 1843. At the time the note was given, Grant, Seaver, & Co. were insolvent. Grant was principally engaged in closing up the business, and this note was given to the Globe Bank by him on a settlement, it being for the balance then found to be due to the bank. The note was not proved until the second dividend was about to be declared; and the assignee moved to expunge the proof against the private estate of Grant, on the ground that he was not liable as indorser of the note.

H. H. Fuller and P. W. Chandler, for assignee.

Charles B. Goodrich, for the Globe Bank.

SPRAGUE, District Judge. The question first presented at the bar relates to the demand and notice. Was any demand necessary; and if so was it made in a reasonable time, or has it been waived? The note was payable on demand after date with interest.

No demand was made until after the lapse of five years and four months—and not only after the makers and indorsers had all gone into bankruptcy, but nearly six months after the first dividend on the estates had been declared; nor until after the proof of debt in this case by the bank. Without undertaking to determine with precision what would be a reasonable time for making a demand, it is sufficient to say, that there is no precedent or opinion which allows a latitude approaching to the length of time which had elapsed here. All the parties here have during the whole term remained in Boston; and I am of the opinion, that if from the circumstances of this case, a demand could be delayed until the 14th of February last, and until after this very proof of debt now moved to be expunged was made, it could be dispensed with altogether. It is contended, that the offer of Grant to compromise and settle the note, was a waiver by him as evidence of demand and notice. The evidence does not, I think, warrant such an inference. He was endeavoring, as he states, to settle the affairs of Grant, Seaver, & Co., the makers, and that in his conversations with the officers of the bank it was always credited as the debt of the firm, and his indorsement was never referred to. Nothing was said or done with reference to his indorsement, and which might not well have exclusive reference to the obligations of the makers. The question then, is, whether a demand was necessary. It has been finally urged that it was not. First, because Grant, the indorser, was a member of the firm of Grant, Seaver, & Co. and always knew that the note was unpaid, and the makers had no means of payment. The cases cited most directly to this point were Gowan v. Jackson, 20 Johns. 176, and Porthouse v. Parker, 1 Camp. 82. They are both cases of a bill drawn by one partner on the firm, and duly presented for acceptance and payment, but notice of refusal not given to the drawer; and it was held, that as the drawer was one of the persons who had refused acceptance or payment, and must therefore have known of the dishonor, notice of that fact need not be given. In the case before us, there was no demand. Dwight v. Scovil, 2 Conn. 654, cited on the other side, was an action by the indorsee of a note against the indorsers. One of the firm which indorsed the note was also a member of the firm which made it; but it was decided, that demand and notice were necessary. Dickins v. Beal, 10 Pet. [35 U. S.] 572, was a case of a bill drawn without funds or authority to draw; a demand was duly made, but notice not given. It was held, that the drawer was not entitled to notice. In Copp v. McDugall, 9 Mass. 1, the payee of a note had negotiated it, knowing that it was not valid against the makers, and after the indorsee had failed in a suit upon it against the maker, he told the indorsee he was ready to pay it. Held, that no demand or notice was necessary. These are all the cases which were cited in the opening argument to sustain this position. Neither of them is precisely in point. The cases subsequently added are not more so.

The second ground for dispensing with demand and notice, is, that Grant had the custody and control of the property of the makers, as a member of the firm, and also by an appointment of the copartners to settle their affairs. Grant states that he conducted the settlement and adjustment of the affairs of the company. But he does not state, that he had any new and special authority or conveyance of property for that purpose; and I do not think that we are to infer, that he had any other custody or control of the property than as a corporation. It has been held, that where an indorser had received a conveyance of property from the maker of a note for the express purpose of securing him against his indorsement, demand and notice may be dispensed with. Such were Mead v. Small, 2 Greenl. 207, and Mechanics' Bank v. Griswold, 7 Wend. 165, and the earlier case of Bond v. Farnham, 5 Mass. 170, in which the court take the ground, that when the indorser represented to the maker, that he was liable and took security, he undertook to pay absolutely; that the intention was, that his promise should be no longer conditional; and in Prentiss v. Danielson, 5 Conn. 175, the court consider the taking such security to be a waiver of demand and notice, in other words an absolute promise to pay. In these cases, the makers, by the intervention of the indorser, were either wholly or in part deprived of the means of payment. In the case before us, whatever property Grant held, was in his control at the time of making the note and in his character of copartner, that is, as one of the makers. But it has been urged with much force, that those cases, although not in all the circumstances precisely like the present, establish a principle which embraces it, that a demand is not necessary when it would be wholly vain and useless. These cases rest either on some deceptive practice, as in drawing without funds, transferring a void note, or on the supposed intention of the parties not to require an act wholly useless. The paramount principle of all the cases dispensing with demand and notice, is to carry into effect the honest intention of the parties and do substantial justice between them. This controlling principle is to be kept constantly in view. The indorser of a note is bound only by virtue of his contract. That contract is such as he chooses to make it. If he indorses in blank, the law implies a promise to pay on the condition of due demand and notice. Under certain circumstances, the law implies an absolute promise: that is, presumes that it was the intention of the parties to dispense with a condition wholly

useless. All the reasoning of the cases and the rules laid down and exceptions introduced, are only to ascertain and carry into effect the real and honest intention of the parties. Suppose Grant, in this case, when he made his indorsement, had expressly stipulated, that he should not be holden in any event as indorser, nobody doubts that he would have been protected from liability, and if he had expressly stipulated, that he should be holden only after demand and notice, it is clear, that such condition must have been complied with. The manifest intention of honest parties must be carried into effect, and circumstances are resorted to only to ascertain such intention when left in doubt. It is to be borne in mind, that all the facts which go to dispense with demand, existed at the time the note was indorsed; and if Grant is liable, it must be on the ground, that it was then intended that he should be bound absolutely and without condition. It is not contended, that there was any express promise by Grant, to pay absolutely as indorser; but it is urged, that the note was not made for circulation, discount, or commercial purposes, but under peculiar circumstances, and therefore that Grant is not entitled to claim the privileges of general commercial paper. In other words, that the law, from these circumstances, implies an absolute and not a conditional promise to pay. On the other hand, it is insisted, that the legal inference, from these extraordinary circumstances, is precisely the reverse; that so far from raising an absolute promise, they imply no promise whatever. Indeed, the learned counsel went further, and urged, that the whole circumstances of the case furnished proof, that it was expressly agreed, that Grant should not be holden as indorser. But I do not see any satisfactory evidence of such express agreement, and if any such had been made, it is reasonable to suppose, that the indorsement would have been without recourse; and, on the other hand, if there had been an actual agreement to be holden absolutely, it would probably have been expressed by an indorsement waiving demand and notice, to prevent all doubt.

The truth manifestly is, that it was not deemed by the parties, at the time, a matter of any importance whether Grant was holden as indorser or not, and they took no care or thought about it. Grant being bound, at all events, as maker of the note, the bank had as perfect right to resort to his private property, as well as that of the firm, as if he was also holden as indorser. The firm had failed, having been indebted to the bank, in a much larger amount, upon which payments had, from time to time, been made. When they came to account together, it was found that this balance of about thirty-six thousand dollars, was due from the firm, and, thereupon, as a matter of convenience, the paper previously holden against the firm, was given before, and this new note was made. Grant made the settlement, signed the name of the firm to the note as makers, inserted his own name as the person to whose order it was to be paid, and then indorsed it in blank. This was the only consideration, and although it might be sufficient in law to sustain an actual promise by the indorser to pay, yet, in considering what was the real intention of the parties, and the rights and obligations which the law will imply, the fact, that nothing of actual value was parted with, or received, is not unimportant. The bank held collateral security, which Grant says he always considered sufficient, or nearly sufficient, to secure this note. That they did not, in fact, regard the indorsement as of any moment, or rely in any degree upon it, is manifest from other circumstances. They well knew the general rule of law, that indorsers are not holden without demand and notice. Grant, and the members of the firm of Grant, Seaver & Co., all lived in Boston; yet for more than four years they take no step to render his liability certain, either by demand and notice or taking his waiver thereof. On the tenth day of January, 1843, the bank, by its president, came forward to prove this debt against the indorser; and this was the first claim they ever made against him. That they did not rely on the circumstances of the case, as dispensing with the necessity of demand and notice, or on any agreement to waive, is manifest from the proof made before the commissioner, in which due demand and notice are stated, and the liability of the indorser put upon the fact of such diligence, and nothing stated of any facts, circumstances, or agreements dispensing therewith. A motion was made to expunge this proof, after which, for the first time, demand was made and notice given, and also the ground taken, that no such diligence was necessary. This is not all. Grant, whose deposition has been introduced by the bank, testifies, that he endeavored, from time to time, to make an adjustment and compromise of this note with the bank; that he had not less than half a dozen conversations with the officers for that purpose; and that "the subject of his individual indorsement was never referred to between them; that it was always treated as a debt of Grant, Seaver & Co."

It is objected by the learned counsel for the bank, that it is not open to the assignee here to prove that it was not intended that Grant should be holden as indorser; that the law fixes the meaning of an indorsement, and that evidence cannot be admitted to contradict the instrument. The admissibility of such evidence has been, heretofore, matter of controversy. I do not think it necessary to decide that question, because all the evidence here was introduced by the bank. In Reed v. Jewett, 5 Greenl. 96, and Smith v. Tilton, 1 Fair. 350, it was decided, that a written contract may be controlled

by parol evidence, introduced by the party who subsequently objects to its effect. But here, this evidence was introduced by the bank, for the very purpose of changing the legal effect of this indorsement, to make it an absolute promise instead of a conditional one; and this is essential to their case, for as the circumstances relied upon existed at the time the note was indorsed, the contract then made is that which still binds the parties. The case of Girard Bank v. Comly, 2 Miles, 405, was in many respects similar to the present. No question of the admissibility of evidence arose, but its effect was considered, and the court held, that the indorsement created no liability. In the present case it is not sufficient for the bank to show, that some liability was assumed by the indorsement. They must go further and show, that it was not the usual conditional promise which an indorsement imports, but an absolute obligation to pay at all events. We have seen, that no such absolute promise was in fact made or intended. Is it implied by law? No precedents precisely in point are found, and no rule that embraces all the circumstances of this case. We are left then to decide it upon the true principles applicable to the case. But, as has already been remarked, the paramount principle of the cases dispensing with notice, is to do substantial justice, to carry into effect the real intention of the parties. When the law raises implied promises, it is to require parties to do, what in equity, in good conscience they ought to do, and what as honest men, it may be presumed they intended to do. I do not think, that justice requires that Grant should be holden as indorser, or that he was ever under any moral obligation as such, and although some of the circumstances, if standing alone, might perhaps have been sufficient to raise a legal implication of an absolute promise, yet they are neutralized at least by other circumstances of an opposite tendency, and from the whole no such promise is to be inferred. The proof must be expunged.

[NOTE. The bankrupt also filed a petition asking inter alia, that his wife be allowed to retain certain personal property, consisting of jewelry and ornaments, and that the assignee should be restrained from demanding the sum of $126 paid out by the bankrupt for the support of his family since the bankruptcy proceedings. An order was made refusing these requests, with some exceptions, but allowing the bankrupt an amount in compensation for his services in the care of the property. Case No. 5,693.]

Case No. 5,692.

In re GRANT.

[2 N. B. R. 106 (Quarto, 35).] [1]

District Court, D. South Carolina. 1868.

ASSIGNEE IN BANKRUPTCY—APPOINTMENT.

Where an assignee is chosen by the greater part in value and number of the creditors who have proved their claims, and there is no imputation either upon his capacity or integrity, he is assignee by virtue of law, and the judge is not competent to interfere.

[In bankruptcy. In the matter of John G. Grant.]

By R. B. Carpenter, Register:

This being the day appointed by the court for the first meeting of creditors, I sat at the time and place above mentioned, among other things, for choice of assignee. The only claim proved was that of Hudson & Townsend, attorneys at law, for about one hundred and seventy-five dollars, subject to a deduction, as stated in the deposition, of an unknown sum, supposed to be fifteen or twenty dollars. These creditors, by their attorney in fact, J. Barrett Cohen, Esq., voted for D. D. McCall, of Bennettsville, S. C., as assignee of said estate. C. P. Townsend, Esq., attorney for the petitioner, objected to the appointment, on the ground that Mr. McRae had been recommended by all the bar, including Hudson & Townsend themselves; had given up other business and devoted himself to this business; that he has been elected and appointed in all the cases in the district; and that he is a man of high character, honest and capable, and that to make this case an exception would be disparaging to him, and that the amount due to Hudson & Townsend is much less than is stated by them, and that their claim is insignificant beside the whole amount of the debts—about five thousand dollars; that the creditors holding securities represent about five thousand dollars. Considering these objections, and that the interest, although that of the bankrupt is an opposing one, I do hereby certify the facts to the court for its action in the premises, simply adding that Mr. McRae is an efficient assignee, and that I would appoint him if I had the power.

BRYAN, District Judge. Duncan D. McCall having been chosen assignee by the greater part in value and number of the creditors who have proved their debts, and there being no imputation either upon his character or competency, the judge does not feel himself competent to interfere, and does not interfere. He is assignee by virtue of the law.

[1] [Reprinted by permission.]

Case No. 5,693.

In re GRANT.

[2 Story, 312; [1] 5 Law Rep. 11.]

Circuit Court, D. Massachusetts. March 19, 1842.

BANKRUPT—DISCHARGE—ALLOWANCE FOR SUPPORT—PROPERTY OF WIFE—TRUSTS—GIFTS.

1. It seems that a person who has been declared a bankrupt, under the late act of congress [5 Stat. 440], may enter into business and hold property, subject to the contingency of obtaining a discharge.

[Cited in Spalding v. Dixon, 21 Vt. 47.]

[1] [Reported by William W. Story, Esq.]

2. The court has no authority to order an allowance to the bankrupt for the support of himself and family; but the assignee may make such allowance, not exceeding the sum of three hundred dollars; and he may also allow the bankrupt any reasonable sum for taking charge of the property.

[Cited in Re Ludlow, Case No. 8,599; Re Fortune, Id. 4,955; Re Hay, Id. 6,253; Re Thompson, Id. 13,938; Re Wells, 4 Fed. 71.]

[Cited in Robinson v. Hall, 11 Gray, 484.]

3. In general, the husband becomes entitled to the personal property belonging to the wife at the time of her marriage, unless his marital right be excluded by some express or implied trust; and his creditors may take it in execution or satisfaction of their debts.

[Cited in Woodford v. Stephens, 51 Mo. 444.]

4. Such a trust may be expressly created, or it may be implied from the nature of the gift, or from other attendant and conclusive circumstances.

5. Gifts after marriage, by third persons, may be expressly made for the sole and separate use of the wife, and if the husband consents to her receiving them, he and his creditors are bound by the trust.

[Cited in The State of New York, Case No. 13,328.]

6. In equity, gifts of personal ornaments or jewelry, made by a husband to his wife, for her sole and separate use, will be good against his personal representatives, in case of his death; but not against his own power to reclaim them during his life, nor against the right of his creditors to take them in satisfaction of their debts.

[Cited in Re Ludlow, Case No. 8,599; Carr v. Gale, Id. 2,434.]

7. Mourning rings given by third persons to the wife, after her marriage, are purely personal, and cannot be touched either by the husband or by his creditors.

[Cited in Re Ludlow, Case No. 8,599.]

[Cited in Tllexan v. Wilson, 43 Me. 186.]

8. A parent may make gifts to his children, if they be proper and suitable in his circumstances and condition; if they be not so, they enure to the benefit of his creditors; but if the gifts have been purchased in part by third persons, the assignee, under the bankrupt law, can only claim the amount paid by the father.

[See Backhouse v. Jett, Case No. 710.]

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

Benjamin B. Grant, a bankrupt, filed in the district court his petition, as follows: "And now, Benjamin B. Grant respectfully represents to this honorable court, that on the second day of February last past, and at the time of filing his petition, he was possessed, in his individual capacity, of the sum of twenty-two hundred and fourteen dollars and seventeen cents, in cash, as set forth in his schedule of individual property, annexed to said petition. That he was at that time, and has ever since been entirely out of business, and without the means of daily support. That his family consisted of himself, wife, and two sons of the ages respectively of seventeen and twenty years. That they were, at the time of filing said petition, and have ever since been at board, paying therefor the sum of twenty-one dollars by the week. That from the filing of said petition to the fifteenth day of March following, the day when your petitioner surrendered his property, in compliance with the order of this honorable court, he was compelled to provide for the necessary support of his family, for the space of six weeks, at the rate aforesaid, and having no other means, he paid therefor from out of said sum of twenty-two hundred and fourteen dollars and seventeen cents the sum of one hundred and twenty-six dollars; and your petitioner further states, that his wife is possessed of a watch of about the value of fifty dollars, presented to her by the petitioner about ten years since. That she has likewise several mourning rings and pins, and a few other articles of jewelry, of the value of about twenty-five dollars, some of which were given her by friends, and others by the petitioner some years since; and one, a mourning ring of the value of about five dollars, given her by the petitioner nearly two years since. And your petitioner further states, that his sons have each a gold watch of the value of about fifty dollars, which were purchased about two years since, with money given by a friend, and with about twenty-eight dollars given to each by the petitioner, out of his private cash. And your petitioner further states, that the assignee of his estate, appointed by this honorable court, demands of him the payment of said sum of one hundred and twenty-six dollars, and requires the delivery to him of said watches and jewelry in the possession of the petitioner's wife and children, as aforesaid. Wherefore your petitioner prays this honorable court to order and direct said assignee to forbear and relinquish said demand of payment of said sum of one hundred and twenty-six dollars, and that said sum may be allowed your petitioner. And further that your petitioner's wife and children may be permitted to retain their said watches and jewelry respectively."

To this petition the assignee filed no answer, submitting himself to the order and decree of the court in the premises. Upon the hearing [case unreported], the district judge ordered that the following questions be adjourned into the circuit court, to be there heard and determined, namely: 1. Whether, upon the facts stated in said petition, any, and if any, how much of said sum of one hundred and twenty-six dollars shall be allowed to the petitioner? 2. Whether the jewelry and watch of the petitioner's wife shall be retained by her? 3. Whether the watches of the petitioner's sons shall be retained by them respectively?

The questions now came on to be argued. Dehon (with whom was C. G. Loring), in opening the case, said, that the first point in the petition was for allowance for money expended in the necessary support of the petitioner and his family. As soon as the decree of bankruptcy was made by the court,

all the property of the bankrupt was divested from himself, and vested in an assignee, as soon as one was appointed. This related back to the time of the petition, and the effect was, that all the property of the petitioner passed from himself at the moment of filing the petition. Unless, then, some provision was made for him, he would in certain cases be entirely destitute. And there was an opinion sometimes expressed, that the petitioner could not enter into business or hold any property until he receive his discharge, which could never take place until several months after he was declared a bankrupt.

STORY, Circuit Justice. I find nothing of that sort in the law. I know of no reason, why the bankrupt may not enter into business and hold property, subject of course to the contingency of obtaining a discharge; for if the bankrupt fails to obtain a discharge, all his property will at last be subject to the claims of all his creditors.

In regard to the first part of the petition, respecting an allowance to the petitioner for the support of himself and his family, the court has no authority to interfere in the matter. The law is express, that all the property of the bankrupt shall be surrendered, with certain exceptions, which are specifically set forth. By the proviso containing these exceptions, in the third section of the act, the assignee is to designate and set apart "the necessary household and kitchen furniture, and other articles and necessaries of such bankrupt, &c., not to exceed in value, in any case, the sum of three hundred dollars." Now, under this provision, it is competent for the assignee to make the allowance sought for in the present case; but it can be allowed on no other ground than as a part of the three hundred dollars mentioned in the law.

The counsel for the petitioner here stated, that this claim was made by the petitioner, as compensation for taking care of this property, between the time of filing the petition and the decree of bankruptcy.

STORY, Circuit Justice. That is another and a distinct question. Undoubtedly the assignee may allow the petitioner or any one else a reasonable sum for taking charge of the property. In regard to the watch and jewelry, the rule in bankruptcy is precisely the same as it is in equity. In the first place, as to the personal property belonging to the wife at the time of her marriage, it may be generally stated, that the husband, under and in virtue of the marriage, becomes entitled to it, unless his marital right is excluded by some express or implied trust. No matter how the property has come to the woman before the marriage, whether by gift or by purchase, by gift of her friends, or by purchase from her own funds, unless at the time of the marriage it stands affected by some trust for her sole and separate and exclusive benefit, it will belong to the husband. It may be affected by an express trust, as by the provisions of a settlement, or by a trust deed, or by the will of a third person; or the trust may be implied from the very nature and character of the gift itself. If there be no such trust, then the husband, immediately after the marriage, may appropriate the property to his own use; and his creditors may take it in execution or satisfaction of their debts. When and under what circumstances a trust, created either expressly, or by implication, before marriage, may be said to remain unextinguished by and after the marriage, is a matter in some cases of considerable nicety. But in all the cases, however varied, the same general principle prevails, which is, to ascertain, whether the nature of the trust, which was originally created, in whatever manner it was so created, is by intendment of law a subsisting trust to continue upon and after the marriage, or not. And it by no means necessarily follows, because the gift before marriage was for the sole and separate use of the woman, that the trust will continue after the marriage, and remain unextinguished. Every thing must here depend upon the character and extent of the trust, according to a just interpretation of its terms, if created by express written documents; or if implied, upon the nature and necessary objects of the gift or bounty, whether they are purely and peculiarly personal to the lady, or not.

Personal property, although given to a woman for her sole and separate use before marriage, necessarily belongs to her in absolute propriety and title, and she has the absolute power to dispose of it, as she pleases, while she remains unmarried. That power ceases upon her marriage; and the same absolute right of property and ownership therein then becomes vested in her husband, unless, indeed, it was originally given in trust for her sole and separate personal use after the marriage, and without any right of interference of her then intended husband, or of any future husband. Such a trust may be expressly created, or it may be implied from the nature of the gift, or from other attendant and conclusive circumstances. But it cannot be implied from doubtful circumstances, or from facts, which are equally reconcilable with the supposition, that she might have, and should have a right, to part with the same in favor of her husband upon the marriage. Gifts made after marriage by third persons may also be expressly given for the sole and separate use of the wife, independent of her husband; and when so given, if the husband consents to her receiving the gifts, he and his creditors are bound by the trust. But the nature of the gift by a third person may equally as clearly establish the intent, that it is to be in trust for the sole and separate use of the wife during the mar-

riage, as if it were positively so expressed; and then the trust will equally attach to and regulate the gift, and bind the husband and his creditors. Neither of them can dispose of any such gift; but it remains the sole property of the wife under the trust, whether it be express or be implied. Nothing can be more clear than that property, held in trust by the husband, is not subject to the debts of the husband, or liable to his creditors. The trust adheres to the property throughout for the benefit of the wife, or other person, who is beneficially entitled to it. But gifts made by the husband to the wife after and during the marriage, admit of a different consideration, with the exception of her wearing apparel. They are not strictly at law capable of taking effect; for the husband and wife are, in contemplation of law, but one person, and are therefore incapable of contracting with, or making gifts to, each other. In equity, however, it is otherwise; and the husband may make gifts to his wife of personal ornaments or jewelry for her sole and separate use, which will be good against his representatives in case of his death; but not good against his own power to reclaim them during his life; nor good against the rights of his creditors to take them in satisfaction of their debts; for here the rule is, that the husband must be just before he is generous. So if the husband dies insolvent, the creditors have a right to take such gifts in satisfaction of their debts. But if his estate is solvent, then, although, in strictness, the creditors may take such gifts in satisfaction of their debts, yet they are not bound to do so; and if the creditors do take them, then the wife will be entitled to be repaid the full amount out of the other assets of the husband; for these gifts are good against the representatives of the husband; and even he himself, since they are of the nature of paraphernalia, cannot dispose of them after his death, but only during his lifetime.

To apply these principles to the circumstances of the present case. All the gifts made by the husband to the wife since the marriage, including the watch, and excluding her personal apparel, belong to the creditors, and must be inventoried as a part of his estate divisible among them, if they insist upon their extreme right, as I should hope they will not. In regard to the mourning rings given by third persons to the wife since her marriage, they are, from their very nature and character, purely personal, and for her sole and separate use, as memorials of the dead, and also of the affection of the living. They are sacred, and cannot be touched either by the husband or by his creditors. In regard to the watches of the petitioner's sons, if given to them by persons other than their parents, there is no doubt, that they can retain them. If given to them by their father, then the question will depend upon circumstances. If the gift is appropriate and suitable to their condition in life, it will be the property of the sons. If, however, the gift is an unsuitable one, one which the circumstances of the father will not justify, then, in legal contemplation, it is no gift at all; but the transaction will give rise to a suggestion of fraud, and the creditors can take them. I know of no rule of law or of equity, which denies to a parent the right to make gifts to his children, which are proper and suitable in his circumstances and condition; but if they are not so, the father being insolvent, and the gifts being large, then they enure to the benefit of the creditors, even although there was no intention on the part of the father to defraud.

Upon a statement by the counsel for the petitioner, that the petitioner was insolvent at the time when the watches were purchased—

STORY, Circuit Justice, said: That makes a difference in the present case. An insolvent person has no right to spend much in articles of mere ornament for his children. But here the assignee can only claim the amount which was paid by the petitioner towards the purchase of his sons' watches. The property is in the children, but the amount, which the father has paid for them, must be paid to the assignee. If it be not paid, the assignee can petition the court, setting forth the facts, and asking for a sale of the watches, unless they are redeemed by a payment of what the father advanced in their purchase:

The following order was thereupon directed to be certified to the district court:

1. That the petitioner is entitled to an allowance of the said sum of one hundred and twenty-six dollars, or any part thereof, solely in virtue of the third section of the act of congress of the 16th of August last past, establishing a uniform system of bankruptcy, and as a part and parcel of the allowance thereby required to be designated and set apart by the assignee as necessaries for the said bankrupt, not exceeding in value and amount the sum of three hundred dollars; and is not otherwise entitled to the same. But the assignee is at liberty to make such reasonable allowance to the bankrupt for the custody and safe keeping of his property, between the time of filing of his petition for the benefit of the act and the assignee's demanding and receiving the same under the proceedings in bankruptcy, as the assignee might reasonably make and allow to any third person for the custody and safe keeping thereof.

2. That the watch of the wife, and any jewelry given to her by third persons before the marriage, or by her husband either before or since the marriage, pass to the assignee as part of the property of the bankrupt, to which his creditors are entitled. But jewelry given

by third persons to the wife since her marriage, as personal ornaments, and mourning rings given to her by third persons since the marriage, as personal memorials, belong to the wife for her sole and separate use in equity, and do not pass to the assignee under the bankruptcy for the benefit of the creditors.

3. That the watches of the sons, under the circumstances stated in the petition, belong to them as their property. But nevertheless, if the petitioner was insolvent, when he applied a part of his own money to purchase the same for his sons, he had no right so to do against the claims of the creditors; and that in equity, therefore, if the petitioner was so insolvent, the sons must account to the assignee for the amount of the money of the petitioner, so paid towards the purchase of the watches. But if the petitioner was not then insolvent, and the donation on his part was made bona fide, and the donation was suitable to his rank in life, condition, and estate, then it was good, and not within the reach of the creditors, or in fraud of their rights under the bankruptcy.

[NOTE. The assignee in this case filed a motion to extinguish proof of a debt in the form of a note upon which the bankrupt was indorser, made payable "on demand after date, with interest." No demand having been made until more than five years after it was decided that the private estate of the bankrupt was not liable for the payment of the note, which had been given in the name of a firm of which the bankrupt had been a member, the proof was expunged. Case No. 5,691.]

Case No. 5,694.

GRANT v. BONTZ.

[2 Cranch, C. C. 184.] [1]

Circuit Court, District of Columbia. Nov. Term, 1819.

ASSUMPSIT—DECEIT—WARRANTY.

An action of assumpsit, in the nature of an action of deceit, will lie for knowingly and falsely representing a slave sold by the defendant to the plaintiff to be sound, although there should be a bill of sale under seal warranting the slave to be a slave for life, without expressly warranting the soundness of the slave.

The declaration in this case was drawn from the precedent in the case of Stuart v. Wilkins, 1 Doug. 120, the form of which was fully approved by all the judges of the court of king's bench. It stated that, whereas the defendant [John Bontz], on the 1st of August, 1816, offered to sell to the plaintiff [James A. Grant] a certain slave called Celia, and a certain other slave called Julia, of him the defendant, and whereupon afterwards, to wit, &c., in consideration that the plaintiff at the special instance and request of the defendant would buy of him, the said defendant, the said slaves at and for the price and sum of $675 to be paid by the plaintiff to the defendant upon demand, the defendant then and there undertook and faithfully promised the plaintiff that the said slaves were sound; and the plaintiff, in fact saith that he, confiding in the promise and undertaking of the defendant so by him made as aforesaid, afterwards, to wit, &c., at the special instance and request of the defendant, did buy of him the said slaves at and for the price of $675 and did then and there pay the same to the defendant; yet the defendant, not regarding his said promise and undertaking so as aforesaid made, but contriving and fraudulently intending to injure the plaintiff in this behalf, did not regard his said promise and undertaking so by him made as aforesaid, but craftily and subtly deceived the said plaintiff, in this, that the said slave Celia, at the time of the making of the said promise and undertaking of the defendant, was not sound, but on the contrary thereof was unsound, and was afflicted with the misfortune of idiocy, to wit, at the county aforesaid, of which the defendant, at the time of his promise aforesaid, was well informed, whereby the said slave then and there became and is of no use or value to the plaintiff. To this was added a count for money had and received by the defendant to the plaintiff's use. At the trial the defendant demurred to the evidence, and the plaintiff joined in the demurrer. The plaintiff's evidence proved the idiocy and worthlessness of the slave Celia. That the defendant knew it at the time of the sale, but represented her to the plaintiff as sound; that the plaintiff bought her and paid the defendant $350 for her upon that representation. That although the plaintiff saw her before he purchased her, yet the defendant prevented the plaintiff from speaking with her, under the pretence that she might run away if she knew that he was about to sell her. That the money was paid in the morning before she was delivered to the plaintiff. That when she was delivered to the plaintiff and he spoke to her he immediately perceived that she was an idiot, and offered to return her, but the defendant refused to receive her; and the plaintiff lodged her in the jail, where she died in less than a month after the sale. The bill of sale was in these words and figures. "Alexandria, August 1st, 1816. Received of James A. Grant six hundred and seventy-five dollars in full for the purchase of two negro girl slaves for life, namely Julia, and Celia, the right and title of which negroes I hereby warrant and defend against all claims unto said Grant and his heirs forever, as witness my hand and seal. John Bontz, (L. S.) In presence of P. Hewitt."

Mr. Swann, for defendant, contended, that as the contract of sale was reduced to writing under seal, and contained a warranty of title, but not of soundness, it is to be inferred that no warranty of soundness was intended. That a false representation if not fraudulent-

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

ly made, will not support any action; and if made fraudulently, can only maintain an action of deceit; not an action of assumpsit. No action will lie unless upon a warranty, or upon a fraudulent misrepresentation. 1 Bac. Abr. tit. "Action on the Case," E; Seixas v. Woods, 2 Caines, 48, 56; Parkinson v. Lee, 2 East, 314; Snell v. Moses, 1 Johns. 96; Perry v. Aaron, Id. 129; Defreeze v. Trumper, Id. 274; Bayard v. Malcolm, Id. 453; Bayard v. Malcolm, 2 Johns. 550.

Mr. Taylor, for plaintiff, cited Stuart v. Wilkins, 1 Doug. 20, and 1 Chit. Pl. tit. "Deceit."

At April term, 1820, the plaintiff, upon discovery of further evidence, before the court had rendered any judgment, or given any opinion upon the demurrer to the evidence, obtained an order for a new trial upon condition of paying the costs. But at November term, 1820, that order was, by consent, rescinded, and the verdict and demurrer reinstated; and

THE COURT, upon consideration of the demurrer, was of opinion that the law was for the plaintiff, and judgment was rendered for $370, according to the verdict.

Case No. 5,695.

GRANT v. HAMILTON.

[3 McLean, 100.] [1]

Circuit Court, D. Michigan. Oct. Term, 1842.

WAGER.

1. At common law, a wager, fairly made, was recoverable.

2. If the money was paid, it could not be recovered back again.

3. But, under the statute of Michigan, money lost at play, or on a horse-race, &c. may be recovered.

[Cited in Tinker v. Van Dyke, Case No. 14,058.]

4. Under this statute, an action may be maintained in the circuit court.

At law.

Howard & Romeyn, for plaintiff.

Mr. Joy, for defendant.

OPINION OF THE COURT. This action is brought to recover back a wager lost and paid on a horse-race. In the Revised Statutes of Michigan (page 210), an action is authorised to recover money lost at play, horse-racing, &c. At the common law, where there was no concealment or fraud, a wager was recoverable. 3 Term R. 693; 5 Burrows, 2802; Cow. 37, 735, 29. In Bunn v. Riker, 4 Johns. 434, the court said: "The law appears to be settled that some wagers form the proper ground of an action. It is worthy of remark, however, that as often as this question has been raised, there is scarcely a judge in England, from the time of the case of Da Costa v. Jones, Cowp. 729, down to the present day, who has not expressed his regret that such was the law.", In Campbell v. Richardson, 10 Johns. 406, where A set up a mark to shoot at, and it was agreed between them "that B should pay A 25 cents for every shot he fired, but if B hit the mark then A should pay him 20 dollars—it was held to be a legal contract, and that B, having hit the mark, might maintain an action against A, to recover the 20 dollars." We think the principle was wrong, which authorised a recovery in such cases; but the law seems to be established. At common law, if the money won was paid, it could not be recovered. But the statute of Michigan alters the common law in this respect. It authorises a recovery of money paid on a wager. And, it would seem, that no one can doubt the policy of this law. It is urged that this is a case where both parties committed a violation of the law and sound policy, in making the wager, and that in such cases it is the policy of the law to aid neither party, but leave them without remedy against each other. This argument would not be without force, if the statute did not expressly authorise the recovery. The argument that this is a penal statute, and cannot be enforced by this court, is also unsustainable. So far as regards this action, to recover back the money paid, it is not for the enforcement of a penalty. The rights of the parties and their remedies, when regulated by the local law, may be prosecuted in the courts of the United States, the same as in the state courts. We cannot give effect to the criminal laws of the state; but this act, and especially this suit, is not of that character. If the jury shall find that the money was lost and paid by the plaintiff, as alleged in the declaration, they will find the amount paid to the defendant.

Verdict for the plaintiff.

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

GRANT (HARTFORD & N. H. R. CO. v.). See Case No. 6,159.

Case No. 5,696.

GRANT et al. v. HEALEY.

[3 Sumn. 523; [1] 2 Law Rep. 113.]

Circuit Court, D. Massachusetts. May Term, 1839.

RATE OF EXCHANGE—BALANCE OF ACCOUNT—REIMBURSEMENT.

1. Where a suit was brought, for a balance of account, for advances made at Boston, upon goods consigned to the plaintiffs at Trieste, and sold by them at a great loss, it was *held*, that the balance was not payable at Trieste, but at Boston, and, therefore, the balance was to be estimated in damages at the par, and not at the rate of exchange.

2. Where a balance is due on account, payable in a foreign country, the creditor, if he sues for the same in another country is entitled to be paid at the rate of exchange. In other words, he is entitled to have the money replaced, where it was agreed to be paid.

[Cited in Mygatt v. Green Bay, Case No. 9,998; Reiser v. Parker, Id. 11,685; Hargrave v. Creighton, Id. 6,064.]

[Cited in Marburg v. Marburg, 26 Md. 16;

[1] [Reported by Charles Sumner, Esq.]

Pfeil v. Higby, 21 Wis. 250; Lodge v. Spooner, 8 Gray, 169; First Nat. Bank of Toledo v. Shaw, 61 N. Y. 293.]

3. Semble.—That there is no difference between bills of exchange and other contracts for payment of money in a foreign country, as to the right to damages to replace the money, where it was payable, except that the usage of trade has fixed the rate of damages.

4. Semble, that advances ought to be deemed reimbursable at the place where they are made, and sales of goods accounted for at that place, where they are made, or authorized to be made.

Indebitatus assumpsit for a balance of accounts. The declaration also contained the money counts. Plea—general issue. At the trial it appeared, that the plaintiffs were merchants at Trieste, in Austria, and the defendant a merchant in Boston. In December, 1836, the plaintiffs, by their agent, Mr. Trueman, a resident at Boston, advanced to the defendant the sum of £4565 sterling, by a bill drawn on Messrs. Baring, Brothers & Co., London, reimbursable to that house by a bill to be drawn upon the plaintiffs by that house, payable at Trieste. In consideration of the advance, the defendant agreed to ship, and did ship on board the bark Talent, a cargo, principally of sugars, consigned to the plaintiffs at Trieste for sale. The bark sailed on the voyage, and at the time of her arrival at Trieste in March, 1837, the market for this kind of sugars (Manilla sugars) was exceedingly depressed, in consequence of some changes in the Austrian tariff of duties, and the uncommon embarrassment of the money market on the continent of Europe. The market for sugar continued to fall until the month of August, 1837; the bills drawn by Messrs. Baring & Co., for their reimbursement, became due in June, 1837; and the sugars were sold in the month of April, 1837, at a price less than half of their invoice value. The defence at the trial was, that the sale was improperly made by the plaintiffs, and the sugars were sacrificed in violation of their duty, if not in breach of their orders. In consequence of these disastrous sales, unexpected by the parties, the net proceeds fell far short of the advance money. This suit was brought for the balance; and it was agreed between the parties, that if the verdict was found for the plaintiffs, the money due should be fixed by the parties, or by an assessor appointed by the court. The jury found a verdict for the plaintiffs. The parties afterwards agreed as to the amount due, except as to a single item; and that was, whether the defendant should be charged for the balance, according to the par of exchange, or the actual rate of exchange, between Boston and Trieste, at the time of the verdict.

C. G. Loring and Mr. Sprague, for defendant.

S. D. Parker and Mr. Choate, for plaintiff.

The cases of Smith v. Shaw [Case No. 13,107]; Adams v. Cordis, 8 Pick. 260; and Lanusse v. Barker, 3 Wheat. [16 U. S.] 101, were cited.

STORY, Circuit Justice. Upon this point I have wished for a little time for reflection, although at the argument I ventured to express what was the inclination of my opinion. In all cases which respect the daily transactions of commercial men, I feel a great desire not to interfere with the known and settled habits of business; and should rather incline to follow the usage, if any, than to form a new rule of my own. No settled usage has been shown; and, therefore, the rule must be settled upon principle. I take the general doctrine to be clear, that whenever a debt is made payable in one country, and it is afterwards sued for in another country, the creditor is entitled to receive the full sum necessary to replace the money in the country, where it ought to have been paid, with interest for the delay; for then, and then only, is he fully indemnified for the violation of the contract. In every such case, the plaintiff is, therefore, entitled to have the debt due to him first ascertained at the par of exchange between the two countries, and then to have the rate of exchange between those countries added to, or subtracted from, the amount, as the case may require, in order to replace the money in the country, where it ought to be paid. It seems to me, that this doctrine is founded on the true principles of reciprocal justice.

The question, therefore, in all cases of this sort, where there is not a known and settled commercial usage to govern them, seems to me to be rather a question of fact, than of law. In cases of accounts and advances, the object is to ascertain, where, according to the intention of the parties, the balance is to be repaid, whether in the country of the creditor, or that of the debtor. In Lanusse v. Barker, 3 Wheat. [16 U. S.] 101, 147, the supreme court of the United States seem to have thought, that where money is advanced for a person in another state, the implied understanding is to replace it in the country, where it is advanced, unless that conclusion is repelled by the agreement of the parties, or by other controlling circumstances.[2] Governed by this rule, the money being advanced in Boston, so far as it was not reimbursed out of the proceeds of the sales in Trieste, would seem to be proper to be repaid in Boston. In relation to mere balances of account between a foreign factor and a home merchant, there may be more difficulty in ascertaining, where the balance is reimbursable, whether it is where the creditor resides, or where the debtor resides. Perhaps it will be found, in the absence of all controlling circumstances, the truest rule and the easiest in its application, that ad-

[2] Mr. Justice Baldwin decided the same point in Woodhull v. Wagner [Case No. 17,975].

vances ought to be deemed reimbursable at the place where they are made, and sales of goods to be accounted for at the place where they are made or they are authorized to be made. See Story, Confl. Laws, §§ 283–285; Bainbridge v. Wilcocks [Case No. 755]. Thus, if a consignment is made in one country for sales in another country, where the consignee resides, the true rule would seem to be to hold the consignee bound to pay the balance there, if due from him, and if due to him on advances there made, to receive the balance from the consignor there. The case of Consequa v. Fanning, 3 Johns. Ch. 587, 610, which was reversed in 17 Johns. 511, proceeded upon this intelligible ground, both in the court of chancery and in the court of errors and appeals, the difference between these learned tribunals not being so much in the rule, as in its application to the circumstances of that particular case. I am aware that a different rule in respect to balances of account and debts due and payable in a foreign country, was laid down in Martin v. Franklin, 4 Johns. 125, and Scofield v. Day, 20 Johns. 102, and that it has been followed by the supreme court of Massachusetts, in Adams v. Cordis, 8 Pick. 260. It is with unaffected diffidence, that I venture to express a doubt as to the correctness of the decisions of these learned courts upon this point. It appears to me that the reasoning in 4 Johns. 125, which constitutes the basis of the other decisions, is far from being satisfactory. It states very properly that the court have nothing to do with inquiries into the disposition which the creditor may make of his debt, after the money has reached his hands; and the court are not to award damages upon such uncertain calculations as to the future disposition of it. But that is not, it is respectfully submitted, the point in controversy. The question is, whether, if a man has undertaken to pay a debt in one country, and the creditor is compelled to sue him for it in another country, where the money is of less value, the loss is to be borne by the creditor, who is in no fault, or by the debtor, who by the breach of this contract has occasioned the loss. The loss, of which we here speak, is not a future contingent loss. It is positive, direct, immediate. The very rate of exchange shows, that the very same sum of money paid in the one country is not an indemnity or equivalent for it, when paid in another country, to which, by the default of the debtor, the creditor is bound to resort. Suppose a man undertakes to pay another $10,000 in China, and violates his contract; and then he is sued therefor in Boston, when the money, if duly paid in China, would be worth at the very moment twenty per cent. more than it is in Boston; what compensation is it to the creditor to pay him the $10,000 at the par in Boston? Indeed, I do not perceive any just foundation for the rule, that interest is payable according to the law of the place, where the contract is to be performed, except it be the very same, on which a like claim may be made as to the principal, viz. that the debtor undertakes to pay there, and therefore is bound to put the creditor in the same situation, as if he had punctually complied with his contract there.

It is suggested, that the case of bills of exchange stands upon a distinct ground, that of usage; and is an exception from the general doctrine. I think otherwise. The usage has done nothing more than ascertain, what should be the rate of damages for a violation of the contract generally, as a matter of convenience and daily occurence in business, rather than to have a fluctuating standard, dependent upon the daily rates of exchange, exactly for the same reason, that the rule of deducting one third new for old is applied to cases of repairs of ships, and the deduction of one third from the gross freight is applied in cases of general average. It cuts off all minute calculations and inquiries into evidence. But in cases of bills of exchange drawn between countries, where no such fixed rate of damages exists, the doctrine of damages, applied to the contract, is precisely that which is sought to be applied to the case of a common debt due and payable in another country; that is to say, to pay the creditor the exact sum which he ought to have received in that country. This is sufficiently clear from the case of Mellish v. Simeon, 2 H. Bl. 378, and the whole theory of re-exchange.

My brother, the late Mr. Justice Washington, in the case of Smith v. Shaw [Case No. 13,107], which was a suit brought by an English merchant on an account for goods shipped to the defendants' testator, where the money was doubtless to be paid in England, and a question was made, whether, it being a sterling debt, it should be turned into currency at the par of exchange, or at the then rate of exchange, held, that the debt was payable at the then rate of exchange. To which Mr. Ingersoll, at that time one of the ablest and most experienced lawyers at the Philadelphia bar, of counsel for the defendant, assented. It is said, that the point was not started at the argument, and was settled by the court suddenly, without advancing any views in the support of it. I cannot but view the case in a very different light. The point was certainly made directly to the court, and attracted its full attention. The learned judge was not a judge accustomed to come to sudden conclusions, or to decide any point which he had not most scrupulously and deliberately considered. The point was probably not at all new to him; for it must frequently have come under his notice in the vast variety of cases of debts due on accounts by Virginia debtors to British creditors, which were sued for during the period in which he possessed a most extensive practice at the Richmond bar. The circumstance that so distinguished

a lawyer as Mr. Ingersoll assented to the decision, is a farther proof to me, that it had been well understood in Pennsylvania to be the proper rule. If, indeed, I were disposed to indulge in any criticism, I might say, that the cases in 4 Johns. 125, and 20 Johns. 102, do not appear to have been much argued or considered; for no general reasoning is to be found in either of them upon principle, and no authorities were cited. The arguments and the opinion contain little more than a dry statement and decision of the point. The first and only case, in which the question seems to have been considered upon a thorough argument, is that in 8 Pick. 260. I regret, that I am not able to follow its authority with a satisfied assent of mind. But in the present case, it strikes me, that the circumstances do not require me to dispose of the more general question, although it is impossible not to feel, that it is fully before the court. My opinion is, that, in the present case, the advances being made in Massachusetts, if the goods sent to Trieste did not fully reimburse the amount, the balance was properly due and payable in Massachusetts. There is not the slightest evidence to prove, that the advances were to be repaid at Trieste, if the consignment did not fully reimburse them. In truth, neither party contemplated the probability, I had almost said the possibility, of the fund not being more than adequate to repay all the advances. The contract, then, appears to me to be in substance this, that the creditors shall be at liberty to reimburse themselves from the proceeds of the sales at Trieste, for the advances. Any personal obligation to repay the advances, in any other manner was not stipulated for. The parties left the rest to the silent operation of law. And my judgment is, that, upon the just principles of law, applied to the contract, the advances, so far as they should not be reimbursed out of the sales of the cargo, were payable, not at Trieste, but at Boston, the place where they were made. In this view of the matter, I remain of the opinion, which was intimated at the argument, that the plaintiffs are entitled only to the balance due at the par of exchange.

Case No. 5,697.

GRANT v. MASON.

[See Case No. 5,701.]

Case No. 5,698.

GRANT v. MASON.

[2 U. S. Law Int. 34.]

Circuit Court, S. D. New York. 1829.

LAW OF PATENTS.

In the circuit court of the United States, at the late term in New York City, in the important patent case of Grant and Townsend v. The Raymonds [see Case No. 5,701], two points were presented in a motion for a new trial: (1) Whether in entry of a vacatur of a previous patent, in the office of the secretary of state, the patentee might take out a new patent for the same subject-matter with a more perfect specification; (2) whether the defendant could bar the plaintiff's recovery by showing that the specification was materially defective and ambiguous, without, also, proving that it was rendered so by the patentee, with design to deceive the public. THE COURT were divided in opinion upon both points.

Case No. 5,699.

GRANT v. MAXWELL

[2 Blatchf. 220;[1] 26 Hunt, Mer. Mag. 60.]

Circuit Court S. D. New York. June 2, 1851.

CUSTOMS—DEPRECIATED FOREIGN CURRENCY—VALUE OF IMPORTS IN.

1. The proviso to the 61st section of the act of March 2, 1799 (1 Stat. 673), which declares "that it shall be lawful for the president of the United States to cause to be established fit and proper regulations for estimating the duties on goods, wares and merchandise imported into the United States, in respect to which the original cost shall be exhibited in a depreciated currency issued and circulated under authority of any foreign government," is not repealed by the act of May 22, 1846 (9 Stat. 14), which prescribes the rates at which certain foreign coins shall be estimated in computations at the custom-house.

[Cited in Dutilh v. Maxwell, Case No. 4,207.]

2. Notwithstanding the act of May 22, 1846, an importer of foreign goods is entitled, under the proviso to the 61st section of the act of 1799 and the treasury instructions issued for carrying the same into effect, to enter his goods on paying duties only upon their cash value in the country of their purchase; and is entitled, in order to fix that value, to have the paper or nominal value at which they were purchased and invoiced, reduced to its specie value in such country at the time of the purchase, and to enter the goods on that valuation.

3. Where goods were purchased in Austria, in 1850, and imported into New-York, and the invoice and entry set forth the purchase price in paper florins, and they were paid for in paper currency, and it appeared that the paper florin was depreciated in Austria, at the date of the purchase of the goods, below the value of the silver florin, although it was the legal currency in Austria, and was a legal tender at its nominal value: *Held* that, although the act of May 22, 1846, directed the florin of the Austrian empire to be estimated at forty-eight and one-half cents, yet, under the proviso to the 61st section of the act of 1799, and the treasury instructions in regard to invoices made out in a foreign depreciated currency, the goods were chargeable with duty only on their value in silver florins, after allowing for the depreciation.

[Cited in Fiedler v. Maxwell, Case No. 4,760.]

[See Alsop v. Maxwell, Case No. 263.]

This was an action against [Hugh Maxwell] the collector of the port of New York, to re-

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

cover back an excess of duties paid on goods purchased in Austria on two different days in May, 1850, and shipped from Trieste to New York. The invoice and entry set forth the purchase-price of the goods in paper florins, and they were paid for in paper currency. It appeared upon the trial, by oral testimony, and also by the official certificate of the United States consul at Trieste, that the paper florin was depreciated in Austria, at the two several dates of the purchase of the goods, 18¼ and 19⅜ per cent. below the value of the silver florin. It was further proved, that the legal currency in Austria at those dates was paper money, estimated in florins, and made by law a legal tender at its nominal value. The plaintiff [Samuel Grant] claimed, that the duty on the goods should be paid upon their value in silver florins. A verdict was taken for the plaintiff, subject to the opinion of the court on a case to be made.

John S. McCulloh, for plaintiff.
J. Prescott Hall, Dist. Atty., for defendant.

BETTS, District Judge. By the act of congress of the 22d of May, 1846 (9 Stat. 14), it is enacted that, in all computations at the custom-house, the foreign coins and money of account therein specified, shall be estimated at certain specified rates, and, among others, "the florin of the Austrian Empire and of the city of Augsburg, at forty-eight and one-half cents." The act also declares, that all laws inconsistent with it are thereby repealed. For the defendant it is urged, that he was bound, by the terms of the act, in charging duties on the goods in question, to rate the florin of the invoice at forty-eight and a half cents, without regard to its specie value or depreciation. The plaintiff, on the other hand, claims that the goods are subject to duty only upon their cash value abroad, and that he is entitled, in order to fix that value, to have the paper or nominal value at which they were purchased and invoiced, reduced to its specie value in Austria, and to enter the goods on that valuation.

The purpose of the government, in all its laws imposing ad valorem duties on foreign merchandise imported into this country, has been to take the true value of the goods in the country which produced them or in which they were obtained, ascertained by the actual purchase price or by their market value, as the basis upon which such duties are to be computed. This is manifested in the various revenue laws introducing from time to time new provisions to enable the collectors to fix the foreign value correctly and to render duties uniform. The oaths exacted to invoices and on entries, and the enlarged powers conferred on appraisers, together with the early regulation by law of the value of foreign currencies, with the methods of determining their depreciation, are all designed to accomplish that end. The enactments for this purpose are found in the acts of July 4, 1789; August 10, 1790; March 2, 1799; March 3, 1801; March 1, 1823; May 19, 1828; July 14, 1832; August 30, 1842; and July 30, 1846. 1 Stat. 24, 180, 627; 2 Stat. 121; 3 Stat. 729; 4 Stat. 270, 583; 5 Stat. 548; 9 Stat. 42. The invoice value of merchandize must be expressed in money, and the invoice and entry must particularly specify in what money the goods are bought and valued. Act March 2, 1799 (1 Stat. 655, § 36). And they must be invoiced in the currency of the country whence they are imported, without respect to the intrinsic value of the money or the standard of the United States fixed for its value. Act March 3, 1801 (2 Stat. 121, § 2). Still, the actual wholesale cash value is to be ascertained and made the dutiable basis, notwithstanding any affidavit or invoice statement or valuation. Act Aug. 30, 1842 (5 Stat. 563, § 16).

The earlier and later enactments concur in enforcing the one prominent object, that of having at the custom-house the actual value in cash of the merchandise imported, at the place of its exportation. To make that purpose effectual, in addition to the regulations respecting invoices, entries and appraisals, congress, by the 61st section of the act of March 2, 1799 (1 Stat. 673), fixed the rates at which all foreign coins and currencies should be estimated in the United States, giving to various known denominations of foreign money a specific value, and requiring all other denominations to be estimated in value, as nearly as might be, to such fixed rates or the intrinsic value thereof, compared with money of the United States. The following proviso was added to the section: "That it shall be lawful for the president of the United States to cause to be established fit and proper regulations for estimating the duties on goods, wares and merchandise imported into the United States, in respect to which the original cost shall be exhibited in a depreciated currency issued and circulated under authority of any foreign government."

The main question submitted to the court for its decision in this case is, whether the act of 1846 covers the whole subject, so that the cost price of the goods must be estimated at forty-eight and a half cents to the florin stated in the invoice or whether the proviso to the 61st section of the act of March 2, 1799, operates in the case, and entitles the plaintiff to enter his goods on paying duties upon the specie or intrinsic value of the Austrian florin or currency. The act of March 2, 1799, is regarded as the fundamental law in relation to imposts and duties, and each of its enactments is viewed as independent, forming a rule upon the particular subject which is not changed by subsequent legislation varying other provisions of the act. The like doctrine applies to the succession of statutes which have followed the parent act. Accordingly, the law of imposts and duties is enforced as a system composed of distinct enactments, passed at various periods of time, and each provision is executed as part of the system, notwithstanding

the change or repeal of other provisions in the same statute in relation to the denomination of imports or the rates of duties or the methods of computing them. This is sometimes effected by virtue of a saving clause appended to the new act (Act July 14, 1832; 4 Stat. 583, § 1); and sometimes by declaring all provisions of any former law inconsistent with the act last passed to be repealed (Act Aug. 30, 1842; 5 Stat. 566, § 26; Act July 30, 1846; 9 Stat. 44, § 11); and, again, by the decisions of the courts on the effect of subsequent enactments. Anterior to the passage of the act of May 22, 1846, the treasury department had treated the proviso to the 61st section of the act of March 2, 1799, as continuing in force, and duties were levied in conformity to its provisions. Treasury Instructions to Collectors, May 14, 1831; Id. Oct. 16, 1832; Id. April 4, 1840; Id. Aug. 20, 1845. The latest instructions from the secretary of the treasury, dated October 12, 1849, direct that bonds taken for the production of consular certificates of the value of depreciated currencies must be strictly enforced; which imports the continuing operation of the proviso, in the judgment and practice of the executive department, because the consular certificates come into existence and have validity solely under the powers given by that proviso. The 61st section of the act of March 2, 1799, fixed the value of certain foreign coins or currencies. So, subsequently, did the 1st section of the act of March 3, 1801 (2 Stat. 121); and similar provisions were re-enacted in the act of June 28, 1834 (4 Stat. 700), in the act of March 3, 1843 (5 Stat. 625), and in the act of May 22, 1846 (9 Stat. 14), the last two acts being framed in like terms, and declaring that all laws inconsistent therewith are thereby repealed.

It is plain, upon this summary statement of the course of legislation and practice on the subject, that the proviso to the 61st section of the act of March 2, 1799, is to be regarded as repealed only in the contingency that it stands opposed to subsequent acts of congress, and especially to the act of May 22, 1846. The reason for its preservation and enforcement, as a means to secure importers against the payment of ad valorem duties on amounts beyond the fair value of the merchandise imported, is the same at the present time as when it was enacted. What, then, does the proviso require? Clearly, not a disregard of the valuation of foreign currency designated by statute; but only a method of determining whether that assumed value remains unchanged, and whether the actual value corresponds with the nominal rate. The invoice must be expressed in the currency of the country from which the goods are exported or in which they are produced. The nominal currency will necessarily very often give the cost or market value very wide of the true value. In the case before the court, it is proved beyond question that the goods imported are rated nearly twenty per cent. above their actual value in Austria, and beyond their real cost to the importer. This disaccordance is forced on him by the imperative direction of the revenue laws. He must invoice the goods at the cost or value expressed in the currency of Austria, although they are obtained at one-fifth less than that amount in specie, and, without the aid of the proviso, he will be precluded from showing the actual cost or value.

It seems to us that the proviso does not in any way contradict the statute of 1846. It supplies the custom-house with a means of levying duties on invoices in conformity with the general provisions and scope of the revenue laws, and helps to carry out the intention of congress, by keeping the fluctuations of nominal values to the standard of specie values, in transactions in foreign currencies. Congress does not make the foreign currencies named in the statute receivable in the United States at the values affixed to them. Had that been so, the merchant might be considered as protected by the opportunity of paying duties in the currency of his invoices. The proviso looks to a remedy for the injury that might, without its aid, be sustained by importers under a statutory regulation of foreign coins and currencies, bringing them in accord with United States currency, and yet leaving their nominal rates to act as a measure of value of merchandize in the country where it is purchased.

We think that there is no incompatibility or inconsistency between the acts subsequent to the act of 1799 upon this subject and the proviso, and that accordingly, neither by the terms of the act of 1846 or of those antecedent to it, nor by legal implication, is the proviso to the 61st section of the act of 1799 repealed or its legal operation suspended. The business of the country was conducted on that understanding of the law antecedently to 1846, and collectors and the treasury department unitedly admitted importations and charged duties in conformity with regulations adopted by authority of the proviso. The proviso was repugnant to the enacting clause of the 61st section of the act of 1799, precisely as it is to a like designation of the value of foreign currencies by the act of 1846. That section, in nearly identical language, declared the value of various denominations of foreign moneys; but the proviso, referring to the depreciation of foreign currencies in which the original cost of goods was exhibited, would necessarily include those specified in the enacting clause, equally with those not named. There was no less necessity for the interposition of the president in relief of the merchant, when his invoices were made up in a currency which had depreciated after its valuation had been once determined by congress, than where no rate of valuation had been established by law. The proviso is accordingly framed to apply to all importations, when the invoice is exhibited in a depreciated currency issued and circulated under the author-

ity of a foreign government, and necessarily embraces equally those currencies whose value has been once fixed by congress, and those which have never been recognized by our laws. The treasury circular of August 20, 1845, regards the proviso as in the alternative. Its directions relate to invoices made out in a foreign depreciated currency, or in a currency the value of which is not fixed by the laws of the United States.

This is, we think, the correct reading and exposition of the proviso to the 61st section of the act of 1799. Congress has since, from time to time, ascertained the existing value of various foreign coins and currencies, and declared them by statute. This relieved the treasury department from keeping on foot a train of investigations, at every importation, respecting the value of the currency in which the invoice was exhibited. The statute value was adopted as the real one, for the time being. But it was manifest that such valuations must be liable to change, from the adulteration of coins or the emission of paper or base currencies abroad; and it was consonant with the general course of legislation in relation to the revenue, that a means should be supplied the executive department to maintain uniformity in imposts and duties, without delaying the business of the country or enforcing hardships or inequalities upon importers until special legislation could be interposed to remove the difficulty. The proviso supplied such means; and, as its operation was so appropriate, as well as effectual and just, we must conclude it to have been the purpose of congress to retain it in force, when they have not in express terms rescinded it or passed any enactment necessarily repugnant to it. On the contrary, it seems to us that, as the proviso is essentially prospective, and contemplates a state of things which may come into existence at a future period, the act of May 22, 1846, instead of being construed as repealing it, ought to be understood as upholding and sanctioning the powers conferred by it on the president. Judgment must, therefore, be entered for the plaintiff, on the verdict.

Case No. 5,700.

GRANT et al. v. POILLION.

[35 Hult, Mer. Mag. 586.]

Circuit Court, S. D. New York. Sept. 15, 1856.[1]

ADMIRALTY JURISDICTION—ACCOUNTING—JOINDER IN LIBEL—EFFECT OF.

[1. The master and part owner of a vessel entered into a joint-stock association which shipped by the vessel a cargo to be sold at the port of destination by the master for the joint benefit, he to receive a commission on the sales, but the cargo failed to realize sufficient to pay the agreed freight. *Held*, that admiralty had no jurisdiction of a libel by the master and other owners against the other members of the association for the deficiency in freight, as such a suit necessitated an accounting between the master and such other members.]

[2. The joinder of the owners, other than the master, in the libel was not an adoption of the master's contract of association so as to make them members thereof, but was merely an affirmance of the contract in the bill of lading.]

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

[This was a libel by William B. Grant, William L. Flitner, and others, owners of the ship Constellation, against Cornelius Poillion, to recover freight. The decree was dismissed in the district court (case unreported), and libelants appeal.]

NELSON, Circuit Justice. The libelants were owners of the ship Constellation, of which Wm. L. Flitner was master and part owner, and carried from this port to the port of San Francisco, in the years 1849-50, 250,000 feet of lumber and 29,700 cypress shingles, freight to be paid at the rate of $55 per thousand feet for the lumber, and $20 per thousand for the shingles, amounting in the whole to the sum of $13,944.02. The net proceeds of the sale at San Francisco amounted only to the sum of $11,494.93, which was received by the master, leaving a balance of $2,449.09 due, to recover which amount the present suit is brought. The defense set up is as follows: Wm. L. Flitner, the master and part owner of the Constellation, which was lying at the port of New York in September, 1849,—the other owners residing in the states of Maine and Massachusetts,—entered into a joint-stock association with the respondents, and several other persons not made parties to the suit, called the Constellation Lumber Company, for the purpose of purchasing and furnishing cargo for the vessel, the cargo to be composed of lumber and such articles as the company might deem proper; and after the departure of the vessel from New York the cargo was taken under the control and disposition of the master, who was to act under instructions from the company, and to be considered its agent. The cargo was also consigned to him, and a commission of five per cent. to be allowed him for making the sales at the port of destination. The price of the freight was agreed on, as already stated. The stock of the company consisted of twelve shares, Flitner, the master, having subscribed two of them, and thus being the owner of one-sixth of the cargo, besides his interest to the amount of five per cent. of the sales. The usual bill of lading was entered into by the master, in which he was made the assignee. The cargo was under the directions of Flitner, and amounted to the net sum stated. It is insisted, on the part of the respondents, that the libelants were jointly concerned in the adventure, and bound to contribute their proportionate share of the loss, and hence that the purchase and shipment of the cargo

[1] [Affirmed in 20 How. (61 U. S.) 162.]

were a partnership transaction, requiring an account to be taken, and the partnership affairs adjusted, in order to ascertain the balance, if any, due them, and that, as a court of admiralty is incompetent to adjust the open accounts of a partnership transaction, the court has no jurisdiction in the case. The position assumes that Flitner, the master, acted on behalf of the owners in entering into the joint-stock association for the purchase of the cargo, with a view to freight the ship; for otherwise there is no pretext for this ground of defense. But it is not pretended that the owners participated in getting up the adventure, or had any knowledge of it, except the master; and it is quite clear that he had no authority to bind them in a transaction of this nature, either as master or part owner. It was said of the argument, the bringing of this suit confirmed the acts of the master. It may be said the bringing of the suit affirms the contract in the bill of lading, but no part of the joint association contract appears in that instrument. It is in the usual form, the Constellation Lumber Company appearing as the shippers of the cargo. The confirmation of the joint-stock company is not at all involved in the suit, so far as the absent owners are concerned. It is further urged that conceding that the absent owners were in no wise connected with the purchase and shipping of the cargo, and hence no partnership transaction involved as to them, still a recovery of the balance of the freight cannot be justly admitted until the settlement of the joint concern between Flitner, one of the libelants, and the other members of the company, and that this ground is equally fatal to the jurisdiction. I am inclined to concur in this view. Flitner is one of the part owners of the vessel, and as such is entitled to a portion of the freight. For this reason he is made one of the libelants. Being also jointly interested in the cargo, and one of the shippers, he is bound to contribute his share of the balance of freight claimed. And whatever may be that contributive share, the respondents are entitled to have it deducted from his portion of the freight, or, if the contributive share exceeds this, the balance should be paid to his co-owners, or accounted to them as his portion of the freight to be paid. I do not see, therefore, that justice can be administered in the case without an account taken between one of the libelants and the respondents, involving the whole of the joint-stock operations in the purchase of the cargo, and which this court is incompetent to take. It would be manifest injustice to allow him to recover in the case his share of the freight, leaving the respondents to bring a cross suit for contribution; and I do not see how this can be avoided short of an adjustment of the partnership concern in the cargo. A court of equity can adjust the interests of all parties concerned in one suit, and we think the libelants should have resorted to that tribunal. I concur, therefore, with the disposition of the case below, and confirm the decree dismissing the libel, with costs.

[NOTE. Upon an appeal to the supreme court, the decree of the circuit court was affirmed in an opinion by McLean, Justice. 20 How. (61 U. S.) 162. It was held that the case would clearly not be within the admiralty jurisdiction in England, and in the United States "the jurisdiction of courts of admiralty is limited, in matters of contract, to those, and to those only, which are maritime." The account to be adjusted in this case is said to be complicated; the losses were to be apportioned, and an inquiry instituted into the conduct of the master. The exercise of such powers was held to be appropriate only to a court of chancery.]

GRANT (UNITED STATES v.). See Case No. 15,247.

Case No. 5,701.

GRANT & TOWNSEND v. ——.

[1 U. S. Law Int. (1829) 22.]

Circuit Court, S. D. New York.

PATENTS—SURRENDER AND RENEWAL—DEFECTIVE SPECIFICATIONS—DAMAGES FOR INFRINGEMENT.

[1. A patentee has the right and power to surrender his patent and take out a new one, and the new patent must be considered in the same light as if no other had been issued.]

[2. The specifications and drawings in the secretary's office, but not the model, may be used as aids to making the machine, and if it can be made from the two former together, the patent is not defective in that particular.]

[3. Defects in the specifications, in order to render the patent void, must be the result of fraudulent or intentional concealment on the part of the patentee.]

[4. In an action at law for infringement the question of damages is exclusively for the jury. Plaintiffs are entitled to actual damages, and the net profits made by defendants is probably the best rule to guide the jury.]

At the late term of the circuit court of the U. S. held in the city of New York, a case was decided in relation to a patented machine for making hat bodies. This machine is one of wonderful ingenuity, and has been of vast advantage to the public; and it is gratifying to learn, that its worthy and indefatigable inventor has been thus far successful in the recovery of exemplary damages for the violation of his just rights. The plaintiffs in the case were Messrs. Grant & Townsend, of Providence—the former, the inventor of the said machine, and owning one-half of the interest therein, and the other owning the remaining half, by virtue of an assignment from the said Grant. There can be no stronger evidence of the great value of this singular machine, than the circumstances of its having been pirated by different persons in the states of New York, Massachusetts, Connecticut, and Pennsylvania. The plaintiffs had before succeeded in recovering a judgment and damages in several suits which they commenced before the circuit court for the district of Connecti-

cut, that were determined at the April term, 1828, against certain violators within that district. And this they did, in opposition to one of the most ingenious and desperate defences which perhaps was ever made, and also in opposition to the positive testimony of a witness, who had been induced to swear that he was the inventor prior to the date of the plaintiffs' patent—which testimony appeared so improbable upon strict cross examination, that it was deemed unworthy of credit, by the court and jury. In the present trial, as well as in the one referred to, the defendants contended that a machine acting upon the same principle, and producing the same results, had been invented and put in operation by one Silas Mason, of Dedham (Mass.) long before the invention of the plaintiff's machine, and that therefore the plaintiffs, not being the true inventors, could not recover; but that their patent was void. It also appeared, that the defendants purchased a right under Mason, and then put into operation one or more of Grant's machines. In 1825 they had four of the plaintiffs' machines at work—in 1826 they employed six of these machines; and in 1827, seven. But if the plaintiff, Grant, was the true inventor, the defendants contended that the patent was void, for the following reasons—That it was a patent, not for a machine, but for an abstract principle—That the specification was false, in claiming as an invention, that which had been long before known; and that the specification and drawing deposited in the secretary's office were insufficient, and would not give a mechanic sufficient data from which to make the machine. Upon this latter point, a host of witnesses were examined on both sides, but the decision of the court rendered their testimony unimportant.

A luminous charge was given to the jury, by Thompson, Circuit Justice, in the course of which he commented upon the various questions of law raised in the cause, and gave his opinion in relation to them.—The plaintiff, Grant, had obtained a patent in the year 1821, which he surrendered in 1825, and took out a new one. The judge decided, that he had the right and power so to do, and that his present patent must be considered in the same light as if no other had been issued. That an abstract principle was not patentable, the judge said, was clearly law, but this patent was not liable to that objection. He also charged, that the specifications and drawings in the secretary's office might both be used to make the machine, and if it could be made from the two together it would be sufficient, but that the model there deposited could not be used for that purpose. He then compared our statute with the English statutes, and decided that the jury must believe (under our statute) that the specification was defective by reason of the fraudulent or intentional concealment of the patentee, or otherwise the patent would be good. He, perhaps, would not be perfectly satisfied of the correctness of this position, had it not been already expressly decided in the United States circuit court in Boston and Philadelphia. The great question was then submitted to the jury, whether or not Grant was the true inventor of the machine. The testimony in relation to Mason's invention was fully commented upon, and the jury was instructed that it was not necessary that Mason should have taken out a patent in order to take away the plaintiff's right—and, on the other hand, the plaintiff's right would not be destroyed merely because Mason had produced the same result, but that it must be shown, that Mason produced the same results by a machine acting upon the same principle as the plaintiff's. As to damages, the judge said, it was a question exclusively for the jury; that the plaintiffs should recover the actual damages which they had sustained, and that the net profits made by the defendants was probably the best rule to guide the jury in assessing them.

The jury returned a sealed verdict in favor of the plaintiffs for three thousand two hundred and sixty-six dollars, and sixty-six cents, which the court are by law obliged to treble—making the judgement $9,799,98, besides costs.

[See Case No. 5,698.]

GRANT, The GENERAL U. S. See Case No. 5,320.

GRANT, The JOSEPH. See Case No. 7,538.

GRANT LOCOMOTIVE WORKS (TORREY v.). See Case No. 14,105.

GRANT, The U. S. See Cases Nos. 16,803 and 16,804.

Case No. 5,702.

The GRAPESHOT.

[2 Ben. 527.] [1]

District Court, E. D. New York. Oct., 1868.

PRIORITIES—LIEN FOR CARGO SOLD, AND FOR SUPPLIES PREVIOUSLY FURNISHED.

1. Where a vessel had been libelled by an owner of cargo shipped on board and sold by her master for the necessities of the vessel, and was condemned by default and sold, and the proceeds were insufficient to pay the libellant's claim, and thereafter a material-man, who had furnished supplies to the vessel before the sale of the cargo, applied to stay proceedings and open the default as to him: *Held*, that the lien for the cargo sold was prior to that for the materials previously furnished.

[Cited in The Rapid Transit, 11 Fed. 335.]

2. The owner of the cargo, therefore, ought not to be put to the expense of contesting the material-man's claim, and the petition must be denied.

[Cited in The Favorite, Case No. 4,699.]

This was a petition filed on behalf of one O'Brien, a material-man, seeking to be paid the amount of certain supplies furnished the schooner Grapeshot, in the port of New Or-

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

leans, out of the proceeds of that vessel now in the registry of the court. The vessel had been orignially proceeded against by Otto J. Eggers and others, owners of certain cargo which had been shipped on the vessel to be transported from this port to Gonives, Hayti, but which had been sold by the master of the vessel to raise money to pay sailors and repair the vessel, to enable her to depart from Turk's Island, where she had gone in distress, and reach her home port. To this action of the owners of the cargo no defence was interposed on the part of the owners of the vessel, and the vessel having been condemned by default, the proceeds were brought into the registry, and were insufficient in amount to satisfy the demand of the libellant Eggers. Before the distribution of the fund, however, the present petition was filed, and there being no real dispute as to the facts upon which the question of priority between the two demands must depend, in order to raise the question the petitioner moved, upon notice to the first libellant, for an order of short publication and for a stay of the distribution of the fund, and that the default as against the petitioner be opened.

T. D. Hall, for the application.
T. Scudder, in opposition.

BENEDICT, District Judge. Inasmuch as it appears that the fund in court is insufficient to discharge the amount claimed by the libellant Eggers, it is manifest that he should not be put to the expense of interposing a defence to the petition of O'Brien, unless the claim is one which, if substantiated, would be entitled to a priority over the claim of Eggers in the distribution of the fund in court. Upon this question I entertain no doubt. The claim of the petitioner arises out of supplies furnished the vessel in New Orleans. The claim of Eggers arises out of a cargo afterward sold by the master in good faith, in a port of distress, when it was impossible otherwise to raise money to pay for supplies furnished to the vessel. The money thus raised from the sale of the cargo was in good faith applied by the master to prevent a condemnation and sale of the vessel in Turk's Island, and to enable her to reach New York. This was a proceeding for the benefit of the petitioner, as thereby the vessel, upon which he claims to have had a lien, was saved from condemnation, and enabled to reach her home, where it might be that her owners could discharge the debts, or if not, where the vessel could be sold to better advantage than by condemnation in Turk's Island. They cannot, therefore, in equity, ask to be paid in preference to the owners of the cargo so sold. The present motion, therefore, which, under ordinary circumstances, would be granted as of course, made as it is for the purpose of saving expense by an early decision of the question of priority raised and involving in its decision no interests other than of the petitioner and the libellant, who has appeared to oppose it, is denied.

Case No. 5,703.

The GRAPESHOT.

[2 Woods, 42.] [1]

Circuit Court, D Louisiana. Nov. Term, 1874.

BOTTOMRY BOND—INTEREST—PREMIUM.

1. When the supreme court reversed a decree in admiralty and remanded the cause to the circuit court, with instructions to render a decree against the ship for the amount found due for supplies and repairs actually furnished and really necessary, and the supplies and repairs were furnished upon a bottomry bond which entitled the libellants to a premium of 19½ per cent. for the voyage: *Held*, that such premium should be included in the amount to be decreed by the circuit court.

2. A bottomry bond contained no stipulation for ordinary interest, nevertheless it was *held*, that interest was recoverable at least from the date of the judicial demand.

3. Interest is not allowed in admiralty unless specially directed. but this rule so far as it governs the construction of the decrees of the supreme court only applies to cases where the decree of the court below in favor of libellant is affirmed. When such decree is reversed and the cause remanded, the circuit court may allow interest unless expressly forbidden to do so by the decree of the supreme court.

4. The fact that the ship against which the bottomry bond was asserted had been seized and sold or the libel, and the proceeds had remained for a long time in the registry of the court without producing interest, was no reason for refusing to allow interest on the sum found to be due.

This cause comes up for hearing on exceptions to the report of J. W. Gurley, master.

W. S. Benedict, for libellant.
James McConnell, for claimant.

WOODS, Circuit Judge. The libel was filed upon a bottomry bond for supplies and repairs furnished the bark at Rio in the spring of 1858. The cause had been once to the supreme court of the United States, which reversed the decision of the circuit court. The circuit court had rendered a decree for the entire sum secured by the bottomry bond. The supreme court was of opinion that some of the items in the bills secured by the bonds were not subjects of bottomry, and that the actual necessity for some of the supplies and repairs was not shown. That court, therefore, reversed the decision of the circuit court and remanded the cause with instructions, "To refer the account for supplies and repairs to one or more commissioners, experienced in commerce and of known intelligence and probity, to ascertain under the instructions of the court, what portion of the supplies and repairs actually furnished to the ship was really necessary; and for the amount thus as-

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

certained and approved by the court, to enter a decree for libellants." The parties selected Mr. J. W. Gurley as master, and the selection was approved by the court. The master took the testimony of but one witness, in addition to the evidence already in the record. This witness testified to facts which had occurred fourteen years before he gave his testimony, and the evidence in the record shows that he must have been mistaken in his statement of facts. The master concluded, and we think properly, that this new evidence did not substantially change the case as it appeared in the original record. The master reported that the principal sum due on the bond for supplies and repairs actually furnished the ship and really necessary, amounted to $4,392.25.

1. The first exception is to the amount of this allowance. The libellant claims that because Clark, the master of the vessel, was also a part owner, he was authorized to make a bottomry bond on the ship anywhere and for any reason. But it seems to me too late to review this question. If Clark was a part owner it must appear in the record, and the supreme court has decided that the whole bond cannot be sustained. It has, therefore, either found that Clark was not a part owner, or if he was, that he was not on that account authorized to make the bond unless there was a real necessity therefor. I regard this exception as raising a question already settled by the supreme court.

2. The second exception is, that the master did not allow the 19½ per cent. maritime interest on the $4,392.25 which was stipulated for in the bond nor legal interest from and after the date of judicial demand, July 3, 1858. The master was not required to pass upon these questions. He has done what the order of reference required and no more. This exception must, therefore, be overruled, but this court will now determine the question for itself. In admiralty appeals, the supreme court never does allow interest as such. Hemmenway v. Fisher, 20 How. [61 U. S.] 255; Boyce's Ex'r v. Grundy, 9 Pet. [34 U. S.] 275; Phil. Pr. U. S. 260. When in the opinion of the court interest should be allowed, it is included in the decree as a gross sum. Now the supreme court has directed specifically for what sum the decree in this case shall be, to wit: The amount found due for supplies and repairs actually furnished and really necessary. The bottomry bond, which is the basis of the libel, expressly provides that the libellant shall be entitled to "a premium of 19½ per cent. for the voyage, in consideration whereof all risks of the sea, seizures, enemies, fires, pirates, etc., are to be on account of" libellants. By the terms of the bond, this premium is as much the due of the libellants as the principal sum loaned on the bond, and as there does not seem to have been any question raised in the supreme court of its allowance, if any part of the principal sum found was recoverable, and it is not excluded by the decree of the supreme court, we must allow the premium on the amount actually found due by the master. But it is insisted strenuously that as neither the bottomry bond nor the decree of the supreme court says anything about the allowance of ordinary interest, none can be allowed. Does the fact that there is no stipulation for ordinary interest in the bond preclude this court from allowing interest from the commencement of the suit, before which time the bond, if anything at all was due on it, was payable? The general common law rule is that the law does not imply a contract on the part of the debtor to pay interest on the sum he owes, although the debt may be of a fixed amount, and may have been frequently demanded. 2 Chit. Cont. (11th Am. Ed.) 950, and cases there cited. But according to the American authorities, interest will be allowed after a demand of payment, even of an unsettled claim, for goods sold and delivered or services rendered, from the time of the demand, and the presentment of an account or commencement of a suit is sufficient demand on which to found and from which to date a claim of interest. Barnard v. Bartholomew, 22 Pick. 291; McIlvaine v. Wilkins, 12 N. H. 481 et seq.; Selleck v. French, 1 Conn. 32; Gray v. Van Amringe, 2 Watts & S. 128; Goff v. Rehoboth, 2 Cush. 475. Interest is allowed on liquidated demands in the admiralty as well as at law. The Swallow [Case No. 13,665]. In suits for seamen's wages, interest is allowed from the time of demand, or if no demand be made, from the commencement of the suit. Gammel v. Skinner [Id. 5,210]; Sheppard v. Taylor, 5 Pet. [30 U. S.] 675.

These authorities settle the principle, and there can be no question that the libellants are entitled to ordinary interest on the amount properly loaned on the bottomry bond, at least from the commencement of the suit. But the claimant says that the question of interest has been ruled adversely to the libellant by the decree of the supreme court in this case. He says that the decree of the supreme court in this case—[The Grapeshot] 9 Wall. [76 U. S.] 145—directs this court to ascertain "what portion of the repairs and supplies actually furnished to the ship were really necessary, and for the amount thus ascertained and approved by the court, to enter a decree for the libellants." That as this direction of the court says nothing about interest, none can be allowed. To sustain this view we are referred to the cases of Boyce's Ex'r v. Grundy, 9 Pet. [34 U. S.] 290; Hemmenway v. Fisher, 20 How. [61 U. S.] 255; to rule 23, U. S. Sup. Ct. Rules; and to Phil. Pr. U. S. (Rev. Ed.) 257. The rule of the supreme court and these authorities apply only to cases when the judgment or decree of the lower court has been affirmed. The holding is that unless the supreme court, in the affirmance of a judgment or decree,

allows interest, it cannot be allowed by the lower court, when called on to execute the mandate. But in the case of The Grapeshot [supra] the decree of the circuit court was reversed, and the cause sent back to the circuit court to ascertain the amount due libellants, and with instructions to render a decree for the amount so ascertained. The supreme court never passed upon the question of interest. It never disallowed interest. The libellants are clearly entitled to it unless it is expressly disallowed. As well might it be claimed that libellants are not entitled to their premium of 19½ per cent. which is expressly provided for in the bond, because the supreme court makes no mention of it in its order remanding the case to this court.

Claimant further says, that no interest should be allowed, because the ship was seized and sold in August, 1858, and ever since that date the proceeds of the sale have been in the registry of the court or in the United States treasury, and claimant has had no use of the funds. This is no answer to the libellant's demand for interest. The claimant might have saved himself this loss by paying what was due on the bond, or if he had tendered the amount now found to be due, he could not have been required to pay interest. The libellants have asserted their rights in the ordinary way, in a court of justice. They are not to be punished, because in the administration of the law the claimant has been subjected to loss, a loss which he might have avoided had he chosen to take the proper steps to avoid it.

3. The third exception is, that the master erred in his construction of the words "were really necessary," contained in the decree of the supreme court directing this court "to ascertain what portion of the supplies and repairs actually furnished were really necessary." "Necessity for repairs and supplies is proved when such circumstances of exigency are shown as would induce a prudent owner to order them." The Grapeshot, 9 Wall. [76 U. S.] 141. I have looked into the evidence in the record, and am not able to see that the master has been too strict in his construction of the words "really necessary." The fact is, he allows for all repairs which the evidence shows were actually made, and for all supplies actually furnished. This exception must be overruled.

The other exceptions refer to small items in the account which the master has rejected. The evidence seems fully to justify the findings of the master in respect to these items. My opinion is that none of the exceptions are well taken, and they must be overruled. In making up the amount of the decree, however, the premium of 19½ per cent. on the amount found due by the master will be allowed, and also interest at the rate of five per cent. per annum on the same amount from the date of judicial demand, to wit, July 3, 1858.

GRASSIN (UNITED STATES v.). See Case No. 15,248.

GRATIOT (UNITED STATES v.). See Case No. 15,249.

Case No. 5,704.

The GRATITUDE.

[3 Ben. 108.] [1]

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

COLLISION IN THE KILLS—SCHOONER AND STEAMER—LOOKOUT—SHEER.

1. Where a collision occurred in the night, between a steamboat and a schooner, each party claiming that the other vessel sheered across the other's bows: *Held*, that the fact that the sails of the schooner did not jibe, was sufficient to confirm the evidence from the schooner, that she made no change.

2. The steward, who was standing by the companion way, and was no mariner, and had not been stationed as a lookout, was no proper lookout.

[Cited in The Ancon, Case No. 348.]

3. The steamboat was in fault, in not having a proper lookout, and in not avoiding the schooner, and was liable for the collision.

In admiralty.

BENEDICT, District Judge. This is a cause of collision, instituted by Charles Bremner, owner of the schooner Genius, to recover of the propeller Gratitude the damages occasioned by the sinking of his schooner, in the Kills, on the night of June 3, 1867. The theories and testimony of the respective parties are in direct conflict, and cannot be reconciled. I have, however, little hesitation in deciding between them, upon the pleadings and proofs, as they stand.

The evidence shows that, on the night in question, the wind was light, from the southwest, the tide running flood in the Kills, and it was not so dark but that lights of vessels could be seen at the distance of a mile at least. The schooner was running east, at the slow rate of about one mile an hour, with her boom off to the port. The propeller was running west, at the rate of about five miles an hour. The two vessels came in contact at right angles, with sufficient force to knock a man overboard, and to cut into the starboard side of the schooner, amidships, so that she sunk before she could be got to the shore.

The libellant insists that the vessels were brought in contact by the steamer's suddenly porting her helm, and attempting to cross the bows of the schooner, when close upon her. The claimant insists that it was done by the schooner, which attempted to cross the bows of the steamer, and bore away when so near that she could not be avoided, notwithstanding the engines of the propeller were at once stopped, and backed. It is clearly proved, in the case, by many witnesses, and disputed by none, that the

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

schooner did not jibe, at any time, but that her boom continued off to port, without change. This circumstance is sufficient, in my mind, to confirm the very positive testimony of persons on board the schooner, that no change was made in the course of the schooner.

If this be true, it follows that the steamboat must be held in fault, for not avoiding the schooner, which could easily be seen. I have no doubt that the collision was the result of the sheer of the steamboat, when near upon the schooner, and that it was caused by the want of a careful lookout on the steamboat. No person was stationed forward, on the steamboat, to perform the duty of a lookout. The steward was forward, standing by the companion way, from which he had come out, and was looking out forward, he says; but he also says that he was not stationed there for that purpose, and that there was no lookout forward—in this, contradicting the pilot of the steamboat, who swears that he stationed the steward forward, as a lookout. This steward was no mariner, and it was no part of his duty to look out, and, manifestly, he was not stationed where he was for that purpose. The oath of the pilot, that he stationed the steward as a lookout, therefore, is well calculated to cast discredit upon the whole evidence. The preponderance of evidence being in favor of the libellant's story, the decree must be for the libellant, with an order of reference to ascertain the amount of damages sustained.

Case No. 5,705.

The GRATITUDE.

The ABNER TAYLOR.

[4 Ben. 62.] [1]

District Court, S. D. New York. Feb., 1870.

COLLISION IN THE KILLS—STEAMBOAT AND SCHOONER.

1. A steamboat, with a canal boat in tow, fastened to her port side, was coming through the Kills from Elizabethport to New York, on the right hand side of the channel. When near the corner stake, where the channel turns, a schooner coming the other way, having the wind free, came in collision with the canal boat. The steamboat, as soon as she saw there was danger of collision, stopped, and backed, and put her wheel hard a port. The schooner claimed that she was on the other side of the channel, and had caught on the mud, so as to be stationary, and was run into by the steamboat. A libel was filed against the steamboat and schooner, by the owner of the canal boat, and the insurer of the cargo, to whom it had been abandoned. *Held*, that, on the evidence, the steamboat was on the starboard side of the channel, and the schooner had the whole channel, and was not so aground as to be stationary.

2. The schooner was in fault, in keeping her helm to starboard, after rounding the corner stake, and was solely responsible for the collision.

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

In admiralty.

Emerson, Goodrich & Wheeler, for libellants.

Beebe, Donohue & Cooke, for the steamboat.

E. D. McCarthy, for the schooner.

BLATCHFORD, District Judge. The libellant Lynch was the owner of the canal boat Uriah, and White, Fowler and Snow were the owners of a cargo of coal, which was on board of her, on transport from Elizabethport to New York, at the time of the collision hereinafter mentioned. The other libellants were insurers of the coal, and, after the collision, the coal was abandoned to them, and the abandonment was accepted by them. The Uriah was in tow at the time of the steamboat Gratitude, being lashed to the port side of the Gratitude, and bound from Elizabethport to New York. The collision occurred about noon on the 1st of October, 1868, between the Uriah and the schooner Abner Taylor, which was bound from New York to Elizabethport. The place of collision was in the Kills, near what is known as the corner stake between Shooter's Island and Elizabethport. The libel alleges that the wind was about north by east; that the schooner was on her port tack, with her three lower sails set; that the schooner, with the bluff of her port bow, struck the bluff of the port bow of the Uriah so violent a blow, that it was manifest she would shortly sink; that thereupon the steamboat towed her to the flats, where she shortly sank; and that the collision occurred wholly by the fault of the persons navigating the steamboat and the schooner.

The answer of the steamboat says, that the collision happened without the fault of those navigating the Uriah, and without the fault of those navigating the steamboat, but solely through the fault and negligence of those navigating the schooner; that the wind was from the northward and eastward, and free for vessels bound towards Elizabethport; that the steamboat and the Uriah proceeded along the right hand side of the channel, as near to the bank as the steamboat could with safety be navigated, leaving the whole channel to the northward and westward clear to vessels bound in an opposite direction; that the way of the steamboat was very slow by the land; that, before she had reached the corner stake, which marks the south bank of the channel, the schooner turned the stake, bound towards Elizabethport, having her lower sails set, her boom off to port, and the wind free, and sailing at a rapid rate of speed; that, notwithstanding she had the whole channel to the northward and westward of the steamboat and the Uriah, and had plenty of room, by keeping her course, to clear the steamboat and the Uriah, it was found that she was bearing down upon those vessels, by starboarding, so as to make it certain, if

she persisted, she would strike the Uriah; that immediately a single whistle was blown by the steamboat to call attention, the wheel of the steamboat was put hard a port, and her engine was at once slowed, stopped and backed; that, notwithstanding this, the schooner came down upon the bow and stem of the Uriah, the port bow and stem of the schooner striking the port bow and stem of the Uriah, and thereby damaging her so that she sank shortly afterwards; that the force of the blow drove the steamboat upon and against the bank of the channel on the starboard side; that, at the time of the collision, the steamboat had no headway on, but, if anything, had stern way on her; and that the collision happened solely by the schooner's not keeping her proper course through the channel.

The answer of the schooner says, that, while she was rounding the corner stake, she got aground, by reason of the narrowness of the channel at that place, and through no fault of those in charge of her; that, before rounding the stake, she was making not more than four knots an hour; that, after rounding the stake, and at least five minutes before the collision, the schooner became almost stationary, her keel sank into the mud, and she was wholly unmanageable; that, while she lay in the mud, the steamboat, having in tow the Uriah, was observed coming down the channel, and several rods distant from the schooner; that the schooner lay completely out of the channel; and, as could have been very easily observed by those having the Uriah in tow, was entirely helpless; that the persons in charge of the schooner called out loudly to those in charge of the steamboat and the Uriah, that the schooner was aground; that they paid no attention, but kept directly on a course which bore directly against the schooner, until they were so near the schooner that it was impossible to avoid running into her; that, after the schooner got aground, the persons having the Uriah in charge had ample time within which to slacken the speed of the steamboat, or to stop fully, and, in either case, to avoid the collision; that there was ample width of channel to enable the steamboat and her tow to clear the schooner; that, if the steamboat had been handled properly, and in a seamanlike manner, she and her tow could have gone entirely free; and that the collision was owing entirely to the carelessness of those in charge of the steamboat and the Uriah.

The main dispute, on the evidence, is, as to whether the collison occurred near the windward bank of the channel or near the leeward bank of the channel. It is insisted, for the schooner, that she was dragging along the windward bank, trying by starboarding, to get off from that bank into deeper water, and that the steamboat pushed the Uriah against the schooner. It is insisted, for the steamboat, that the steamboat and the Uriah were close to the leeward bank of the channel, and that the schooner, after she rounded the corner stake, kept on starboarding, and ran into the Uriah, and then ported and ran across to the windward side of the channel and got aground there. The weight of the evidence is, that the wind was northeast; that the course of the channel, from Shooter's Island to the corner stake, is about northwest; that the schooner had the wind free, her booms to port, and her sheets half off, before she reached the corner stake; that the turn at the corner stake is pretty sharp, say five points, from northwest to west by south; that the schooner had the wind still more free after she turned the stake; that the collision happened some three hundred feet towards Elizabethport from the corner stake; that the channel, at the place of collision, is sufficiently wide for two steamboats, each with two canal boats on each side, to pass each other in safety; and that the steamboat and her tow were on the leeward side of the channel, that is, the right-hand side to them as they moved forward. The master of the schooner says, that he put his wheel to starboard before he reached the stake, and kept it hard a-starboard until the collision, and had had it hard a-starboard for from six to ten minutes before the collision; that he had his mainsail, foresail, jib and flying-jib set; that he put his wheel to starboard. because he found that the keel of his vessel was in the mud; and that she kept going along with her keel in the mud. I am satisfied, on the proofs, that the steamboat and the Uriah were as close to the leeward side of the channel as they could be, and that the collision happened through the fault of the schooner, in keeping her helm to starboard. She, doubtless, with the aid of the wind and her starboarding, left the mud, and crossed over, and came against the Uriah, without her master being aware of the consequences that were to follow his persistence in starboarding. The answer of the schooner avers that she got aground, and that, at least five minutes before the collision, she became almost stationary, and was entirely helpless. This is wholly untrue. The master of the schooner testifies, that, at the collision, she was going at the rate of about a knot and a half an hour, and that his vessel kept going along with her keel in the mud. If her helm had been ported, and, notwithstanding that, she had been driven against the Uriah, there might have been some excuse for her; but so long as the steamboat and the Uriah were on the leeward side of the channel, nothing but the starboarding of the schooner could have brought about a collision, if, as is claimed for the schooner, her keel caught the mud on the windward side of the channel, by her luffing up to the windward, before reaching the corner stake, to let another vessel pass

on her port side. Such starboarding by the schooner is admitted, and, on the facts, must be held to have brought about the collision. The steamboat slowed, stopped, and reversed her engine, after the schooner rounded the stake, and had sternway on at the collision, and she and the Uriah were shoved around by the blow to the starboard, so that, by going ahead, the Uriah, which projected forward beyond the steamboat, was shoved upon the flats.

The libel must be dismissed as to the steamboat, and there must be a decree for the libellants against the schooner, with a reference to a commissioner to ascertain the damages.

Case No. 5,706.

The GRATITUDINE.

[Cited in The Shand, Case No. 12,702. See 3 C. Rob. Adm. 240.]

Case No. 5,707.

GRATTAN v. APPLETON et al.

[3 Story, 755; 8 Law Rep. 116.] [1]

Circuit Court, D. Massachusetts. May Term, 1845.

LETTERS TESTAMENTARY—DONATIO CAUSA MORTIS—DOMICIL—PERSONAL PROPERTY—COSTS.

1. Where A, being domiciled in New Brunswick, wrote certain letters to B, desiring him, on the death of A, to make a certain distribution of the property belonging to A in the hands of B; and after A's decease (who died insolvent), C, his administrator, brought the present suit to recover the money of B,—it was *held*, that the letters were testamentary in their character, but that, as they were not in conformity with the law of A's domicil, by which they were to be governed, they did not constitute a valid will; and that, had they been valid as a will, the legatees could have obtained no benefit therefrom, on account of the insolvency of A.

[Cited in Lee v. Luther, Case No. 8,196; McKinnon v. McKinnon, 46 Fed. 722.]

[Cited in Manuel v. Manuel, 13 Ohio St. 463.]

2. To constitute a donatio causa mortis, there must have been a transfer of property in expectation of death from an existing illness, the donation depending on the condition of death from such illness. But any instrument may constitute a will, which appears to be intended to operate after the death of the party making it, and not before.

[Quoted in Smith v. Dorsey, 38 Ind. 457. Cited in Cutting v. Gilman, 41 N. H. 152; Craig v. Kittredge, 46 N. H. 58.]

3. The law of the place of the testator's domicil governs in relation to a will of personal property, although the will be made in another state or country, where a different law prevails.

4. In the present case, as the defendant was acting bona fide, and was in no default, he was not bound to pay interest on the assets in his hands, unless he had made interest thereon, and he was entitled to costs. As the questions in this case were new and important, and were proper for discussion, each party should bear his own costs, except the principal defendant.

Bill in equity. The bill in substance stated, that Sir John Caldwell died at the city of Boston, on or about the eighth day of October, A. D. 1842, and that the plaintiff [Thomas C. Grattan], on the twenty-second day of April, A. D. 1844, was duly appointed administrator of the estate of the said Sir John, within the commonwealth aforesaid, and has given bonds according to law for the faithful performance of his duties as such. That the said Sir John Caldwell died insolvent; that on or about the twenty-first day of April, A. D. 1841, the said Sir John Caldwell assigned to the said William Appleton twenty shares in the Nashua Manufacturing Company, and at the same time received from the said Appleton seven thousand dollars, as an advance on account of the said shares. That on or about the same time, the said Sir John addressed to the said Appleton a letter of instructions with regard to the said shares, which was duly received by the said Appleton, in the following words: "Boston, 21st April, 1841. Mr. William Appleton,—Dear Sir: I am desirous of getting an advance on twenty shares in the Nashua Manufacturing Company, of seven thousand dollars. Will you receive the shares, make the advance,—sell the shares at such time as you deem expedient—my wish would be to have them held with a hope of getting six hundred dollars per share for them; but you will please dispose of them within one year, at the market price—so many as will reimburse your advance, should I not before repay your advance. Yours truly, John Caldwell. Boston, April 21, 1841. Received of William Appleton seven thousand dollars as advance on twenty shares in the Nashua Company, transferred to him. John Caldwell." That on or about the fourteenth day of January, A. D. 1842, the said Sir John Caldwell addressed to the said Appleton a letter, which was duly received by the said Appleton, in the following words: "Boston, 14th January, 1842. William Appleton, Esq., Boston. My Dear Sir: I beg to trespass on your friendship, by requesting, that in the event of my death occurring before I have the pleasure of seeing you again, that you will be so kind as to remit the proceeds of treasury bill for five hundred dollars, now in your hands, in a bill of exchange, and remit the same to E. H. Chapman, Esq., Leaden-Hall street, London, for the use of Miss Johnson, who is well known to him. I remain, dear sir, your very truly obliged friend and servant, John Caldwell." That the said letter enclosed the two following letters: "Boston, 25th April, 1841. William Appleton, Esq., Boston. My Dear Sir: May I request the favor of your keeping the inclosed until you hear of my death, and then open it, as it conveys my wishes with respect to the disposition of what balance of mine may be in your hands. Before that event takes place,

[1] [Reported by William W. Story, Esq. 8 Law Rep. 116, contains only a partial report.]

I hope many times to have the pleasure of seeing you; it is, however, only right, to be prepared for an event which, sooner or later, must happen to us all. With many thanks for your late kindness, and apologizing for thus far troubling you, believe me, my dear sir, your very faithful and obliged friend, John Caldwell." "Boston, 25th April, 1841. William Appleton, Esq., Boston: My wish is, that whatever balance Mr. Appleton may find in his hands after disposing of the Nashua stock, should be equally divided; one half to go to Mrs. Jacob Hathorne, of Dracutt, near Boston, now of Lowell, and the other remitted to Miss Eliza Johnson. Information can be obtained respecting the latter by inquiring of Mr. E. H. Chapman, merchant, Leaden-Hall street, London. John Caldwell." That the last letter was sealed and endorsed as follows: "William Appleton, Esq., is requested to take charge of this packet in his safe, until he either sees or hears from Sir John Caldwell, or receives authentic intelligence of his death, when Sir John Caldwell begs he will be so good as to open it, and comply with the request therein contained. Boston, 24th February, 1842." That at some time after the death of the said Sir John, the said Appleton opened the said letter and the several enclosures therein. That the several sums of money, amounting in all to a large sum, to wit: three thousand dollars, which the said Appleton had in his possession at the time of the death of the said Sir John, and belonging to the said Sir John, rightly belong to the plaintiff as administrator of his estate; and that the said Appleton is justly bound to pay the same to the plaintiff, with interest thereon for their detention. And the plaintiff well hoped, that the said Appleton would pay the same, but the said Appleton pretends, that he cannot with safety pay the same, on account of certain pretended claims made in pursuance of the letters herein before recited, by the said Jacob H. Hathorne, and his said wife, and also by one Eliza Johnson, of Boulogne, near London, in the kingdom of Great Britain and Ireland, spinster, a person out of the jurisdiction of the court, and on this account alone, not a party to this bill; and under this pretence, though often requested, the said Appleton refuses to pay the same. The bill prays, that the said Appleton may be decreed to pay to the plaintiff the said sum of three thousand dollars, with interest thereon, for the unjust detention thereof; that the said pretended claims of the said Hathorne and wife, and of the said Johnson, may be decreed to be without force and virtue; and that the plaintiff may have such further relief in the premises, as the nature of the case may require, and as may be agreeable to equity and good conscience.

The answer of William Appleton stated, that he has been informed and believes it to be true, that the said Sir John Caldwell, deceased, at Boston, on or about the eighth day of October, A. D. 1842, and that the said complainant has been appointed administrator of the estate of the said deceased; but for greater certainty, this defendant prays that the said complainant may be held to produce his letters of administration, or other proper proof, if deemed material. That on or about the twenty-first day of April, A. D. 1841, the deceased borrowed of this defendant the sum of seven thousand dollars, upon interest, and as security for the payment thereof, transferred to this defendant twenty shares of the stock of the Nashua Manufacturing Company, with the right to sell the same, as appears by his letter and receipt of that date, as set forth in the said bill of complaint. And afterward the said deceased wrote the two letters set forth in the said bill of complaint, bearing date the twenty-fifth day of April, A. D. 1841; but at what time the same were written this defendant has no knowledge except from the dates thereof. And afterwards said deceased deposited in the hands of this defendant a certain treasury note for the sum of five hundred dollars, which was paid on or about the tenth day of August, A. D. 1843, and on account of which and the interest thereon, this defendant then received the sum of five hundred and sixty-nine dollars and fifty-eight cents: and afterwards this defendant received the letter set forth in the said bill, dated the fourteenth day of January, A. D. 1842, respecting the disposition to be made of the proceeds of the said bill, which letter enclosed the said two letters bearing date the twenty-fifth day of April, A. D. 1841, and which last described letter was sealed, endorsed, and directed as in the said bill is set forth, and which with the letters enclosed was opened by this defendant after receiving notice of the decease of the said Sir John. That at different times, at the request of the said deceased, he advanced to him other sums of money, relying for his reimbursement upon the securities aforesaid, and that he has received certain dividends upon the said shares, and that in pursuance of the power to him granted he has sold said shares for his reimbursement, and has received the proceeds, and that after deducting from such dividends and sales, and the proceeds of the said treasury note, the amount of his advances with interest and charges, there remained in his hands on the first day of January last, the sum of twenty-eight hundred and eighty-two dollars eighty-one cents. And that he has always been ready and desirous to pay over the said balance to such person or persons as might be lawfully entitled to receive the same; and that after the decease of the said Sir John, and before the appointment of the complainant, to wit, on the tenth day of August, A. D. 1843, he notified Sir Henry Caldwell, the son and heir of the said deceased, of the existence of the property aforesaid,

and of the disposition made or intended to be made thereof by the said deceased, and requested him to notify the executors or administrators, if any, thereof, and afterwards this defendant notified the said Eliza Johnson and Jacob H. Hathorne, and his said wife thereof. And that the personl representatives of the said deceased claim the said sum in his hands as a part and parcel of the estate of the said deceased, and that he has been notified by the said Eliza Johnson and the said Jacob H. Hathorne and his said wife not to pay over the same to the said representatives, but to hold it on their account, but that neither of the said parties have tendered him any indemnity in the premises. And the defendant submits to this honorable court what interest the said complainant is entitled to in the sum of money in his hands as aforesaid, and says, that he is willing and ready to account as this honorable court shall direct respecting the same, having all just and reasonable allowances made, which he is entitled to; and in all other respects this defendant submits to act as the court shall direct, upon being indemnified his expenses and costs of suit.

The answer of Jacob H. Hathorne and Julia his wife stated that they believe that the statements set forth in the complainant's bill of complaint are true. That they believe that the statements set forth in the answer of William Appleton, one of the defendants, are also true. That the said Jacob and his wife have claimed and do claim of the said Appleton, the payment of the amount now in his hands, and which the said Sir John Caldwell directed him to pay to the said Mrs. Hathorne, the letter and direction of said Caldwell, constituting in law or in equity an assignment of said amount, which is valid and effectual as against the complainant and other claimants. That the said Julia H. Hathorne is the daughter of the said Sir John Caldwell, by Mrs. Harriet Usher; and has always been, during his life, treated by him with the tenderest affection. And that the amount thus directed to be paid to her, was intended by him to be a last proof of paternal affection: and the assignment thereof, has in law been founded on a good and legal consideration, as they believe.

The following agreement was also made by the parties: "It is agreed by the parties in the above entitled cause, that the legal domicil of Sir John Caldwell, at the time of his death, was in the province of New Brunswick. It is further agreed, as a fact in the case, that the law governing wills in the province of New Brunswick, is an act entitled as follows: 'An act for the amendment of the law with respect to wills, passed March 9, 1838;' and that the said act is to be found among the 'Acts of the General Assembly of Her Majesty's Province of New Brunswick, passed in the year 1838,' c. 9, p. 56, which collection of acts is to be found in the law library of Harvard University, reference to which is hereby made."

C. Sumner, for plaintiff.

F. C. Loring, for defendant William Appleton.

William Whiting, for defendants Hathorne and wife.

STORY, Circuit Justice. It is agreed by the parties, that, at the time of his death, Sir John Caldwell had his legal domicil in the province of New Brunswick; and, indeed, there is no doubt, that he was at that time, and for many years before, and probably from his birth, a subject of the sovereign of the United Kingdom of Great Britain and Ireland. His residence in Boston was merely for temporary purposes. It is further agreed between the parties, that the law governing wills in the province of New Brunswick is an act entitled "An act for the amendment of the law with respect to wills," passed on the 9th of March, 1838 (Act 1837-38, 1 Vict. c. 9), which is now before me in the printed laws of New Brunswick, and it is in its main provisions a transcript of the act of the British parliament of 1 Vict. c. 26. By the provincial statute, it is expressly enacted, "that no will shall be valid, unless it shall be in writing and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." Now this enactment is, in its terms, equally applicable to all wills whether of personal estate or of real estate or of both. And it is plain, that the letters of Sir John Caldwell, stated in the bill and admitted by the answers, if they constitute a testamentary disposition of the property therein mentioned, are void under the statute of the province, as not being executed according to the provisions of that statute, if that statute constitutes the governing rule.

Two questions therefore arise: (1) Whether these letters constitute in point of law a testamentary disposition by Sir John Caldwell. (2) If they do, then, whether the law of the province constitutes the rule, by which they are to be judged as to their interpretation and validity. In respect to the first question, it is manifest, that these letters are susceptible of but three modes of interpretation as to their object and effect. They constituted a disposition of the property therein mentioned, either by way of gift or by way of donation mortis causa, or by way of testament. In the first place, they cannot be construed as a gift inter vivos, because they were to have effect only in case of the death of Sir John Caldwell, were revoked by him in his life time, and there was

no delivery or transfer either actual or constructive to the donees. See 2 Bl. Comm. 441; Vin. Abr. tit. "Gift," A. In the next place, they cannot be construed as a donation mortis causa—for all the essential ingredients of such a mortuary donation are wanting. There was no delivery or transfer of the property. The donation was not in any illness of Sir John, or in expectation of death from any existing illness; and it was not made to depend upon the condition of his death by any disorder or illness then existing. Now these are indispensable to the validity, and indeed constitute the essence of a donation mortis causa. The cases on this subject will be found generally collected in 1 Story, Eq. Jur. §§ 606, 607; and in Mr. Williams' excellent Treatise on the Law of Executors and Administrators (volume 1, Ed. 1838, pt. 2, bk. 2, c. 2, § 4, pp. 544–554). The judgment of Lord Eldon in the case of Duffield v. Elwes in the house of lords, 1 Bligh (N. S.) 497, 527–530, contains a very full and accurate review of the whole doctrine, and completely disposes of the point, that these letters in no just sense constitute a donation mortis causa. See, also, Tate v. Hillbert, 2 Ves. Jr. 111, 118, 119. The letters must then be treated as in their nature, scope and object testamentary, or, in other words, as being a testament of personal property. To constitute such an instrument no particular form is necessary. All that is required is, that it should clearly appear, that it is the intention of the party, that it should operate after his death and not before; for that constitutes the test whether it is testamentary or not. Hence a deed poll, or indenture, a deed of gift, a bond, a marriage settlement, letters, drafts on bankers, assignments of bonds, and indorsement of notes, have been held to be testamentary where it was clear, that they were intended to operate only after the death of the party. See Williams, Ex'rs & Adm'rs (Ed. 1838) pt. 1, bk. 2, pp. 58–61, c. 2, § 3. Tried by this test it is plain, that these letters are purely testamentary. They are to take effect in the event of the death of Sir John, and after his death, and until that period they are intended to be inoperative. Swinburne has put the definition of a will or testament correctly when he says, "It is the first sentence of our will touching what we would have done after our death," respecting our property. Swinb. Wills, pt. 1, § 231; Williams, Ex'rs & Adm'rs, pt. 1, bk. 1, p. 6, c. 2. And this is the very definition given by Modestinus in the Roman law. Testamentum est voluntatis nostrae justa sententia de eo, quod quis post mortem suam fieri velit. Dig. lib. 28, tit. 1, l. 1.

In respect to the second question, by what law the execution of a will of personal estate is to be governed as to its validity and interpretation, there is now no ground for doubt. The rule now firmly established is, that the law of the place of the testator's domicil is to govern in relation to personal property, although the will may have been executed in another state or country, where a different law prevails. It was settled many years ago in America, and, at least, as early as the case of Desesbats v. Berquier, 1 Bin. 336, and the same rule is now as firmly established in England. Stanley v. Bernes, 3 Hagg. Ecc. 373–466; Moore v. Darell, 4 Hagg. Ecc. 346, 334; Countess Ferraris v. Marquis of Hertford, Curt. Ecc. 468. So that here there is no matter open to controversy. The validity and interpretation of these testamentary papers must be governed by the laws of the province of New Brunswick, where Sir John Caldwell was domiciled at the time of his death, and where they were executed; and by that law the testamentary papers are utterly void and incapable of any legal operation to pass the property bequeathed therein. If, indeed, these papers had constituted a valid testament, the legatees could have obtained no benefit from the bequests therein contained, since it is admitted that Sir John died insolvent. But then the present grant of administration, being not as in a pure case of intestacy, could not have stood; but administration should have been taken by the plaintiff as administrator cum testamento annexo; and this could not have been granted until after the papers had been first duly admitted to probate in the proper probate court of the province of New Brunswick; or at least until they were established as testamentary in the proper court in Massachusetts. Notwithstanding the doubt intimated by Sir John Nicholl in the Case of Reid, 1 Hagg. Ecc. 474, I very much incline to the opinion that either course might have been open to the parties to have been pursued, if these papers had been a valid testamentary disposition; and I should rather gather from the case of Price v. Dewhurst, 4 Mylne & C. 80, 84, that this was the inclination of opinion of Lord Cottenham in Larpent v. Sindry, 1 Hagg. Ecc. 382, where it was thought a foreign will might well be admitted to probate in the ecclesiastical courts of England, upon the production of an exemplified copy of the will proved in the foreign domicil. See 1 Williams, Ex'rs & Adm'rs (Ed. 1838) pt. 1, pp. 228, 229, c. 3, § 6. But it is unnecessary to decide this point; and I have introduced it merely to show, that the present bill, upon the present grant of administration, is maintainable solely upon the ground, that the case is one of pure intestacy of Sir John Caldwell.

Upon the whole, upon the grounds already stated, I hold, that these papers are testamentary in their nature, character and operation, and as such are a nullity by the law of Sir John's domicil; and that consequently he died intestate, and the plaintiff, as his administrator, is entitled to the assets belonging to Sir John, for which the present bill is brought. In respect to the question of interest to be allowed upon the property, my judgment is, that as Mr. Appleton is in no default, and could not safely

have acted otherwise than he has done, that he ought not to pay any interest upon the assets, unless he has made interest thereon; and it does not appear that he has made any. His is the case of a mere state administrator, acting bonâ fide, and enitled to be protected by the court. He should, therefore, receive the ordinary costs as between client and solicitor. In respect to the other defendants, I think, that the case is not one for costs either for them or against them. The questions involved in the case are very fit for discussion, and were too novel and important, at least here, not to justify a full defence on their part. It appears to me, therefore, that they are not entitled to any costs, and they ought to bear their own costs; and of course, the plaintiff is to bear his own costs as a charge upon the fund. I shall direct a decree to be entered accordingly.

The decree was as follows: That the said Sir John Caldwell, in the bill mentioned, at the time of the writing and executing the letters mentioned in the said bill, and also at the time of his death, was domiciled in the province of New Brunswick; and that the letters aforesaid purport to be, and are, testamentary papers; and that the legal validity and interpretation thereof are to be governed and adjudged by the laws of the said province; and that the same not being executed so as to be binding as a will and testament by the laws of the said province, they are to be deemed to all intents and purposes as testamentary papers, a mere nullity, and of no effect; and that the said Sir John Caldwell is, therefore, to be deemed to have died intestate; and that the said Thomas C. Grattan having been duly appointed administrator of the goods and effects of the said Sir John Caldwell, is entitled to have and hold as such, the assets of the said Sir John Caldwell, now in the hands of the said William Appleton, as in his answer is stated and admitted. And it is thereupon ordered and decreed by the court, that the said William Appleton do forthwith pay over the same to the said Thomas C. Grattan, as administrator, deducting therefrom the amount which shall be awarded to him as costs in this cause by the court, as hereinafter stated. And the court do further order and decree, that the said William Appleton be allowed his reasonable costs, as between client and solicitor, in this cause, to be settled, in case of difference between the parties, by a master of the court. And that the defendants, Jacob A. Hathorne and Julia A. Hathorne, his wife, do neither receive nor pay any costs; and that the costs of said Thomas C. Grattan, in the cause, be a charge upon the assets to be received in pursuance of this decree.

GRATZ (COHEN v.). See Case No. 2,963.

GRATZ (PREVOST v.). See Cases Nos. 11,406 and 11,407.

Case No. 5,708.

GRAU v. McVICKER.

[8 Biss. 13.] [1]

Circuit Court, N. D. Illinois. May, 1874.

LEASE—PRINCIPAL AND AGENT—EXECUTORY CONTRACTS—NOTICE OF RENUNCIATION—PREMATURE SUIT—BREACH OF CONTRACT — SET-OFF—MEASURE OF DAMAGES.

1. In a lease of a theater, the lessee was described as "M. G., representing Messrs. C. A. C. & Co., manager of the Opera Company," and the lease was signed by "M. G. representing C. A. C. & Co." One clause of the lease was: "The said M. G. agrees to pay," etc.: *Held*, that M. G. was liable as principal, and that the words added to his name were simply words of description.

2. Where one makes a contract to be performed in the future, and before the time for performance has arrived, notifies the other party that he will not comply with its terms, this may be treated as an immediate breach of the contract, and suit commenced before the time for performance has arrived is not prematurely brought.

[Cited in Sullivan v. McMillan (Fla.) 8 South. 457.]

3. A declaration that a party will not perform an act in the future, may be treated as a breach of a promise to perform such act.

4. A. agreed to rent B.'s theater for two weeks from the 9th of February. On the 9th of January he informed B. of his intention not to take or occupy the theater according to agreement: *Held*, that B. might treat this notice as a breach of the contract, and that the amount of the rental under the contract would be a valid set-off in an action commenced by A. against B. on the 13th of January.

5. It seems, that where a contract is broken, by a notice of renunciation, prior to the time for its performance, the damages are such as would have arisen from the non-performance of the contract at the appointed time, subject to abatement in respect to any circumstances that may afford the means of mitigating the loss.

This was an action of assumpsit [by Maurice Grau against James H. McVicker]. Defendant pleaded in defense a breach of lease and amount due thereon as a set-off. Demurrer to the plea.

Hunter & Page, for plaintiff.

Clarkson & Van Schaack, for defendant.

DRUMMOND, Circuit Judge. The questions involved in this case are of much interest and rather peculiar. The facts seem to be substantially these: That the defendant having in his possession some funds belonging to the plaintiff, was sued by him in an action of assumpsit to recover the amount, and to the declaration filed in the case the defendant alleged as a defense a contract made between him and the plaintiff on the 27th day of June, 1873, by which the plaintiff "representing" (as is interpolated in the original contract) "Messrs. C. A. Chizzola and Company," agreed to rent defendant's theater for two weeks from the 9th of February, 1874, for the Aimée Opera Bouffe Company. By the terms of the lease, the

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

theater was rented to "the said Grau" and "the said Maurice Grau" agreed to pay $2,500 a week and the further sum of twenty per cent. of the gross receipts after deducting this $2,500 per week. The $2,500 was to be paid in daily installments of $500 until $5,000 was paid. The twenty per cent. of the gross receipts was to be paid at the end of the engagement. The defendant relies upon the violation of this contract on the part of the plaintiff as a defense to the action.

The peculiarity of the case arises out of the fact that the lease was not to commence until the 9th of February, and this action was instituted by Grau against McVicker on the 13th of January. If, then, the defendant is entitled to the set-off he claims, it is upon the ground that there was a right of action on his part against Grau in consequence of the refusal of Grau to comply with his contract by giving notice to McVicker to that effect before the time when the lease was to operate had arrived.

These being the facts in the case, there are two points made on the demurrer filed to the plea of the defendant. The first is, that Grau was not personally bound by the contract of the 27th of June, 1873, but that he was the agent of other parties, who are themselves liable. I think this position is untenable under the terms of the contract. The only circumstances which show that Grau was an agent, are that it is stated he represents C. A. Chizzola and Company, and when he signs his name, he signs it: "Maurice Grau, representing C. A. Chizzola and Company." But it will be observed that the contract is made with Grau personally. He is the "manager," so named in the contract, for the Aimée Opera Troupe. The language of the contract is, "Maurice Grau, representing Messrs C. A. Chizzola and Company, manager of the Aimée Opera Bouffe Company;" and the contract states that he, Grau, is to have the privilege of giving a certain number of performances each week, and the contract shows that Grau was himself personally bound by its terms. "The said Maurice Grau, in consideration of the above, agrees to pay to the said McVicker, or his representatives, the sum of $2500," etc. So that, while he represents certain persons, and is a manager of a particular company, the theater is rented to him and he, personally, is to have the privilege of giving performances, and is to pay the various sums of money. Then the words added to the name of Grau in the contract, and also to his signature, indicate nothing more than a description of the person himself, and do not show that these were principals in the agreement, but that Grau himself was the principal with whom McVicker made the contract, and to whom, if it was violated on Grau's part, McVicker could look for the damages growing out of its non-fulfillment.

The second objection as already suggested, that inasmuch as this suit was commenced on the 13th of January, 1874, there was no complete liability on the part of Grau at that time by which McVicker could hold him responsible under the lease, conceding that he had given notice to McVicker before, that he would not comply with its terms, as it was not to begin until the 9th of February, and there was an opportunity for him to retract, or as it is called in the books, a locus poenitentiae. Some authorities declare that in law there is this locus poenitentiae, and that a party shall have a chance to recant and say, "I was wrong, but when the time comes I will perform my contract."

Undoubtedly there are authorities which declare that there can not be a breach of contract strictly so-called until the time has arrived when its performance was to commence; and so in this case, there could be no breach of this contract until after the 9th of February, 1874; because that was the date of the commencement of the contract. There are other authorities, however, which hold the contrary; and in the conflict of authority upon the subject, the question is, what is the true rule in cases of this kind? And the chief importance, perhaps, of this case is that it becomes necessary to determine in the midst of the conflict of authority upon this subject, whether in point of fact, there could be a breach of this contract, properly so-called, so as to entitle McVicker to commence an action against Grau prior to the 9th of February, 1874; and I have come to the conclusion that there may be such breach.

I think that the principles decided in the case of Hochster v. De Latour, reported in 20 Eng. Law & Eq. 157, are sound. That was a case where two parties made an agreement with each other by which one was to enter the employment of the other and to perform a contract which was to commence on a day named. The plaintiff in the action agreed to be a courier of the defendant, on the continent of Europe, for a time, commencing on the first of June. Before that time arrived the defendant had notified the plaintiff that he would not perform the contract, in other words, that he did not want him as a courier. Thereupon, before the first of June, the plaintiff commenced an action against the defendant, and recovered, and the question came up before the court of queen's bench, whether the action, under such circumstances, could be maintained. And the unanimous opinion of the court was that the action was maintainable, and on the ground that, although the time had not arrived when the contract was to commence, still, as the defendant had apprised the plaintiff that he would not perform it, the plaintiff was not bound to wait until the first of June or until the termination of the contract, it being for three months, before he brought the action. He could treat the breach as complete and recover against the defendant on the ground that there was a legal liability on the

part of the defendant to respond in damages. And the reasoning in that case, it seems to me, is very strong. It reviews the arguments upon the subject. For example, there would be just as much reason to say that the action could not be maintained until the first of September as that the action could not be maintained for a breach, prior to the first of June, because there were three months during which the service was to be performed and in one sense it could not be said that there was a complete non-fulfillment of the contract until the three months had expired. And when in that case and in this, the party who had become bound notified the other that he would not comply with his contract, he certainly ought not to complain if the other takes him at his word, for it may make a great difference to him as to what he shall do—as to other contracts he may make, whether or not that contract is binding on him. There are frequent cases where contracts run for years, and it would be unreasonable in such a case to require a party to wait all the time before he could institute an action against the delinquent person for damages. It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterward or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages. For instance, if in consequence of the discharge of a servant, or of the refusal of a person to require or receive any of the service which would take time, the servant has the opportunity of engaging in other employment, that can be shown in mitigation of damages, and one of the objections that occurred to me at the argument, I think, may not have the weight that I then supposed, namely, that the status of the parties in relation to the extent of their liability must be considered as fixed when the suit was commenced. That is not so. On the contrary it is competent to show any facts which have occurred subsequent to the commencement of the suit for the purpose of determining the amount of damages which the party can recover; or, to apply it to this case, the amount of damages which the defendant could set off or recoup. For example, this was the case of a theater leased by the defendant to Grau for a particular time. It may be that in case Grau failed to comply with his contract, the defendant could lease the theater to some one else. Now, if that could have been done, and the violation of the contract on the part of Grau did not prevent the defendant from making the lease, then that may be taken into consideration to determine the amount of damages which McVicker has sustained for the violation of the contract. If, on the other hand, the fact that McVicker entered into this contract in June, 1873, and consequently made all his arrangements upon the hypothesis that the theater was to be used by Grau during the time named in the contract, prevented him from leasing the theater to other parties during that time, and so he lost the rent, there is no reason why Grau should not be responsible for the use of the theater during the whole time, and I have come to the conclusion that the fair result of the authorities upon this subject is that prima facie upon the showing of the plea Grau is responsible to McVicker for the amount which he agreed to pay, because the inference would be, that the defendant was prevented from leasing the theater to other parties. It may be, also, that the defendant could, himself, have used the theater during that time. If so, that would be taken into consideration, but I am only considering the question now in its apparent aspect, and I think the plea prima facie is good. The language of the plea is, after setting out the contract, that he, the defendant, was ready to comply with all the conditions on his part to be performed, which were in relation to lighting the theater and printing and posting advertisements, and furnishing the orchestra, etc., "that Grau after the contract was entered into and before the 9th day of February, 1874, and before commencing this suit, to-wit, the 9th day of January, 1874, wholly refused to take, receive, occupy, and rent the said theater of the said defendant for the purpose aforesaid on or from the said 9th day of February, 1874, for the term or time aforesaid or for any other term or time, and wholly refused to perform and fulfill the said agreement on his part, and then and there wholly discharged the said defendant from said agreement and from the performance of the same and wholly and absolutely broke and put an end to his said agreement and engagement, without the consent and against the will of him, the said defendant."

Now, I think that is a complete breach of the contract, and if McVicker instead of being the defendant were the plaintiff, he would be entitled to institute a suit at once against Grau for a breach of the contract although the time of its performance had not commenced. For these reasons the demurrer to the plea must be overruled.

NOTE. Where one party to a contract refuses to perform, the other party has an immediate right of action, and need not wait for the time of performance. Cort v. Ambergate, N. & B. & E. J. R. Co., 6 Eng. Law & Eq. 230; Hochster v. De Latour, 20 Eng. Law & Eq. 157; Traver v. Halsted, 23 Wend. 66; Franchot v. Leach, 5 Cow. 506; Ripley v. McClure, 4 Exch. 345; Danube & Black Sea R. Co., etc., v. Xenos, 103, E. C. L. 152. See, also, McPherson v. Walker, 40 Ill. 371; Wolf v. Willits, 35 Ill. 89; Frost v. Knight, L. R. 7 Exch. 114; Burtis v. Thompson, 42 N. Y. 246; Crabtree v. Messersmith, 19 Iowa, 179; Holloway v. Griffith, 32 Iowa, 409.

Case No. 5,709.

In re GRAVES.

[2 Ben. 100; [1] 1 N. B. R. 237 (Quarto, 19).]

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

ASSIGNEE—SALE OF PROPERTY — POWER OF REGISTER.

Applications by assignees in bankruptcy to settle controversies under the seventeenth section of the bankruptcy act [of 1867 (14 Stat. 524)], or to sell property under the twenty-fifth section, must be made to the court, and not to a register.

[In the matter of John Graves, a bankrupt.]

In this case, the register certified to the court the question whether assignees must apply to the court for authority, if they wished to take action under the seventeenth and twenty-fifth sections of the bankruptcy act.

[2] [I, Isaiah T. Williams, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Messrs. Sanford, La Baron & Porter, who appeared for the bankrupt, and Mr. Albert Smith the assignee of the said bankrupt. The bankrupt had, shortly before the filing of his petition, purchased a quantity of carpets. The vendor conceiving that they had been bought with the fraudulent intent not to pay for them, brought replevin for them, and the sheriff took possession of the goods. The bankrupt immediately bonded them back under the provisions of the Code, and they thereupon came into the hands of the assignee. The suit is now pending, the assignee claiming now, as the bankrupt before claimed, the goods. Of course the event of the suit is uncertain, and the sureties in the bond so given by the bankrupt to procure the return of the goods, now claim that they should be protected, so far as protection is possible against loss in case of an adverse termination of the case. The parties appear before me and ask that the goods be held by the assignee to abide the result of the action, or that they be delivered over to the plaintiff in the action, and the bond of the sureties to be cancelled, or for such other relief in the premises as to the court may seem fit. I am arrested in limine by a question of jurisdiction, whether the party should not apply to the court, and not to a register. The concluding paragraph of section 17 of the act gives the assignee full power to deal with a matter of this kind, "under the direction of the court." Does the word court here mean "register," as in many other cases? I am not willing without first referring the matter to the court, to assume that it does. If your honor is of opinion that it does, I shall have no difficulty in properly disposing of the case. If not, the parties must make their application directly to the court. I think section 25 should also be construed in the same connection, and if your honor will consider both these sections, and determine what, if any of the duties in these two sections referred to devolve upon the register, it will be of much aid to us in the discharge of our duties. I think I may safely say that scarcely an hour of the day passes, in which at least one assignee does not apply to me to know what in a given case he ought to do. Doubting my jurisdiction touching such matters, I have the honor to apply to the court for instructions in the premises, as I may do under the 25th rule of this honorable court.] [2]

BLATCHFORD, District Judge. If an assignee desires to settle a controversy under section 17, or to have property sold as perishable, or because the title to it is in dispute, under section 25, he must apply to the court by petition, and not to a register. If, on the presentation of the petition on notice to any party interested, it shall appear that the matter is uncontested, the court can, under section 4, refer it to the register, with power to dispose of it.

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

[2] [From 1 N. B. R. 237 (Quarto, 19).]

GRAVES (ANDREWS v.). See Case No. 376.

GRAVES (LAWRENCE v.). See Case No. 8,138.

GRAVES (UNITED STATES v.). See Case No. 15,250.

GRAVES (WHITING v.). See Case No. 17,577.

Case No. 5,710.

GRAVES et al. v. WINTER et al.

[9 N. B. R. 357; 6 Chi. Leg. News, 284; 1 Cent. Law J. 178; 21 Pittsb. Leg. J. 159.] [1]

District Court, S. D. Mississippi. Jan., 1874.

BANKRUPTCY — KIND OF EXECUTORSHIP ADMINISTERED UNDER ACT OF 1867.

A made a codicil to his will nominating C and D his executors for the limited purpose of winding up his business (banking,) and clothing them with the necessary power to carry on the business to effect that object, without injury either to his estate or to those dealing with him as a banker. The codicil was admitted to record, and C and D qualified as such limited executors. The business was continued until the recent panic, when the executors suspended and failed to pay their depositors, and their other liabilities as bankers. A petition in bankruptcy was filed against them, which they moved to dismiss, mainly on the ground that under the powers conferred upon them by the will they are not subject to the provisions of the bankrupt act [of 1867 (14 Stat. 517)]. *Held*, that this is not one of the class of executorships designed to be administered under the bankrupt act, therefore, the petition must be dismissed at the cost of the petitioner.

[2] [From 1 N. B. R. 237 (Quarto, 19).]

[1] [Reprinted from 9 N. B. R. 357, by permission. 6 Chi. Leg. News, 284, and 21 Pittsb. Leg. J. 159, contain only partial reports.]

In bankruptcy.

F. B. Pratt, for petitioners.

Messrs. Johnston, for defendants.

HILL, District Judge. The questions presented for decision arise upon defendants' motion to dismiss the petition, praying to have them declared bankrupts as such executors, and the assets in their hands administered under the bankrupt law. Several grounds, insisted upon as sustaining the motion, are stated and relied upon, only one of which need be noticed; and that is whether or not the defendants, under the powers conferred upon them, are subject to the provisions of the bankrupt act. Richard Winter made and published his last will, which has been admitted of record, in which he devised and bequeathed to his widow, Sallie F. Winter, his estate, real and personal, and nominated her as executrix, who qualified as such. Being a private banker, he made a codicil nominating the defendants his executors for the limited purpose of winding up his banking business, and clothing them for that purpose with such powers as were necessary to carry on the business to effect that object without injury either to his estate or to those dealing with him as such banker, authorizing them to receive and pay out deposits, draw drafts and checks, collect what was due to him, and pay those to whom he was indebted as such banker. This codicil was also admitted to record, and the defendants qualified as such limited executors, and they continued the business until the panic last summer or fall, when, as is alleged, they suspended and have not resumed, failing to pay their depositors, and other liabilities as bankers. It is alleged that they have made preferred payments to different individuals. The bankrupt act embraces individuals, co-partnerships, joint stock companies and corporations of almost every class, but does not, in general, embrace trustees, such as executors, administrators and guardians, and others acting strictly in a fiduciary capacity.

This is the first case, so far as I am aware, in which executors as such, have been proceeded against under our bankrupt act, either the present or former, or who have applied for its benefits. Under the English bankrupt law there are instances in which executors who were directed by the will of the testator to carry on trade in partnership with others, or in which a specific sum has been placed in the hands of the executors to be employed in trade, and was so employed, and acts were committed falling under the bankrupt laws of individuals, co-partnerships or corporations, that the executors were held amenable to the bankrupt law, and the estate so employed distributed under the bankrupt law, but in all such cases the business was conducted, not for the purpose of winding up the business, but for the purpose of employing the capital for the acquisition of profits, and benefit of the beneficiaries under the will. A fair construction of the powers conferred upon the defendants under the will, did not authorize them to continue the business longer than they might deem necessary to a fair liquidation and settlement of the business, and no power was intended to be conferred that did not tend to that object. The reception and use of deposits might be necessary for the purpose of paying off acceptances and other obligations for which the testator, in his capacity of banker, was liable; the drawing of drafts or checks on funds in the hands of others due the testator as banker might be necessary; also the drawing of such drafts or checks on such funds in favor of creditors might become the most convenient and easy mode of settling up and liquidating the debts and credits of this banking business. The banking machinery was intended only for purposes of liquidation and settlement. This was right and proper, and not inconsistent with their duties as executors under the powers conferred by the will, and though more extended than the powers usually conferred upon executors, was not inconsistent with the object of the usual powers and duties conferred upon and intended to be attained by the appointment of and duties performed by executors.

It is insisted by petitioners' counsel that the depositors and other creditors of this banking establishment have no other sufficient remedy. In this I am of opinion there is a mistake. They are trustees, and as such are liable to be proceeded against under a creditor's bill in the chancery court of Madison county by any creditor, or if a non-resident creditor, and his demand is over five hundred dollars, in the circuit court of the United States for this district, in either of which having jurisdiction, the assets can all be marshaled and paid according to the rights of the parties, and in which every discovery may be had necessary to a full and fair collection and appropriation of the assets. This is certainly so as it relates to the banking assets and liabilities; how far the estate, in the hands of Mrs. Winter, may be reached, it is not necessary now to determine. In considering the whole case as presented by the petition and exhibits, I am satisfied that this is not one of the class of executorships designed to be administered under the bankrupt act, and therefore feel constrained to sustain the motion, and dismiss the petition at petitioners' cost.

GRAVES, The WILLIAM T. See Cases Nos. 17,758 and 17,759.

Case No. 5,711.

GRAVIER v. NEW ORLEANS.

[See 11 Mart. (La.) 620.]

Case No. 5,712.

GRAY et al. v. CALL et al.

[2 Hask. 242.] [1]

Circuit Court, D. Maine. April, 1878.

EQUITABLE RELIEF—CLOUD ON TITLE—REMEDY AT LAW.

Relief in equity cannot be had, in Maine, to remove a cloud from the title to land, caused by an invalid levy, inasmuch as a plain, adequate, and complete remedy at law is provided by Rev. St. Me. c. 104, § 6.

In equity. Bill by the tenants in possession of land in Maine, to remove a cloud from the title arising under a levy of execution thereon, invalid for irregularity. The respondents demurred for want of equity, and because of a plain, adequate, and complete remedy at law.

Hanno W. Gage and Sewall C. Strout, for orators.

Albert P. Gould, for respondents.

Before CLIFFORD, Circuit Justice, and FOX, District Judge.

FOX, District Judge. The respondent, Emma P. Call, demurs to this bill, which is brought to quiet the title to a parcel of real estate in this district, of which the complainants allege they are tenants in common with all the respondents, save Mrs. Call, who has levied on the premises as the estate of Moses G. Call.

The allegations in the bill are, that on the fifteenth of April, 1872, Mrs. Call commenced a libel for divorce against her husband and attached thereon all his real estate; that this attachment was dissolved April 7, 1873, by an amendment to the libel, setting forth new grounds for divorce upon which she relied and obtained her divorce; that April 7, 1876, a decree for $5,000 was made on said libel in her behalf for the support of her infant child; that execution issued thereon June 27, 1876, and an alias execution November 1, 1876, which was levied on the premises.

The title of complainants under Call occurred after the attachment and before the levy; and the bill charges, that the attachment was dissolved by the proceedings on said libel, and by the neglect to seize and levy on the estate within thirty days after judgment; that they are in possession of the premises, but that the levy is a cloud on complainants' title; and they ask for relief.

Upon one ground, at least, we think the demurrer is well taken; and that is, the complainants have a plain, adequate, and complete remedy at law; and in such case, the bill can not be sustained. Clouston v. Shearer, 99 Mass. 209, and cases there cited.

By Rev. St. Me. c. 104, § 6, it is enacted that "every person alleged to be in the possession of the premises demanded in such writ, claiming a freehold therein, may be considered a disseizor for the purpose of trying the right; but the defendant may plead in abatement, but not in bar, that he is not tenant of the freehold; * * and he may show that he was not in possession of the premises when the action was commenced, and disclaim any right, title or interest therein, and proof of such fact shall defeat the action."

If the complainants had adopted this course and instituted their suit at law, the title to the premises could have been fully determined therein between themselves and Mrs. Call, either by her disclaimer, which would have fully and effectually established complainants' title, or by the judgment which would have been rendered after a trial upon the merits.

It may be urged, that in such an action, when the plaintiff is himself actually in possession of the premises demanded, an allegation of a possession by the defendant is false; but the same objection would apply whenever a party other than the defendant is in possession; and in actions of ejectment, from the earliest times, fictitious and untrue averments have always abounded.

The purpose of this statute was to afford a remedy at law to determine the title of land, the equity powers of the supreme judicial court being quite restricted; and we see no good reason for depriving one in possession of a lot of land, and whose title is disputed, from adopting this course against another party making claim to the same estate, as the plaintiff, in the action at law, is liable for costs if the defendant is not in possession and shall disclaim all interest in the premises in the early stage of the suit. We regret not to find that this statute has received a construction by the supreme judicial court of Maine, as in that case, we should have readily adopted it.

In the opinion of the court, the complainants could have availed themselves of this remedy to determine their rights, and there was no occasion for them to resort to equity. Demurrer sustained. Bill dismissed, with costs.

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

Case No. 5,713.

GRAY v. CHICAGO, I. & N. R. CO.

[Woolw. 63.] [1]

Circuit Court, D. Iowa. May Term, 1864.

PROCEEDINGS TO PUNISH CONTEMPT—BY MOTION TO COMMIT—NOTICE NECESSARY—ORDER GRANTED WITHOUT NOTICE DISCHARGED—INJUNCTIONS IN VACATION, AND WHEN THEY EXPIRE—SOLELY STATUTORY.

1. The proper practice to punish for contempt in violating an injunction, is by motion to commit, upon proper notice to the parties proceeded against.

[Cited in U. S. v. Anon., 21 Fed. 767.]

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

2. The rule requiring notice is salutary, and will not be relaxed by this court.

[Cited in Industrial & Mining Guaranty Co. v. Electrical Supply Co., 7 C. C. A. 471, 58 Fed. 737.]

3. An order of arrest issued without such notice will be discharged on motion.

4. In courts exercising equitable jurisdiction, injunctions are allowed by the judge in vacation solely under the authority of a statute.

5. An injunction allowed by a district judge, by virtue of the power conferred upon him by the act of February 13, 1807 (2 Stat. 418), expires at the commencement of the term next succeeding its allowance.

[Cited in Fanshawe v. Tracy, Case No. 4,643.]

6. The 55th rule in equity does not remove the limitation. The terms of the rule, rightly construed, do not remove the limitation. If they did, as the rule would then operate a repeal of the statute, it would be in excess of the authority of the court to establish it.

7. The judges of the supreme court have power to grant injunctions in vacation, which do not expire with the vacation.

This was a bill in chancery, filed to enjoin the defendant [the Chicago, Iowa & Nebraska Railroad Company] from erecting a bridge across the Mississippi river at Clinton, Iowa. The plaintiff, during the summer vacation, procured from the district judge an order allowing the injunction as prayed for. The writ was accordingly issued, and was duly served upon the officers of the defendants, previous to the October term of the court. At that term, no orders or other proceedings were had in the case. Since that term, the defendants having proceeded with their enterprise, notwithstanding the command of the writ, the plaintiff, without notice to any other party concerned, presented in the vacation, to the district judge, an affidavit showing a violation of the injunction, and procured from him an order directing the clerk to issue a writ of attachment for the arrest of the persons guilty of the alleged disobedience, with bail for their appearance at the next term, and requiring them to answer for their contempt at that time. The parties arrested now moved to discharge the attachment, on the ground that it was irregularly issued.

Mr. Nourse, for the motion.

Mr. Grant, contra.

MILLER, Circuit Justice. The proper and regular course for proceeding against persons who are alleged to have committed a contempt of the court in disobeying the command of a writ of injunction, is by motion to commit. The party proceeded against must have due and reasonable notice of this motion before it should be granted. An opportunity to be heard must be given before the party can be deprived of his liberty. In these two particulars these proceedings were irregular: First, that no formal hearing of the charge and the answer thereto, upon motion duly made, was had; and secondly, no notice of the application was given to the parties charged.

The charge of a deliberate and intentional violation of a writ of injunction, duly served, is a very grave one. It is within the power of the court to punish a party found guilty of such an offence with imprisonment; a circumstance which does not diminish the gravity of the charge.

The rule which requires notice to the party charged, of proceedings which may result in such serious consequences, is salutary. It will not be relaxed by this court. This rule has been violated here, and the order was unauthorized. The motion is sustained, and the prisoners will be discharged.

The plaintiff, upon an affidavit showing a violation of the injunction by the persons there charged, moved that they be committed.

Mr. Grant, for the motion.

Mr. Nourse and Mr. Witherow, contra.

MILLER, Circuit Justice. Under the course of practice in the English chancery, a writ of injunction could not formerly issue, except upon an order of the court in term. But inasmuch as, to be of any avail, the writ is often required to be issued speedily, and the various courts in the United States exercising chancery jurisdiction are generally in session only a part of the year, at regular terms, and have corresponding vacations, it was found necessary to remedy by legislation the evils thus arising. Accordingly all the states of the Union have statutes providing that the judges, and, in some instances, other officers, may allow the writ in vacation. It is by virtue of these statutes that all writs of injunction which are allowed during vacation are issued.

The act of congress, which is almost coeval with our federal judiciary, authorized the justices of the supreme court, in proper cases, to allow such writs in vacation.

The district judges, although as fully judges of the circuit courts as the justices of the supreme court, had no power to grant writs of injunction out of term, until the act of congress, approved February 13, 1807. 2 Stat. 418. This act, however, imposed two limitations upon their exercise of this power. One was in any case where a party had had a reasonable time to apply to the circuit court for the writ; the other declared that the injunction thus granted should expire at the commencement of the next term of the circuit court succeeding its allowance, unless continued in force by an order of the court.

As no such order was made in the present case, at the last term of this court, it is obvious that no injunction was in existence when these parties are charged to have violated it, unless its continuance can be shown otherwise than by the statute just referred to.

The plaintiff's counsel claims that the 55th equity rule furnishes such authority. That rule, after prescribing some of the circumstances required as pre-requisites to granting in-

junctions, says: "In every case where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court."

It is argued that as no order of the court to dissolve such an injunction can be had until the next term after it is granted, the last clause can have no meaning unless it be, that the injunction must remain until dissolved either by order of the court or by the judge who granted it. And the author of the treatise referred to (Conk. Pr. 218) proposes to read "and" for "or" in support of this view.

This, however, only transfers the difficulty to the other member of the sentence, and renders the words "until the next term of this court" useless; for, if the injunction is to continue, at all events until dissolved by order of the court, there is manifestly no sense in saying that it shall continue until the court sits.

There is a still more serious objection to this construction of the rule, namely, that it would amount to a repeal of the statute. Were it necessary to decide the point, we should feel bound to hold that, notwithstanding the liberal provisions of the act of 1842 [5 Stat. 516], under which these rules were framed by the supreme court, that court derived from them no authority to make any rule which would conflict with an act of congress. Ward v. Chamberlain, 2 Black [67 U. S.] 430.

But the necessity of deciding this point does not arise here. By a reference to the two acts of congress already cited, conferring on the judges of the supreme court, and on the district courts respectively, the power to grant injunctions, the sentence may be relieved of its apparent incongruity.

The justices of the supreme court have power to grant injunctions which do not expire by the commencement of the next succeeding term. To injunctions thus granted, the latter part of the rule applies, namely, that they continue until dissolved by some other order of the court.

To injunctions granted by the judges of the district courts, the other alternative of the disjunctive sentence applies, merely reiterating the provision of the statute, that they continue only until the next term of the court, unless otherwise ordered by the court. Thus, when we suppose the framer of the rule to have had the statutory provisions in his mind (and no other supposition can be indulged), and that the rule was made in view of it, instead of to repeal it, the sentence becomes intelligible and harmonious in its own members and with the acts of congress.

We are therefore of opinion, that there was no injunction in existence at the time the acts which are alleged to have violated it were performed. The motion to commit must be overruled. Motion overruled.

NOTE. As to the extent of the power of the supreme court to prescribe rules, and their force in connection with provisions in the statutes, see Burr v. Haughton, 9 Pet. [34 U. S.] 360, commented on and distinguished in Ward v. Chamberlain, cited in the text; The St. Lawrence, 1 Black [66 U. S.] 522; Scott v. The Young America [Case No. 12,550]; Keary v. Farmers', etc., Bank, 16 Pet. [41 U. S.] 89; Massingell v. Downs, 7 How. [48 U. S.] 760. And as to the control of the circuit court over its own practice—(1) When a rule has been prescribed by the supreme court, see Bank of U. S. v. White, 8 Pet. [33 U. S.] 262. (2) When such rule would work an injustice. Poultney v. City of Lafayette, 12 Pet. [37 U. S.] 472. (3) When supreme court has prescribed no rule, Burr v. Haughton, 9 Pet. [34 U. S.] 329; Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 448; Fulerton v. Bank of U. S., 1 Pet. [26 U. S.] 604, 612.

[In the same suit a motion was made to dismiss the bill for want of jurisdiction. A decree was entered accordingly, but not for the reason alleged in the motion. Case No. 2,900. Since the erection and completion of the bridge, congress had passed an act declaring it a lawful structure. It was decided, upon an appeal by the complainants to the supreme court, in an opinion by Mr. Justice Nelson—10 Wall. (77 U. S.) 454—that the suit in equity, although pleas and replication had been filed and proofs taken, was abated by such act, which was constitutional.]

GRAY v. CLINTON BRIDGE. See Case No. 2,900.

Case No. 5,714.

GRAY v. COFFMAN.

[3 Dill. 393; 1 Cent. Law J. 326.][1]

Circuit Court, D. Kansas. 1874.

WYANDOT INDIANS — CONSTRUCTION OF TREATY — INDIAN WILLS—DEVISE OF "FLOAT"—DESCENT OF PROPERTY.

1. The treaty of March 17, 1842 (7 Stat. 608, § 14), and of January 31, 1855 (10 Stat. 1159), between the United States and the Wyandot Indians in respect to the grant to members of the tribe, of a right to select and locate a section of land, construed.

[Cited in Elk v. Wilkins, 112 U. S. 100, 5 Sup. Ct. 44; Wau-pe-man-qua v. Aldrich, 28 Fed. 498.]

2. The treaty of 1855 requires the patent to issue in the name of the reservee, though, if he be dead, the selection may be made by his "heirs or legal representatives," to be determined by the laws, usages and customs of the tribe. Whether a patent issued in the name of the heirs of the reservee is void, quaere?

[Cited in U. S. v. Payne, Case No. 16,014; Kennedy v. Indianapolis, C. & L. R. Co., 3 Fed. 100.]

3. A will of the right to this "float" made and executed according to the laws of the tribe, and proved and allowed by the proper tribunal of the tribe, is valid and will be respected by the civil courts. See Mackey v. Coxe, 18 How. [59 U. S.] 100.

4. Relation of the Wyandot Indians to the civil laws of the territory of Kansas, in respect to the disposition of property before and after the treaty of 1855. considered.

This is an action of ejectment [by Panela Gray against Jacob Coffman] for lands situate in Lyon county, in the state of Kansas. The case was tried upon testimony submitted

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

to the court, a jury having been waived. The evidence was voluminous, but the material facts sufficiently appear in the opinion of the court.

R. M. Ruggles and Clough & Wheat, for plaintiff.

Wilson Shannon, W. P. Montgomery, and E. S. Waterbury, for defendant.

DILLON, Circuit Judge. To determine the title to the land here in controversy involves the necessity of deciding several novel and highly interesting questions. The plaintiff claims title under a patent dated the 3d day of May, 1861, reciting the treaties of 1842 and 1855, below mentioned, between the United States and the Wyandot Nation of Indians, and which patent was issued to the heirs of John Hicks. John Hicks was a Wyandot Indian.

It is necessary briefly to refer to the history of the Wyandot tribe and of their removal to Kansas. In 1825 the Kansas Indians ceded, with the exception of a limited reservation, this country to the United States. 7 Stat. 244. In 1830 congress adopted the policy of causing Indian tribes residing east of the Mississippi to be removed to specified reservations west of the Missouri. 4 Stat. 411. The Wyandot Indians were the last tribe in Ohio which ceded their reservation in that state to the United States. This was done in 1842 by the treaty of Upper Sandusky, of March 17th of that year. 7 Stat. 608. By the 14th section of that treaty, the United States agree to grant to the above named John Hicks, to his heirs, and to thirty-five other specified persons of the Wyandot nation, one section of land each: "The land hereby granted is to be selected by the grantees, surveyed and patented at the expense of the United States, but never to be conveyed by them or their heirs without the permission of the president of the United States."

The next year, 1843, the Wyandot Indians, including John Hicks, removed to their reservation in Kansas. Here he lived with the tribe until 1853, when he died. On the 10th day of January, 1853, a short time before his death, he made his last will in writing. It was drawn up with all the usual formalities of such instruments, by Governor William Walker, an educated Wyandot Indian, attested by him and signed by the testator. The third clause of this will is in these words: "I will and bequeath unto my sons, Francis A. Hicks, and John Hicks, Jr. the section of land granted to me by the treaty of Upper Sandusky, dated March 17th, 1842." This instrument is produced and bears upon it this endorsement: "The within will and testament was read in open court, and allowed probate and ordered recorded. Wyandot Council, February 16th, 1853. John D. Brown, Principal Chief. Joel Walker, Clerk pro Tem."

It is indisputably established by evidence aliunde that the will was presented to the Wyandot council at that date, and was regularly allowed by it as the will of John Hicks, Sr. These devisees, John Hicks, Jr., and Francis A. Hicks, were the only living children of John, Sr. but there were then living grandchildren by two of his deceased children.

On the 31st day of January, 1855 (10 Stat. 1159), another treaty was made with the Wyandot Indians, which was ratified March 1st of that year. The first article states that "The Wyandot Indians having become sufficiently advanced in civilization, and desirous of becoming citizens, it is hereby agreed and stipulated that their organization and their relations to the United States as an Indian tribe, shall be dissolved and terminated on the ratification of this agreement, except so far as the further and temporary continuance of the same may be necessary in the execution of some of the stipulations herein; and from and after the date of such ratification the said Wyandot Indians, and each and every one of them, except as hereafter provided, shall be deemed, and are hereby declared to be, citizens of the United States, to all intents and purposes; and shall be entitled to all the rights, privileges and immunities of such citizens and shall in all respects be subject to the laws of the United States and the territory of Kansas, in the same manner as other citizens of said territory; and the jurisdiction of the United States and of said territory shall be extended over the Wyandot country in the same manner as over other parts of said territory." Then follows a declaration excepting, for the time, from the above provision as to citizenship, such Indians as may apply for it.

The treaty makes provision for the survey, platting and partition of their reservation, and for lists of the members of the tribe, divided into three classes: 1st, of those who are able to control and manage their affairs and interests. 2d, those who are not. 3d, orphans, idiots and insane persons. Lists of the second and third classes were to be furnished by the Wyandot council, under whose supervision and guardianship the treaty continues them.

The eighth article of the treaty defines the persons entitled to money and lands thereunder "to be such only as are actual members of the Wyandot Nation, their heirs and representatives, and as are entitled to share in the property and funds of the said Nation, according to the laws, usages and customs thereof."

Article 9, which is important, is in these words: "Each of the individuals to whom reservations are granted by the 14th article of the treaty of March 17, 1842 (of Upper Sandusky), or their heirs or legal representatives, shall be permitted to select and locate said reservations, on any government land west of Missouri and Iowa subject to pre-

emption and settlement; said reservations to be patented by the United States in the names of the reservees; and the reservees, their heirs and proper representatives, shall have the unrestricted right to sell and convey the same; but in cases where any of the said reservees may not be sufficiently prudent and competent to manage their affairs in a proper manner, which shall be determined by the Wyandot council, or where any of them have died, leaving minor heirs, the said council shall appoint proper and discreet persons to act for such incompetent persons and minor heirs in the sale of the reservations, and the custody and management of the proceeds thereof; the persons so appointed to have full authority to sell and dispose of the reservations, and to make and execute a good and valid title thereto."

On the 30th day of May, 1854—the year preceding this treaty—congress passed the act organizing the territory of Kansas [10 Stat. 277], but previous to this the public lands therein had been thrown open to pre-emption and settlement, and these Wyandot "floats," by which 640 acres could be secured for town sites, instead of 320 acres, were in great request. Francis A. Hicks, one of the devisees of the John Hicks "float," died August 16, 1855, a few months after the treaty of that year, leaving children and grand-children. He made a will on the 7th day of August, 1855, and therein directs "the one-half of the section of land willed to him by his father, under the treaty of March 17, 1842, to be sold, and the avails thereof to be applied to the liquidation of his debts and liabilities," and appoints Joel Walker his executor.

Now at the date of the death of Francis A. Hicks, on the 16th day of August, 1855, no statute of descent or wills had yet been passed by the territorial legislature of Kansas. The council still continued to act, and the will of Francis A. Hicks was admitted to probate September 25, 1855, the executor gave bond, and was authorized by the council to act as such. Subsequently, to-wit, January 5, 1863, the will was presented to the regular probate court of Wyandot county, and proved and allowed, but without any notice being published or otherwise given, so far as appears of record. Joel Walker, the executor of Francis A. Hicks, pursuant to directions in his will, sold the testator's undivided half of his 640 acre "float" to Jacob Ulrich for $1,000, and reduced the contract to writing. Ulrich located the float on the land in question, which was approved, and the patent issued, as above mentioned, May 3, 1861, "to the heirs of John Hicks," Sr. Subsequently, conveyance was made to Ulrich's estate, for this interest, and the heirs of Ulrich conveyed the land in question to the defendant.

The plaintiff claims a title through conveyance from grandchildren of John Hicks, Sr. who, if his will and the will of Francis A. Hicks are valid, had no title. In other words, the right of the plaintiff to recover is based upon the proposition that these two wills are nullities; that, though made, executed and probated according to the laws, customs and usages of the Wyandot Nation of Indians, to which they belonged, these instruments have, in law, no legal effect in determining the rights of the parties.

The Wyandot Indians, before their removal from Ohio had adopted a written constitution and laws, and among others, laws relating to descent and wills. These are in the record, and are shown to have been copied from the laws of Ohio, and adopted by the Wyandot tribe, with certain modifications, to adapt them to their customs and usages. One of these modifications was that only living children should inherit, excluding the children of deceased children, or grand children. The Wyandot council, which is several times referred to in the treaty of 1855, was an executive and judicial body, and had power, under the laws and usages of the nation, to receive proof of wills, etc.; and this body continued to act, at least to some extent, after the treaty of 1855.

The first question arises under the patent. The treaty of 1855 required the patent to be issued in the name of the reservee. The patent of May 3, 1861, was in fact issued not to John Hicks, the reservee, but to the heirs of John Hicks. If it had been issued in the name of John Hicks, though he was then dead, it would, under the act of 1836, have inured to his heirs, devisees, or assignees. 5 Stat. 31. What is the effect of its being issued as it was to the heirs of John Hicks? The plaintiff contends that the patent was rightfully issued, and that under it the heirs of John Hicks take by purchase. That to ascertain who are his heirs, resort must be had, not to Indian laws, but to the laws of Kansas at the time, and that the legal effect of the patent is the same as if the children or heirs of John Hicks, Sr. had been named therein, which, if true, would cut off the rights of the creditors, devisees or assignees of John Hicks, Sr.

On the other hand the defendant insists, inasmuch as it is true, that if the patent is valid, the heirs of John Hicks take by purchase, that the patent is void because it was not issued, as the treaty specifically required, in the name of the reservee.

The issuing of a patent is a ministerial act, and a patent issued without authority is void. I am inclined to think that the departure of the patent in respect to the name of the grantee from the requirements of the treaty is material, and that the patent is therefore a nullity. The effect of this would be that the legal title is still in the United States, and, of course, the plaintiff could not recover in ejectment. But this point I leave undetermined, preferring to rest my judgment upon the ground that under the circumstances, the court must give effect to the well established laws, customs, and usages of the Wyandot tribe of Indians in respect to the disposition

of property by descent and will. John Hicks, Sr. had a valuable right given by the treaty of 1842—a right to select and locate 640 acres of land—not land but a "float," or right to land. He died in 1853, within the limits of what afterwards became the territory of Kansas. There is no national law of descent and wills, none regulating the rights of members of Indian tribes. The treaty of 1855 recognizes and provides in several places for the rights of heirs or legal representatives of the reservees under the treaty of 1842. These must mean heirs and legal representatives "according to the laws, usages and customs" of the tribe. See articles 8 and 9 of the treaty of 1855.

The government was aware that between 1842, when the right was given, and 1855, when the second treaty was made, that some of the reservees had died, and it provided carefully for this contingency by authorizing their heirs or legal representatives to select and locate the section of land. It is hardly possible to suppose that congress meant to refer to the law of Missouri territory of 1815, to ascertain who were the heirs or legal representatives of the deceased reservees. There is but one way to determine this, and that is by the laws, customs and usages of the tribe. If this is so, then the will of John Hicks, Sr. made and allowed in 1853, was valid and gave the right to his sons, John, Jr. and Francis A. If the will of the elder Hicks is valid, so likewise is the will of Francis A. whose death occurred previous to the enactment of any statute of wills or descents in Kansas, but after the ratification of the treaty of 1855. The dates are as follows: The treaty was ratified March 1st, 1855; Francis A. Hicks died August 16, 1855; the territorial statute of Kansas concerning wills was approved August 30, 1855 (Laws Kan. 1855, pp. 753, 761). The will of Franc's A. Hicks was admitted to probate by the Wyandot council Sept. 25, 1855. If the foregoing views are correct, the will of Francis A. Hicks was valid when he died, because it conformed to the laws and usages of his tribe, and there were no laws either of the United States or the territory of Kansas upon the subject.

Passing the question whether it is necessary to valid action by an executor under a will, that his appointment should be ratified by some court with probate powers, the only remaining inquiry would be, must Indian wills, after the ratification of the treaty of 1855, be presented to and allowed by the civil tribunals, before acts done thereunder and authorized thereby can be treated as valid?

Notwithstanding the broad language of the first article of the treaty of 1855 as to the dissolution of the tribal relation of the Wyandot Indians, and as to their becoming citizens of the United States and subject to its laws and the laws (prospective) of the territory of Kansas, it is evident from a view of the whole treaty, that their property rights were regulated by it, and that the Wyandot council, which was a tribunal with executive and judicial functions, was still to continue in force, at least for a time.

Francis A. Hicks died, leaving a will made and executed in due form, according to the laws of the tribe, before there were any laws of Kansas on the subject of the descent of property or of wills. The Wyandot council with jurisdiction over wills, continued to act. Wills which would be formal and valid by the laws or usages of the tribe, might be, and probably would be, informal when tested by territorial laws subsequently enacted. The foregoing views find strong if not, indeed, full support in the case of Mackey v. Coxe, 18 How. [59 U. S.] 100.

I am of opinion, therefore, that both wills are valid, and that the plaintiff, whose case rests upon the hypothesis of their nullity has no title to the land in controversy. Accordingly, there will be a judgment for the defendant. Judgment for defendant.

See Hicks v. Buttrick [Case No. 6,458], and Mungosah v. Steinbrook [Id. 9,924].

GRAY (COLLINS v.). See Case No. 3,013.

Case No. 5,715.

GRAY v. DAVIS et al.

[1 Woods, 420.] [1]

Circuit Court, W. D. Texas. Jan. Term, 1871.[2]

OBLIGATION OF CONTRACT—SUIT AGAINST A STATE—DUTY OF RECEIVER OF RAILWAY COMPANY—LAND GRANTS—CHARTER.

1. An act of the legislature of Texas whereby a railroad company was incorporated and a grant of lands made on certain conditions to be performed by the company is a contract between the state and the company within the meaning of section 10, art. 1 of the constitution of the United States.

2. A provision of the constitution of Texas adopted subsequently to the passage of such an act, annulling it, impairs the obligation of the contract, and is therefore void.

[Cited in Grand Lodge of State of Louisiana v. City of New Orleans (La.) 11 South. 151.]

3. The state of Texas granted lands to a railroad company on certain conditions which the company performed. A provision in a new constitution of the state purported to annul the grant, and the governor commenced signing patents to private parties for lands included in the grant: *Held*, that a bill in equity filed against "Edmund J. Davis, Governor of Texas" to restrain him from issuing patents for lands included in the grant, is not a suit against the state of Texas within the meaning of article 11 of amendments to the constitution of the United States.

[See note at end of case.]

4. When G., a citizen of the state of New York, was appointed by a court of competent jurisdiction receiver of the property of a railroad corporation created by the laws of Texas,

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

[2] [Affirmed in 16 Wall. (83 U. S.) 203.]

and domiciled in that state, the circuit court of the United States for the Western district of Texas had jurisdiction of a suit brought by such receiver against citizens of that district.

[Cited in Merchants' Nat. Bank v. McLeod, 38 Ohio St. 174; Miller v. Sunde (N. D.) 44 N. W. 302.]

5. The receiver of the property and effects of a railroad corporation appointed by a court of equity represents the creditors of the corporation, so that in a suit brought by the receiver to protect the property of the company, the creditors are neither proper nor necessary parties.

This was a bill in equity filed by John A. C. Gray, a citizen of the state of New York, receiver of the Memphis, El Paso and Pacific Railroad Company against Edmund J. Davis, governor of Texas and Jacob Kuechler, commissioner of the general land office of Texas, both citizens of Texas. The case was argued and submitted on demurrer to the bill.

A. J. Hamilton, E. M. Pease, and Gray & Davenport, for complainant.

Wm. Alexander, Atty. Gen. of Texas, for defendants.

Before WOODS, Circuit Judge, and DUVAL, District Judge.

WOODS, Circuit Judge. This cause having been submitted on demurrer to the bill, all the facts well pleaded by the bill are for this hearing to be taken as true. The bill alleges, in substance, that, on the 4th day of February, 1856, the legislature of the state of Texas passed an act to incorporate the Memphis, El Paso and Pacific Railroad Company, and providing that all vacant lands within eight miles on each side of the extension line of said railroad should be exempt from location or entry from and after the time when such line should be designated by survey, recognition or otherwise; that the lands so exempted should be surveyed by said company, at its own expense, and the odd sections thereof reserved for the company, and the even sections for the use of the state; that upon the grading of successive sections of said road, it should be the duty of the commissioner of the general land office of the state to issue to the company, in its corporate name, eight certificates for 640 acres of land each for each mile so graded, and upon the completion and equipment of successive sections, to issue eight other certificates of 640 acres each, for each and every section so completed and equipped, said certificates to be located upon the odd sections within said reservation, or upon any other vacant and public land in the state, not reserved to the state, or some other corporation, and patents to be issued thereon; that, in reliance upon the grants and guaranties aforesaid of the state of Texas, and in pursuance of the said act of incorporation, the said Memphis, El Paso and Pacific Railroad Company was, in the said year 1856, duly organized, and accepted said grant and reservation; that on or before March 1st, 1860, the company had designated its line of road to the general land office, from the eastern boundary of Texas to El Paso, and surveyed, sectionized, and numbered the sections and fractional sections of vacant land within said reservation, from the eastern line of the state to the Brazos river, which said surveys were duly filed with the commissioner of the general land office; and that said surveys were of great value to the state, and made at a cost to the company of more than one hundred thousand dollars; that the company, after its organization as aforesaid, proceeded to grade its road and roadbed, and in or before the year 1861, the said road was completely graded and ready for the iron rails a distance of sixty-five miles westward from Moor's landing, in the county of Bowie; that the rights and franchises granted to said company have never been forfeited, the legislature having extended, from time to time, the period for the performance of conditions precedent by the company, and the said legislative acts having been recognized by the constitutional convention of the state of Texas by ordinance, ratified in July, 1869; that sundry holders of land certificates other than those granted to said company have located and surveyed under their certificates great quantities of land within and forming a part of said reservation, and have made returns thereof to defendant, Kuechler, commissioner of the general land office, and have made application for patents therefor, and that sundry of the said patents have been signed by said Kuechler as commissioner, and his excellency Edmund J. Davis, as governor, notwithstanding the protest of said company, and said land commissioner and governor avow their intention to issue and execute patents for all certificates located and surveyed within said reservation, unless prevented and restrained therefrom by process of law. The prayer of the bill is that the said company may be confirmed in its rights to said reservation and grant, and that defendants may be restrained by injunction from further interference with or infringement of said land grant and reservation, and from issuing, or causing to be issued, any patent or grant of the lands of said reservation, except to said company, or to the holders of certificates issued to the same. This, in brief, is the case made by the bill. It is, in our opinion, difficult to imagine one more clearly demanding the equitable interference of this court, unless there be some technical obstacle to prevent. The act of incorporation and the land grant was a contract. It was between parties competent to contract, and made upon a valuable consideration. On the part of the company the contract has been in part performed at great expense to itself and great advantage to the state. To allow the state to recede from the contract would be to sanction a most unjust and oppressive proceeding.

In Fletcher v. Peck, 6 Cranch [10 U. S.] 137, it was held by the supreme court that a

grant of lands by the authority of the state to a citizen was a contract. It has been held by the same court that a legislative act declaring that certain lands which should be purchased for the Indians should not thereafter be subject to any tax constituted a contract which could not be rescinded by any subsequent legislative act. New Jersey v. Wilson, 7 Cranch [11 U. S.] 166. The 60th section of an act of the general assembly of Ohio, passed in 1845, declaring that each banking company organized under the act should semiannually set off to the state 6 per cent. of its net profits, which sum so set off shall be in lieu of all taxes to which the bank or its stockholders would otherwise be subject, was held to be a contract between the state and the bank. State Bank of Ohio v. Knoop, 16 How. [57 U. S.] 369; Jefferson Branch Bank v. Skelley, 1 Black [66 U. S.] 436; Ohio Life & Trust Co. v. Debolt, 16 How. [57 U. S.] 432; Mechanics' & Traders' Bank v. Debolt, 18 How. [59 U. S.] 380. In the case first cited the court says: "Every valuable privilege given by a charter, and which conduced to an acceptance of it, and an organization under it, is a contract, which cannot be changed by the legislature when the power to do so is not reserved by the charter." It is unnecessary to cite further authority to show that the charter and grant to the Memphis, El Paso and Pacific Railroad Company is a contract. Being a contract, its obligation cannot be impaired by the state. On this point the current of authorities is unbroken. Fletcher v. Peck, 6 Cranch [10 U. S.] 137; New Jersey v. Wilson, 7 Cranch [11 U. S.] 166; State Bank v. Knoop, 16 How. [57 U. S.] 369; Jefferson Branch Bank v. Skelley, 1 Black [66 U. S.] 436; Terrett v. Taylor, 9 Cranch [13 U. S.] 43; Bronson v. Kinzie, 1 How. [42 U. S.] 311; McCracken v. Hayward, 2 How. [43 U. S.] 608; Von Hoffman v. Quincy, 4 Wall. [71 U. S.] 535. And it is immaterial whether the law impairing the obligation of the contract is an ordinary act of legislation or is embodied in the organic law of the state. It would be a strange construction of this constitutional provision which would forbid a state to pass an act by its legislature, and yet allow the same provision to be permanently embedded in its jurisprudence, by the enactment of a constitutional convention. It is not a particular manner of doing the thing, but the thing itself which is prohibited. In the case of Dodge v. Woolsey, 18 How. [59 U. S.] 331, the act repealing that portion of the charter of the bank which prescribed the method and limit of taxation, was founded on an express provision of a new constitution of the state, adopted after the passage of the bank charter. But the supreme court held that the fact that the people had, in 1851, adopted a new constitution, in which it was declared that taxes should be imposed upon banks in a mode different from that prescribed by their charters could not release the state from the obligations and duties imposed by the constitution of the United States.

In the case of Ohio Life & Trust Co. v. Debolt, 16 How. [57 U. S.] 429, Chief Justice Taney says: "Banks and other companies may be exempted by legislative contract, from their equal share of the taxes, under the belief that the corporation will prove a public benefit. Experience may prove that it is a public injury, yet if the contract was within the scope of the authority conferred by the constitution, it is like any other contract made by competent authority, binding upon the parties." Now can the people or their representatives by any act of theirs, impair the obligation of the contract without the consent of the other party to the same? We may assume then, that the state of Texas having entered into the contract with the railroad company set forth in the bill, no act or ordinance passed either by the legislative body or a constitutional convention can impair its obligation. In other words, the charter and grants are still in full force and effect, and binding upon the state, its officers and people.

The point is made by the demurrer, that this is in effect a suit against the state of Texas, and that an action against a state is prohibited by the eleventh amendment to the constitution of the United States. It would seem a sufficient reply to this, to say that the suit is not in fact a suit against the state. It may affect the interests of the state, but the state is not a party and therefore does not fall within the constitutional prohibition. If we are right in the views we have expressed as to the binding efficacy of the charter and grant to the railroad company, and the absolute nullity of any state law or constitution impairing its provisions, then the case stands thus: the defendants, officers of the state, are undertaking without authority of law to impair and deny the rights of the company, and to inflict irreparable mischief upon it, and threaten to continue this line of conduct. The law of the state granting the reservation of land to the company stands unimpaired and in full force; it is the expressed will of the state unrepealed and unchanged by any valid enactment, and these defendants without authority of law are undertaking to deprive the company of its rights under the law. The case of Dodge v. Woolsey, supra, was a bill in equity filed by Woolsey to restrain an officer of the state of Ohio from collecting taxes which he alleged to be due the state. The complainant complained that the bank in which he was a stockholder was not liable to pay the amount of taxes claimed by the officer. The officer was acting under what purported to be a law of the state prescribing his duties, and the taxes when collected, would in part be the property of the state. The state was therefore directly interested, and the officer had no personal interest in the controversy; yet in that

case the court held that a stockholder had a remedy against individuals in whatever character they professed to act, if the subject of complaint was an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there was not an adequate remedy at law. Suppose there had been no change in the policy of Texas respecting land grants to railroads; that in 1860, for instance, when this grant to the Memphis, El Paso and Pacific Railroad was admitted on all hands to be in full force, the governor and commissioner of the general land office had undertaken to locate certificates upon this railroad reservation, could there be a doubt that they might have been restrained at the instance of the company, and that a suit instituted for that purpose would not have been a suit against the state, but a suit against the officers? According to the view we take of this case, that is precisely the predicament in which the matter stands. The officers are acting without sanction of law, in violation of law, to the injury of the rights of this company; and while the state may derive advantage from the illegal acts of her officers, as Ohio would have done from the collection of any illegal tax, yet a suit against the officers cannot be, in any just sense, considered a suit against the state, nor falling within the prohibition of the federal constitution.

Numerous cases might be cited where the officers of a state have been restrained from acting by injunction in matters directly affecting the interest of the state, and the objection has never been sustained that such suit was an action against the state. Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738, was a bill in equity, praying for an injunction against the auditor of the state of Ohio to restrain him from the collection of a tax alleged to be illegal, and precisely the same objection was taken to the jurisdiction of the court as the one we are now considering, namely: that it was a suit against the state of Ohio, but the court said: "It may, we think, be laid down as a rule which admits of no exceptions, that in all cases where the jurisdiction depends on the party, it is the party named in the record; consequently, the eleventh amendment, which restrains the jurisdiction granted by the constitution over suits against states, is of necessity limited to those suits in which a state is a party on the record." The court held in that case, in substance, that the exemption of the state from suability was no objection to proceedings against its officers for executing an unconstitutional law. The authority just cited disposes of another ground of demurrer to the bill, namely, that the complainant is not competent to sue in this court. According to the Case of Osborn, we must look to the record, and the record alone, to determine the question of jurisdiction. The bill avers the complainant to be a citizen of New York, and the defendants to be citizens of Texas. This brings the case within the provisions of the constitution and judiciary act.

In Dodge v. Woolsey, Woolsey, the complainant, was a stockholder in a bank organized under a law of Ohio, and Dodge, the defendant, was a citizen of Ohio. Yet, Woolsey being a citizen of Connecticut, the jurisdiction of the court was maintained.

It is further assigned, as ground of demurrer, that the creditors of the railroad company and the parties applying for patents to land within the reservation are not made parties to the bill. The creditors are neither necessary nor proper parties, because they are represented by the complainant, who is receiver. We do not think that the persons applying for patents are necessary parties to the bill. But if they were, it is a sufficient reply to the objection that they are not made parties, to cite the 48th equity rule: "When the parties on either side are very numerous and cannot, without manifest inconvenience and oppressive delays, be all brought before it, the court, in its discretion, may dispense with the making of all of these parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests." The views now expressed appear to us to dispose of all the grounds of demurrer. We think the demurrer is not well taken on any of the grounds assigned. It is therefore overruled at defendant's costs.

[NOTE. This case was carried to the supreme court by the defendants, and the decision was affirmed in an opinion by Mr. Justice Swayne. 16 Wall. (83 U. S.) 203. Mr. Justice Hunt did not hear the argument or participate in the decision. Mr. Chief Justice Chase, and Mr. Justice Davis, dissented upon the point of the nonsuability of a state, taking the ground that on the face of the bill it was apparent that the state of Texas was arraigned as a defendant. The majority of the court, however, in expressly affirming the doctrines in Osborn v. Bank of U. S., 9 Wheat. (22 U. S.) 738, held that it was not proper to look beyond the record for a defendant, and that making a state officer a party does not necessarily make a state a party, although her law may prompt his action. The office and duties of a receiver were also discussed, and his power to sue in his own name fully affirmed.

[It was further held that the state of Texas herself, by plunging into the Civil War, had confessedly rendered it impossible for the company to fulfill the conditions of the charter in time, and "we are clear in our convictions that under the circumstances a reasonable time for performance had not elapsed when this bill was filed. That the act of incorporation and the land grant here in question were contracts, is too well settled in this court to require discussion."]

Case No. 5,716.

GRAY et al. v. HARPER et al.

[1 Story, 574; [1] 4 Law Rep. 334.]

Circuit Court, D. Massachusetts. Oct. Term, 1841.

CONTRACT OF SALE—CONSTRUCTION OF—EVIDENCE.

1. Construction of a contract in relation to the sale of books.

[Cited in Bell v. Golding, 27 Ind. 180.]

2. Conversations between parties, at the time of making a contract, are competent evidence to show the sense, which they attached to a particular term used in the contract.

[Cited in Quarry Co. v. Clements, 38 Ohio St. 592; Donley v. Tindall, 32 Tex. 43; Collender v. Dinsmore, 55 N. Y. 210.]

This was an action of assumpsit to recover the sum of $841.39, the balance of an account, alleged to be owing by the defendants [John Harper and Brothers] to the plaintiffs [Hilliard, Gray & Co.], for sundry volumes of Sparks's American Biography. The plaintiffs, in order to maintain their action, produced in evidence the following agreement: "Boston, May 22, 1839. We agree to take of Hilliard, Gray & Co. any volumes of Sparks's American Biography, bound or unbound, that they may ship to us, within three months from this date, at the cost thereof, and pay for the same in six months from date of shipment. Harper & Brothers." The plaintiffs contended, that the cost of the books in question consisted of four items of expense: 1st, paper; 2d, press-work; 3d, binding; 4th, amount paid by the volume to the owner of the stereotype plates to produce the books. To prove these items, they introduced in evidence a letter written by the plaintiffs to the defendants, as follows:

"Boston, August 10th, 1839. Gentlemen:—On the 22d of May you agreed to take of us any volumes of Sparks's American Biography, bound or unbound, that we might ship to you within three months from that date, at the cost thereof; we have accordingly shipped this day, as per bill of lading, to your risk, the books, as per bill, and on the same sheet have given a statement of the cost of making the books, with the amount paid Mr. Sparks for copyright; but we have added nothing for interest, which we shall claim the right to add hereafter, if you dispute the correctness of our estimate, or way of making up the cost, according to a legal construction of your contract, that would make the cost to us as much as the paper. We have put in, also, a large lot of back-titles and over-sheets, for which we have made no charge; but we shall expect them to be returned to us, unless you will agree, that if any of the books we have heretofore sold should be found incomplete, that you will supply the sheets wanted without charge to us. We have charged a lot of heads, title-pages, and fac simile plates, at less than cost to us, they being valuable to you; but if not willing to pay the sum named, please return them to us. If we had time, many of them might have been placed in the volumes sent, consequently not so much deducted from the volumes, where they belong. But this is a small matter,—you may take them, or not, at that price, as you choose. Having complied with our part of the contract with you, we shall expect you to send us your note at six months from this date, for $1641.39—less $25 for the plates, if you do not take them. Yours, respectfully, Hilliard, Gray & Co. Messrs. Harper & Brothers, Booksellers, New York. P. S. You will find all the copper and steel plates, belonging to the work, in a bundle, in box No. 6."

On the same sheet with this letter, was a computation of the cost of the American Biography, made up by the plaintiffs, each volume separately, and specifying the number of volumes printed:

No. of copies.	Cost of paper.	Cost of printing.
Vol. 1, 2000	$255.50	$245.33
500	53.40	24.00
" 2, 2000	256.38	283.70
500	60.40	23.40
" 3, 3000	328.50	279.70
500	50.40	24.30
" 4, 2000	259.30	281.67
1000	128.45	140.83
500	60.20	24.30
" 5, 2500	295.43	118.45
" 6, 1500	174.15	73.00
500	53.40	21.60
" 7, 1500	218.25	81.00
" 8, 1500	195.75	78.00
" 9, 1500	152.25	76.00
" 10, 750	84.20	40.00
750	84.20	40.00
22,050	$2709.97	$1855.48
	Paper,	2709.97
	Binding,	2812.00
	Printing fac similes,	304.50
	" portraits,	196.87
	Paper for fac similes,	52.20
	" " portraits,	29.25
		$7960.27

being 35,37-100 cents per volume.

Vols. 1, 2, 3, and 4,—cost of paper, &c.,	$.3537		
Copyright paid Mr. Sparks on these volumes,	.1250	——	$.4787
883 vols.,			$421.59
Vols. 5, 6, 7, 8, 9, and 10, —cost of paper, &c.,	$.3537		
Copyright paid Mr. Sparks on do.,	.2600		
2623 vols.	$.6137		1609.73
3506 vols.			$2031.32

being 57 cents per volume.

The account of the volumes sent was also contained in the same sheet, by which it appeared, that they had sent 3506 volumes,

[1] [Reported by William W. Story, Esq.]

bound, unbound, and in sheets; some with and some without plates; among these there was not a perfect set, and 1600 volumes were imperfect. The amount charged for the books was $1611.97; lot of portraits, title-pages, and fac similes, $25; 4 boxes, $4.42—$1641.39. The plaintiffs then produced the following letters:

Harper to Gray: "New York, August 30th, 1839. Messrs. Hilliard, Gray, & Co. Gentlemen:—Your favor of the 10th instant has been received. Having several times, in person, demurred to your charges for copyright on the odd volumes of Sparks's American Biography, we now do so formally, in writing, and at the same time propose leaving the question at issue between us to the arbitration of disinterested men. We requested Messrs. Folsom, Wells, and Thurston, some time since, to forward the volumes of the work, which they printed for us; but, as they have not done so, we take the liberty of asking you to request them to send them on without delay. Respectfully your obedient servants. Harper & Brothers."

Gray to Harper: "Boston, December 9th, 1839. Gentlemen:—In our last we requested you to send us your two acceptances of $800 each, to balance the bill of Biography; but not hearing from you, and wanting that paper for immediate use, we have drawn on you for $800, through the bank, which we trust you will not refuse to accept, on account of our bill for Biography, as it is only part of the amount, and will not compromise you in the question in dispute between us. We have made the draft payable in March, instead of February, when the amount is due; and we hope you will not hesitate to accept it and send us another for the balance soon, and thus end this disagreeable affair without any more words on the subject. Yours respectfully, Hilliard, Gray, & Co. Messrs. Harper & Brothers, New York."

The plaintiffs upon these letters contended, that the only question left open was the question of copyright. They abandoned the claim for amount of copyright paid on the first four volumes. They then produced an agreement made between the plaintiffs and Mr. Sparks, for publishing the last six volumes, by which it appeared, that the plaintiffs agreed to pay Mr. Sparks $650 per volume for the right of publishing 2500 of each of the said volumes, and the use of the stereotype plates. This agreement bore date April 26th, 1836. They also produced the receipts of Mr. Sparks for $650 for each of said volumes. The receipt for the last volume was dated November 15th, 1838. They then called Charles Folsom, who proved the price of printing to be as stated in the account rendered by the plaintiffs. He also made the following statement of the number of volumes published, the time of publication, and cost and time of stereotyping each:

Vol. 1,	2000 copies from	movable types—1834, Jan. 27,		
	500	" stereotype plates—1838, Dec. 20—		
		cost of plates,		$238 01
Vol. 2,	2000	" movable types—1834, April 11,		
	500	" stereotype plates—1839, Jan. 27—		
		cost of plates,		276 33
Vol. 3,	2000	" movable types—1835, Jan. 8,		
	500	" stereotype plates—1839, Feb. 14—		
		cost of plates,		230 70
Vol. 4,	2000	" movable types—1835, Aug. 12,		
	500	" stereotype plates—1839, April 10—		
		cost of plates,		270 80
Vol. 5,	2500	" stereotype plates—1836, May 28,		
		cost of plates,		275 50
Vol. 6,	1500	" stereotype plates—1836, Sept. 6,		
		cost of plates,		264 04
Vol. 7,	1500	" stereotype plates—1839, April 20,		
	500	" 1837, March 3,		
		cost of plates,		305 00
Vol. 8,	1500	" stereotype plates—1837, Sept. 25,		
		cost of plates,		231 10
Vol. 9,	1600	" stereotype plates—1838, March 10,		
		cost of plates,		294 89
Vol. 10,	750	" stereotype plates—1838, Dec. 20,		
		cost of plates,		302 41
Vol. "	750	" stereotype plates—1839, Feb. 8.		

The defendants admitted, for the purpose of this trial, that the cost of paper and binding of said volumes was correctly charged in the plaintiffs' account. The plaintiffs here rested their case.

The defendants' counsel then opened the defence, and introduced the following evidence.

(1) A deed of the copyright of the whole ten volumes, and the stereotype plates of the last six volumes, from Jared Sparks to Hilliard, Gray, & Co., dated October 15th, 1838, and recorded November, 1838, for the consideration of $2400,—reserving to Mr. Sparks the right of publishing the lives written by himself.

(2) A deed of the copyright of stereotype plates of the whole ten volumes, from Harrison Gray and Charles Brown to Harper & Brothers, dated May 22d, 1839, acknowledged June 27th, 1839, and recorded July 15th, 1839, —reserving to Mr. Sparks the same rights as the deed to Hilliard, Gray, & Co., and subject to a contract made with Messrs. Folsom, Wells, & Thurston, and a contract made with Marsh, Capen, & Lyon, by Hilliard, Gray, & Co.

(3) A deed from the plaintiffs to the defendants, (which had been cancelled on account of informality of execution,) dated May 22d, 1839, of the same copyrights and plates as preceding, and in every respect like it, except that it was made and executed in the firm name of Hilliard, Gray, & Co., and contained no reference to the contracts with Folson, Wells, & Thurston, and Marsh, Capen, & Lyon.

(4) The following correspondence between the parties:

Harper to Gray: "New York, June 29th, 1839. Harrison Gray, Esq. Dear Sir:—The

deed of copyright for 'Sparks's American Biography,' which you have substituted for the one, which I obtained from you, when I made the purchase, is not satisfactory. At the time I received it of you, you promised, in the presence of Mr. Wells, that you would have another executed, with the individual signatures of your firm, if required. My brother understood, that you declined giving such a deed; but I am in hopes, that he misunderstood you. Permit me, therefore, to inquire, whether you will, or will not, have such an instrument executed, without any variation, other than that of substituting the individual signatures of your house, instead of the general signature of your firm? Please let me hear your definite and conclusive decision by return of mail, and much oblige your ob't servant, F. Harper."

Gray to Harper: "Boston, July 2d, 1839. Fletcher Harper, Esq. Dear Sir:—I duly received yours of the 29th, and must confess, that I am quite surprised at its contents. When your brother presented our deed, signed by me for our firm, no objection was made as to a new one; my partner, Mr. Brown, who had never seen the paper before, suggested, that, as we had conveyed to you two contracts with Marsh, Capen, & Lyon, and Folsom, Wells, & Thurston, they should have been added or recognized in the contract or conveyance; and it was agreed to by your brother, and made part of the new conveyance. Now, as this was an agreement with the senior partner of your house, and only recognizes the two contracts, which made part of the contract or conveyance to you, I cannot see, why you have any reason to be dissatisfied with it, and I would respectfully ask you to state, where it differs from our original agreement. Respectfully, &c. H. Gray."

Harper to Gray: "New York, July 9th, 1839. Harrison Gray, Esq. Dear Sir:—My brother Fletcher has just shown me a letter from you, in which you state, that I agreed to a change in the deed of copyright, which you gave him for Sparks's American Biography. In this you are mistaken, as I distinctly informed you, that I had paid no attention to the subject of the contract, and did not feel myself at liberty to interfere therein; and it was entirely upon your representations, that all should be right and satisfactory, that I consented to the destruction of the original deed. Having since heard my brother's views, objections, &c., I now concur with him in opinion, that the present deed is not satisfactory, and such as under the circumstances it should be; and that you are bound in honor to execute the deed, as originally agreed upon between him and yourself. Hoping that you will not refuse to do so, I remain yours truly, James Harper."

Harper to Gray: "New York, July 9th, 1839. Harrison Gray, Esq., Boston. Dear Sir:—I have yours of the 2d inst. By the annexed letter of my brother, you will at once perceive, that the ground you assumed, of there having been 'an agreement made with the senior partner of our house,' is not correct. Permit me, therefore, again to inquire, whether you will, or will not, fulfil the agreement you made in relation to the original deed of copyright, which you gave me. Please let me hear from you by return of mail. Your ob't servant, F. Harper."

Gray to Harper: "Boston, July 11th, 1839. Dear Sir:—Yours of the 9th, with your brother's of same date, is before me. I am more surprised at his letter than I was at your last, as I can prove all, I stated in my last, that your brother cheerfully agreed to the change we made in the conveyance of the copyright, and read the same over carefully with our bookkeeper, after he had copied the original memorandum agreed upon; and I cannot see, why you, or he, or any one else, should be dissatisfied with it, as I can prove by Mr. J. Brown, that you agreed to fulfil those contracts; and if you will refer to the transfer of them on the back, you will find, that in Folsom, Wells, and Thurston's it was so expressed; and you must be aware, that we could not legally give you a deed of the copyright without reference to those contracts. And as I am unwilling to suspect, that you wish to have the deed with that omission, to make a question of your liability to fulfil those contracts, you will please inform us, as I requested in my last, what you are dissatisfied with, or send us the form of a deed, such as you want, and if not inconsistent with my agreement with you, and has reference to the fulfilment of those contracts, I have no doubt my partner will cheerfully sign it with me. Yours respectfully, Harrison Gray. Fletcher Harper, Esq., New York."

Gray to Harper: "Boston, July 20th, 1839. Gentlemen:—When your Mr. James Harper was here, we gave him a letter to your house, with a list of the volumes of American Biography on hand, and proposed an exchange of vol. 5 for vols. 1, 2, and 3, to complete sets. If this is done, we must have the vols. 1, 2, and 3 immediately, or we shall not be able to complete the sets in season to answer our purpose, and the consequence will be, that we shall have a larger lot of odd volumes to send you, at a high price, according to the contract with us. Let us have your order, by return of mail, on Messrs. Folsom, Wells, & Thurston, for the volumes, according to our letter, and much oblige your ob't servants, Hilliard, Gray, & Co. Messrs. Harper & Brothers, New York."

Harper to Gray: "New York, July 23, 1839. Messrs. Hilliard, Gray, & Co. Gents:—Yours of the 20th instant is at hand. We are unwilling to comply with your request therein. You need not fear but that any 'contract' you have with us, whether at a 'high price' or low price, will be fulfilled to the letter. Respectfully, Harper & Brothers."

(5) A copy of the agreement made for the purchase of the volumes of the Biography in the handwriting of the plaintiffs' clerk, in all respects like the one produced by the plaintiffs, except at the foot of the same was a memorandum of three acceptances of $2000 each.

(6) Three acceptances of the defendants, which they had taken up, for $2000 each, dated May 22d, 1839, payable to the plaintiffs in six, nine, and twelve months. Also three acceptances (taken up) for $800, dated December 9th, 1839, in three months.

(7) The assignment from the plaintiffs to the defendants of the contract with Marsh, Capen, & Lyon, dated May 22d, 1839, and the contract with Folsom, Wells, & Thurston, of the same date.

Here the defendants rested their case.

The plaintiffs then called Jared Sparks, who testified to the payments being made, as stated in his receipts. John G. Roberts, who testified, that many of the volumes sent were deficient only in engravings, title-pages, and portraits. James Brown, who testified, that he was a secret partner of the firm of Hilliard, Gray, & Co. at the time of the transfer of the copyrights and plates to the defendants; that he recollected the transaction; that he was present at Gray's store when the negotiation was going on between Gray and Fletcher Harper; that he understood, that the defendants had agreed for the copyright, plates, and all the odd volumes. He could not say, that the written contracts had then been signed. He did not recollect, that anything was said as to the cost of the odd volumes; something was said about completing of sets; the defendants were to fulfil the contract with Marsh, Capen, & Lyon, and Folsom, Wells, & Thurston. Witness could not state, what was said in regard to Gray's retaining the plates for that purpose. They had some difficulty, but he could not state what, as his attention was not specially called to it at the time. Soon after, Gray and F. Harper came to the store of the witness; they differed as to the details of the bargain, and came there to settle in some way or other. The difficulty was, what constituted the cost of a volume. Gray wished to include copyright. Harper thought it ought not to be included, as he had already purchased the copyright. Harper offered to refer the question to me to decide; this, Mr. Gray declined. Witness did not hear Gray tell Harper, what the cost would amount to. He said the cost would be high. At the time of the last conversation, witness supposed the contracts had not been signed, as it was so soon after the first conversation. He did not, however, know, whether they had or had not then executed the contracts.

The defendants then introduced the following note from the plaintiff:

"Tremont House, 8 o'clock p. m., May 24th, 1839. I called to see you, in hopes we should be able to settle the price of the volumes of Biography. If it is not correct to include the plates in the cost, something should be added for their use. At any rate, I think if you will stop until the afternoon train for Worcester, to-morrow, you and I can settle the question without the sin of giving any wine to referees for what we can settle ourselves. I cannot ship the books, until this question is settled. We shall lose the chance of selling them to others. Yours truly, H. Gray."

Rand & Fisk, for defendants, contended: (1) That the plaintiffs' account, as made up by them, was erroneous upon their own principle. That all the volumes sent were printed from plates, and that in computing the cost, the plaintiffs had charged for what is technically termed composition on the first four volumes. That the amount to be recovered by the plaintiffs, if the charge of copyright on the last six volumes was correct, was $633.23. If the copyright was not included correctly, then the defendants had overpaid $49.75. That from the above sum, at all events, should be deducted the amount, charged for the copies of the sixth and tenth volumes sent, which had been printed since the plaintiffs became proprietors of the copyright and plates. (2) That the charge for copyright, or use of plates, was not to be reckoned as part of the cost of the books under the circumstances of this case. That whatever might be the true meaning of the terms "cost thereof," under ordinary circumstances, under the circumstances of this case they could only include the "cost of making" the books. That the plaintiffs owned the copyright, and therefore stood precisely in the same position as the author, and he might as well include, what he had expended in writing the book, as the defendants could, in this case, include, what they had charged; and the plaintiffs might with equal propriety here include the cost of the stereotype and altered plates. That the sale of copyright and plates having been made to the plaintiffs at the same time, or just prior to the making the contract for the books, it was most manifest, that the defendants never could have intended to pay the plaintiffs a second time for the copyright; that they could only have intended to mean, by the word costs, the cost of "making the book," and that the plaintiffs could not have intended any more, nor could they in justice recover any more. That the defendants having purchased the copyright and plates of the plaintiffs, were in fact doing the plaintiffs a great favor to take, at the cost of manufacturing, the odd and imperfect volumes, which they might have on hand after three months further sales. That the defendants' view of this matter was aided by the consideration, that, as they owned the copyright and plates, they could produce the books for the simple cost of making them; and it could hardly be supposed possible, that they should be willing to pay for odd and imperfect volumes to the

plaintiffs twenty-six cents per volume more than what it would cost to produce them.

John A. Bolles, for plaintiffs, contended, that the contract of the defendants for the purchase of the volumes of Biography, and the sale of the copyright and plates by the plaintiffs, were separate and independent contracts, as much so as though they had been made with different persons. That from the evidence it was certain, that the plaintiffs had paid Mr. Sparks twenty-six cents per copy for each of the last six volumes, and that, therefore, the same was part of the cost to them, and to be included in the sum to be paid by the defendants. That it was certain, from the contract with Mr. Sparks, and the number of volumes published, that the plaintiffs had paid Mr. Sparks thirty-seven cents per volume, and therefore were entitled to recover $959.41. That if they were precluded by the account rendered by them from recovering beyond twenty-six cents per volume, they were entitled to recover $674.18, the whole number of copies of the last six volumes sent by the plaintiffs to the defendants, being 2593. That the defendants, in their letter of August 30th, 1839, having excepted only to the charge for copyright, were presumed to be satisfied with the order of cost as made up by the plaintiffs, and the sum paid by them was intended to apply to those items only. The plaintiffs farther contended, that from the last letter of the plaintiffs, introduced in evidence by the defendants, it was to be presumed, that the whole question had been settled between the parties, and that the assent of the defendants to the charge for copyright was to be presumed therefrom.

STORY, Circuit Justice (charging jury). It appears to me, that the words of the written contract, "at the cost thereof," ought to be construed, "all the cost of the copies," including the allowance to Mr. Sparks, unless it is clearly made out in the evidence, that the parties, in the use of this language, adopted a different construction, and limited the "cost" to the mere expense of the paper, press-work, and binding. I do not think, that it is absolutely incompetent for the parties to show, from the conversations between them at the time of the making the contract, what was the sense, in which they then understood the word "cost" as used in the contract, as it is a word capable of a larger or narrower construction according to the subject matter, and the circumstances of the particular case. Those conversations may be deemed a part of the res gestae, and thus may be referred to, as explanatory of the real intentions of the parties in the use of the word. It appears, however, that the parties at the very time differed as to the very point, whether the money paid to Mr. Sparks ought to be included in the "cost" or not; and there is no evidence to establish in direct terms, how the disputed item was settled between them. If the contract was signed after the dispute, it would go far to show, that the word "cost" ought to include the money paid to Mr. Sparks, since in its general meaning the word "cost" would certainly comprehend that expense. But the learned counsel for the plaintiffs insist, that the contract at the time of the dispute had been actually signed and completed; and if so, then every inference of this sort is repelled. On the other hand, if the contract was not signed at the time of the dispute, it is singular, that the ambiguity should not have been removed by the addition of some explanatory language.

The whole point in the argument turns upon this. The plaintiffs say, that "cost" includes all the items of cost, there being no qualifying words to limit the meaning. The defendants, on the other hand, say, that this could not have been the intention of the parties, because the defendants had then purchased all the stereotype plates from the plaintiffs, and consequently could publish complete copies of all the volumes, instead of taking broken series, at the mere cost of the paper, press-work, and binding; and this is certainly true. If the purchase of these volumes had constituted a part of the original bargain for the purchase of the copyright and plates for $6000, then it would be easy to see, that the taking of these copies at the enhanced price of the money paid to Mr. Sparks might have been included. But this construction also is repudiated by the plaintiffs' counsel, who insists, that the bargains were independent of each other. There is, therefore, great difficulty in arriving at a satisfactory conclusion; and the jury will decide the matter upon a close review of all the circumstances.

The jury retired at half past one o'clock in the afternoon, and after remaining together until the opening of the court on the next morning, came in and stated, that they could not agree. The judge, upon their application, gave them some farther instructions, and they again retired. At half past ten o'clock they again came into court, and said, that there was no prospect of their coming to any agreement, and they were then discharged.

GRAY (HART v.). See Case No. 6,152.

Case No. 5,717.

GRAY et al. v. HULSHIZER et al.

[13 O. G. 10.]

Circuit Court, E. D. Pennsylvania. Jan. 17, 1878.

PATENTS—INFRINGEMENT—HORSE-POWERS.

[The Gray reissue, No. 1,322, for an improvement in horse-powers, *held* not infringed.]

Suit [by A. W. Gray, L. Gray, and A. Y. Gray against Daniel Hulshizer and Henry B.

Larzalere] for infringement of patent [No. 15,693] granted to A. W. Gray, September 9, 1856, for "improvement in horse-powers," reissued July 1, 1862 [No. 1,322], and extended seven years from September 9, 1870.

No written opinion delivered. The judge stated orally that, leaving other questions aside, he did not regard the proof of infringement as satisfactory.

M. D. Connolly, for complainants.
Charles Howson, for defendants.

McKENNAN, Circuit Judge. And now, to wit, January 17, 1878, this cause having been brought to final hearing upon the pleadings and proofs, and counsel for the parties respectively having been heard thereupon, and the same having been duly considered by this court, it is hereby ordered, adjudged, and decreed that complainants' bill of complaint herein be, and the same hereby is, dismissed, with costs to be taxed by the clerk of this court.

Case No. 5,718.

GRAY v. JAMES et al.

[Pet. C. C. 394;[1] 1 Robb, Pat. Cas. 120.]

Circuit Court, D. Pennsylvania. April Term, 1817.

PATENTS—INFRINGEMENT — SIMILARITY — USE OF IMPROVEMENTS — DEFECTIVE SPECIFICATIONS — ABANDONMENT — DAMAGES — NAIL-MAKING MACHINE.

1. Action for the violation of a patent right. Where two machines are substantially the same, and operate in the same manner to produce the same kind of result, they must be in principle the same.

[Cited in Whitney v. Emmett, Case No. 17,585; Smith v. Pearce, Id. 13,089; Brooks v. Bicknell, Id. 1,944; Hogg v. Emerson, 6 How. (47 U. S.) 481; Stephenson v. Hoyt, Case No. 13,373. Followed in Nichols v. Harris, Id. 10,244. Cited in Teese v. Phelps, Id. 13,819; Rapid Service Store Ry. Co. v. Taylor, 43 Fed. 251.]

[Cited in Tillotson v. Ramsay, 51 Vt. 311.]

2. If an invention for which a patent has been obtained, is improved by any person other than the patentee, the inventor of the original machine has no right to use the improvements, and the inventor of the improvements has no right to use the original machine, without the license of the patentee.

[Cited in Reed v. Cutter, Case No. 11,645.]

3. A patent "for an improvement in the art of making nails, by means of a machine which cuts and heads the nail at one operation," is not a grant of an abstract principle, nor is it the grant of the different parts of any machine; but of an improvement applied to a practical use, effected by a combination of various mechanical powers to produce a new result.

[Cited in Wilson v. Rousseau, Case No. 17,832; Aiken v. Bemis, Id. 109.]

4. It is not sufficient to invalidate a patent, that the specification is materially defective, unless the patentee intended by concealment of parts of the machine to deceive; and where practical mechanics are enabled to supply any omissions in the specification, such an intention will not be presumed.

[Cited in Whitney v. Emmett, Case No. 17,585; Hogg v. Emerson, 6 How. (47 U. S.) 482; Cutting v. Myers, Case No. 3,520; Dederick v. Cassell, 9 Fed. 312; Webster Loom Co. v. Higgins, 105 U. S. 588.]

5. Quere: If in an action for the violation of a patent right, where the general issue has been pleaded, it is competent to the defendant to give in evidence that the machine is useless, and has been abandoned.

6. After a patent is granted for an invention or discovery, the disuse of it by the patentee is not an abandonment of the rights of the patentee to the same, but they continue for fourteen years from the date of the patent.

7. It is the duty of the jury, should their verdict be in favour of the plaintiff in an action for the violation of a patent right, to find the actual damages sustained by the plaintiff, which the court will treble.

[Cited in Allen v. Blunt, Case No. 217.]

[Cited in Heckle v. Grewe, 125 Ill. 60, 17 N. E. 437.]

[S. Cited in Whitney v. Emmett, Case No. 17,585, to the point that the want of utility may be a good reason for not issuing a patent, but is no cause for avoiding it.]

This was an action [by Gray and Osgood against James, Odion, and Wilson,] for a violation of the plaintiffs' patent right, for an improvement in the art of cutting and heading nails by one operation. The specification which is part of the patent, describes the machine to consist in an upright and permanent jaw, and a moveable jaw, united by a pivot at the top, representing a vice; in each jaw there is a cutter fixed, to nip the bar of iron to the size of the nail, a griping die to hold the iron, until the head is made, by what is called a set or heading die, which is placed below. The power which effects and completes this operation, is generated by a lever of the first order, passing through a mortice made in the standing jaw which acts upon a toggle or double joint connected with the moving jaw of the vice, which in its first movement compresses the jaws so as to cut the iron, and then as it is further depressed, forces up the set and completes the nail by heading it. This invention was made by Jacob Perkins, some time in the year 1798, who, on the 24th of July of that year, assigned his right to the same to Guppy and Armstrong, to whom a patent was granted the 14th of February, 1799, and on the 14th of December, 1801, Guppy and Armstrong assigned the patent to the plaintiffs. The machine, which it was proved had been used by the defendants prior to the expiration of the patent to Guppy and Armstrong, was invented by Jesse Read, who obtained a patent for the same in February 1807. It consisted of the two jaws of a vice, the one fixed and the other moveable, with cutters inserted in each for cutting off the iron, intended for the nail, and griping the heading dies for holding and heading it. These jaws are united by a pivot below, in consequence of which, a lever, of the second order, is used to generate the

[1] [Reported by Richard Peters, Jr., Esq.]

power, being forked and embracing the two jaws, which are compressed together by a friction roller, fixed between the forks of the lever, which acts on an inclined surface of the moveable jaw.

It was proved by witnesses that more than 200 pounds of iron were made into nails by Perkins's machine which was erected by Guppy and Armstrong at their works at Amesbury; that for the want of machinery to force the piece of iron down into the griping die, the machine would clog if an attempt were made to work it with rapidity, and on this account it would not make more than thirty or forty nails in a minute; in consequence of this defect, it was altogether abandoned by Guppy and Armstrong, and it did not appear that Perkins's machine had been ever used afterwards by any person. All the defects in this machine were cured in Read's. In the latter there was a forcing slide, which instantly removed the piece of cut iron into the griping die and thus enabled the machine to operate with all the rapidity that it was capable of, insomuch that it has made in one working day to the amount of 1,500 pounds of nails, and upwards of 200 nails in a minute. From the models of the two machines exhibited in court, it appeared that independent of the difference in the position of the two machines, of the levers, the friction roller on the inclined plane instead of the toggle joint and the forcing slide, there were others which gave to Read's a preference over Perkins's. For instance, in the former the dies were in contact nearly with each other and with the cutters; they are visible, can be easily taken out and sharpened or otherwise repaired without taking the machine to pieces; whereas in Perkins's the dies were at such a distance from the cutters, that the witnesses supposed the piece of iron might not always fall regularly into the dies; and the cutters and dies being concealed in the jaws, they could not be taken out and sharpened and adjusted, but by taking the machine to pieces and wasting much time. It was proved by many witnesses examined on the part of the plaintiffs, that the two machines were precisely the same in principle, and that from an inspection of the specification and drawing, they or any artist skilled in nail machinery might make the machine. The defendants examined a number of witnesses, who stated that they considered the two machines to be different in principle from each other, and that from the specification and drawings, they should not know the form of the cutters and dies, or where or how to fix them, as nothing in relation to their form or situation, positive or relative, is stated in the specification or appears in the drawings. The defendants produced a number of patents, for cutting and heading nails at one operation, all prior to Perkins's discovery, with the specifications and drawings; but not a single witness was examined to explain them, so as to show the principle on which they operated, nor did it appear in evidence, that any machines for cutting and heading nails, at one operation, had ever been erected or used prior to Perkins's; except that one witness said he had seen in the year 1797, a machine like Perkins's invented by Rodgers, which cut and headed nails at one operation, but no particular description of it was given.

It was contended by the defendants' counsel. First, that Perkins is proved not to have been the original inventor of this machine. Second. That the two machines are entirely different in principle from each other. Third. That the patent is for the whole machine, which comprehends the lever, and the other parts of the machine, of which it is agreed Perkins was not the inventor. That the patent therefore is broader than the invention, and is therefore void. Fourth. That Perkins's machine was altogether useless, and was abandoned. Fifth. That the specification is not sufficiently precise within the words of the law. Bull. N. P. 77; 2 H. Bl. 470, 463.

WASHINGTON, Circuit Justice (charging jury). Many defences have been set up to this action, each of which will require a distinct consideration. I shall derange somewhat the order in which the points have been argued, and present first to the consideration of the jury, that which is involved in the general issue. First, it is denied that the defendants have at any time used the machine for which a patent was granted to Guppy and Armstrong. It is not denied, that the defendants have used a machine for cutting and heading nails at one operation, but it is contended that that machine is different, not only in form, but in principle from the plaintiffs' machine.

What constitutes a difference in principle between two machines, is frequently a question of difficulty more especially if the difference in form is considerable, and the machinery complicated. But we think it may safely be laid down as a general rule, that where the machines are substantially the same, and operate in the same manner, to produce the same result, they must be in principle the same. I say substantially, in order to exclude all formal differences; and when I speak of the same result, I must be understood as meaning the same kind of result though it may differ in extent. So that the result is the same according to this definition, whether the one produce more nails, for instance, in a given space of time than the other, if the operation is to make nails. The application of this rule will be more obvious and better understood, by dissecting the machine invented by Perkins, and afterwards the machine which the defendants have used. In the former, we find the two jaws of a vice, the one fixed and the other moveable on a pivot at the top, which connects them to-

gether. In each of these jaws is fixed a cutter, the use of which is to cut off from the bar of iron as much as will be necessary to form the nail, which, being separated, falls by its own gravity into a die, which holds it by a firm gripe until the head is formed, by what is called the set or heading die. The power which produces this double operation, is a lever of the first order, acting upon a toggle joint which compresses the two jaws, and consequently the cutters together and also raises the set, in such a manner as to head the nail. But the whole is performed by the same movement of the lever. It is impossible to describe the parts of the defendants' machine, and its operation, without using the same expressions, except that his is inverted, the pivot of the vice being below, and a lever of the second order embracing the jaws with a friction roller, acting on an inclined plane made on the moving jaw of the vice, instead of the lever of the first order, and the toggle joint. But it is in full proof, that these differences as to the lever and the friction roller, are the necessary consequences of the machine being inverted. After having made this comparison and ascertained the mode of operation by each machine, connected with the result of each, the jury can find little difficulty in deciding whether they are the same in principle or not.

The witnesses have differed in opinion, as to the comparative merit of the toggle joint in Perkins's machine, and the friction roller in Read's. If their operation is precisely the same, the difference in form does not amount to an invention of any kind. If the friction-roller is better than the toggle joint, which seems to be the opinion of some of the defendants' witnesses, then Read has the merit of having discovered an improvement on Perkins's machine, and no more. If the jury should be of opinion, that the parts of the two machines which I have noticed are the same in principle, and that each will by the same operation cut and head nails; then it will follow, that the forcing slide, the proximity of the cutters and dies to each other, the balance wheel, and some other additional parts in Read's machine, which give it a great and acknowledged preference over Perkins's, are merely improvements, but do not change the principle of the machine. If improvements only, what is the legal consequence? Most clearly this and no more: that Perkins and those claiming under his patent, have no right to use those improvements without a license from the inventor. But on the other hand, neither Read nor any other person, can lawfully use the discovery of Perkins of the principal machine without a license from him. The law wisely and with justice, discriminates between, and rewards the merit of each, by granting an exclusive property to each in his discovery, but prevents either from invading the rights of the other. If then the jury should be of opinion, that the two machines are the same in principle, it is no defence for the defendants for using Perkins's discovery, that they have improved it, no matter to what extent.

The next objection made to the plaintiffs' right of recovery is, that the plaintiffs' patent is void, for the following reasons:

First. Because Perkins was not the original inventor. It is insisted, that the patents which have been read, show that machines for cutting and heading nails at one operation, had been discovered prior to the discovery by Perkins. Whether this be so or not, this court feels itself incompetent to decide. No explanation of those machines has been given, and we cannot from the specifications and drawings which accompany these patents, form the slightest idea of their structure, operation or result. It will be for the jury to examine these papers and decide for themselves. It is however not unworthy of remark, that in addition to the circumstance, that no explanation of those machines has been given to the jury, it does not appear that any one of them was ever put into operation. As to Rodgers's machine, there is but one witness who gives evidence respecting it, and that in a very imperfect manner. It is not mentioned in the notice of special matter to be given in evidence, and although this affords no sufficient ground for rejecting the evidence, it furnishes a reason why the defendants should be expected to lay before the jury, a satisfactory explanation of the principles of that machine, and the manner in which it operated. Upon the whole, the jury, after examining carefully the evidence given in support of this objection, will apply to it the same rule which the court has laid down under the former head, for testing the similarity between Perkins's and Read's machines, and will be governed by it.

Second. The next reason assigned against the validity of the plaintiffs' patent, is, that it is too broad; or if not so, that the patent is for a principle merely. The court is of opinion, that there is not the slightest foundation for this objection. The patent is supposed to be for the machine itself, which is composed of parts which have long become public property. This is not the fact. The patent is for an improvement in the art of making nails, by means of a machine which cuts and heads the nails at one operation. It is therefore not the grant of an abstract principle, nor is it the grant of the different parts of any machine; but of an improvement applied to a practical use, effected by a combination of various mechanical powers to produce a new result. The lever, the vice, the cutters, the dies, &c. may be used by any person without a violation of the plaintiff's patent. But they cannot be used in their combined state, to produce, by the same operation the same result, which is the distinguishing characteristic of the plaintiffs' machine, without a license from the owners. If, indeed, Perkins was not the original inventor, then the plaintiffs' patent is void,

without inquiring whether it is too broad or not. But if the jury should be of opinion that he is the original inventor, then there is nothing in this objection.

The third objection made to the validity of the patent, is, that the specification is defective. The law declares that it must be full, clear, and explicit, so as to distinguish it from all other machines of the same kind, and to enable any person skilled in the art, of which it is a branch, to make and use the same. These expressions are very strong, and seem intended to accommodate the description which the patentee is required to give, to the comprehension of any practical mechanic skilled in the art of which the machine is a branch, without taxing his genius or his inventive powers. Whether the specification in this case be defective, within this interpretation of the law, must depend upon the evidence of the practical mechanicians, who have testified on each side of the question, as well as upon the judgment of the jury.

Those examined on the part of the plaintiffs, have stated, that the position of the cutters and dies would necessarily be understood by any practical mechanic acquainted with nail machines, upon examining the specifications and drawings. This is denied by some of the defendants' witnesses. But if the jury should be of opinion, that the specification is materially defective, the objection will not be sufficient to invalidate the plaintiffs' patent, unless they should also be satisfied, that the concealment of the circumstances not described, was intended to deceive the public.[2] What degree of evidence ought to be required to prove such fraudulent intention, must rest with the jury to decide. Positive evidence can seldom be expected, nor is it necessary. The law it is true, requires that such intention should fully appear; but still it may be presumed from circumstances entirely to the satisfaction of the jury, which would be sufficient to authorise them to find the fact. As if the parts concealed are so essential and so obviously necessary to be disclosed, that no mechanic skilled in the art could reasonably be expected to understand the subject, so as from the description given to make the machine; it would be difficult to impute the omission of the patentee to a fair motive. But, this presumption would seem to be much weakened in a case like the present, where so many practical mechanics have testified that they could not hesitate in supplying the omissions in this specification. With these observations, this objection is submitted to the jury.

The last objection to the plaintiffs' patent, is, that the machine is not a useful one, and that it was abandoned both by the inventor and his assignees. Whether this objection can, in an action for a violation of a patent right, upon the general issue, be made to the validity of the patent, may well be doubted. If true, it might afford a good reason against granting the patent as well as for repealing it on a scire facias, on the ground of the patent having issued upon a false suggestion. But, the defence is by no means involved in the general issue, which merely denies that the defendants have used the plaintiffs' machine; nor does the 6th section of the law authorise the defendants to give it in evidence, on the general issue. They are therefore not bound to give notice of such a defence under that section, and the consequence would be, that the plaintiffs could not fail to be surprised at the trial, with a defence which they could not from the general issue, anticipate. As to this however, no positive opinion is given. But, is not such a defence in the mouth of these defendants, totally irreconcilable with the act which forms the basis of the action? If the machine be useless, it may fairly be asked, why do they use it? If they give the answer which has been given in this case by their counsel, that it was used with improvements which make it valuable, may it not be replied, that this proves that the original invention was useful? For, if that had not been made by some person, it is most obvious that the improvements could not have been made. If Perkins, or some other person, had not made the discovery which he did, can any person doubt that the present improved and valuable nail-machinery would be unknown in the world? How then, can it be said with truth, that the original discovery was useless? It is contended that this discovery was abandoned. But after it was patented, no disuser of it could amount to an abandonment, so as to deprive Perkins or his assignees of their exclusive right to it for fourteen years. There is no doubt but that it went into disuse in consequence of the subsequent improvements; but this does not prove it to be useless, any more than it impairs the plaintiffs' right to the original discovery. If the jury should be in favour of the plaintiffs upon these points, they will find for the plaintiffs the actual damages sustained by them, by reason of the use by the defendants of the discovery to which they are entitled; which the court will treble.

Verdict for 750 dollars single damages; judgment for the treble damages.

[Two rules were subsequently obtained (see Case No. 5,719), one to show cause why a new trial should not be awarded, the other, why judgment should not be arrested. In support of the first rule it was contended that the evidence showed that Perkins was not the original inventor of the machine, and also that the damages were excessive. In support of the second it

[2] If the invention be specifically described in the patent, so as to distinguish it from what was before known, the patent is good, although the specification does not describe the invention in such full, exact, and clear terms, that a person skilled in the art or science, of which it is a branch, could construct or make the thing invented; unless such defective description or concealment, was made with intent to deceive the public. Lowell v. Lewis [Case No. 8,568].

was contended that the description of the patent in the declaration rendered it too vague, and that the breach was too generally stated. Both rules were discharged.]

Case No. 5,719.

GRAY et al. v. JAMES et al.

[Pet. C. C. 476;[1] 1 Robb, Pat. Cas. 140.]

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

PATENTS — IMPROVEMENT ON ORIGINAL DEVICE—DECLARATION—TITLE—SPECIFICATION —OYER—PRIORITY.

1. If a machine in the state in which it was first made, was so far inferior to other machines used for the same purpose as that it was of no intrinsic value, yet if another person superadd to the invention and remove its defects, the inventor of the improvements derives no right to the original machine from having made it of value by addition to it.

[Cited in Blake v. Smith, Case No. 1,502.]

2. The declaration ought always to show a title in the plaintiff, and that with sufficient certainty, and to set forth all the matters which are the essence of the action; without these, the plaintiff fails to show a right in point of law to ask the court for judgment in his favour.

3. If the plaintiff's title depends upon the performance of certain acts, he must affirm the performance of those acts.

4. What defects are cured by verdict.

[Cited in Kay v. Fredrigal, 3 Pa. St. 222; Richardson v. Farmer, 36 Mo. 46.]

5. Where the declaration describes the plaintiff's improvement in the words of the patent, it is not necessary, that the description of the machine as stated in the specification, should be set forth. If the defendant require the specification in his defence, he may have it placed on the record by asking oyer of it.

[6. Cited in Whitney v. Emmett, Case No. 17,585, to the point that the want of utility may be a good reason for not issuing a patent, but is no cause for avoiding it.]

[This was an action at law by Gray and Osgood against James and others, for the violation of a patent right.]

Two rules were obtained, at the last term, to show cause why a new trial should not be awarded, and why the judgment should not be arrested.

WASHINGTON, Circuit Justice. In support of the first rule, the following reasons were assigned. First, that the verdict is against evidence and against the charge of the court, inasmuch as it was proved to the jury that Perkins was not the original inventor of the machine, for the use of which by the defendants, this action was brought; and secondly, because the damages were excessive.

First. It is contended, that the priority of invention claimed by Perkins was disproved at the trial by the patents to Chandler, Garretson, Bigelow, Spence, and Read, all granted prior to the alleged discovery of Perkins, for machines, which it is insisted are in principle substantially the same as Perkins's. As Chandler's machine has been selected by the defendants' counsel, as bearing the strongest resemblance to that which was the subject of this action, the observations of the court will be principally directed to that machine. This machine consists of a solid piece of iron, into which the under steel cutter is fixed. An iron lever, working in a steel socket at one end, in which lever the upper cutter is fixed, and a spring fastened to it to throw it up after it is forced down. The upper lever has also a side cutter screwed to it, for cutting off the rods at the same time that the die cuts and shapes the nail. The heading is formed by concave dies fixed in two side or horizontal levers, in the ends of which are mortices to receive a tenon fitted on the centre bolt, held firm by a pin;—springs to each of these levers, to throw them back after heading the nail. The lever containing the upper cutter, is forced down by an axis in a shaft, cutting the nails lengthwise of the rod, whilst hot, on the under cutter which holds them fast, while the side levers force up the heading dies, which action is by means of secondary levers, or by the axis of a wheel during the revolution of which the cutting and heading levers are disengaged, at the same period the nails are pushed out by springs, and the rods are pushed forward by hand in constant succession.

Let us now compare this machine, as to its component parts and mode of operating, with Perkins's machine. The parts of the former are, as has been stated, cutters fixed in a lever and a fixed piece of iron. Concave dies fixed in side levers for forming the head of the nail, with springs in both sets of levers to open them after they have performed their parts, and other springs to extricate the nails. Secondary levers, or a wheel which in its revolutions disengages at the same moment the cutting and heading levers. The manner in which it operates, is by forcing down the upper lever so as to bring the cutters into contact, and thus to cut and shape the nail. By the pressure of the horizontal levers containing the concave dies, against the sides of the cutters when closed, the head is formed, which action is performed by means of secondary levers, or by the axis of a wheel during its revolutions; and the nails when thus completed are forced out by springs. The parts of Perkins's machine are the jaws of a vice, the one fixed and the other movable, with cutters fixed in them, and a heading die in the moveable jaw; a lever, with a toggle joint at the end of it to force the cutters together and also to force up the heading die at the same pressure of the lever. The manner in which it operates is by the toggle joint, which, by the pressure of the lever, forces the cutters together, so as to cut off the nail, whilst the lever, by an instantaneous but successive motion, forces up the heading die to complete the nail; the whole operation being

[1] [Reported by Richard Peters, Jr., Esq.]

carried on during the same pressure of the lever. The two machines agree in the following particulars: Each of them have cutters for separating the nail from the rod, and dies for forming the heads by pressure. Here the similitude ceases. The one has one lever, which is the great agent, by the power of which, and at the same motion, the whole operation is performed. The other has a lever for cutting, and levers for heading, which are put into operation by another set of levers, or by the axes of a wheel. The latter requires, as appears by the specification, the aid of a machine which the other does not, that is, a blacksmith's furnace to heat the iron. This is certainly a very material difference, and we must suppose it to be indispensable, and without which the operation could not proceed. But the important difference is in the mode of operating. Perkins's machine makes the nail by one and the same pressure of the lever, Chandler's, so far as the court can perceive, effects nothing more by the pressure of the lever, than the cutting of the nail rod; but, by what power the side or horizontal levers which form the head, are moved, does not appear, otherwise than as it is stated in the specification, to be by the action of what is called secondary levers, or the axes of a wheel during its revolutions. But, by what power are these secondary levers or wheel worked? This is not stated, and it is most obvious that it cannot be by the downward pressure of the first lever; and therefore it is reasonable to conclude, that some other power is used to act upon the secondary levers or on the wheel. In short, the court finds it impossible to discover in what manner the complicated parts of this machine are worked, beyond the pressure of the lever which cuts the nail. If they act by means of some other power, it certainly cannot be pretended that the two machines are substantially the same, and operate in the same manner to produce the same result. They are materially unlike in their parts, in their structure, and in their operation. The one operates upon cold iron, and the other, as stated in the specification, requires the aid of a furnace as an appendage. The one operates by means of a single power; the other by the aid of more than one power. Or, if this be not so, it behooves the defendants clearly to show the contrary, before the court can listen to a motion to set aside the verdict, on the ground that the two machines are substantially alike in principle.

From the view which the court has taken of the other machines, and so far as we have found it possible to comprehend the numerous and complicated parts of which they are composed, more especially Garretson's and Read's, we are of opinion, that the least exceptionable of them are open to the objections stated to Chandler's. The parts are different, the powers are either different, or they are differently applied, and the modes of operating are dissimilar. In some, perhaps in all, the cutting and heading are distinct operations. In two of them, the head of the nail is formed by concussion instead of pressure. In one of them, for want of the toggle joint, or something equivalent to it, the principle of gravitation is resorted to, and the vices are opened by weights. As to Rodgers's machine, it need only be observed that the jury were left to decide as to the existence, the form, and principles of it, upon the imperfect account given of it by Howard, the only witness. No model, and no particular specification, was given descriptive of the parts of that machine, their combination, and the mode of operating. It appears from the verdict, that the jury were not satisfied with the evidence, either as to the existence of such a machine, or as to its resemblance to Perkins's. It would ill become the court to say, that the jury decided this point improperly, even if the inclination of our minds had been different, which it certainly was not.

The next reason assigned for a new trial, is, that the damages given by the jury are excessive. I do not understand the objection to be to the amount, provided the plaintiff was entitled to any thing beyond nominal damages. The argument is, that Perkins's machine was acknowledged by himself to be worthless, and that it was in fact thrown away as a useless thing, and was so considered by those who knew any thing of it; consequently, his assignees sustained no damage by the use which the defendant made of it. Now the premises may all be admitted, and yet the argument terminate in what is called a non sequitur. Ore in the bowels of the earth would be of no value to the owner of the land, were it not that other persons can make it valuable by the employment of skill, labour, and money, to render it so. It is not the intrinsic value of the thing itself, but its capacity to be converted into something which may be useful, that gives it value. Admit, for the sake of the argument, that Perkins's machine, in the form in which it came from his hands, was so far inferior to the common nail machines then in use as to deprive it of all intrinsic value; still, if another person can superadd to that invention something which will remove all its defects, and render it useful, it immediately becomes valuable, not on account of its own qualities, but because of its capacity to receive the improvement and with its aid to become useful. The original discovery, and the improvement, became articles of traffic between the two discoverers, as soon as the improvement was made which it was their mutual interest to give value to. Is the defendant's improved machine valuable? This is admitted. But why is it so? Because he has availed himself of Perkins's original discovery on which to ingraft his own, and without which his

own would have been useless to himself and to the world. But how did he possess himself of Perkins's discovery? By an unlawful invasion of property to which Perkins was exclusively entitled. Had he, as he was bound to do, sought to acquire a title to this property by contract, is it to be believed that it would have been treated by the parties as of no value? It is obvious that it would not. This course of reasoning is intended to show, that when it was stated by the court to the jury that the charge of worthlessness against Perkins's machine came with a bad grace from the defendant, who was making so profitable a use of it, it was no answer to say that it is useful merely on account of the improvement which others had made to it; because, if it was useful in that respect, and without the original discovery the improvement could not have been made, it followed that the original discovery was useful and valuable. But the fact is, that Perkins's machine was proved at the trial to possess intrinsic value on the single ground of a saving of labour. Whether the value so proved justified the jury in finding the damages which they did, is a question of which that body were the proper judges upon the evidence laid before them, and the court sees no reason to find fault with their decision.

The motion in arrest of judgment is grounded upon certain alleged defects in the declaration. The declaration states, that Jacob Perkins, having invented a new and useful improvement in the manner of manufacturing nails, &c. which had not been known or used before his application, &c. (and so averring a compliance with all the requisitions of the law previous to obtaining the patent, and stating the assignment of his right to Guppy and Armstrong granting to them the full and exclusive right and liberty of making, &c. the said improvement, &c.) then sets forth the assignment of Guppy and Armstrong to the plaintiffs; and the breach is, that the defendants, without the consent of the plaintiffs first had in writing, on a certain day and for a long time before and continually since, had used in numerous machines, the improvement aforesaid.

It is contended, that the et cetera in the description of the discovery renders the patent too vague, and that the material parts of the specification ought to have been set out in the declaration, so as to leave no doubt as to the particular discovery for which the patent was granted, and for the violation of which this suit is brought. It is further objected that the breach is too generally stated. It may be laid down as a general rule, that a declaration ought always to show a title in the plaintiff, and that with convenient certainty. It ought to state all matters that are of the essence of the action, without which the plaintiff fails to show a right in point of law to ask for the judgment of the court in his favour. If his title depends upon the performance of certain acts, he must affirm the performance of those acts. If enough is stated to show title in the plaintiff, and with sufficient certainty to enable the court to give judgment, but with less certainty than the case admitted of, and which for the purpose of notice to the adverse party or otherwise, ought to have been stated, the defect is cured by the verdict. The court will presume that all such omissions were supplied, and obscurities explained, at the trial, by the evidence given to the jury.

In this case, the plaintiffs' title is founded on a patent to Guppy and Armstrong, granting them an exclusive right to Perkins's invention of a new and useful improvement in the manner of manufacturing nails, &c. in the words of the declaration. The declaration contains all the necessary allegations to show that the patent was regularly granted, and the patent is designated by the terms which itself uses. It is true, that the specification is referred to in the patent as part thereof, but that is merely descriptive of the invention, and not of the patent. It is a matter of evidence to be used at the trial, and if a sight of it be necessary to the defence, the defendant may have it placed on the record by asking oyer of it. The court are of opinion, that the patent is described with sufficient certainty even upon a demurrer, and that the breach, if it be too general in not stating the number of machines used by the defendants, (a point not necessary to be decided,) is cured by the verdict, since it is fairly to be presumed that proof of the fact was given to the jury. Both rules therefore must be discharged.

[The trial of this case, and the charge to the jury by Washington, Circuit Justice, can be found in Case No. 5,718.]

Case No. 5,720.

GRAY v. JENKS et al.

[3 Mason, 520.] [1]

Circuit Court, D. Maine. Oct. Term, 1825.

MORTGAGE—WRIT OF ENTRY.

A mortgagee of a satisfied mortgage cannot maintain an action at law to recover possession against the mortgagor, or persons claiming under him, by the law of the state of Maine.

[Cited in Hull of a New Ship, Case No. 6,859; Shipley v. Rangley, Id. 12,756; Leland v. The Medora, Id. 8,237; Brobst v. Brock, 10 Wall. (77 U. S.) 537.]

[Cited in Martineau v. McCollum, 3 Pin. (Wis.) 456; Southerin v. Mendum, 5 N. H. 431; Robinson v. Leavitt. 7 N. H. 94; McMillan v. Richards, 9 Cal. 409; Hyams v. Bamberger (Utah) 36 Pac. 204; Mathews v. Light, 40 Me. 396; Dyer v. Toothaker, 51 Me. 381.]

Writ of entry.—The cause was argued on special pleadings, setting up a defence, that the suit was brought on a satisfied mortgage.

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

Mr. Daveis, for plaintiff.
Fessenden & Greenleaf, for defendants.

STORY, Circuit Justice. This is a writ of entry sur disseisin in common form. The pleadings, upon which at present I shall not stop to comment, set up as a principal bar to the recovery, that the title of the demandant is solely founded upon a satisfied mortgage, the demandant being mortgagee, and the tenants, heirs or privies in estate of the mortgagor. It is unnecessary to consider, whether the mortgagee, after condition broken, can maintain a general writ of entry sur disseisin, if the fact is specially pleaded in bar of the action. The early decision in the negative (Erskine v. Townsend, 2 Mass. 493) seems upon good reason to have been recently overturned in the case of Green v. Kemp, 13 Mass. 515. But without expressing any absolute opinion on this point, because it is not in contestation between the parties, I proceed at once to that, which has been so ably and elaborately argued at the bar. The question is, whether after a mortgage has been paid or satisfied, but the same has not been discharged by an acknowledgment of satisfaction in the registry of deeds, or by a release, the mortgagee can maintain a suit at law for the recovery and possession of the mortgaged premises against the mortgagor and persons claiming under him. In the examination of this question the court must be governed altogether by the state jurisprudence, for it is purely a point of local law; and the doctrines of the common law, and the decision of the judicial tribunals of other states, are no farther to be used, than as they may illustrate what is obscure, and furnish analogies to guide in what is unsettled on this subject in our own jurisprudence. The view, which is taken of mortgages in courts of common law is, in many respects, essentially different from that, which attracts the attention of courts of equity. This circumstance will in some measure account for the very different language held by eminent judges in discussing the subject at different times, and reconcile many of the apparent contrarieties of opinion, which are found in the authorities. A judge at law sometimes deals with it in its most enlarged and liberal character, stripped of its technical and legal habiliments; and a judge in equity is sometimes obliged, in the administration of his duties, to follow out the doctrine of law, and to contemplate it with much of its original and ancient strictness. We all know, that after condition broken the mortgagee is considered at the common law as the absolute owner of the estate; but in equity the mortgagor is deemed the owner, and the mortgage itself a mere security of the debt. When, however, we come to the doctrine of tacking mortgages, equity there looks to the law, and stays its hand upon that, which constitutes a legal objection to relief.

It does not appear, that before the provincial charter of Massachusetts, in 1692, there was any remedy at law for the mortgagor after breach of the condition; at least, I have not been able to trace any in the colonial ordinances. Immediately after that charter, provision was made for the erection of a high court of chancery, by the act of 4 W. & M. c. 5; and again, in a more complete form by the act of 5 W. & M. c. 26. These statutes would have afforded the means of effectual relief; but the equity jurisdiction not being relished in the province, these statutes soon fell, and every subsequent effort to establish a general court of chancery has proved abortive. The provincial act of 9 Wm. c. 48, § 3, directed, that upon satisfaction and payment of the mortgage, the mortgagee should, at the request of the mortgagor, cause such satisfaction and payment to be entered in the margin of the record of such mortgage in the register's office, and sign the same, which should "forever thereafter discharge defeat, and release such mortgage and perpetually bar all actions to be brought thereupon in any court of record;" and in case of the refusal of the mortgagee to make and sign such acknowledgment, or otherwise discharge the mortgage and release the estate, that statute gave an action against the mortgagee for all damages for want of such discharge or release. Act 10 Wm. III. c. 58, further provided, that in real actions upon mortgage the judgment should be conditional, that the mortgagor, his heirs, &c. should pay the mortgagee &c. such sum, as the court should determine to be justly due therefor, within two months' time after judgment, for discharging the mortgage, or that the plaintiff should recover possession of the estate sued for, and execution be awarded for the same. And it was further provided, that where the mortgagee had entered into possession of the estate, the mortgagor should, upon tender of the money due, have a right to redeem the same at any time within three years after such entry, and that a bill in equity should lie in the courts of law for this purpose. Compare Act 10 Wm. III. c. 58, §§ 3, 4, and Act 12 Anne, c. 108, § 2,—Colony & Prov. Laws (Ed. 1814) 324, 402. These enactments continued in force until after the revolution, and are substantially incorporated into the existing statutes of Massachusetts on the subject of mortgages. Judge Trowbridge in an argument on mortgages, written by him before the revolution, and since published in the supplement of our reports, seems to have considered, that under the provincial statutes the estate of the mortgagee was not divested by the mere fact of payment of the mortgage. "If," says he, "the mortgagor in fee pay the money at the day, on his entry he is in of his former estate. If he does not pay, yet by law he is impowered to redeem at any time within three years after entry for condition broken, by paying principal and interest, or tender

of it, but yet by mere entry and payment the mortgagor is not in as of his former estate, nor can he regain it, but by a reconveyance, or a judgment of the inferior or superior court, as judges in equity under the provincial law (10 Wm. III. c. 13), any more than in England without a reconveyance or the aid of chancery." 8 Mass. 563. The present case, however, is to be decided by the statute of Maine of 1821 (chapter 39) respecting mortgages; 1 Me. St. 1821, p. 144, c. 39, which in a revised form contains the substance of all the statutes of Massachusetts made before the separation; and the decisions of the supreme court of the latter state giving a construction to these statutes are, therefore, of very high authority in the exposition of the statutes of Maine. By the latter it is enacted, that in all real actions on "mortgage, &c. the judgment shall be conditional, that if the mortgagor, his heir, &c. shall pay unto the mortgagee &c. such sum as the court shall adjudge due, within two months from the time of entering up judgment, with interest, then no writ of possession shall issue, otherwise the plaintiff shall be entitled to his writ of possession in due form of law." Now, upon the plain terms of this enactment, it would seem difficult to doubt, that, if the mortgage were actually paid, no real action would lie by the mortgagee for the estate. The judgment is to be conditional for the payment of the sum due, and no writ of possession is to issue, when that sum is paid. If upon the hearing, the court should adjudge, that nothing was due to the mortgagee, how could he be entitled to the conditional judgment? The very form of the judgment supposes, that something is due, and the judgment for possession is absolute only, when there is an omission of payment of the sum found due. The proper conclusion seems to be, that when nothing is due, when nothing remains to be paid, there can be no judgment, even upon a confession of condition broken by the defendant, if the fact so appear to the court. And if so, why may not the same facts be pleaded directly in bar to the action? Surely, it will not be pretended, that the law authorizes an action to be maintained, where the court can render no judgment in aid of the demandant.

But it may be said, that the statute supposes, that the action brought declares upon the mortgage itself, and is not, as in this case, a common writ of entry at the common law. If this prove any thing, it proves, that the latter action ought not to be maintainable at all upon a mortgage after breach of the condition, since it would defeat the statuteable judgment. But as the present doctrine is in favour of such an action, there seems no reason, why the defendant may not show by special pleading, that the suit is, in fact, founded on a mortgage, and thus entitle himself to the benefit of that judgment. It would be difficult to establish, that the demandant might by the mere form of his action oust the other party of his rights; or that the court would be justified in giving a general judgment, when upon the whole record it appeared, that the suit was clearly upon a mortgage. It is supposed, however, that the language of other parts of the statute controls the inference deducible from this provision. The allusion is to those clauses, which give a remedy by bill in equity to the mortgagor to redeem, when the mortgagee has entered and taken actually possession of the estate for the condition broken. In such cases, upon tender of the sum due, or other performance of the condition, the statute requires the mortgagee to restore the possession and execute a release and quit-claim of the mortgage, or to cause satisfaction and payment to be entered in the margin of the record of such mortgage in the register's office, and sign the same, which shall for ever after discharge and "release such mortgage, and perpetually bar all actions to be brought thereupon in any court of record." Upon the refusal of the mortgagee a suit in equity may be brought, in which the court is authorized to proceed according to equity and good conscience, and to decree the party to restore possession and execute a release of the mortgage. The argument derived from this source is, that the provision supposes, that something more than payment is necessary to discharge the mortgage at law, since it requires the mortgagee to execute a release either by deed or in the margin of the registry; and upon his refusal justifies a decree for a release. And in aid of this argument is drawn the provision of the Massachusetts act of 1783 (chapter 29, § 6), which gives a remedy by action on the case for damages against the mortgagee, when he refuses to execute such release after having received full satisfaction and payment. This last provision is omitted in the Revised Code of Maine, and stands repealed by its legislature. It loses somewhat of its force therefore in its present application.

But the whole argument, giving it its full latitude, falls far short of the cogency, which is attributed to it. In respect to the statute action on the case, it lies only for such damages as may arise from the refusal to discharge the mortgage after satisfaction; but it does not necessarily suppose, that such mortgage constitutes a legal title. The existence of a satisfied mortgage may throw a cloud over a title to the injury of the owner, and may prevent a profitable sale. The evidence of payment is liable to be lost, or may exist only in pais, and depend upon the testimony of witnesses, whose death may take place long before a legal presumption of satisfaction can arise. No person can be insensible to the value of a clear unincumbered title apparent upon the face of the public records; nor of the inconvenience of subjecting purchasers to the unravelling of accounts between mortgagors and mortgagees. The law, therefore, may wisely require, that what

is charged upon the record should, when discharged, be evidenced by an instrument of as high verity, not only as a preventive of litigation, but as a security of title, even though the charge were extinguished at law; as equity sometimes orders instruments to be delivered up, upon which there would be a good defence at law. A construction of the statute quite as natural as that contended for at the bar is, that it supposes the mortgage extinguished at law by payment, and means only to provide a remedy for damages sustained by the refusal of the mortgagee to put an acknowledgment of such payment on record.

As to the remedy in equity for the mortgagor, it is observable, that the statute gives it only in case the mortgagor is out of possession, and the mortgagee is in possession after condition broken. I agree, that in such case the remedy for the mortgagor to obtain possession is solely in equity. So it was adjudged in Hill v. Payson, 3 Mass. 560, and Parsons v. Welles, 17 Mass. 419, and, in my humble judgment, with great propriety. The plain reason is, that such is the remedy prescribed by the statute; and it is a very convenient and perfect remedy. But where the mortgagor remains in possession, he is not entitled to bring any bill in equity, for the statute does not extend to such a case. This defect has been supplied in Massachusetts by the statute of 1821 (chapter 85); but no similar one has been adopted in Maine. Unless, therefore, the mortgagor can resist a recovery by the mortgagee at law, he may be turned out of possession, when nothing is due on the mortgage, against the plainest principles of justice, and be driven by a circuity of action to enforce his acknowledged rights. If a cent only be due on the mortgage, the mortgagee can obtain no judgment at law in his suit, but a conditional one, and no possession at all if that cent is paid; and yet, if nothing is due, his rights are absolute, and he is entitled to an unconditional surrender of the possession. I confess I do not understand the reasoning, upon which such a distinction can be maintained. Nor am I prepared to give any construction to a remedial statute, which works such mischief, and is unsupported by its terms, unless I am driven to it by authorities absolutely conclusive and obligatory. The statute provisions appear to me to be in perfect harmony with each other, and each is just and appropriate for its own particular purpose. When the mortgagee seeks possession after condition broken, he may sue at law, but he is not entitled to any judgment, except as security for the sum due on his mortgage; and that being paid, he has no right to possession. In other words, his title, upon payment, is barred at law. When the mortgagor seeks possession from a mortgagee in possession, he is confined to his remedy by bill in equity, because it is a more convenient form to adjust the various claims for improvements and disbursements, which may exist between the parties, and ordinarily something remains due on the mortgage, the payment of which ought to precede the possession. As to the ascertainment of the sum due or paid on the mortgage, there is no more dimculty in arriving at it by a court of law, when it is wholly paid, than when it is partially paid. And in every case of a conditional judgment at law, this is an indispensable inquiry on the part of the court.

Let us now examine the authorities, which have been cited at the bar. If they speak a uniform language; if they give a uniform construction, this court has nothing to do but obey them. If, on the other hand, they express a diversity of opinion, or leave the question open for further inquiry, this court is at liberty to pursue that course which approves itself to its own judgment as the true interpretation of the statute. In Erskine v. Townsend, 2 Mass. 493, the court were of opinion, that after condition broken the mortgagee could have no other judgment but a conditional one. The authority of that case (as has been already stated) has been broken in upon; but it clearly shows the impression of the court, that if the mortgage was paid, there could be no judgment. In Porter v. Perkins, 5 Mass. 233, where there was a mortgage, and judgment had been obtained on the attendant bond, and the judgment had been duly released, the court said, that the party by discharging the judgment, discharged with it the mortgage. In Gould v. Newman, 6 Mass. 239, the court, arguendo, said, that the assignee of a mortgage was entitled to his action to foreclose the mortgage and to have a conditional judgment, unless the judgment on the attendant bond was satisfied. The same doctrine is implied in Taylor v. Porter, 7 Mass. 355. In Perkins v. Pitts, 11 Mass. 125, Chief Justice Sewall in delivering the opinion of the court admitted, that in ordinary cases, where the contract was certain, payment after the day might be a good plea in a suit brought by the mortgagees to obtain possession against the mortgagor. In Inches v. Leonard, 12 Mass. 379, the representative of the mortgagee sought to recover on a mortgage forty-two years after it was given; but the court were of opinion, that there was a presumption of payment from the lapse of time and other circumstances; and the case carries an implied acknowledgment, that payment would have been a good defence. In Pomeroy v. Winship, 12 Mass. 514, Chief Justice Parker intimates, though with caution, that the mortgagor, after payment, may resist the entry of the mortgagee to obtain a foreclosure. His language is, "The remedy in such case must be in equity, or perhaps by resisting the entry of the mortgagee, when he shall attempt to foreclose by a suit, by showing actual payment of the debt secured by the mortgage." I lay no stress upon the lan-

guage of the court in Darling v. Chapman, 14 Mass. 101, as it probably has reference to a suit for the land before condition broken. Up to this period it may be asserted with some confidence, that the doctrine deducible from the authorities, so far as it bears on this point, is uniformly in favour of the right of the mortgagor to resist at law any assertion of title by the mortgagee after satisfaction of his debt. But in Parsons v. Welles, 17 Mass. 419, Mr. Justice Wilde, in delivering the opinion of the court, intimates a contrary opinion. That was not the point before the court, for the only question was, whether a mortgagor, after the entry of the mortgagee for condition broken, could upon payment of the debt, maintain any suit at law for the recovery of the mortgaged estate. It was held, upon principle and in conformity to prior decisions, that he could not. But the learned judge, after reasoning upon the general question with great force, proceeds to say, "to this view of the subject it may be objected, that it enables the mortgagee, if he is so disposed, to vex and harass the mortgagor unreasonably. After receiving his debt, having no claim in equity and good conscience upon the land, but a mere legal estate, he may nevertheless expel the mortgagor, or he may bring a vexatious suit against him and subject him to costs. The answer to this objection is, that the law can never be expected wholly to prevent injustice," &c. Now, while I entirely agree in the judgment of the court on the principal point, I must be permitted to add, that I do not perceive, that the objection stated has any real foundation in law, or any application to the case before the court. Assuming, that the remedy of the mortgagor was solely in equity, it surely created no hardship; and when the legislature gave a remedy to the mortgagor, it had a right to prescribe the form and the manner of pursuing it. For me, it is sufficient that the legislature has chosen to declare, that it shall be by a suit in equity. But the learned judge has contented himself with answering the objection, without considering, whether it had any legal existence. I should be glad to know, what judgment for the mortgagee could be rendered upon a writ of entry consistently with the statute of 1785 (chapter 22), where, upon the pleadings, his title is established to be by a mortgage, which has been satisfied by payment. With great deference, it appears to me, that the objection should have been met with a denial of the right of the mortgagee to maintain any action in such a case. In the case of Vose v. Handy, 2 Greenl. 322, Mr. Chief Justice Mellen, in his very elaborate opinion, declares, that where the debt has been paid, there is no reason in law or justice, why the mortgagee should have any judgment whatever in his favour. I confess, that my own judgment goes along with his on this subject; and finding no decision against the doctrine, and no inconsiderable weight of opinion in its favour, I think it my duty to adhere to the plain sense of the statute, and to pronounce, that the plea of payment or satisfaction after the day is a good bar to any suit by the mortgagee after condition broken for possession of the estate. The prevailing doctrine in New York seems to be in conformity with this view of the subject. A mortgage, which has been paid, is there treated at law, as an extinguished title. Hitchcock v. Harrington, 6 Johns. 290; Collins v. Torry, 7 Johns. 278; Titus v. Neilson, 5 Johns. Ch. 452; Runyan v. Mersereau, 11 Johns. 534. Without, therefore, adverting to the accuracy of the pleadings, my opinion upon the point in controversy is, that a mortgagee cannot at law maintain a suit to recover the premises mortgaged after payment of his debt against the mortgagor, or any persons claiming under him. Upon the pleadings it sufficiently appears, that the debt has been extinguished. A payment of the judgment extinguished the principal debt, and no interest can accrue between the time of issuing the execution and the satisfaction of it. The whole debt is gone by an entry of satisfaction on the execution, and does not revive in equity or law for such intermediate interest. The district judge concurs in this opinion; and, therefore, judgment is to be entered for the defendants.

It is proper to add, that this suit has been brought without any oppressive intent, and merely to give a surety for the debt of the mortgagor, who has paid it, the benefit of the mortgage. The mortgagee has no interest and expects no benefit. He wishes only to aid the surety, so far as by law he may.

GRAY (JONES v.). See Case No. 7,463.

Case No. 5,721.

GRAY et al. v. LARRIMORE.

[4 Sawy. 638; 2 Abb. (U. S.) 542.] [1]

Circuit Court, D. California. Aug. 12, 1865.

THE JURISDICTION OF EVERY COURT OPEN TO INQUIRY—DISTINCTION MADE IN THIS INQUIRY BETWEEN COURTS OF SUPERIOR AND INFERIOR AUTHORITY—LIMITATION UPON PRESUMPTION IN FAVOR OF JUDGMENTS OF SUPERIOR COURTS—SERVICE BY PUBLICATION — STATUTORY PROVISIONS TO BE STRICTLY FOLLOWED—THE STATUTE OF CALIFORNIA—THE DOCTRINE IN EQUITY AS TO ABSENT PARTIES—ALL MEMBERS OF A COPARTNERSHIP INDISPENSABLE PARTIES TO A SUIT—INVALIDITY OF A DECREE IN SUCH CASE AGAINST A PARTNER NOT PROPERLY BROUGHT INTO COURT.

1. The jurisdiction of any court over either the person or the subject-matter, may be inquired into whenever any right or benefit is claimed under its proceedings; and want of

[1] [Reported by L. S. B. Sawyer, Esq., and by Banjamin Vaughn Abbott, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 4 Sawy. 638, and the statement is from 2 Abb. (U. S.) 542.]

jurisdiction will render its judgment unavailable for any purpose.

[Quoted in Stansbury v. Inglebark, 20 D. C. 136.]

2. In making this inquiry the only difference recognized between courts of superior or general authority and courts of inferior or limited anthority is, that with reference to the former jurisdiction is presumed until the contrary appears; but with reference to the latter, jurisdiction must be affirmatively shown by parties who claim any right or benefit under their proceedings.

[Cited in Gager v. Henry, Case No. 5,172.]

3. The presumption in favor of the judgments of superior courts is limited to jurisdiction over persons within their territorial limits, and to proceedings in accordance with the course of the common law. Wherever it appears, either from the record or by evidence outside, that the defendants were at the time of the alleged service upon them, beyond the reach of the process of the court, the presumption ceases, and the burden of establishing the jurisdiction over them is thrown upon the party who invokes the benefit of the judgment. So, too, the presumption ceases when the proceedings are not in accordance with the course of the common law.

[Cited in Galpin v. Page, Case No. 5,206.]

[Cited in Gibney v. Crawford, 51 Ark. 34, 9 S. W. 312.]

4. A statute authorizing a suit to be commenced against a non-resident upon constructive service of summons by publication, is in derogation of the common law, and its provisions must be strictly pursued in order to sustain the judgment recovered. A failure to comply with any of its requirements will be fatal, unless cured by the voluntary appearance of the party.

5. The requisites prescribed by the statute of California to obtain an order for the constructive service of summons in a civil action by publication, and the proofs required to show such service, stated and considered in a cause involving the rights of a purchaser under the judgment as against the defendant, suing after the reversal of the judgment to recover back the property sold under it.

6. The general doctrine of courts of equity in relation to absent parties is, that if persons out of the jurisdiction are merely incidental to those of the parties before the court, then inasmuch as a complete decree may be obtained without them, they may be dispensed with. But if such absent persons are to be active in the performance or execution of the decree; or if they have rights wholly distinct from those of the other parties; or if the decree ought to be pursued against them, then the court cannot properly proceed to a determination of the whole case without their being made parties; and the suit, so far at least as their rights and interests are concerned, should be stayed; for, to this extent, it is unavoidably defective.

7. All the partners, or their representatives, are indispensable parties to a bill filed to procure a dissolution of the copartnership and an account.

8. Where, upon a bill filed in a state court, to procure a dissolution of copartnership and an account, one of the partners is not a resident of the state in which the suit is commenced, and cannot be served with process therein, the suit is defective and cannot proceed, unless service by publication is authorized by the law of the state, and is made in strict conformity therewith, or unless there is a voluntary appearance.

[Cited in Cissell v. Pulaski Co., 10 Fed. 893; Martin v. Barbour, 34 Fed. 708.]

Trial of issues by the court. This was an action to recover the possession of land in San Francisco, and was brought by Matilda C. Gray and Franklina C. Gray (an infant suing by next friend) against Richard Larrimore and others. The facts immediately material to the decision are stated in the opinion of the court. See, also, Gray v. Brignardello, 1 Wall. (68 U. S.) 627.

Philip G. Galpin, for plaintiff.

Williams & Thornton, for defendant.

FIELD, Circuit Justice. This was an action to recover the possession of certain real property situated within the city of San Francisco, and the rents and profits of the same whilst withheld from the plaintiffs. It was tried by the court without a jury, pursuant to a stipulation of the parties at the June term of 1865.

Both parties claimed title from the same source—from Franklin C. Gray, who died intestate in July, 1853, possessed of a large property, real and personal. Of the real property, the premises in controversy were a portion. The deceased left surviving him a widow, Matilda C. Gray, and a posthumous child, Franklina C. Gray, and by the statute of descents and distributions of California, they inherited his entire estate in equal shares.

The defendants claimed title to the premises by virtue of a sale and deed, made under a decree rendered in an action in a district court of the state, to which the widow and child are alleged to have been parties. It was upon the validity of this decree, and consequent sale and deed, that the case turned. The action in which the decree was rendered arose in this wise: In February, 1854, William H. Gray, a brother of the deceased, instituted a suit in equity, in a district court of the state, against Joseph C. Palmer and Cornelius J. Eaton; who had been appointed administrators of the estate of Franklin C. Gray, and against the widow, Matilda, and one James Gray. Subsequently the child Franklina was made a party defendant. In his bill the complainant alleged that a copartnership had existed between him and his brother since 1848, and that it embraced all their business operations and all their purchases of real property, although the titles were taken in the individual name of the deceased. The partnership stated was both universal and dormant, the interest of the complainant extending to one-third of all acquisitions of every kind and description of both copartners. The object of the bill was to settle up the affairs of the alleged copartnership and obtain a decree for the one-third claimed by the complainant.

In January, 1855, Cornelius J. Eaton, who had been a clerk of the deceased, and who, as administrator, was made a defendant in the above action of Gray, resigned his trust, and instituted a suit in equity, in a district court of the state, against Palmer, the remaining administrator, and against the widow and child. In his bill he also alleged that a copartnership had existed between

himself and the deceased; that it commenced in January, 1851, and embraced all the property, both real and personal, of both, and all their business operations, and that his interest extended to one-fourth of the property possessed at the time, and of all future acquisitions. The object of the suit was to settle up the affairs of the alleged copartnership, and to obtain a decree adjudging to the complainant the one-fourth part of the estate claimed.

The amendment to the bill in the suit brought by Gray, by which the child Franklina was made a party, alleged that she was absent from the state, and resided with her mother at Brooklyn, in the state of New York. The bill filed by Eaton averred that the child was not a resident nor a citizen of California, but was a resident and citizen of the state of New York, or of the District of Columbia. Service of summons upon her was therefore attempted by publication in both cases. When, as was supposed, the service had been in this way effected, a guardian ad litem for the child was appointed by the court in both cases. The appointment was made in each case upon the petition of the complainant. The other defendants appeared by attorneys and answered.

On the twenty-third of October, 1855, upon the stipulation of the guardian and the attorneys of the other defendants, the two actions were consolidated into one. Four days subsequently a decree was entered without trial, upon the consent and agreement of the parties. By this decree it was adjudged that a partnership had existed between Eaton and the deceased, which embraced all the property, real and personal, and all the business of both, and that in this partnership Eaton had an interest of one-fourth; that a similar copartnership had also existed at the same time between Gray and the deceased, in which Gray had an interest of one-third; that the latter copartnership was subject to the copartnership of Eaton; and that, therefore, Eaton should first take one-fourth of the estate, and Gray one-third of the remaining three-fourths, and that the other two-fourths should be equally divided between the widow and child. By the decree, a reference was also ordered to a commissioner, to take and state an account of the business, profits, and property of the two copartnerships, with directions upon the confirmation of his report to sell all the property of both, and upon the confirmation of the sales to execute proper conveyances to the purchasers.

Upon the statement of the accounts by the commissioner, the deceased was found largely indebted to each of his alleged copartners. Although Gray had been interested, as pretended, in one-third of the property and profits of a universal copartnership with his brother for nearly five years, and had been oftentimes pecuniarily embarrassed in transactions with other parties, and on one occasion, as late as March, 1853, had even borrowed money of his brother, on interest at the rate of three per cent. a month, he had been careful to preserve untouched his proportion of the large sums and property accumulated by the alleged copartnership, and therefore had refrained from drawing any moneys from the concern. The deceased, in the meantime, as counsel very pointedly observe, had spent the money of the alleged firm as freely as though it had been his own. Like prudential considerations appear to have governed, except in one instance, the conduct of the alleged partner Eaton during the period of two years and a half. It very naturally turned out, under these circumstances, upon the accounting, that the indebtedness of the deceased to both copartners for the excess over his share, drawn by him from the concern, was large. It was found to be so large that it absorbed the entire portion of the estate, which would otherwise have gone to the widow and child. Out of property inventoried in the probate court of San Francisco at $237,000, there was nothing left for them. Indeed, the estate of the deceased was brought in debt to these alleged universal copartners over $3,500.

By a decree of the court, bearing date on the seventh of April, 1856, the report of the commissioner was confirmed, and a sale of the entire property, real and personal, of the alleged copartnerships, was ordered. Objection was taken to the admissibility of this decree, but it was treated as properly in the case. The sale which it directed was made on the third of May, 1856. At that sale, the defendant, Larrimore, became the purchaser of the property in controversy, and subsequently received a deed from the commissioner, and went into possession, and had continued in the possession and use of the premises ever afterward. The other defendants held under him.

On appeal to the supreme court of the state the decree of the district court in the consolidation action was reversed, and it was held that the evidence presented did not warrant the conclusion that a copartnership had existed between William H. Gray and the deceased. The case was accordingly remanded to the district court, and afterward both suits were dismissed.

The plaintiffs then brought the present suit of ejectment. The defendants relied, as already stated, upon the validity of the decree, in the consolidated action, for the sale of the premises, notwithstanding its subsequent reversal.

On the other hand, the plaintiffs insisted that the district court never acquired jurisdiction of the person of the child Franklina by service of summons or by her appearance; and that in her absence as a party to the proceedings, no valid decree for the sale of the alleged partnership property could pass; in other words, that she was an indispensable party to the ascertainment of the

debts, and the settlement of the accounts of the alleged copartnership, and the sale of the property belonging to them. The questions presented, then, were: Was she brought before the court by service of process, or did she otherwise appear in the suits? And if she neither was served nor appeared, was it competent for the court to proceed with the suits in her absence?

It is a familiar doctrine, that the jurisdiction of any court over either the person of the defendant or of the subject-matter, may be inquired into whenever any right or benefit is claimed under its proceedings. The want of jurisdiction will render its judgments and decrees unavailable for any purpose. Borden v. Fitch, 15 Johns. 140; Williamson v. Berry, 8 How. [49 U. S.] 541. The doctrine is as applicable to the proceedings of courts of superior or general authority as it is to courts of inferior or limited authority. The difference between these courts in this respect relates only to the presumptions raised by the law. With reference to courts of superior or general authority, jurisdiction is presumed until the contrary appears; but with reference to courts of inferior or limited authority, the jurisdiction must be affirmatively shown by parties who claim any right or benefit under their proceedings. Mills v. Martin, 19 Johns. 33; Bloom v. Burdick, 1 Hill, 140.

The general presumption indulged in support of the judgments and decrees of the superior courts is, however, limited to jurisdiction over persons within their territorial limits; persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law. Whenever it appears, either from inspection of the record, or by evidence outside the record, that the defendants were at the time of the alleged service upon them beyond the reach of the process of the court, the presumption ceases, and the burden of establishing the jurisdiction over them is thrown upon the party who invokes the benefit or protection of its judgments and decrees. So, too, the presumption ceases when the proceedings are not in accordance with the course of the common law. With reference to such proceedings, the superior courts, though in other respects possessing general authority, exercise only a limited and special jurisdiction.

In the bills of complaint in the two actions of Gray and Eaton, the absence of the infant Franklina from California, and her residence in another state, are alleged. The presumption of jurisdiction over her person by the district court is thereby repelled, and it remains for the defendants to show that by means provided by the statute in such cases, the jurisdiction was acquired. The statute substitutes, in cases of a non-resident and absent defendant, constructive service, by publication of the summons in place of personal service; and it designates the facts which must appear to authorize an order for the publication, the period for which the publication must be made, and the manner in which such publication must be proved. The statute is in derogation of the common law, and its provisions must be strictly pursued. A failure to comply with any of the particulars stated will be fatal, unless cured by the voluntary appearance of the party. In the first place, to obtain the order it must appear, by affidavit, to the satisfaction of the court or the judge, that the defendant is at the time a non-resident, or absent from the state; and that the plaintiff has a cause of action against him, or a cause of action to the complete determination of which he is a necessary or proper party. Until these facts appear, not by the complaint, but by affidavit, no order can be legally issued. "In granting the order," says the supreme court of the state in a recent case, "the court or judge acts judicially, and can know nothing about the facts upon which the order is to be granted, except from the affidavit presented by the applicant. There is no other way of bringing the fact of residence to the judicial knowledge of the court or judge." Ricketson v. Richardson, 26 Cal. 149, and Pr. Act, § 30. In the second place, the order must direct the publication to be made in a newspaper to be designated as most likely to give notice to the defendant, and the publication must not be less than three months. If the residence of the non-resident or absent defendant be known, the order must also direct a copy of the summons and complaint to be forthwith deposited in the post-office, addressed to him at his place of residence. Pr. Act, § 31. And in the third place, proof of such service must be made "by the affidavit of the printer, or his foreman or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post-office, if the same shall have been deposited. Id. § 32.

Tested by these provisions of law, the proceedings to secure service by publication, and the proof of publication, were defective in essential particulars:

1. There was no affidavit presented to the court in either case when the order was obtained. The action of the court, so far as the record discloses, may have been taken in each case upon the verbal statement of the plaintiff or of his counsel.

2. In the case of Eaton v. Palmer [11 Cal. 341] there was no affidavit or other proof of publication; and in Gray v. Eaton [5 Cal. 448] the affidavit does not show that the affiant was either "the printer, or his foreman, or principal clerk." It merely describes himself as being the clerk; it did not state such to be the fact. This description was not a compliance with the requirements of the statute. The authorities are uniform on this point. In the recent case of Steinbach v. Leese, in the supreme court of the state, the precise question was considered

and determined. 27 Cal. 295. There the affiant described himself as principal clerk in the office of the newspaper in which the publication was made, but did not aver that such was his position in fact, and the court held that the affidavit was fatally defective; that by the statute the only persons competent to testify as to the publication are the "printer, his foreman, or principal clerk;" and that the affiant is one of them, is of itself a substantive fact, which must be proved as such before the court can proceed to render judgment. Staples v. Fairchild, 3 Comst. [3 N. Y.] 43; Payne v. Young, 4 Seld. [8 N. Y.] 158.

There was an attempt made to supply the omission of the affidavit, by evidence at the trial, that the affiant was in fact the principal clerk of the printer; but such evidence was clearly inadmissible. The statute prescribes the character of the evidence which shall be produced, and by whom it shall be given. It is not sufficient that other proof equally persuasive and convincing may be offered. The statutory proof will alone suffice.

If the omission could be remedied at all at this late day, which is very questionable, it could only be done by the direct action of the court to which the record belongs. It is not competent for this court to receive parol testimony to supply the omission. Noyes v. Butler, 6 Barb. 617; Lowry v. Cady, 4 Vt. 506.

The defects stated are decisive upon the question whether the district court ever acquired jurisdiction over the person of the infant, Franklina. As to her, the alleged record of that court is no record. The position urged by counsel, that the mother, as the natural guardian of the infant, had the right to appear for her without service on her, does not require consideration, for no such appearance was made or attempted. The guardian ad litem for the infant was appointed upon the application of the plaintiff in each case. But were it otherwise the result would be the same. There can be no appearance of the infant until a guardian ad litem is appointed, and no such appointment can be made until service on the infant is effected. Gray v. Palmer, 9 Cal. 638. The appearance of the mother on her own behalf, or any request by her attorney for the appointment of a guardian, could not dispense with the service.

The infant not having been brought into court, the next inquiry is as to the effect of the proceedings and decree upon the interests of the widow, Matilda. The object of the two actions of Gray and Eaton, and of course of the consolidated action, was, as already stated, to settle up the affairs of the alleged copartnerships and to obtain a distribution of the effects and property of the copartners according to their respective interests. To these actions the deceased, had he been living, would have been an indispensable party, their aim being to dispose of property the title to which stood in his name, and of which he was apparently the sole owner. Any decree therein distributing or settling the property without his presence would have been a nullity, a confiscation of his rights without his day in court—a simple act of judicial usurpation. The same necessity which would have required the presence of the deceased, had he been living, exacts the presence of those who, upon his death, became clothed with the title and apparent ownership of the property. To reach the property and give the court authority to interfere with it and divest the owners of their title by ordering a sale, it was necessary to establish the existence of the alleged copartnerships, and that there were debts owing by them. Both of these facts were essential to the jurisdiction of the court, and the foundation of the entire proceedings. The establishment of either of them necessarily affected, to the same extent, the interests of both the widow and child. If the copartnerships existed, they embrace the property claimed by both; they could not exist with reference to the interest which descended to the widow, and not also exist with reference to the interest which descended to the child. They embraced the whole interest in the property, not an undivided interest. Therefore no valid determination of the fact of copartnerships could be made against the widow which would not be equally valid against the child; and if no valid determination could be made against the child, she not being brought into court, there could be none against the widow. The fact of copartnership being established, its operation upon the coportnership property was incapable of division or abridgment.

The same objections apply to the debts alleged to be owing by the copartnerships. If they were legally established, they become liens not upon the interest of the widow alone, but upon the entire property.

The conclusion which follows from these views is, that the child, Franklina, was an indispensable party to any valid adjudication of the facts of partnership and debt, and consequently to any binding decree for the sale of the alleged copartnership property.

The doctrine of equity, when some of the parties are out of the jurisdiction of the court, is well stated by Mr. Justice Story in his Equity Pleadings. Sections 81–83. After commenting upon the general rule that all persons legally or beneficially interested in the subject-matter of a suit in equity should be made parties, and stating an exception with reference to persons without the jurisdiction, who cannot consequently be reached by the process of the court, the learned justice says: "It is an important qualification ingrafted on this particular exception that

persons who are out of the jurisdiction, and are ordinarily proper and necessary parties, can be dispensed with only when their interests will not be prejudiced by the decree, and when they are not indispensable to the just ascertainment of the merits of the case before the court. The doctrine ordinarily laid down on this point is, that when the persons who are out of the jurisdiction are merely passive objects of the judgment of the court, or their rights are merely incidental to those of the parties before the court, then, inasmuch as a complete decree may be obtained without them, they may be dispensed with. But if such absent persons are to be active in the performance or execution of the decree; or if they have rights wholly distinct from those of the other parties, or if the decree ought to be pursued against them, then the court cannot properly proceed to a determination of the whole cause without their being made parties. And under such circumstances, their being out of the jurisdiction constitutes no ground for proceeding to any decree against them or their rights or interests; but the suit, so far at least as their rights and interests are concerned, should be stayed; for to this extent it is unavoidably defective. In many instances, the objection will be fatal to the whole suit."

The case of a bill brought by one partner against several other copartners, one of whom was out of the jurisdiction, praying for an account and dissolution of the copartnership, is given by Story, in illustration of this last position, that the objection will sometimes be fatal to the whole suit, for "the absent partner," says the justice, "would have a distinct and independent interest, and would seem to be an indispensable party, since the decree must affect that interest, and indeed would pervade the entire operations of the partnership." The case of Browne v. Blount, 2 Russ. & M. 83, is also referred to as illustrating the same position. In that case a judgment creditor of one Blount had sued out a writ of elegit upon his judgment, and had filed his bill to reach certain real estates, which were vested in trustees upon certain trusts, under which Blount was entitled to the rents and profits during his life. The trustees and certain parties interested under the trusts, and others having a charge upon the trust estates were made parties, but Blount was abroad, and had been for years previous to the institution of the suit, and was not therefore made a party. The court held that "Blount being the person whose interests were sought to be affected by the decree, the suit could not proceed in his absence." See in further illustration of the doctrines stated: Mitf. Eq. Pl. 31, 32; Inchiquin v. French, 1 Amb. 33; Fell v. Brown, 2 Brown, Ch. 276; Beaumont v. Meredith, 3 Ves. & B. 180; Evans v. Stokes, 1 Keen, 32; Russell v. Clark, 7 Cranch [11 U. S.] 98; Mallow v. Hinde, 12 Wheat. [25 U. S.] 194; Fuller v. Benjamin, 23 Me. 255; Spurr v. Scoville, 3 Cush. 578.

In Evans v. Stokes, the bill was filed to have the affairs of a joint-stock company, which was a copartnership, wound up and settled under the decree of the court, and accounts of the partnership property taken, and a sale of some portion of the property made by the directors set aside, and it was held that all the members of the company, however numerous, must be made parties. "It is perfectly obvious," said the master of the rolls, "that a suit, where all the accounts of the partnership are to be taken, and the rights of all the parties are to be determined, as between themselves, and under the various circumstances in which they stand in relation to each other, some of them, for instance, having paid their calls, and others having omitted to do so, cannot be prosecuted in the absence of any of those parties."

The case of Fuller v. Benjamin is equally pointed. In that case four persons had been copartners, two of whom had become insolvent, and were out of the state; the suit was brought by one of the partners against the solvent member. On demurrer, for want of parties, the court said: "In cases of partnership it must be difficult, if not impracticable, to proceed in equity without the presence of all the copartners or their legal representatives. Each must be expected to have claims, either for services rendered or advances made, without the adjustment for which, it will be impossible to ascertain what may be due from or to the joint concern by each; or what just claim any one or more of them may have against any one or more of the others. Until such an ascertainment shall have been made, it will be impossible to pass a decree, which shall be founded upon the principles of justice, as to their several rights." And again: "The plaintiff in this case would seem to be without remedy, either at law or in equity. In Story on Equity Pleadings (sections 82, 83, 152, 218), it is clearly shown that a court of equity cannot take cognizance of a case in the predicament of the one here exhibited. Although the partners not present are insolvent, yet are they indispensable parties whose rights might be affected by a decree, and who must be present to be able to afford information as to their own claims in connection with those of the others, and if bankrupts, their assignees should be made parties."

The condition of the alleged copartners, Gray and Eaton, might have been similar to that of the plaintiff in this last case—without relief either at law or in equity—had there not been a provision in the legislation of the state for securing service by publication, upon the non-resident infant. As they did not pursue the course pointed out by the statute, their present position with ref-

erence to the subsequent proceedings, and the decree rendered, is precisely what it would have been if no such statute had existed. The principle upon which the several cases cited proceed is fundamental, and underlies the administration of justice in all courts of equity.

The conclusion which we have reached renders it unnecessary to pass upon the objection taken to the introduction of the decree of April 7, 1856. The decree has never been produced upon any previous trial of the actions brought by the widow and child; it is not embraced in the judgment roll of the consolidated action of Gray & Eaton; it did not form any portion of the record which was presented in that action to the supreme court of the state, or of the record in the recent action of ejectment of Gray against Brignardello, before the supreme court of the United States. For nearly nine years the original document, signed by the district judge, has lain unknown in the desk of the commissioner in this city. It appears also that subsequently, on the fourteenth of May, 1856, the decree was amended for some alleged want of conformity to the previous report of the commissioner and that a new decree was substituted in its place. It may well be doubted whether, under these circumstances, the decree should have been received in evidence; but, as stated, the question of its admissibility is rendered immaterial from the conclusions reached on other grounds.

The tax deeds produced by the defendant Larrimore do not aid the defense. He was in possession of the premises at the time the taxes were levied, and the sales by the tax collector were made, and it was his duty to have paid the taxes. Moss v. Shear covers his case. 25 Cal. 38. Nor did the assessment roll for the years in which the taxes were unpaid show any valuation of the property. Hurlbutt v. Butenop, 27 Cal. 50; Woods v. Freeman, 1 Wall. [68 U. S.] 398.

As to the rents and profits of the premises since the defendant Larrimore went into possession, there is some conflict in the evidence. Our conclusion is, that the premises have been worth to him since May 26, 1856, $100 a month, and that amount will be found as the monthly rents and profits.

The plaintiffs are entitled to a joint judgment against all the defendants for the possession of the premises in controversy, and the plaintiff, Franklina, to a several judgment against the defendant, Larrimore, for one-half of the estimated rents and profits from May 26, 1856; and the plaintiff, Matilda, to a several judgment against him for the remaining half of the rents and profits, commencing three years before the filing of the complaint in the present action—the rents and profits to be calculated in both cases up to this date. Galpin v. Page, 18 Wall. [85 U. S.] 350; Id. [Case No. 5,206]; also Neff v. Pennoyer [Id. 10,083].

[NOTE. The validity of the decree of sale involving this estate, was further discussed in a lengthy opinion by Sawyer, Circuit Justice, in Case No. 5,205. The plaintiff in the action of ejectment there instituted was one Galpin, who had acquired such title to the premises in controversy as belonged to Matilda and Franklina C. Gray after the sale and conveyance made under said judgment, and the defendant was Lucy B. Page, the heir of the purchaser at the sale by the commissioner. The court sustained the validity of the decree, and gave judgment for the defendant. Subsequently, in another action between the same parties to recover possession of the premises, Field, Circuit Justice, gave judgment for the plaintiff, substantially the same points being involved. Id. 5,206.]

Case No. 5,722.

GRAY v. LAWRENCE.

[3 Blatchf. 117.] [1]

Circuit Court, S. D. New York. Dec., 1853.

CUSTOMS DUTIES—INVOICE PRICE—USAGE—POWER OF SECRETARY OF TREASURY—PROTEST—PRINCIPAL AND AGENT.

1. An invoice of Irish linens, as entered, carried out the prices in gross, with a credit underwritten, "deduct discount allowed for cash, 7½ per cent." The invoice prices, with the allowance of such discount, gave the true market value of the linens. The appraisers found the invoice to be correct, as made out, and did not appraise the linens according to their judgment, but, in obedience to circular instructions from the secretary of the treasury, valued them at the invoice prices less a discount of only 2½ per cent., and duties were exacted on the remaining 5 per cent. The usage of the trade was to make up invoices of linens at nominal prices, and reduce those to the true market value by discounts or rebatements: *Held*, that, under the usage proved, the sum to which an invoice was reduced by the rebatement, and not its gross sum, must be regarded as representing the real invoice price.

[Cited in McCall v. Lawrence, Case No. 8,672; Balfour v. Sullivan, 17 Fed. 233.]

2. The secretary of the treasury had no legal power to direct the judgment of the appraisers in valuing goods, or in adding to or subtracting from the charges in invoices, for the purpose of determining market values, and the increase of the invoice 5 per cent. in amount, in the manner in which it was done, was without authority of law.

3. An entry or protest made by an agent is, in law, made by his principal. Under Act Feb. 26, 1845 (5 Stat. 727), which requires a protest to be in writing, and to be signed by the claimant of goods, a protest signed not by the claimant personally, but by his agent, is sufficient.

[Cited in Waring v. Mayor of Mobile, 8 Wall. (75 U. S.) 116; Herman v. Schell, 18 Fed. 892.]

This was an action [by George Gray] to recover back an excess of duties exacted by the defendant [Cornelius W. Lawrence], as collector of the port of New York, on several

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

invoices of Irish linens, consigned by the plaintiff to Bird, Gillilan & Co., his agents, and entered by them. The invoices carried out the prices of the linens in gross, with a credit underwritten, "Deduct discount allowed for cash, 7½ per cent.," and the plaintiff, by his agents, claimed to enter the goods at the prices less that discount, as being their true market value abroad. The collector, in obedience to circular instructions from the secretary of the treasury, of October 29th, 1847, and August 7th, 1848, directing "that no discount be allowed on invoices of Irish linen beyond 2½ per cent.," refused to allow the discount beyond 2½ per cent., and charged duty upon the remaining 5 per cent. The consignees protested in writing against that exaction, "with only 2½ per cent off," claiming that, under existing laws, they were entitled to enter the same with 7½ per cent. off. It appeared, upon the proofs, that the invoice prices, with the allowance of 7½ per cent. rebatement, gave the true market value of the goods. It also appeared, that the appraisers declared the invoices to be correct as made out; and that the valuation reported by them was made in obedience to the order of the secretary of the treasury, and not upon an appraisal of the linens according to the judgment of the appraisers. It was proved to be the usage of the trade, to make up invoices of linens at an arranged rate of prices, (in effect nominal), and reduce those to the true market value by discounts or rebatements. The defendant objected to the sufficiency of the protest, because it was not signed by the claimant of the goods personally (Act Feb. 26, 1845; 5 Stat. 727), requiring the protest to be made in writing and to be signed by the claimant.

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

THE COURT held: 1. That, under the usage proved, the sum to which an invoice was reduced by the rebatement, and not its gross sum, must be regarded as representing the real invoice price;

2. That the secretary of the treasury had no legal power to direct the judgment of the appraisers in valuing goods, or in adding to or subtracting from the charges in the invoices, for the purpose of determining market values; and that the increase of the invoices 5 per cent. in amount, in the manner in which it was done, was without authority of law;

3. That an entry or protest made by an agent is, in law, made by the principal, and that the act of 1845 did not necessarily impugn that general principle. Mason v. Kane [Case No. 9,241].

Judgment for the plaintiff for the amount of duties charged upon the 5 per cent. so added to the invoice, with interest from the time of payment.

Case No. 5,723.

GRAY et al. v. MECHANICS' BANK OF ALEXANDRIA.

[2 Cranch, C. C. 51.] [1]

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

BANK CHARTER—CONSTRUCTION—DIRECTORS—MANDAMUS.

Under the charter of the Mechanics' Bank of Alexandria, it is not necessary that the eight directors who are to be practical mechanics, should be in actual practice at the time of the election.

Rule to show cause why a mandamus should not issue to the directors of the Mechanics' Bank of Alexandria, to admit the complainants as directors, in the place of Mr. Langdon, Mr. McGuire, and Mr. Weightman, who, it was alleged, were not practical mechanics at the time of their election. The 5th section of the charter of the 16th of May, 1812, requires that "there shall be fifteen directors, eight of which at least shall be practical mechanics."

C. Lee, for defendants, objected that this was not a case for a mandamus, although it might perhaps be a case for an information in the nature of a quo warranto.

Mr. Taylor, in support of the authority of the court to issue the mandamus, cited 2 Esp. N. P. 661, 666; Anon., 2 Strange, 696; Rex v. Turkey Co., 2 Burrows, 1000; Rex v. Surgeons in London, Id. 892; Rex. v. Barker, 3 Burrows, 1265; 5 Com. Dig. 22.

THE COURT directed the complainants to suggest their case, and support it by affidavits; and said they would consider it and the question of jurisdiction.

Afterwards, THE COURT (nem. com.) was of opinion that it is not necessary that any of the directors should be in actual practice at the time of the election. They gave no opinion as to the jurisdiction.

Case No. 5,724.

GRAY et al. v. MUNROE et al.

[1 McLean, 528.] [2]

Circuit Court, D. Ohio. July Term, 1839.

IMPRISONMENT OF DEBTORS—TIME OF OPERATION OF ACT FEB. 28, 1839—BAIL.

1. The act of the 28th February, 1839 [5 Stat. 321], which adopts the laws of a state in regard to imprisonment of debtors, gives immediate effect to such laws, as well in cases pending, as in those subsequently commenced. This law relates to the remedy, and does not impair the obligation of the contract.

[Cited in Brown v. Dillahanty, 4 Smedes & M. 713; McCormick v. Rusch, 15 Iowa, 136; Willard v. Harvey, 24 N. H. 353; Baldwin v. Buswell, 52 Vt. 61.]

[See Beers v. Haughton, Case No. 1,230.]

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

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

2. In a case where appearance bail had been given, before the passage of the law, the defendants are not bound to give special bail, but may be discharged on motion, on common bail.

[Cited in Wilber v. Ingersoll, Case No. 17,632.]

[This was an action at law by Gray, Sherwood & Co. against Charles C. Munroe and others.]

Mr. Switzer, for plaintiffs.

Goddard & Converse, for defendants.

OPINION OF THE COURT. The capias which was issued in this case, bears date the 5th February, 1839, and was served the 1st March, ensuing, and appearance bail was given. A motion is now made to discharge the defendants on common bail. This motion is made under the act of congress of the 28th February, 1839, which provides "that no person shall be imprisoned for debt in any state, on process issuing out of a court of the United States, where, by the laws of such state, imprisonment for debt has been abolished; and where, by the laws of the state, imprisonment for debt shall be allowed, under certain conditions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States, and the same proceedings shall be had therein as are adopted in the courts of such state." By the act of Ohio of the 19th March, 1838 [36 Ohio Laws, p. 75], it is provided in the first section, "that no person shall be arrested or imprisoned on any mesne or final process, &c. except in certain cases." The exceptions are, proceedings for contempt, for crimes, misdemeanors or offences prosecuted by the state, judgments for fines, judgments against a public officer or an attorney at law for monies received, or where an affidavit is made agreeably to the statute, &c. And an affidavit is required to be made before a capias ad satisfaciendum shall issue on a judgment. This statute has never received a construction by the supreme court of the state, and it is understood to have been differently construed in different circuits of the common pleas. The imprisonment of the defendant is said to be a satisfaction of the judgment; but it is in fact a remedy given to enforce the payment of the judgment. And when this remedy is taken away by a law abolishing imprisonment for debt, or by a proceeding under an insolvent law, the contract is not reached, nor its obligation impaired. The remedy only is affected, and the legislature have a right to change this at their discretion. The bail bond is a part of the remedy, and if its condition to surrender the defendant is afterwards made unlawful, the bail on principle and authority must be discharged. 14 East, 599; 5 Bin. 332; 4 Johns. 407. In the case of Beers v. Haughton, 9 Pet. [34 U. S.] 358, hereafter cited, the supreme court say: "In order to clear the case of embarrassment from collateral matters, it may be proper to state, that the recognizance of special bail, being a part of the proceedings on a suit and subject to the regulation of the court, the nature, extent and limitations of the responsibility created thereby, are to be decided, not by a mere examination of the terms of the instrument, but by a reference to the known rules of the court and the principles of law applicable thereto. Whatever in the sense of those rules and principles will constitute a discharge of the liability of the special bail, must be included within the purview of the instrument as much as if it were expressly stated." The rule under which the bail were discharged in the above case, was adopted subsequently to the recognizance of bail. The act of congress adopts the state law, and the question is whether an individual under this law is liable to be imprisoned, except on the conditions which it prescribes. No substantial objection is perceived to the mode in which the question is raised. The defendant has given appearance bail, and by the terms of his bond he is required now to enter special bail, or bail to the action. But he asks the court to release him from this condition on the ground that as the law now stands he cannot be imprisoned for debt, except under proceedings different from those which have been had in this case. In this summary mode the point may be presented as fully as in an action on the bail bond, or in any other form. Indeed the bail are generally discharged on motion, where there has been a surrender of the principal, or where such surrender cannot be made, relief is given without making it.

In the case of Beers v. Haughton, 9 Pet. [34 U. S.] 358, the supreme court say, that the doctrine is clearly established that where the principal would be entitled to an immediate and unconditional discharge, if he had been surrendered, the bail are entitled to relief by entering an exoneretur without any surrender. And that where the law prohibits the party from being imprisoned at all, or where by the positive operation of law a surrender is prevented, this doctrine must apply. But it is insisted that this writ having been legally issued, the marshal was bound to arrest the defendants and take bail notwithstanding the law which abolished imprisonment. That if under this law the defendants shall be discharged on common bail, the plaintiffs are placed in a worse situation than if they had instituted their suit under the present law, as by it on making the affidavit required they would have been entitled to bail. This writ was issued under the law which entitled the plaintiffs to bail, but it is not perceived how this can give effect to that law, after it shall have been repealed. If the position contended for be correct, the law under which a suit is commenced must regulate its future progress, though repealed. The law declares that there shall

be no imprisonment for debt, except in the cases stated, and the pendency of a suit, before the law took effect, is not within the exceptions. So far as regards the remedy, the legislature may alter the law, in their discretion, and unless they be excepted, the law operates as well on cases pending, as on those which may be commenced subsequently. In the present case it is admitted that the plaintiffs in this, or in any other cause, cannot take out a capias ad satisfaciendum on a judgment without making the oath required by the present law. And if in this respect this law is to govern, why does it not equally apply to bail? As the case now stands, the plaintiffs are not entitled to a ca. sa. against the defendants, and under such circumstances, can they object to their discharge? It would seem to follow as a necessary consequence, if the plaintiffs cannot arrest the defendants on final execution, that they cannot require them to give special bail. And this is the principle laid down in the case of Beers v. Houghton [supra]. The plaintiffs may entitle themselves to a capias ad satisfaciendum on the judgment, but this depends upon a proceeding subsequent to the judgment. It is not a right which necessarily follows the judgment, or grows out of the preliminary proceedings in the case. The statute requires bail to the action only on condition that certain facts are sworn to by the plaintiff, and this has not been done and cannot now be done, in the present case. The right to bail is cut off by the statute, and as regards the present suit, stands as though no bail could be required in any case. No hardship or equitable considerations arising out of the circumstances of the case, can alter the law. And its language will not admit of the construction, as contended for, which shall limit the application of all its provisions to suits commenced subsequently. Effect can be given to some of its provisions, only, in suits subsequently commenced; but there are others which take immediate effect, and among them is the provision which abolishes imprisonment for debt.

In the case of Satterlee v. Matthewson [13 Serg. & R. 133, 16 Serg. & R. 169], the supreme court of Pennsylvania decided that the lease set up by the defendant, under a Connecticut title, did not establish the relation of landlord and tenant between the defendant and the lessor of the plaintiff, and consequently that the defendant might show a title in himself. Shortly after this decision, the legislature of Pennsylvania passed a law declaring that the relation of landlord and tenant should exist under such a title as that under which the defendant entered, and the supreme court of Pennsylvania held this act to be valid and gave effect to it. And on the case being brought before the supreme court of the United States by writ of error (2 Pet. [27 U. S.] 380), the law was not considered as impairing the obligation of the contract, and the case was dismissed. Now here is a case in which the law acted upon, and to some extent modified vested rights, and yet it was carried into effect. But the law abolishing imprisonment cannot be said to disturb vested rights; for remedies are always subject to such modifications as the legislature, in the constitutional exercise of its powers, shall think proper to adopt. The defendants will be discharged on common bail and an exoneretur may be entered.

Case No. 5,725.

GRAY v. MURPHY.

[Cited in Galpin v. Page, Case No. 5,206. Nowhere reported; opinion not now accessible.]

Case No. 5,726.

GRAY v. NATIONAL STEAMSHIP CO.

[7 Reporter, 581.] [1]

Circuit Court, S. D. New York. March 31, 1879.[2]

EQUITY PRACTICE AND PLEADING—FEDERAL COURTS—PLEA—NON-JOINDER—NON-RESIDENTS.

Where a plea of non-joinder is interposed and it appears that the parties omitted are not inhabitants of the federal district and do not voluntarily appear, the plea will be overruled.

Bill in equity.

Henry Morrison, for plaintiff.
John Chetwood, for defendant.

BLATCHFORD, Circuit Judge. The substance of the plea is, that it appears by the bill that the plaintiff recovered a judgment against the National Steam Navigation Company, that such judgment is unpaid, that William Rome and Charles E. Dixon are the liquidators of said company, that property of said company has been transferred in fraud of the plaintiff and of said company's creditors, and that the plaintiff seeks to have a receiver appointed of such property as property of said company. The plea avers that the said National Steam Navigation Company and the said Rome and Dixon ought to be, but are not, made parties to the bill. The bill avers that on the 16th of August, 1867, the National Steam Navigation Company, a corporation then existing under a statute of Great Britain known as the "Companies Act of 1862," William Rome and Charles Edward Dixon and the defendant then entered into an agreement of which a copy is annexed to the bill, the defendant being a corporation existing under the same statute; that the plaintiff on the 23d of June, 1868, recovered judgment in a court of this state against the Steam Navigation Company for $3,269.05,

[1] [Reprinted by permission.]
[2] [Affirmed in 115 U. S. 116, 5 Sup. Ct. 1166.]

which is now vested in her; that the said National Steam Navigation Company disposed of its property to the defendant in this suit in fraud of the rights of the plaintiff by transferring to the defendant certain steamships; that the National Steam Navigation Company, from August 16, 1867, was engaged in winding-up under said act, and that on the 12th of July, 1870, it accomplished and terminated its winding-up, and on that day, under said act, filed a return of final winding-up with the registrar of joint-stock companies. The bill prays for an appointment of a receiver of said property and for its sale and the payment of the plaintiff's judgment out of its proceeds. The agreement of August 16, 1867, shows that the National Steam Navigation Company was to be wound up voluntarily as and from the 15th of August, 1867; that Rome and Dixon of Liverpool, in England, merchants, were appointed liquidators for the purpose of winding up its affairs and distributing its property; that all its business and property were to be transferred to the defendants in this suit, and that the latter was to assume the liabilities of the National Steam Navigation Company.

It is provided by section 737 of the Revised Statutes that the non-joinder of parties who are not inhabitants of, nor found within the district in which the suit is brought, and do not voluntarily appear, shall not constitute matter of abatement or objection to the suit. The plea in this case does not aver that the National Steam Navigation Company, or Rome or Dixon, is an inhabitant of or can be found in this district. It does not allege that they are willing or desire voluntarily to appear. It does not allege that the company is still in existence, or that Rome or Dixon is still living. The bill shows that Rome and Dixon, when living, resided in Liverpool, in England, and that the company was a British corporation. No allegation is made in the plea that this court can acquire jurisdiction of them or of the company, by the service of any process. The bill does not state a case within section 738 of the Revised Statutes. The suit is not made by the bill one to enforce a lien or claim against property in this district. Under section 737 this court could proceed to adjudicate the suit between the parties before it, even though the parties alleged by the plea to be necessary parties have been named as parties by the plaintiff but were not brought into court. The plea is overruled with costs.

[NOTE. The case was heard upon the proofs, and a decree was rendered by the circuit court dismissing the bill. From this decree the complainants appealed to the supreme court, which, in an opinion by Mr. Justice Field (115 U. S. 116, 5 Sup. Ct. 1166), affirmed the decree, holding, upon a review of the proof, that the National Steamship Company ought not to be charged with a debt of the old navigation company.]

GRAY (PEOPLE v.). See Case No. 10,968.

Case No. 5,727.

GRAY v. REARDON.

[2 Cranch, C. C. 219.][1]

Circuit Court, District of Columbia. Nov. Term, 1820.

SALE — PRINCIPAL AND AGENT — PAYMENT OF PROCEEDS.

If the defendant sell personal property as the agent and by the authority of the plaintiff, and agree to pay him the proceeds, he is liable to the plaintiff for the proceeds of the sale, although other persons may have been jointly interested with the plaintiff in the property.

Assumpsit for money had and received to the plaintiff's use. The plaintiff, being in possession of some slaves, empowered the defendant to sell them for him and to pay him the proceeds of the sale. The defendant sold them and received the money, but refused to pay it to the plaintiff, because he alleged that the slaves were the property of one Manly Reardon, who died intestate, and that the title was in his administrator. The plaintiff claimed the slaves in right of his wife, who was the mother and heir at law of Manly Reardon. The defendant contended, that Manly Reardon left brothers and sisters who are co-heirs with the mother.

Mr. Mason, for plaintiff, contended that as the defendant acted solely as the agent of the plaintiff who was in possession, and derived his whole authority from the plaintiff, he was bound to pay over the money to him, although others may have had a joint interest in the slaves.

THE COURT (nem. con.) upon the prayer of the plaintiff's counsel, instructed the jury that if they should believe from the evidence, that the defendant, in making the sale, acted as the agent and by the authority of the plaintiff, and agreed to pay the plaintiff the proceeds, he is liable to the plaintiff in this action, although the jury should be satisfied by the evidence, that other persons were jointly interested with him in the slaves.

Case No. 5,728.

GRAY et al. v. RUSSELL et al.

[1 Story, 11;[2] 2 Law Rep. 294.]

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

COPYRIGHT — WHAT MAY BE SUBJECT OF — VIOLATION — ABRIDGMENT — ADAM'S LATIN GRAMMAR.

1. Any compilation may be the subject of a copyright, provided the plan, arrangement, and combination of the materials be new.

[Cited in Emerson v. Davies, Case No. 4,436; Atwill v. Ferrett, Id. 640; Webb v. Powers, Id. 17,323; Greene v. Bishop, Id. 5,763; Lawrence v. Dana, Id. 8,136; Falk v. Donaldson, 57 Fed. 35.]

2. Though the original sources of information are open to the use of all persons, yet the use

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

[2] [Reported by William W. Story, Esq.]

of a particular compilation is not. As if a person prepare a map from original surveys, he cannot supersede the right of another person to make similar surveys to accomplish the same end; but no one, without such surveys, has a right to copy the map.

[Cited in Banks v. McDivitt, Case No. 961; Johnson v. Donaldson, 3 Fed. 25; Chapman v. Ferry, 18 Fed. 541.]

3. It is of no consequence in what form the works of another author are used, whether it be by a simple reprint, or by incorporating the whole, or a large portion thereof in some larger work.

4. The question of violation of copyright may depend upon the value, rather than the quantity of the selected materials; as where in an abridgment only the unimportant parts are omitted, or, under pretence of a review, the substance of an original work is given.

5. The author of an edition of Adam's Latin Grammar made certain additions and alterations in that work, and also prepared notes to it, which the author of a subsequent edition of the same work adopted. *Held*, that such adoption was an infringement of the copyright of the notes, inasmuch as the notes, though not new, had never before been collected and embodied.

6. Quaere, in what cases an abridgment will be regarded as a piracy of the copyright of an original work. A reporter has a copyright in his marginal notes and in the arguments of counsel as prepared and arranged in his work, though he has none in the opinions of the court, published under the authority of congress.

[Cited in Banks v. Manchester, 23 Fed. 146. Quoted in Callaghan v. Myers, 128 U. S. 649, 9 Sup. Ct. 185.]

Bill in equity. The bill set forth that the complainants, Harrison Gray, James Brown, and Charles Brown, booksellers and copartners, under the firm of Hilliard, Gray & Co., were the proprietors of the copyright and publishers of a certain book, entitled "Adam's Latin Grammar, with Some Improvements and the Following Additions: Rules for the Right Pronunciation of the Latin Language; a Metrical Key to the Odes of Horace; a List of Latin Authors Arranged According to the Different Ages of Roman Literature; Tables Showing the Value of the Various Coins, Weights, and Measures, Used among the Romans. By Benjamin A. Gould, Master of the Public Latin School of Boston." That the complainants became proprietors, in their own right, of said copyright, on the seventh day of March, 1833, by assignment from Cummings, Hilliard & Co., the original proprietors, and ever since that time have been, and now are, such sole proprietors, and ever since the said seventh of March, have had, and now have, the exclusive right of printing, publishing, and exposing for sale and selling copies of the improvements and additions, made and originally published in said edition of said book, entitled as aforesaid. In which edition, the said Benjamin A. Gould, the editor of the same, made the following among other additions and improvements, viz: he prefixed rules for accent and rules for the sound of the vowels; detached from the original text and omitted all that related to English grammar, as distinguished from Latin; marked the quantity of the penultimate vowel on every Latin word throughout the book, where it was not determined by being placed before another vowel, a double consonant or two single consonants; made divisions of the text by introducing new heads in numerous places; divided the paragraphs in numerous instances, and distinguished parts as more important, by printing them in larger type; in many instances transposed a part of the text of the original work into notes; gave the English of the nouns declined as paradigms; prefixed remarks on gender to the declension of nouns; arranged the termination of each declension in columns, instead of putting them in transverse lines, as in the original work; added an additional termination in the vocative and ablative cases in the word "Anchises"; declined the words, "Opus," "Parens," "Dogma," "Arundo," "Dido," "Calcar," "Aetas," and "Vox," in the third declension, at full length, and gave the English in full to the two first; made a distinct head of heterogeneous nouns and heteroclite nouns, and made remarks under the latter; declined at length the words, "Respublica," "Jusjurandum," "Paterfamilias," "Jupiter," "Bos," "Orpheus," "Oedipus," "Achilles" or "Achilleus," under the head of heteroclites; added the noun "Veprem" to the list of defective nouns under the head of "Diptota"; gave the English of the adjectives, declined as paradigms; declined at length the adjectives "Prudens" and "Plus"; added the Arabic and Roman numerals in the table of the numeral adjectives; changed the translation of the imperfect and future tenses of the verb; altered the arrangement or order of the principal parts of the verb in conjugating it; gave the entire Latin word in each voice, mood, tense, person, and number, and a full English translation in the paradigms in the second, third, and fourth conjugations; gave the word "Capio" as a paradigm displayed at full length of verbs in "io," in the third conjugation; added rules on the subject of the regular formation of the tenses of the verbs; added the paradigm "Prosum" under irregular verbs; gave a new form of expression to the 50th, 51st, 52d, and 56th rules of syntax; added observations on the 50th, 53d, and 54th rules of syntax; made a new distinct head of "Prosody," and of "Rules for the Quantity"; made a new definition of prosody and accent, and a numerical arrangement and new observations under the head of "Prosody"; gave an analysis or metrical key of the various combinations of verse used in the Odes of Horace, with an index to the Odes, omitting the analysis of the kinds of verse used by Buchanan; gave an appendix on the subject of punctuation, abbreviations, division of the Roman months, tables of Roman coins, weights, and measures; and made other alterations and improvements in the said original work.

The bill went on to allege, that the plaintiffs being possessed of the copyright of said

book so as aforesaid, John B. Russell, Lemuel Shattuck, and John D. W. Williams, booksellers, and copartners under the name and style of Russell, Shattuck & Company, without the consent or allowance of the plaintiffs, on the 14th day of August, 1836, and before and since that day, exposed to sale and sold copies of a work entitled, "Adam's Latin Grammar, with Numerous Additions and Improvements, Designed to Aid the More Advanced Student by Fuller Elucidation of the Latin Classics. By C. D. Cleveland, A. M., Late Professor of the Latin Language and Literature in the University of the City of New York." The bill then alleged, that the last named work is a copy of the said improvements and additions in the first mentioned work; and the several particulars are pointed out with minuteness; the bill concluding with the allegation, that the said "Cleveland's edition has taken, in most instances literally, and in others, substantially, making very slight alterations, from the matter added in said Gould's edition to Adam's original work, on the following pages of said Cleveland's edition, viz: pages 11, 12, 17, 18, 22, 30, 32, 33, 34, 58, 69, 70, 72, 75, 92, 95, 101, 102, 103, 104, 105, 106, 107, 109, 110, 111, 113, 114, 115, 116, 117, 118, 119, 272, 273, 274, 298, 303, 305, 306, 307, 313, 314, 315, 316, 326, 329, 330, 331, 332, 333, and in the appendix to the same to the amount of thirty pages or more, being a very large proportion of the additions, alterations, and improvements made by the said Gould in his edition of said work." The bill concluded with a prayer for an injunction on the defendants, from selling, or exposing to sale, any copies of said Cleveland's edition of said work; and that the defendants be ordered to render an account of the copies of the same that they have sold, and to pay over the profits of such sales to the plaintiffs, and to deliver up what copies they may have on hand, and to pay the costs.

The bill was entered at the October term of this court, 1836. At the October term, 1838, it was ordered, that the case be referred to a master to examine and report the coincidences and differences of the plaintiffs' and the defendants' grammars; how far the author of the defendants' grammar has used the plaintiffs' grammar in compiling his own, and how far he has made use of similar or the same materials independently of any use, or with how great a use, of the plaintiffs' grammar; and to report the evidence in the case as far as either party may request, and his conclusion thereupon; whether the whole or any part, and if any, what parts of the defendants' grammar are an infringement of the plaintiffs' copyright. At the present term of the court, the master made his report, which concluded as follows:—"As I have been requested by the complainants' counsel to report the amount of matter taken by the defendants from this work, I accordingly find, that substantially the whole of what was added by Mr. Gould to the old editions of Adam, (whether from one or another source, or as matter more purely of invention on his own part,) has been adopted by the defendants. How far this matter was drawn from other sources, and from authors alike open to the complainants and defendants, appears under each of the foregoing heads. How far the use of such matter by the defendants, in the same form or arrangement, or in the same phraseology, or in different phraseology, (which seem to be the main questions arising in the case,) constitutes an infringement of copyright, I conceive to belong solely to the province of the court."

Phillips & Robins, for plaintiffs.
John Pickering, for defendants.

STORY, Circuit Justice. The question now before the court is upon the confirmation of the master's report. No exception has been taken to the facts and detailed statements in the master's report; and, therefore, the point is narrowed down to the inquiry, whether the conclusion drawn from these facts by the master is correct. I am of opinion, that it is, and that the report ought to be confirmed; and, as consequent thereon, that a perpetual injunction ought to be granted, prohibiting the sale of the edition of Cleveland's Adam's Latin Grammar in the pleadings mentioned by the defendant.

The argument proceeds mainly upon this ground, that there is nothing substantially new in Mr. Gould's notes to his edition of Adam's Latin Grammar; and that all his notes in substance, and many of them in form, may be found in other works antecedently printed. That is not the true question before the court. The true question is, whether these notes are to be found collected and embodied in any former single work. It is admitted, that they are not so to be found. The most, that is contended for, is, that Mr. Gould has selected his notes from very various authors, who have written at different periods, and that any other person might, by a diligent examination of the same works, have made a similar selection. It is not pretended, that Mr. Cleveland undertook or accomplished such a task by such a selection from the original authors. Indeed, it is too plain for doubt, that he has borrowed the whole of his notes directly from Mr. Gould's work; and so literal has been his transcription, that he has incorporated the very errors thereof.

Now, certainly, the preparation and collection of these notes from these various sources, must have been a work of no small labor, and intellectual exertion. The plan, the arrangement, and the combination of these notes in the form, in which they are collectively exhibited in Gould's Grammar, belong exclusively to this gentleman. He is, then, justly to be deemed the author of them in their actual form and combination,

and entitled to a copyright accordingly. If no work could be considered by our law as entitled to the privilege of copyright, which is composed of materials drawn from many different sources, but for the first time brought together in the same plan and arrangement and combination, simply because those materials might be found scattered up and down in a great variety of volumes, perhaps in hundreds, or even thousands of volumes, and might, therefore, have been brought together in the same way and by the same researches of another mind, equally skilful and equally diligent,—then, indeed, it would be difficult to say, that there could be any copyright in most of the scientific and professional treatises of the present day. What would become of the elaborate commentaries of modern scholars upon the classics, which, for the most part, consist of selections from the works and criticisms of various former authors, arranged in a new form, and combined together by new illustrations, intermixed with them? What would become of the modern treatises upon astronomy, mathematics, natural philosophy, and chemistry? What would become of the treatises in our own profession, the materials of which, if the works be of any real value, must essentially depend upon faithful abstracts from the Reports, and from juridical treatises, with illustrations of their bearing. Blackstone's Commentaries is but a compilation of the laws of England, drawn from authentic sources, open to the whole profession; and yet it was never dreamed, that it was not a work, which, in the highest sense, might be deemed an original work; since never before were the same materials so admirably combined, and exquisitely wrought out, with a judgment, skill, and taste absolutely unrivalled. Take the case of the work on insurance, written by one of the learned counsel in this cause, and to which the whole profession are so much indebted; it is but a compilation with occasional comments upon all the leading doctrines of that branch of the law, drawn from reported cases, or from former authors; but combined together in a new form, and in a new plan and arrangement; yet, I presume, none of us ever doubted, that he was fully entitled to a copyright in the work, as being truly, in a just sense, his own.

There is no foundation in law for the argument, that because the same sources of information are open to all persons, and by the exercise of their own industry and talents and skill, they could, from all these sources, have produced a similar work, one party may at second hand, without any exercise of industry, talents, or skill, borrow from another all the materials, which have been accumulated and combined together by him. Take the case of a map of a county, or of a state, or an empire; it is plain, that in proportion to the accuracy of every such map, must be its similarity to, or even its identity with, every other. Now, suppose a person has bestowed his time and skill and attention, and made a large series of topographical surveys in order to perfect such a map, and has thereby produced one far excelling every existing map of the same sort. It is clear, that notwithstanding this production, he cannot supersede the right of any other person to use the same means by similar surveys and labors to accomplish the same end. But it is just as clear, that he has no right, without any such surveys and labors, to sit down and copy the whole of the map already produced by the skill and labors of the first party, and thus to rob him of all the fruit of his industry, skill, and expenditures. See Wilkins v. Aikin, 17 Ves. 424, 425; Eden, Inj. pp. 282, 283, c. 13; 2 Story, Eq. Jur. §§ 939–942. It would be a downright piracy. Neither is it of any consequence in what form the works of another author are used; whether it be by a simple reprint or by incorporating the whole or a large portion thereof in some larger work. Thus, for example, if in one of the large encyclopaedias of the present day, the whole or a large portion of a scientific treatise of another author, as, for example, one of Dr. Lardner's, or Sir John Herschell's, or Mrs. Somerville's treatises, should be incorporated, it would be just as much a piracy upon the copyright, as if it were published in a single volume.

In some cases, indeed, it may be a very nice question, what amounts to a piracy of a work, or not. Thus, if large extracts are made therefrom in a review, it might be a question, whether those extracts were designed bonâ fide for the mere purpose of criticism, or were designed to supersede the original work under the pretence of a review, by giving its substance in a fugitive form. The same difficulty may arise in relation to an abridgment of an original work. The question, in such a case, must be compounded of various considerations; whether it be a bonâ fide abridgment, or only an evasion by the omission of some unimportant parts; whether it will, in its present form, prejudice or supersede the original work; whether it will be adapted to the same class of readers; and many other considerations of the same sort, which may enter as elements, in ascertaining, whether there has been a piracy, or not. Although the doctrine is often laid down in the books, that an abridgment is not a piracy of the original copyright; yet this proposition must be received with many qualifications. See 2 Story, Eq. Jur. §§ 939–942; Sweet v. Shaw (before the vice chancellor, in 1839) Eng. Jur. 1839, p. 217. In many cases, the question may naturally turn upon the point, not so much of the quantity, as of the value of the selected materials. As was significantly said on another occasion,—"Non numerantur, ponderantur." The quintessence of a work may be piratically extract-

ed, so as to leave a mere caput mortuum, by a selection of all the important passages in a comparatively moderate space. In the recent case of Bramwell v. Halcomb, 3 Mylne & C. 737, it was held, that the question, whether one author has made a piratical use of another's work, does not necessarily depend upon the quantity of that work, which he has quoted, or introduced into his own book. On that occasion, Lord Cottenham said: "When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value, which is looked to. It is useless to look to any particular cases about quantity." See the lord chancellor's opinion in Bell v. Whitehead, Eng. Jur. 1839, p. 68; Sweet v. Shaw (before the vice chancellor, 1839) Id. 217. The same subject was a good deal considered by the same learned judge in Saunders v. Smith, 3 Mylne & C. 711, 728, 729, with reference to copyright in Reports; and how far another person was at liberty to extract the substance of such reports, or to publish select cases therefrom, even with the notes appended. In the case of Wheaton v. Peters, 8 Pet. [33 U. S.] 591, the same subject was considered very much at large. It was not doubted by the court, that Mr. Peters' Condensed Reports would have been an infringement of Mr. Wheaton's copyright, (supposing that copyright properly secured under the act,) if the opinions of the court had been, or could be, the proper subject of the private copyright by Mr. Wheaton. But it was held, that the opinions of the court, being published under the authority of congress, were not the proper subject of private copyright. But it was as little doubted by the court, that Mr. Wheaton had a copyright in his own marginal notes, and in the arguments of counsel as prepared and arranged in his work. The cause went back to the circuit court for the purpose of further inquiries as to the fact, whether the requisites of the act of congress had been complied with or not by Mr. Wheaton. This would have been wholly useless and nugatory, unless Mr. Wheaton's marginal notes and abstracts of arguments could have been the subject of a copyright (for that was all the work, which could be the subject of copyright); so that if Mr. Peters had violated that right, Mr. Wheaton was entitled to redress.

But we are spared from any nice inquiries of this sort in the present case. The master's report finds that the substance of all Mr. Gould's notes are used in Mr. Cleveland's book, and for the most part literally copied. It is, therefore, a clear infringement of Mr. Gould's copyright, not, indeed, in Adam's Latin Grammar, (for he has none in that,) but in his own notes, first collected together by him in their present form, and in the plan and arrangements, (also his own,) in which they are actually embodied. Under these circumstances, I shall decree a perpetual injunction. In consideration, that the defendants have already struck out of their editions of Mr. Cleveland's book now sold by them, all the notes of Mr. Gould, and that the defendants are insolvent, the plaintiffs have waived any decree for an account. I shall, therefore, pass that over, and only decree costs for the plaintiffs. Decree accordingly.

Case No. 5,729.

GRAY v. SIMS et al.

[3 Wash. C. C. 276.] [1]

Circuit Court, D. Pennsylvania. April Term, 1814.

MARINE INSURANCE.

1. If the trade in which a vessel is to be engaged during the voyage, be contrary to the laws of the country, or the laws of nations, a policy upon the ship equally with one on the cargo, the peculiar subject of interdiction, is void.

2. The rule, that if the policy once attaches, the right to the premium becomes indefeasible, is not without exceptions.

3. If a contract of insurance be legal when it is made, and the performance of it is rendered illegal by a subsequent law, both parties are discharged from its obligations. In such a case, the insured loses his indemnity, and the insurer his premium.

[Cited in Macon & B. R. Co. v. Stamps (Ga.) 11 S. E. 444; Statham v. New York Life Ins. Co., 45 Miss. 581.]

This was a case reserved for the opinion of the court, and is as follows:—On the 17th of December, 1810, the plaintiff underwrote a policy for 5000 dollars, on two-thirds of the brig South-Carolina, belonging to the defendants [Sims & Bethel], on a voyage at and from Philadelphia to Calcutta, and at and from thence to Philadelphia, with liberty to touch and trade at Madras, on her outward and homeward voyages. The vessel cleared out for Calcutta, from Philadelphia, and sailed on the voyage insured, in December, 1810; and at Calcutta took in a cargo of British goods, one of the defendants being her supercargo and commander on her return voyage, and with that cargo returned to the United States. On her arrival, she was seized, with her cargo, on behalf of the United States; and the forfeiture, or alleged forfeiture, was afterwards remitted to the defendants and the other owners. This action is brought, to recover the amount of the premium. The jury found a verdict for the plaintiff, subject to the opinion of the court on the above case.

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

J. R. Ingersoll and Mr. Rawle objected to the plaintiff's right of recovery, upon the ground, that the voyage insured was illegal; the non-importation law being to take effect on the 2d of February, 1811, unless Great Britain should, before that day, repeal her Orders in Council. They read the acts of congress of the 1st of March, 1809 [2 Stat. 528], 1st of May, 1810 [Id. 605], and 2d of March, 1811 [Id. 651]; the president's proclamation of 19th of April, 1809, reviving trade with Great Britain; of the 2d of November, 1810, declaring that France had repealed her edicts. 1 Burrows, 341; Park, Ins. 232; Marsh. Ins. 180, l. 72, 65-68, 74, 57; 1 Ld. Raym. 724; Roccus, note 1; Bynk. bk. 1, c. 21; 1 P. Wms. 185; 3 Ves. 373; [Mitchell v. Smith, Maybin v. Coulon, Duncanson v. McLure] 4 Dall. [4 U. S.] 269, 298, 308; Murgatroyd v. McLure [Case No. 9,943].

Mr. Binney, for plaintiff, contended, that at the time this policy was underwritten, there was no law which forbade the importation of goods from British possessions; and that consequently, the policy having once attached, no future circumstance could affect it. The policy is on the vessel only; and the conduct of the insured in taking goods on board, contrary to law, cannot exonerate him from paying the premium. He cannot make a violation of law the ground of his defence.

WASHINGTON, Circuit Justice. This case presents a question somewhat novel, from the particular circumstances of it; although it is fully within certain well-established principles of law, by which it may, without much difficulty, be decided. The question is, whether the policy was void, upon the ground, that the trade in which this vessel, during the voyage insured, was to be employed, was, or might be forbidden by law. Before arriving at the immediate decision of this question, we lay down the following positions, which, if not admitted, may easily be proved: 1. That if the commerce in which a vessel is to be engaged, during the voyage insured, be contrary to the laws of this country or to the law of nations, a policy upon the ship equally with that upon the cargo, the peculiar subject of interdiction, is void. It is true, that the insurance upon the ship, is strictly an insurance upon the voyage, which, independent of the traffic in which she is engaged, may be perfectly lawful. But, if the traffic be forbidden by the laws of this country, the voyage, connected with such traffic, becomes on that account unlawful. The voyage is identified with the trade, for the sake of which it was undertaken; and the ship is the instrument with which the trade is carried on, and without which, the law could not be violated. The law, therefore, considers the ship, in pari delicto, with the prohibited cargo; and a policy made upon her for the voyage, equally undeserving of its aid to enforce the performance of its stipulations. In the next place, we take it for granted, that the object of this voyage, was the importation of goods from Calcutta or Madras into the United States; because it is inconceivable, that the owner of this ship would encounter the heavy expenses of an East India voyage, without a view to profit; which could only arise by bringing home, as he in fact did, a return cargo. There is on ground for presuming, that the intention of the owner was to trade between Calcutta and Madras, or any other ports; because the voyage insured, was from Philadelphia to Calcutta and back, merely with liberty to touch and trade at Madras, on the outward and homeward voyages. Any other trading, therefore, would have deprived the insured of the protection of the policy. If the real intention of the voyage can be discovered, either by the nature of it, or by other evidence, and the object appears to be an illicit trading, the legal consequence will be the same, as if it had appeared on the face of the policy. If, then, this policy had been effected after the 2d of February, 1811, the case would have come precisely within the rule, which declares, that the law will not lend its aid to enforce the performance of a contract, made in contravention of its own regulations.

This leads immediately to the material question in this cause; does the above rule apply to the policy under consideration, the same having been underwritten a few weeks prior to the 2d of February, 1811, and before the non-importation law came into operation against Great Britain? The difference between a policy made prior to the 2d of February, 1811, and one made subsequent to it, is, that in the latter case, the subject of the contract was immediately and absolutely illegal; whereas in the former, the illegality of it depends upon a contingency. But nevertheless, the underwriter promises to the insured an indemnity against loss, upon a traffic which the laws of his country may forbid, and whether it should be forbidden or not. He engages to protect a trade, which is to be carried on in defiance of any law which may be passed to interdict it. And is this a contract which can show its face in a court of justice, whose duty it is to enforce the laws of the country?

It was contended, with great ingenuity, by the plaintiff's counsel, that at the time this policy was underwritten, the importation of goods from a British port into the United States, was lawful; and consequently, that the policy having once attached, the right of the insured to the premium became perfect, and could not be defeated by any thing ex post facto. Now, it may safely be admitted, that the importation was lawful at the time this insurance was effected; and yet it will not follow, that the policy attached; or if it did, that the right of the insurer to the premium, could, under any pos-

sible circumstance, be enforced. The importation was lawful at the time the insurance was made; and yet the contract was illegal, because it stipulated to protect a prohibited trade. It was impossible, that an importation of goods from Calcutta could be made into the United States, within the period of time which would elapse between the 17th of December, 1810, and the 2d of February, 1811; and consequently, it was to be made after the latter day; and if it should then be prohibited, still, the underwriter was bound to indemnify the insured against all risks to which he might be exposed, in making such illegal importation. The contract was illegal, because it looked to a period beyond that when the importation might be contrary to law, and engaged to protect it, although such should be the case. The policy, therefore, never did attach. Neither is it correct to lay it down as a general rule, without exception, that if the policy once attach, the right to the premium becomes indefeasible. It does so, we admit, notwithstanding any act of the insured, or of his agents. But if the contract be legal when it is made, and the performance of it is rendered illegal by a subsequent law, the parties are both of them discharged from its obligations. The insured loses his indemnity, and the insurer his premium. This is totally unlike the case of Odlin v. Pennsylvania Ins. Co. [Case No. 10,433]; because, in that, the embargo law did not forbid, but only suspended, the performance of the contract. The voyage and trade were not condemned, but merely postponed.

It was contended by the plaintiff's counsel, that the contract should be construed to protect the importation, only in case it should be lawful; but not so, if it should be forbidden by the non-importation law coming into force. This would be to set up an implied warranty on the part of the insured, to destroy the protection which the policy promises him, and for which the premium was paid. A warranty which is totally inconsistent with the express stipulations of the policy, cannot, with any propriety, be implied. The insurer, in this case, engaged to indemnify the insured against all losses which might happen to the ship on her voyage. The object, therefore, of the insured, was to be protected on that voyage at all events; and the protection was expressly and unconditionally promised by the underwriter. The supposed warranty, therefore, would be entirely contradictory to the obvious intention of both parties; and for that reason it cannot be implied. Upon the whole, we are of opinion, that the law is in favour of the defendants, and that judgment be rendered for them. Judgment for defendants.

GRAY (SPRING v.). See Case No. 13,259.

GRAY (THOMAS v.). See Case No. 13,898.

Case No. 5,730.

GRAY et al. v. TUNSTALL.

[Hempst. 558.] [1]

Circuit Court, D. Arkansas. June, 1847.

OATHS— JUSTICE OF THE PEACE—PROMISSORY NOTE —BURDEN OF PROOF.

1. Justices of the peace, and masters in chancery of the state of Arkansas, are authorized to take affidavits, to be used in the circuit court of the United States, in civil causes, and affidavits so taken, are as valid and effectual as if subscribed in open court.

2. Non assumpsit sworn to, puts in issue the execution of the writing sued on, and it then devolves on the plaintiff to prove the execution.

[Action at law by Alexander P. Gray and Alexander Griffith against Thomas T. Tunstall.]

Daniel Ringo and F. W. Trapnell, for plaintiffs.

A. Fowler, for defendant.

JOHNSON, District Judge. The defendant has made oath to the truth of his plea of non assumpsit to the last count of the amended declaration, before Graham Witherspoon, a justice of the peace in and for Jackson county, in this state, and the question for the decision of the court is, whether the affidavit is made before a person authorized by law to take it. By the act of 1812, "for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States" (2 Stat. 679), this court is vested with authority "to appoint such and so many discreet persons, in different parts of the district, as it shall deem necessary, to take acknowledgments of bail and affidavits, which shall have the like force and effect as if taken before a judge of this court." On the 20th June, 1839, this court made the following rule: "That affidavits required in the progress of any civil cause in this court, to pleas, motions for continuance, and to all other steps in a cause to which an affidavit may be necessary, may be taken before any judge or justice of the peace, or master in chancery, of the state of Arkansas, and shall have the same effect and validity as if subscribed in open court." The question here arises, whether this rule is warranted by the act of congress above recited. I think it is; and moreover that it substantially complies with the requirements of that act. Now it is seen that by that act, this court is authorized to appoint as many discreet persons in different parts of the district, as it shall deem proper to take affidavits. The rule of this court virtually appoints all the justices of the peace of the state of Arkansas, and empowers them to take affidavits to be used in this court, in civil causes. True, it does not in express terms make such appointment; but in authorizing such affidavits to be taken before them, and declaring that when thus taken, they shall be valid and effectual; im-

[1] [Reported by Samuel H. Hempstead, Esq.]

pliedly, necessarily, and substantially appoints them for the purposes indicated in the rule. The motion to strike the plea from the files, must therefore be overruled, and as the plea of non assumpsit sworn to puts in issue the execution of the note, it will devolve on the plaintiff to prove it. Rev. St. p. 633, § 104. Motion overruled.

GRAY (UNITED STATES v.). See Cases Nos. 15,251–15,253.

Case No. 5,731.

GRAY v. YORK.

[15 Blatchf. 335.] [1]

Circuit Court, N. D. New York. Nov. 12, 1878.

BONDS OF TOWNS IN NEW YORK — SUBSCRIPTIONS TO STOCK OF RAILROAD CORPORATION —LIABILITY ON COUPONS.

Under the act of the legislature of New York, passed May 18, 1869 (Laws N. Y. 1869, p. 2303, c. 907), commissioners were appointed to issue the bonds of a town and invest the proceeds in the stock of a specified railroad corporation. The commissioners subscribed for the stock, but, before the bonds were issued, the corporation was merged in a new corporation, by proceedings taken under a general statute in force when the proceedings to appoint such commissioners were taken, which provided that all debts due to the old corporation, and all stock subscriptions belonging to it, should vest in the new corporation. After the stock was subscribed for, the provisions of such general statute were extended to said two corporations by a special act. The bonds were issued to the new corporation. Afterwards, by a special act, the issuing of the bonds to the new corporation was ratified, and the bonds were declared to be binding on the town. In a suit to recover on coupons attached to the bonds: *Held*, that the town was liable on the coupons.

[This was a suit by Charles F. Gray against the town of York.]

Spencer Clinton, for plaintiff.

Theodore Bacon and Henry R. Selden, for defendant.

WALLACE, District Judge. By the order of the county judge of Livingston county, predicated upon a petition by a majority of the tax payers of the town of York, and pursuant to the provisions of the act of May 18, 1869 (Laws N. Y. 1869, p. 2303, c. 907), the persons who signed and issued the bonds in question were appointed commissioners, with authority to create and issue the bonds of the defendant, to the amount of $100,000, and invest the same, or the proceeds thereof, in the stock of the "Northern Extension of the Rochester, Nunda and Pennsylvania Railroad Company." The commissioners duly subscribed for the stock, but, before the stock was delivered, and before any bonds were issued in payment of the subscription, the corporation became merged in the "Rochester, Nunda and Pennsylvania Railroad Company," a new corporation, created by the consolidation of several corporations. This consolidation was attempted to be effected under a general statute of the state (Act May 20, 1869; Laws N. Y. 1869, p. 2399, c. 917), authorizing the consolidation of railroad companies, which was in force at the time the proceedings were instituted pursuant to which the commissioners were appointed; and this statute, among other things, provided, "that all debts due, on whatever account, to either of said (consolidating) corporations, as well as all stock subscriptions, and other things in action, belonging to either of said corporations, shall be taken and deemed to be transferred to, and vested in, such new corporation, without further act or deed." By an act of the legislature of the state, passed May 17, 1872 (Laws N. Y. 1872, p. 1825, c. 764), and after the commissioners had subscribed for the stock, the provisions of the general act were extended to the Northern Extension of the Rochester, Nunda and Pennsylvania Railroad Company, and to the Rochester, Nunda and Pennsylvania Railroad Company. The commissioners issued and delivered the bonds to the new corporation, and thereafter the bonds came to the possession of the Buffalo Savings Bank, with full knowledge by the officers of the bank of the origin and history of the bonds. Subsequently, on February 22d, 1873, an act was passed by the legislature of the state of New York (Laws N. Y. 1873, p. 19, c. 24), ratifying and confirming the acts of the commissioners in issuing the bonds to the new corporation, and declaring that the bonds should be valid and binding upon the defendant. The plaintiff is a purchaser of coupons originally attached to these bonds, for the payment of interest maturing September 1st, 1877, and March 1st, 1878. He purchased the coupons after those payable September 1st, 1877, became due.

Upon these facts the question first arises, whether or not the acts of the commissioners in taking the stock from, and issuing the bonds to, the new corporation, were obligatory upon the town, irrespective of the operation of the validating act of the legislature. The commissioners were authorized to subscribe for stock in a designated and existing corporation, possessing an organization and advantages peculiar to itself. They were invested with no discretion, but were limited to the strict terms of the authority conferred by the statute, and of the order which gave effect to the statute. If they had subscribed originally for the stock of the new corporation, it could not be contended for a moment that their act would have been binding upon the town. These considerations, however, fall short of reaching the real question to be solved. The commissioners did pursue their lawful authority in subscribing for the stock of the original corporation. Could this

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

subscription have been enforced against the town by the new corporation? If it could, the commissioners have done only that which they were in duty bound to do, and their principal cannot question the acts of its agents in this behalf. When the town, by the action of its tax payers, expressed in the mode sanctioned by the statute, concluded to become a stockholder in a railroad company, it consented to assume and occupy towards the company the same relations as those of any individual stockholder. Its contract was subject to the same implications, depended upon the same conditions, conferred upon the railroad company the same rights, and imposed upon the town the same liabilities, as that of an ordinary subscriber for stock; and, however unwise may have been the legislation which permitted it to make such a contract, and however unfortunate may be the results which have ensued from the contract it made, its rights must abide the same test which would be applied if an individual, instead of a municipal corporation, were a party to the subscription.

The town subscribed for stock in a company which, by the statutes under which it existed, was permitted to merge itself in another corporation, without sanction from, or consultation with, a subscriber for its stock, and not only to do this, but also to transfer to the new corporation all its subscriptions for stock, and all its other rights of action, by the mere process of consolidation, and the right thus reserved to the corporation entered into, and became one of the conditions of, the subscription made by the town. In other words, the town agreed to become a stockholder in a corporation which might consolidate itself in another corporation, without any further consent on the part of the town.

The contract of subscription implies the right on the part of the corporation to effect such changes in its organization and operations as are permitted under the powers reserved in the charter or act of incorporation; and, accordingly, it has been often decided, that a subscriber for stock is not released from his obligation because, subsequently, the corporation has availed itself of the power thus reserved. Even where the power is reserved by the legislature, in the act of incorporation, to alter or amend the act, a subscriber for stock is not released, when, by subsequent legislation, the capital of the corporation is increased, or the sphere of its operations is extended. To have this effect, the alterations must be so extensive and radical as to virtually subvert the corporation itself.

It will not be profitable to discuss the principles upon which these decisions rest. It seems reasonable to say, that a subscriber consents in advance to the changes which may be made by the legislature in the charter of a corporation, where the right to do so is reserved, or to any changes which may be made by the corporation itself, under the authority of its charter or act of incorporation, when those changes are not so radical as to deprive him of the substantial benefits of the contract into which he has entered. But, it seems hard to reconcile with the principles of the law of contracts, the position, that he is bound by the obligations of a contract with a corporation, when the corporation, by its own act, has put it out of its power to make substantial performance on its own part. In the present case, the defendant subscribed for stock in a corporation, which, by its own act, deprived itself of the power to deliver the stock, and the defendant is now asked to accept, in substitution, stock in another corporation, constituted with a much larger capital, operating an extended line of road, and presenting an investment of a very different character from that originally contemplated. The case, however, is precisely similar to that of Nugent v. Supervisors, 19 Wall. [86 U. S.] 241, where it is said, by Mr. Justice Strong, that, "in a multitude of cases decided in England and in this country, it has been determined, that a subscriber for the stock of a company is not released from his engagement to take it and pay for it, by any alteration of the organization or purposes of the company, which, at the time the subscription was made, were authorized, either by the general law or by the special charter, and a clear distinction is recognized between the effect of such alterations and the effect of those made under legislation subsequent to the contract of subscription." "They uniformly assert, that the subscriber for stock is released from his subscription by a subsequent alteration of the organization or purposes of the company, only when the alteration is both fundamental and not provided for or contemplated by either the charter itself or the general laws of the state." This was a case where the corporation, after the subscription and before the stock was delivered, consolidated, under the provisions of its act of incorporation, with another corporation, and took the name of the latter. This consolidation was effected at the instance of the subscriber, but no notice is taken of this circumstance, in the opinion of the court. The opinion proceeds upon the doctrine, as stated therein, that "it was contemplated by the legislature, as it must have been by all the subscribers to the stock of the company, that precisely what has occurred might occur," and that "subscribers must be presumed to have known the law of the state, and to have contracted in view of it," and cites, as sustaining its conclusions, Sparrow v. Evansville & C. R. Co., 7 Port. [7 Ind.] 369, where the consolidation took place without the knowledge or consent of the subscriber. Bish v. Johnson, 21 Ind. 299, and Bishop v. Brainerd, 28 Conn. 289. The same doctrine is reaffirmed, and the same conclusion reached, in East Lincoln v. Davenport, 94 U. S. 801, where the town was held liable upon

similar facts with those in the present case. Mr. Justice Hunt says: "All this" (the consolidation) "was provided for in the charter of the original company, to which the town subscription was made, and the subscription was made with the knowledge of the town, that new organizations might be made, and that the subscription was liable to be transferred to, and its stock to become that of, another company." To the same effect is the case of County of Henry v. Nicolay, 95 U. S. 619, where the company to the stock of which the county subscribed, consolidated, after the subscription, with another company; in which case Mr. Justice Bradley says, speaking of the effect of the consolidation upon the liability of the county: "Had the company ceased to exist, it would make no difference."

The case has thus far been considered as though the several railroad corporations had consolidated at the time the bonds were issued. It is insisted, however, that the corporations which attempted to consolidate, were not authorized by law to do so, inasmuch as neither of them were roads in operation, and the statute authorizing consolidation of roads only applies to companies "operating a railroad * * * within, or partly within and partly without, this state." The statute declares, that "it shall and may be lawful for any railroad company or corporation, organized under the laws of this state, or of this state and any other state, and operating a railroad or bridge, either wholly within, or partly within and partly without, this state, to merge and consolidate its capital stock, franchises and property, with the capital stock, franchises and property of any other railroad company or companies, organized under the laws of this state, * * * whenever the two or more railroads of the companies or corporations so to be consolidated, shall or may form a continuous line of railroad with each other, or by means of any intervening railroad, bridge or ferry." The corporations here were neither of them operating a railroad. They contemplated doing so at some future time. It seems quite clear, that neither of them was within the description of corporations to which the statute extends, as it confers power to consolidate upon such corporations only as are operating railroads within, or partly within, this state, which may form, by the consolidation, a continuous line of railroad.

The question then arises as to the effect upon the rights of the parties, of the act of the legislature extending to these railroad corporations the provisions of the general act authorizing corporations to consolidate. This act was passed after the commissioners for the town had made the subscription for stock. The statutes under which the original company was incorporated, did not permit it to consolidate itself with another corporation, there was no general statute permitting such a corporation to consolidate, and, conceding the power of the legislature to alter or amend the statutes under which it was incorporated, so far as to permit it to merge itself in another corporation, with an increased capital and an extended sphere of operations, it yet remains to determine whether such legislation did not work such fundamental changes in the character of the corporation, as to absolve the town from obligation upon its subscription. By this legislation, it was permitted to the corporation to surrender its franchises and destroy its own identity. Such a result is not in accordance with what was the understanding of the parties to the subscription, or what could have been within their legal contemplation when the subscription was made. When the original corporation availed itself of a statute passed after the subscription was made, by which it transferred its franchises and property to another corporation, and ceased to exist, and this action was not warranted by the statutes under which it was incorporated, or by any general law of the state, existing when the subscription was made, it must be held that the town was absolved from the obligations of a contract which could not have contemplated such a contingency.

Notwithstanding this, the plaintiff is entitled to recover. The act of the legislature, passed after the bonds had been issued, validating the acts of the commissioners in issuing the bonds, and declaring the bonds valid and binding upon the town, was a ratification, by the legislature, of a proceeding which they might have authorized originally. The case of Horton v. Town of Thompson, 71 N. Y. 513, is cited as an authority to the contrary, but that case was decided by a divided court, and is in conflict with Town of Duanesburgh v. Jenkins, 57 N. Y. 177, and Williams v. Town of Duanesburgh, 66 N. Y. 129. Whatever may be the state of the decisions of the state courts, the question is not an open one in this court. As was said in Beloit v. Morgan, 7 Wall. [74 U. S.] 619: "Whenever it has been presented, the ruling has been, that, in cases of bonds issued by municipal corporations, under a statute upon the subject, ratification by the legislature is, in all respects, equivalent to original authority, and cures all defects of power and all irregularities in its execution." The decisions of the state court upon this question are not obligatory as the rule of decision here. Venice v. Murdock, 92 U. S. 494.

Judgment is ordered for the plaintiff, for $6,685.88.

GRAY, The A. R. See Case No. 519.

GRAY, The A. R. See Case No. 10,949.

Case No. 5,732.

GRAYDON v. HOOD.

[Cited in Morr. Min. Rights (4th Ed.) 65, as a state decision by Stone, J.]

Case No. 5,733.

GRAYDON et al. v. SWEET et al.

[1 Woods, 418.] [1]

Circuit Court, W. D. Texas. Jan. Term, 1871.

LIMITATIONS—CIVIL WAR.

1. The act of congress approved June 11, 1864 [13 Stat. 123], which suspends the running of the statute of limitations during the Rebellion, is not itself a statute of limitation.

2. Article 12 of the constitution of Texas, which declares that "the statutes of limitation of civil suits were suspended by the so called act of secession of January 28, 1861, and shall be considered as suspended within this state until the acceptance of this constitution by the congress of the United States," does not conflict with the said act of congress.

3. The constitution was accepted on March 29, 1870. Therefore when an action was commenced on May 8, 1871, for goods sold in 1860, the plea that more than two years had elapsed after the cause of action had accrued and before suit brought, and that more than four years had elapsed after the close of the war and after the time the court was reopened to suitors, was *held* bad and stricken out.

Heard on exception to the plea of the statute of limitations.

M. H. Barnes and A. S. Walker, for plaintiffs.

A. M. Jackson, for defendants.

DUVAL, District Judge. This suit is brought to recover the value of certain goods, wares and merchandise alleged to have been sold and delivered by the plaintiffs to defendants in the year 1860. The petition was filed on the 8th of May, 1871. On the 9th of June, 1871, the defendants answered, setting up the general denial, and pleading in bar that more than two years had elapsed after the cause of action had accrued, and before suit brought, and that more than four years had elapsed after the close of the war, and after the time when this court was reopened to suitors, etc. There was a demurrer filed to the petition on the 9th of June, 1871, which was met and the objection cured by an amended petition filed June 13th, 1871. On the 21st of June, 1871, plaintiffs filed an exception to the plea of limitation, and now ask that the plea be stricken out, because by article 12 of the constitution of the state of Texas, it is declared that "the statutes of limitation of civil suits were suspended by the so called act of secession of the 28th of January, 1861, and shall be considered as suspended within this state, until the acceptance of this constitution by the United States congress." This acceptance occurred on the 29th of March, 1870. If this provision of the constitution of the state of Texas controls the question of limitation in this case, it is evident that this suit is not barred. But it is contended by defendants' counsel that this constitutional provision is controlled by the act of congress of June 11, 1864 (13 Stat. 123), and that so far as the national courts are concerned, the question of limitation must be governed by the latter. By this act it is declared that "whenever during the existence of the present Rebellion, any action, civil or criminal, shall accrue against any person who, by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of such action, or the arrest of such person, or whenever after such action, civil or criminal, shall have accrued, but such person cannot, by reason of such resistance of the laws, or such interruption of judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall so be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action." This act does not specify any time within which an action shall be brought. In this respect it lacks an essential feature belonging to a statute of limitations. At the time of its passage, the civil war was going on, and it simply declared that during the existence of the Rebellion, the time during which the ordinary course of judicial proceedings was interrupted should not be deemed or taken as any part of the time limited by law for the commencement of an action. It did not provide that when such interruption ceased, or process could be served, the limitation provided by law should begin to run. Had it done so, I presume there could be little doubt that the present action should be held to be barred. But the act does not so provide, and it is only by inference or implication that such a construction can be given to it. Inasmuch as no bar is expressly created by this statute, and I am unwilling to give it a construction at variance with the rule established by the constitution of the state, I must hold that, in this case at least, the state constitutional limitation should govern. My opinion is that the exception or demurrer of plaintiffs to the plea of limitation in this case should be sustained, and said plea stricken out. And it is so ordered.

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

Case No. 5,734.

The GRAY EAGLE.

[1 Biss. 476.] [1]

District Court, D. Wisconsin. April, 1865.[2]

VESSEL HAVING LOST HER LIGHTS—WHEN EXCUSABLE FOR RUNNING—HELD TO STRICTEST RULES—LOOKOUT—DUTY OF OFFICERS—APPROACHING SAIL VESSEL—VESSEL DISREGARDING POSITIVE RULES.

1. A sail vessel having lost her green and red lights in the night time, in a storm on Lake Michigan, may be excusable for pursuing her voyage,

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

[2] [Reversed in Case No. 5,735.]

from necessity, during that night with the prohibited white light; but is in primary fault for running the next night down the Straits of Mackinac where there was good anchorage, without the signal red and green lights.

[See note at end of case.]

2. A sail vessel running with the prohibited white light alone, in the night time, is under superior obligations to observe the strictest duty to avoid collisions.

3. A sail vessel in an unseaworthy condition is in fault, when not having sufficient and competent lookouts, and an officer of nautical skill on deck.

4. The master of a vessel running in the night without the proper signal lights, having seen a sail vessel four miles ahead, went below leaving a second mate in command, who was not skilled in seamanship, and no proper lookouts on deck, and when a collision became imminent, the second mate left his post and called up the master; *held*, these officers are in fault, and their evidence in regard to the collision is not reliable.

5. A sail vessel in every respect seaworthy, meeting in the night time another sail vessel running on a calm water without the red and green signal lights, and with a white light alone, is justified in considering the white light to be the light of a vessel at anchor; and, in the absence of willfulness or gross negligence, is not in fault of a collision.

6. A sail vessel running in the night time in disregard of the positive rules as to signal lights, is guilty of a violation of law, and if she caused thereby uncertainty and embarrassment with the men on the colliding vessel as to her motion and course, the colliding vessel should not be adjudged in fault for a mistake in endeavoring to avoid an impending peril.

In admiralty. This was a libel brought by John Greening and Charles N. Deott, owners of the schooner Perseverance, which sailed from the port of Chicago for Ogdensburg, with a cargo of wheat on board, in the month of November, 1864. In a storm on Lake Michigan, she shipped a heavy sea, which washed away her screen, and broke both her colored signal lamps, leaving her with nothing but a white light. The master, being unable to procure signal lights at the Manitou Islands, and the weather being cold, proceeded on his voyage, and about two o'clock, a. m., of the 24th November, the schooner sailing down the Straits of Mackinac, wind south, her course lying east of south, collided with the schooner Gray Eagle and was sunk. The facts are further stated in the opinion.

Wm. P. Lynde, for libellants.
Emmons & Van Dyke, for respondent.

MILLER, District Judge. The second mate of the Perseverance, who had the watch that night, and was the commanding officer on deck, being on the lookout discerned lights ahead, and soon discovered that they were borne by a schooner, approaching the Perseverance in a west, south-west direction about half a mile distant, and bearing about one point on her starboard bow. In the 4th article of the libel it is propounded, that at the time when the light was first discovered the Perseverance carried a bright light suspended on her pawl post, which remained there until she went down. It is further alleged in the libel "that as soon as the second mate discovered the approach of the vessel, he called the captain of the Perseverance, who came immediately on deck. The approaching vessel hauled up so much that she shut out her red light, and the Perseverance kept on her course, the master and mate believing that the approaching vessel would keep clear of her on the starboard side, until the vessels were nearly abreast, when the approaching vessel kept away again until she showed her red light, when the master of the Perseverance called to the approaching vessel to luff, and several times repeated this request in a loud and audible voice, and at the same time ordered his own man at the wheel to put the wheel down hard a-starboard. The approaching vessel made no reply, but kept on her course, and in less than two minutes the approaching vessel struck the Perseverance astern on about the starboard quarter with such force as to sink her in about two minutes, and was with her cargo totally lost."

The answer states that the schooner Gray Eagle was sailing up the Straits of Mackinac, on a voyage from Buffalo to Milwaukee, that when about two miles to the southward and westward of Sheboygan light, which is about ten miles below the port of Mackinac, the Gray Eagle being in the usual course of vessels coming up the straits, and heading west-north-west, the wind being south-south-west. The first mate then had the watch, and was the commanding officer on deck. The schooner had two men on the lookout forward, and the commanding officer in his position, and a competent man at the wheel, and carrying a red light on her port bow and a green light on her starboard bow, as required by the regulations. A white light was seen about a mile distant bearing about a point on the Gray Eagle's port bow, which was supposed to be a light on shore, or upon a vessel at anchor. The Gray Eagle was then kept away about a point and steadied on her course to give berth to the light. The light was not discovered to be a vessel's light in motion, by the commanding officer, until the Perseverance got within about three lengths of the Gray Eagle. Said light was then nearly ahead, and to windward.

The answer further states that the mate not seeing any other light ordered the helm hard a-port, so as to pass on the port side and keep off, and clear the stern of the Perseverance; and that he then heard for the first time a cry from the other vessel to put the helm hard down, but it was too late, the vessels came right together. That the Perseverance instead of passing the Gray Eagle on the port side as she should have done, without the knowledge of the commanding officer or the men of the Gray Eagle, and without lights to indicate her course, and contrary to prescribed or known rules of

navigation, came right across the bows of the Gray Eagle, and was struck by the Gray Eagle on her starboard quarter, in the forward part of her cabin.

From the evidence, the Perseverance was under way in the night time, in the narrowest part of the Straits of Mackinac, and where there was good anchorage, without the signal green and red lights prescribed by the act of congress, entitled "An act fixing certain rules and regulations for preventing collisions on the water," approved April 29, 1864 (13 Stat. 51), and with the white light prohibited by said act.

Article 2 of rules concerning lights, is, "The lights mentioned in the following articles and no others shall be carried in all waters between sunset and sunrise."

Article 3 directs that steam vessels, when under way, shall carry at the foremast head a bright white light, with a green light on the starboard side, and a red light on the port side. The green lights and red lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

By article 5, sailing ships under way, or being towed, shall carry the same lights as steam ships under way, with the exception of the white light, which they shall never carry.

By article 7, ships, whether steam ships or sailing ships, when at anchor in roadsteads or fair ways, shall between sunset and sunrise exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light, in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform and unbroken light, visible all around the horizon, and at a distance of at least one mile.

These rules are so positive, that courts of admiralty will not be justified in construing them otherwise than literally; and navigators must be required to strictly observe them.

The Perseverance having lost her green and red lights in a storm in the open lake in the night time, might be excused, upon the plea of necessity, in pursuing her voyage to the Manitou Islands, with a white light between sunset and sunrise; but there is no possible excuse for violating the positive rule the succeeding night in the Straits of Mackinac, where there was good anchorage.

Pressing necessity alone can excuse a vessel for violating this rule of navigation. The Perseverance was clearly the primary fault of the collision, by her running in the night time under a prohibited white light, and in the absence of the signal red and green lights.

The master of the Perseverance left the second mate on duty, and went below, where he remained warming himself and drying his clothes, he having on board an abundance of clothing. The lights of the Gray Eagle were observed ahead four or five miles off, which should have required the master to be on deck. And when within half a mile, the second mate, fearing danger, left his post and went below to call the master, who came on deck a very short time before the collision.

The theory of lookouts is so well established as not to require reference to authorities. The Perseverance had not sufficient and competent lookouts posted in proper positions on deck; neither did she observe the rule in respect to the officer's watch. A vessel on the lakes is more directly under the command of the master and first mate. The second mate, as in this case, is not usually employed or depended upon for his nautical skill.

The Perseverance was under way, descending the Straits of Mackinac at six miles an hour, without the required green and red lights, and carrying the prohibited white light. The master, under these circumstances, should have been on deck. Being wet and cold was no excuse for absence from his post. The master should have been strictly vigilant, but it seems he was extremely negligent. For these reasons the Perseverance was in fault. Henry v. Baltimore Steam Packet Co., 23 How. [64 U. S.] 287; Union Steam Co. v. New York & V. S. S. Co., 24 How. [65 U. S.] 307.

It is contended that the Perseverance, not carrying the red and green lights prescribed by the rules, and sailing with the prohibited white light, must not be adjudged solely in fault, but that the colliding vessel, the Gray Eagle, is also in fault, as in the case of Chamberlain v. Ward, 21 How. [62 U. S.] 548, decided under the act of March 3, 1849 (9 Stat. 382).

That act did not prohibit the white light. I think the intention of the prohibition was to render the vessel guilty of its violation solely responsible for a collision, in the absence of willfulness or gross negligence on the part of the colliding vessel. Do the pleadings and proof show the Gray Eagle to be in fault? This vessel was seaworthy in every respect, experienced officers, a full crew, and competent lookouts in proper positions. They saw the white light a mile off, which was supposed to be a light on shore, or upon a vessel at anchor. They knew that there was good anchorage at that point; and it was natural and consistent with duty for them at first, to consider the vessel bearing the white light to be at anchor, according to the rules of navigation. This would be the first impression on the minds of navigators who understood their duty; and such is the legal presumption. The Gray Eagle was then kept away about a point, and steadied on her course to give berth to the light, which was her duty. The light was not discovered to be a vessel's light in motion, until the Perseverance got within three lengths of the Gray Eagle. It is urged that this is a confession of negligence; that the motion of the Perseverance should have been sooner seen.

The night was hazy and clear by times, and the water was smooth. A vessel with one white light at such a time, and on a smooth water, will not appear to the beholder at a distance to be in motion, or its course be observable in the absence of some otner object. Its course can only be ascertained in the night, at a distance, from surrounding objects. The sails of the Perseverance were visible for nearly a quarter of a mile, but her course and motion might not be. The Perseverance saw the Gray Eagle half a mile off, and was running at the rate of six miles an hour, which would have brought her to the Gray Eagle stationary in five minutes. The Gray Eagle, running at about the same rate, the vessels would be brought together in two minutes and a half. It would be contrary to judicial experience to presume that the men on board the Gray Eagle were neglectful of duty under the circumstances, in the absence of satisfactory evidence. Five men at their posts on the deck of the Gray Eagle, observed the white light one mile off, bearing a point on the Gray Eagle's port bow, which they supposed to be the light of a vessel at anchor, or a light on shore. They knew they were in the narrowest part of the straits, and where there was good anchorage. They kept the Gray Eagle away about a point, and steadied her on her course to give berth to the white light. They were watching the light and at last when within three lengths, they discovered it to be a vessel's light in motion. It is not at all probable that the officers and men of the Gray Eagle, in the night time, would be indifferent as to the light ahead.

Each vessel charges the other with changing its course immediately before the collision. The Gray Eagle is charged with having headed up so as to shut off her red light. From the want of competent officers and lookouts on board the Perseverance, and the absence of the second mate when below to call the master, the charge that the Gray Eagle changed her course, is not reliable. The mate of the Gray Eagle, not seeing any other light, ordered the helm hard a-port, so as to pass on the port side and keep off, which order was obeyed. The Gray Eagle could not have run across the bow of the Perseverance, but in my opinion, from the weight of reliable evidence, the Perseverance ran across the bow of the Gray Eagle, and was struck on her starboard quarter. By changing the course of the Perseverance, the red light of the Gray Eagle was shut off, if such was the fact.

It is alleged that there was confusion on board the Gray Eagle, the lookout and the mate giving different and contrary orders to the wheelsman, but the man at the wheel testifies that he obeyed the orders of the mate, but that it made no difference what order he obeyed, or how the wheel was turned, for the collision could not then be avoided or prevented. The men on board the Gray Eagle testify that they did not change her course, and that they were at their posts and on duty. "What a witness asserts he did at the time, or did not do on his own vessel, is generally more satisfactory evidence of the fact, than the opinions and belief of a dozen others formed from what they supposed they saw or heard on another vessel." The Neptune [Case No. 10,120].

The Perseverance running without the red and green lights and with the prohibited white light, was guilty of embarrassing the men on board the Gray Eagle in their observations as to the motion and course of the Perseverance, as testified by them.

It was the special duty of the Perseverance to avoid collision in her unseaworthy condition. She could ascertain the course of the Gray Eagle by her signal lights, and is supposed to know that collision with the Gray Eagle might occur, and she should have kept away. Estimating three lengths of the Perseverance to be four hundred feet, the distance she was off when first discovered by the Gray Eagle to be in motion, the vessels each running at the rate of six miles an hour, would strike in about twenty seconds. The unavoidable collision would naturally cause some excitement on board the Gray Eagle.

In my opinion it makes no difference if there was a mistake at that crisis, in regard to the wheel of the Gray Eagle. The Perseverance caused the difficulty, and her owners must bear the consequences. Even if the Gray Eagle changed her course, under the embarrassments caused by the Perseverance, when the peril was impending and the collision inevitable, she did not commit a fault. An error committed by those in charge of the Gray Eagle under the circumstances, to avoid an imminent collision, will not prejudice her rights in a court of admiralty. I do not think that the Gray Eagle should be adjudged in fault, and thereupon decree that the libel be dismissed.

NOTE. For opinion of Davis, J., on appeal to circuit court, see [Case No. 5,735], and on appeal to the supreme court the decision was again affirmed. 9 Wall. [76 U. S.] 505. The New York court of appeals also rule that the fact that one vessel does not carry the prescribed lights does not excuse other craft from proper care and diligence in approaching or passing her; and even though such vessel were entirely without signals, or had negligently and recklessly undertaken to navigate a harbor where she should have come to anchor, if another omit to do what prudent and discreet navigators would have done, and which, if done, would have prevented the collision, the latter is chargeable. Hoffmann v. Union Ferry Co., 47 N. Y. 176. Though a vessel is deceived by the want of proper lights upon another vessel, still if she, with reasonable care, could have avoided the collision, she is still liable. Silliman v. Lewis, 49 N. Y. 379, and cases there cited.

Case No. 5,735.

The GRAY EAGLE.

[2 Biss. 25; 7 Am. Law Reg. (N. S.) 226; 2 Am. Law Rev. 359.] [1]

Circuit Court, D. Wisconsin. Sept., 1868.[2]

VESSEL HAVING LOST HER SIGNAL LIGHTS—DUTY OF OTHER VESSELS—MUST WATCH LIGHTS.

1. Vessel having lost her signal lights in a storm, and proceeding on her way with the prohibited white light, is not necessarily to be charged with all the damages in case of collision.

[See note at end of case.]

2. The fact that she carried a light prohibited to vessels while sailing does not of itself absolve other vessels from the observance of that degree of caution, care and nautical skill which the exigencies of the case require.

[Distinguished in The Scotia, Case No. 12,513.]

[See note at end of case.]

3. Though a white light usually represents a vessel at anchor, the officers of an approaching vessel have no right to conclude that it always does.

4. It was their duty, from the moment the light was seen, to watch it carefully in order to ascertain from its bearings whether the vessel was in motion; and if, in the exercise of ordinary nautical skill and care, this could have been done, and was omitted, and this omission contributed to the accident, then their vessel must share the loss, although the other vessel was in fault in running with a prohibited light.

[Cited in The Golden Grove, 13 Fed. 695.]

5. A vessel is not under all circumstances required to come to anchor at night when, through misfortune she has lost her signal lights. In running, she is so far protected that every other vessel must be navigated with reasonable care, skill and caution.

This was an appeal from a decree of the district court dismissing a libel filed by John Greening and Charles N. Deott, as owners of the schooner Perseverance, against the schooner Gray Eagle, for damages caused by a collision. [See Case No. 5,734.]

Wm. P. Lynde and Willey & Cary, for libelant.

Emmons and Van Dyke, for respondents, as to absence of lights cited Waring v. Clarke, 5 How. [46 U. S.] 465; The Delaware v. The Osprey [Case No. 3,763]; The Emperor v. The Zephyr, Holt, Rule of Road, 24; The Pyrus v. The Smales, Id. 40; The Louisa v. The City of Paris, Id. 22. What will excuse departure from rule. The Princessan Lovisa v. The Artemas, Holt, Rule of Road, 78; The Newcastle v. Graaf van Rechteren, Id. 247; The Margaret v. The Emma, Id. 252; The Planet v. The Aura, Id. 257; The Concordia, L. R. 1 Adm. & Ecc. 93; The Spring, Id. 99. That the Gray Eagle had used all the diligence required by law or good seamanship, Strout v. Foster, 1 How. [42 U. S.] 89; The Delaware v. The Osprey [supra]; Peck v. Sanderson, 17 How. [58 U. S.] 178; The Columbus [Case No. 3,043]; The Grace Girdler, 7 Wall. [74 U. S.] 196–203; The Nichols, Id. 656. That the fault did not originate on her part, and that the real responsibility was with the Perseverance. The Genesee Chief, 12 How. [53 U. S.] 443; Ward v. The Fashion [Case No. 17,154]; The Northern Indiana [Id. 10,320]; Union S. S. Co. v. New York & V. S. S. Co., 24 How. [65 U. S.] 307; Ralston v. The State Rights [Case No. 11,540]; Ward v. The M. Dousman [Id. 17,153]; The Nichols, 7 Wall. [74 U. S.] 656.

DAVIS, Circuit Justice. The schooner Perseverance sailed from Chicago on the 19th of November, 1864, with a cargo of wheat, bound for Ogdensburg. When in Lake Michigan, off the Manitou Islands, during a severe storm, she lost her signal lights, which she was unable to replace after making efforts to do so. Owing to the lateness of the season, the severity of the weather, and the extent of her voyage, being unwilling to incur the delay of lying by at night, she proceeded on her way, showing at night a white light, in order to call the attention of other vessels to her. While running through the Straits of Mackinac, at two o'clock on the morning of the twenty-fourth of November, the schooner Gray Eagle, bound from Buffalo to Milwaukee, collided with her, and destroyed both vessel and cargo.

It is argued, that as the Perseverance was running without the regular lights, and with the prohibited white light, she must be charged with all the damages, although the court should find that the Gray Eagle was also in fault. This position is untenable. It is unquestionably true that the rules of navigation, as prescribed by the act of congress, must be observed, "but in obeying and construing these rules due regard must be had to all dangers of navigation." The fact that the Perseverance had a light prohibited to vessels while sailing, did not of itself absolve the Gray Eagle from the observance of that degree of caution, care and nautical skill which the exigencies of the case required. If a white light usually represented a vessel at anchor, the officers and seamen of the Gray Eagle had no right to conclude that it always did. It was their duty, from the moment the light was seen, to have watched it carefully, in order to ascertain from its bearings whether the vessel was in motion or at anchor. And if, in the exercise of ordinary nautical skill and care, this could have been done, and was omitted, and this omission contributed to the accident, then the Gray Eagle must share the burden of the loss, although the Perseverance was in fault in running with a prohibited light. I cannot say that a vessel is under all circumstances required to come to anchor at night, if through misfortune she has lost her signal lights. There may be a state of case in which herself and cargo would be in more peril by delay at night than by pursuing a continuous voyage. It is true she encounters serious hazard by

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 2 Am. Law Rev. 359, contains only a partial report.]

[2] [Reversing Case No. 5,734. Decree of circuit court affirmed in 9 Wall. (76 U. S.) 505.]

running at night, but she is so far protected that every other vessel occupying the same waters must be navigated with reasonable care, skill and caution.

The obligation of the Gray Eagle to use all reasonable precautions to avoid a collision was not varied because the Perseverance was running with a prohibited light. The present case is one of mutual fault, which, in my opinion, requires a division of damages. It is unnecessary to discuss the evidence at length, in order to show carelessness and fault on the part of the Gray Eagle. She is convicted of want of ordinary seamanship in her own statement of the collision.

The answer says, "A white light was seen about a mile distant, which was supposed to be a light on shore or upon a vessel at anchor. The Gray Eagle was then kept away about a point and steadied in her course to give berth to the light. The light was not discovered to be a vessel's light in motion by the commanding officer until the Perseverance got within about three lengths of the vessel." And why was this important discovery not sooner made? The night was not too dark to do it, for the evidence is that the sails of the Perseverance could readily have been seen a quarter of a mile off; and the wheelsman of the Gray Eagle (in not the best portion of the vessel to see the light), nevertheless, saw it twenty minutes before the collision.

If the light was discovered a mile off, is it not apparent that ordinary vigilance would have disclosed to those on board the Gray Eagle that it was on a vessel in motion, long before there was any danger of collision? The vessels could not have kept their respective courses without it being evident to a watchful seaman that the light was in motion. I cannot, for want of time, analyze the evidence, so as to show how the collision could have been avoided, if the light of the Perseverance had been properly watched. It is very clear the persons in charge of the Gray Eagle were so confident that the light was stationary, that they rested in security, and omitted the observations which good and prudent seamanship required to be made, and which, if made, could not have failed to have disclosed to them the character of the light, and enabled them to keep out of the way of the Perseverance. This conduct on the part of the Gray Eagle contributed very materially to the collision, and that vessel should share with the Perseverance the consequence of that disaster. [The clerk of the circuit court is therefore directed to enter an order, reversing the decree of the district court, and referring the case to a commissioner to ascertain the damages.] [3]

NOTE. For opinion of the district court in this case, see [Case No. 5,734]. For opinion of the supreme court affirming the decision, see 9 Wall. [76 U. S.] 505. See, also, The Scotia, 14 Wall. [81 U. S.] 170. The supreme court have recently decided, that although a vessel may be sailing at night with other than the prescribed lights, and by thus actually misleading another vessel tend to cause a collision, yet this will not discharge the other vessel, if she by intelligent vigilance would have discovered from other indications that the vessel was not what her lights indicated. The Continental. 14 Wall. [81 U. S.] 345.

[The decree of the circuit court dividing the damages between the two vessels was affirmed, on appeal by the respondents, in the supreme court, in an opinion by Mr. Justice Bradley. 9 Wall. (76 U. S.) 505. The omission on the part of the Perseverance to exhibit a proper light, though a fault which put that vessel prima facie in the wrong, was held not to exempt other vessels from the consequences of negligence on their part. The decision in Chamberlain v. Ward, 21 How. (62 U. S.) 548, arising under a similar act (March 3, 1849; 9 Stat. 380), was followed and approved.]

[3] [From 7 Am. Law Reg. (N. S.) 226.]

GRAY, The WILLIAM. See Case No. 17,694.

GREAT EASTERN, The (TOWLE v.). See Case No. 14,110.

Case No. 5,736.

The GREAT BRITAIN.

[Olc. 1.] [1]

District Court, S. D. New York. Sept., 1843.

WAGES OF SEAMEN — STIPULATION FOR COSTS — "SLUSH."

1. When a sailor brings a suit in rem against a ship to enforce a conditional agreement, made with the master, and outside of the written articles, he will be required to file a stipulation for costs in the same manner as an ordinary suitor.

2. Rule 45 of the district court was intended to give seamen high privileges for the collection of the wages agreed upon for their services; it will not be extended to claims extraneous the contracts for wages.

3. A cook not allowed to proceed under the rule in rem against a vessel to enforce a demand for the slush made during a voyage, when that perquisite was not agreed for in the shipping articles. He must give the stipulations exacted in ordinary cases for libellants.

In admiralty.

A. Nash, for libellant.
Burr & Benedict, for claimants.

BETTS, District Judge. A motion was made by the owner of the ship that the libellants be ordered to file the usual stipulation to cover the costs of suit, and that proceedings in the cause be stayed until the order is complied with. The action was brought by the cook of the vessel to recover the value of the slush made on her last voyage, and appropriated by the master to himself as owner, on her arrival in port. The wages stipulated in the articles ($16 per month) have been paid the libellant in full, but he avers in his libel that the master agreed to allow him the

[1] [Reported by Edward R. Olcott, Esq.]

slush in addition to the money wages; and it is insisted in his behalf that his case comes within rule 45 of this court, which provides, that seamen suing in rem for wages in their own right, and salvors coming into port in possession of the property libelled, shall not be required to give such security (stipulation for costs) in the first instance. He had brought suit against the master personally on that agreement, and recovered judgment in the marine court of this city for $31, the value of the slush, and that judgment has not been satisfied; he is now proceeding against the ship, to render her answerable for the sum, claiming it as part of his wages for the voyage.

The present posture of the case does not demand a decision upon the merits of the claim, but only whether it comes before the court prima facie as a suit for wages, giving the libellant the privilege of carrying it to a hearing without entering into stipulation for costs. Admitting that the written articles are not conclusive upon the sailor as to the amount of his compensation, and that he may prove by parol an agreement made at the time for the allowance of perquisites or other privileges as part of the recompense for his services, it would not follow that he should be allowed, against the owner, to go into that collateral matter without indemnifying him for costs, if he fails to establish his allegations by proof. The shipping articles are the first and highest evidence of the liability of the ship. The owner is to be presumed cognizant of that engagement; and if at the termination of the voyage he contests the right of the sailor to that compensation, it is reasonable and equitable that the seaman should be allowed to seek the aid of the court for enforcing it without the condition of giving security for costs. But when he interposes an additional demand not mentioned in the articles, and resting on extraneous evidence, or dependent upon contingencies, the equity of the protection passes to the side of the owner, and he should be indemnified in the controversy respecting such a claim, if it be ultimately shown to be unfounded. Here is a written contract on the part of the libellant to serve for $16 per month; that sum has been fully paid him; but he asserts that there was a conditional verbal agreement between him and the master that the vessel's slush should belong to him also if he performed his duties satisfactorily. If this is a contract binding on the ship, it is not one the owner must be presumed to have sanctioned, as it appears to have been a verbal arrangement between him and the master aside of the engagement in the articles. It is, moreover, positively denied by the master, and the seaman shows no equity entitling him to prosecute the ship for the claim without giving the stipulation of an ordinary suitor. The rule was intended to give seamen high privileges in collecting the wages agreed upon for their services, but it was not designed to distinguish them from other suitors in respect to emoluments and advantages arising out of collateral arrangements, and not directly and palpably part of their wages. Leaving the libellant the opportunity to take the judgment of the court on his case in respect to his right to recover at all, and also in respect to the liability of the vessel for the amount, I am of opinion that he is not entitled to hold the ship in arrest upon it, without filing the ordinary stipulation for costs. It is accordingly ordered, that unless the libellant file stipulation for costs, according to the course of the court, immediately on notice to his proctor of this decision, the ship be discharged from attachment, and that the libellant stand chargeable in the first instance with the expenses of her arrest.

GREATHOUSE, In re. See Case No. 5,741.

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

GREATHOUSE (UNITED STATES v.). See Case No. 15,254.

GREATRAKE v. BROWN. See Case No. 5,743.

GREAT REPUBLIC, The (LEVY v.). See Case No. 8,302.

GREAT REPUBLIC, The (SCULLY v.). See Case No. 12,571.

GREAT WESTERN, The (WESTERN TRANSP. CO. v.). See Case No. 17,443.

Case No. 5,737.

GREAT WESTERN INS. CO. v. FOGARTY.

[See 19 Wall. (86 U. S.) 640.]

Case No. 5,738.

GREAT WESTERN INS. CO. v. THWING.

[1 Lowell, 444.] [1]

Circuit Court, D. Massachusetts. May Term, 1870.[2]

INSURANCE—DUNNAGE—CARGO.

1. A warranty in a policy of insurance that the ship shall not load more than her registered tonnage, means that cargo shall not be carried beyond that amount.

[Cited in Thwing v. Great Western Ins. Co., 111 Mass. 108.]

2. Necessary and proper dunnage is no part of the loading within this warranty, though it is carried on freight.

[See note at end of case.]

Assumpsit to recover back money paid for a partial loss, under a policy of insurance, on the ship Alhambra, on a voyage from Liverpool to San Francisco. The policy contained a warranty that the ship should not

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

[2] [Reversed in 13 Wall. (80 U. S.) 672.]

"load more than her registered tonnage of lead, marble, coal, slate, copper, ore, salt, stone, bricks, grain, or iron, either or all, on any one passage." The ship took on board at Liverpool among other things, 1,064 tons of iron, 6 tons of brick, and 238 tons of cannel coal, making in all, 1,308 tons, and her register showed 1,285 tons, making an excess of twenty-three tons. There was evidence that the coal was used for dunnage; that cannel coal is suitable for dunnage, and is often used for that purpose in cargoes shipped at Liverpool; and that when so used it is liable to be crushed and otherwise injured; and when received for cargo it is usually stowed differently from dunnage. And on the other hand, there was evidence that the charterer of the ship made an agreement with the master, independent of his charter-party, to furnish this coal for dunnage, and to pay freight for it, and that it was put in the freight bill, and a bill of lading signed, and freight paid for it. The plaintiffs, when they paid the loss, were not aware of any breach of the warranty, and it was agreed that they could maintain their action if the loss was not covered by the policy. At the trial before Lowell, J., the plaintiffs asked the judge to rule that if freight was paid for this coal it came within the warranty, although used for dunnage. But the instruction given was, that if the article was in fact received as dunnage, and not as cargo, it would not be part of the loading within the meaning of the contract. The jury found for the defendant [William Thwing], and the plaintiffs now moved for a new trial.

M. E. Ingalls, for plaintiffs.

S. Bartlett and D. Thaxter, for defendant.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

LOWELL, District Judge. A warranty in a policy, like a condition in a deed, since it goes to defeat the general purpose of the contract, should be construed strictly. So construed, it seems to us, that the agreement was not to take cargo beyond the registered tonnage of the ship. It is argued that the purpose was to prevent the overloading of the vessel, and this is undoubtedly true; but the contract itself does not provide that no more than a certain weight shall be put on board the vessel, but only that the "loading" shall not exceed so much.

It is said that to load means to put or take on board for the purpose of carrying, and that the dunnage is and must be carried as far as the cargo is carried, and is, in fact, rather an incident to the cargo, than any part of the tackle, apparel, or furniture of the ship. We are not prepared to say that dunnage is not a part of the fittings of the ship to enable her to carry her cargo safely and properly. But if not, it does not follow that it is part of the cargo. The subject-matter of this insurance is a ship expected to carry cargo; the stipulation has reference to cargo and enumerates articles which may probably be shipped as such; and it seems to us, construing this warranty strictly, though without any violence to the language, that it fairly means "if the cargo shall be iron, coal, grain, &c., either or all, she shall not take as such cargo more than the registered tonnage." Suppose there were no enumeration, but that the stipulation merely said, warranted not to load more than her registered tonnage, ought the usual and necessary dunnage, say of plank, wood, rattan, or mats, to be counted, though they might amount to a very considerable weight? Could passengers' luggage be within the warranty in such a case? Or take the case of a freighting steamer; the coal necessary for the use of her engines would not be estimated in ascertaining whether she had loaded iron, coal, stone, &c., beyond the agreed amount; and this because the warranty relates to a different subject, the cargo, and supposes the vessel to be duly fitted and prepared to receive her agreed cargo, before it begins to operate. It may be said that in such a case the coal-bunkers are no part of the registered capacity of the vessel; but I apprehend that the decision could not turn on the fact that the coal was or was not carried in the bunkers, or that more was carried than the bunkers would hold. If it was mixed up with the cargo, the result would be the same. So here, if iron, &c., were carried on deck or in the cabin, but carried as cargo, and not as stores or dunnage, the warranty would be broken.

If this be so, and if, as the jury have found, this cannel coal was in truth used for dunnage, it does not seem material that freight was paid for it. The evidence shows that it was the subject of a special agreement, and was stowed in a way that cargo ought not to be stowed.

The fact that the article has a market value does not change its character and bring it within the language, when, if furnished by the ship, and of no great value, it would not be included. Perhaps nearly all dunnage has some value. The strongest mode of stating the argument for the plaintiff on this point is, that here, in fact, was a cargo that needed no dunnage, because a part of it would serve the purpose. But the facts seem rather to show that here was dunnage of intrinsic value, besides the cargo which the charterer had agreed to furnish; and which, without a special agreement, he could nor furnish, because it would be the right of the master to supply such dunnage as might be proper, at his own risk. When that had been supplied, by whomsoever it might be supplied, the ship was ready to receive her cargo. It occupied a space, and was put on board under a responsibility different from that of the loading, properly so called. This is rather a question of fact than of law, and

the jury have found, in effect, that this coal was used in good faith, and properly, as dunnage; and we are not ready to set aside the verdict on this point. Motion denied.

[NOTE. This case was reversed by the supreme court in an opinion by Mr. Justice Bradley—13 Wall. (80 U. S.) 672—upon the ground that no one had a right to import into the contract of insurance an implied qualification that a reasonable amount of merchandise proper for ballast or dunnage should not be reckoned as loading within the meaning of the contract. "When merchandise is used in lieu of dunnage, or to perform the office of dunnage, it does not lose its character as cargo, and the insurance company has the right to treat it as cargo. And it is evident that no form of words which the captain and the charterer might use on the subject can affect the rights of the insurance company. It would be res inter alios acta." Mr. Justice Clifford, Mr. Justice Swayne and Chief Justice Chase dissent.]

GREAT WESTERN QUICKSILVER MIN. CO. (KNOX v.). See Cases No. 7,906 and 7,907.

Case No. 5,739.

In re GREAT WESTERN TEL. CO.

[5 Biss. 359;[1] 5 Chi. Leg. News, 493.]

Circuit Court, N. D. Illinois. July, 1873.

PRACTICE ON REVIEW — NEWLY-DISCOVERED EVIDENCE—SETTLEMENT OF PROCEEDINGS.

1. The circuit court will not on petition for review hear additional testimony. Its power is simply revisory.

2. It will strike out from a petition for review all portions regarding newly discovered evidence.

3. Where there is newly discovered evidence the district court may in a proper case open the decree and grant a re-hearing, and it seems that the circuit court might peremptorily direct the district court so to do.

4. Pending such application for re-hearing, the circuit court will suspend action on the petition for review, and afterwards review the new case as finally decided in the district court.

5. If the bankrupt can settle all but a few contested claims the court may, on consent of creditors, dismiss the proceedings on security being given to the non-assenting creditors.

In bankruptcy. The Great Western Telegraph Company was adjudicated a bankrupt by the district court, on the petition of John C. Hilton, and thereupon a petition for a review of the proceedings in the district court was filed in this court by the company; and pending this petition in the circuit court, an application was made by the petitioners for leave to take testimony in addition to what was before the district court, as affecting the question of the bankruptcy of the telegraph company; and a motion was also made by Hilton, the petitioning creditor in the district court, to strike out such portions of the revisory petition filed in this court, as set forth new evidence discovered by the company since the decree of the district court, and which tended to impeach the validity of Hilton's claim upon which the company was adjudged bankrupt.

George C. Campbell, G. S. Paddock, and E. A. Small, for petitioner, Hilton.

George F. Harding and John I. Bennett, for Telegraph Co.

DRUMMOND, Circuit Judge. This case raises the question as to the proper practice in this court where there has been evidence recently discovered since the trial in the district court, affecting the question of bankruptcy. As I stated during the argument, if, after a decree of bankruptcy in the district court, there are facts ascertained which may affect the propriety of the decree, and which in fact show prima facie that the decree was improperly rendered, there ought to be some way by which that wrong could be rectified.

The petition in bankruptcy in the district court was founded upon an indebtedness upon some promissory notes which had been reduced to judgment. And the question which is sought to be made now is, as touching the validity of that indebtedness.

It is alleged by the petitioners in this court, that there really was no existing indebtedness to the petitioners in the district court, and, therefore, there was no proper foundation for the commencement of proceedings in that court.

I have come to the conclusion that it would not be proper for this court to hear any additional evidence as affecting the decree in bankruptcy. That is a matter within the jurisdiction of the district court. [The only power that this court has over it is that of superintendence or revision simply.][2]

It was not the intention of the bankrupt law [of 1867 (14 Stat. 517)], I think, to make the circuit court a court of original jurisdiction, or to allow the circuit court to act upon the bankruptcy proceedings as if it had original jurisdiction de facto. Its only object was to give the circuit court a supervisory control and superintendence over the proceedings of the district court.

There are two ways in which the object of the petitioners in this court can be accomplished. If it be true, as they allege, that there was no bona fide indebtedness, upon which the petition in the district court was founded, they can make an application to the district court, setting forth sufficient facts to justify that court in re-opening the question connected with the decree in bankruptcy, and ask for a re-hearing of the subject matter of that decree. There can be no doubt that the district court would have the power, upon a proper case, to entertain and grant such an application.

It may be that when a case is pending in the circuit court upon review, as it is termed, under the second section of the bankrupt

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

[2] [From 5 Chi. Leg. News, 493.]

law, upon a showing of the facts warranting the court in so doing, that the circuit court might direct peremptorily the district court to re-hear the case upon new facts thus presented, and to determine whether or not there should be a decree in bankruptcy rendered against the company.

But it would seem to me as though the better course would be in such a case for an application to be made to the circuit court, asking for a suspension of action upon a petition of review until the case can be heard in its new aspect in the district court. And when it is thus heard in the district court, and the action of the court is had upon the new case, of course it would be subject to review by the circuit court, and any error of the district court could be corrected by the circuit court.

That is one way in which the object of the petitioners in this court can be attained. Another is this: If, as they allege, the company is entirely solvent, and able to settle all the bona fide claims against the company, leaving nothing but the contested claim of Mr. Hilton, who was the petitioner in the district court, then they could make an application to the district court to supersede the proceedings in bankruptcy, paying off all these other claims, or settling or adjusting them, and obtaining the consent of creditors to such a course and then giving security to the non-assenting creditor for any claim which it may turn out he has against the company and which he may be able to sustain before a competent tribunal. This was the course which was adopted in Indiana in a case which came before me at the last term of the circuit court. In re Indianapolis, C. & L. R. Co. [Case No. 7,023].

In the case I refer to, the court allowed the bankruptcy proceedings to be dismissed on the giving of security for the payment of the claims of the non-assenting creditors, those claims being in controversy.

Now, that may be done here. This claim of Mr. Hilton, it is insisted upon the part of the company, is not a bona fide claim; that it cannot be sustained when properly investigated, and when the proof attainable is brought to bear upon it. If the company is prepared to pay the other claims, and is entirely solvent, there can be no objection to this course.

Therefore the motion of the petitioners to allow the testimony to be heard in this court, will be overruled; and the motion of the petitioning creditor in the district court, Mr. Hilton, to strike out a certain portion of the petition, will be sustained. This, of course, is without prejudice to the right of the petitioners in this court to reach the end they desire in one of the ways which has been suggested by the court.

[In Case No. 5,740, the respondent made a motion in the district court to set aside the adjudication of bankruptcy made against it. The motion was overruled.]

Case No. 5,740.

In re GREAT WESTERN TEL. CO.

[5 Biss. 363.] [1]

District Court, N. D. Illinois. July, 1873.

BONA FIDE HOLDER — LIS PENDENS — NOTES OF CORPORATION—USAGE—INCIDENT TO BUSINESS —AUTHORITY OF OFFICERS PRESUMED.

1. A bona fide transfer of an interest in a partnership may be made without writings or vouchers.

2. A person may be a bona fide holder of a promissory note without having paid for it in cash, if it is a genuine business transaction in which he believed that he was paying with a valid and valuable asset.

3. The fact that he considers the maker of a note "slow" does not show that he is not a bona fide holder, especially where it appears that he paid for the note in other securities equally "slow."

4. A note in the hands of a bona fide holder is not avoided by the fact that the contract in part payment of which it was issued was fraudulent, and proceedings to annul the contract were pending at the time the note was issued.

5. Though the rule of lis pendens would apply to a contract assigned during the pendency of litigation over it, the doctrine cannot be carried so far as to affect commercial paper given by the litigating parties.

6. Where a promissory note is fair upon its face, an indorsee is not bound to inquire into the consideration or circumstances under which it was given.

7. A corporation may be bound by promissory notes issued by its treasurer in accordance with a usage, as well as by express authority.

8. The power to make commercial paper is incident to a business corporation, and the usual executive officers are presumed to act within the scope of their authority, and every intendment will be made to support the paper given, especially when signed by the financial officer of the company.

In bankruptcy.

This was a motion by the respondent, the Great Western Telegraph Company, to set aside the adjudication of bankruptcy previously entered against it on the petition of John C. Hilton, a creditor. The petition was filed on the 8th of February, 1873, and on the 28th of April, the company was adjudicated bankrupt. The company then filed a petition for review by the judge of the circuit court on the ground of newly discovered evidence, but the circuit court refused to hear this testimony and remitted the case to the district court. This court then allowed the respondent to introduce this testimony, and this motion was made on the final submission of the proofs. Hilton's claim against the company consisted of judgments rendered in the circuit court of Cook county on three promissory notes given by the company to Selah Reeve, dated June 6th, 1872, for $6,-

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

603.16 each, due respectively in four, five and six months after date, and one note for $869, dated August 1st, 1872, due in four months from date, all indorsed by Reeve to Hilton. These notes all bear interest at the rate of ten per cent. and were signed by George L. Otis as treasurer of the company. The respondent claimed that the notes were invalid, having been executed and delivered after the publication of the decision of the circuit court of Cook county in the case of J. M. Terwilliger, against the respondent Selah Reeve and David A. Gage, declaring void a certain contract entered into between the company and Reeve, and decreeing an accounting. The respondent also denied that Hilton was a bona fide holder of the notes. The notes which Hilton held were originally transferred by Reeve to David A. Gage, and on the — day of July, 1872, transferred by him to Hilton in exchange for his interest in the firm of Reid, Sherwin & Co., in which both Hilton and Gage were partners, their respective interest therein being about $20,000. There being a disagreement in the firm, Gage and Hilton both proposed to withdraw, but Hilton, not being able to make a satisfactory settlement with the other partners, assigned his interest in the firm to Gage, who assumed the negotiation in his own name for the adjustment of the partnership. Gage finally adjusted his interest in the firm, including the interest of Hilton assigned to him, together with a mortgage which he held upon their property at $60,000, which was secured by a second mortgage on the firm property for that amount payable in installments of $5,000 each. The notes were originally issued to Reeve on a contract with him for building a telegraph line from Chicago to Princeton, and transferred by him to Gage in re-payment of advances to him on carrying out his contract.

BLODGETT, District Judge. I see nothing in the evidence pertaining to the transfer of the notes from Gage to Hilton tending to show it was not a bona fide transaction. Gage in dealing with Reid & Sherwin had claimed to own Hilton's interest in the business, and had included that interest in this long mortgage taken to himself. As between himself and Hilton, he was bound to pay Hilton what that interest was worth, and proposed to give him these notes of the telegraph company for Hilton's interest in the Reid & Sherwin matter, and the railroad bonds.

It is true that both Gage and Hilton state that no writings were executed between them, at the time Hilton assigned his unliquidated interest in the firm to Gage for adjustment; but I cannot deem that a circumstance of sufficient import to say that Hilton really had no interest in the firm. He and Gage were partners, and intimate friends; and I do not think the fact that vouchers were not exchanged, or writings executed, shows that Hilton had no bona fide claim against the firm to be adjusted. If he had, in fact, no such interest, it would have been easy to have proven it by the books of the firm of Reid & Sherwin, or by calling parties intimate with its affairs, neither of which was done.

It may be and probably is true that neither of the securities exchanged were deemed first-class. The Reid & Sherwin claim had a long time to run, because the mortgage debt, which formed at least one-half of the final balance of $60,000 struck in the settlement against Reid & Sherwin, would be first satisfied by the $5,000 installments as they were paid.

This $60,000 was also a second mortgage on the Reid & Sherwin property, and Hilton testifies that while he supposed the telegraph company notes were in all respects valid, yet he anticipated that some part of them might have to be renewed and extended. But the fact that an indorsee considers the maker of a note in doubtful credit, or, as the saying is "slow" does not show that the indorsee is not a bona fide holder, especially when it appears that he paid for the paper in other paper perhaps equally "slow." It is sufficient to say that the whole testimony, when taken together, seems to my mind to show that the transaction between Gage and Hilton, by which Hilton became the owner of this paper, was a genuine business operation in which each party at least supposed he was parting with a valid and valuable asset for another equally valid and valuable to himself.

It is, however, urged by the respondent that, notwithstanding Hilton paid value for these notes, yet he took them with knowledge of the equities of the company against the original payee to such an extent that they are chargeable with those equities in his hands.

The evidence to sustain this part of the case consists in the fact that the Terwilliger Case [59 Ill. 249] was pending in the supreme court of Illinois at the time these notes were made; that the substance of the bill in that case had been published in the papers of this city, which Hilton was in the habit of reading, and that the allegations of that bill and subject matter of the suit amounted to a caveat to all persons not to deal with Reeve in any matter growing out of his relations to the respondent. But I cannot believe any application of the doctrine of lis pendens has gone to the extent claimed in this case.

The Terwilliger bill charged that a certain contract made between Reeve and this company was fraudulent as against the bona fide stockholders of the company, and asked for an accounting in regard to the money paid and work done under that contract. The case had been heard before the learned and able circuit judge of Cook county, upon

proofs and arguments, and he had delivered an exhaustive opinion reviewing the evidence, and had dismissed that part of the bill for want of equity, from which Terwilliger had appealed. The opinion of his honor, Judge Williams, holding that there was no fraud in the contract, had been published in the papers of this city months after the publication of the synopsis of the bill, so that if any weight is to be given to publications in the papers of the substance of the bill, the opinion of the circuit judge at least neutralized the allegations of the bill, and as the record stood at the time Hilton became the purchaser of these notes, there was a judicial finding that the contract between Reeve and the respondent was not fraudulent for the causes alleged in Terwilliger's bill.

There was no injunction against this company at that time. It was in possession of long lines of telegraph and engaged in the construction of more. It had full control of its affairs through its officers. The bank where Hilton kept his account had recently discounted the paper of the company, and was then the holder of it, to the extent of several thousand dollars, and I cannot conceive that the doctrine of lis pendens should be held to have created a conclusive judicial presumption that this company could not on the 6th day of June, 1872, make a valid note to Selah Reeve or owe him a bona fide debt.

The general principle by which a third person is charged with notice under the doctrine of lis pendens is that the notice attaches only to the thing—the res—which is the subject matter of the suit. Here the subject matter of the suit was partly a contract between two of the parties to the suit, and probably Reeve could not have assigned that contract pending the suit without the assignees taking it subject to the result of that suit. But in regard to promissory notes, fair upon their face, an indorsee is not bound to inquire into the consideration of the note or the circumstances out of which it grew. The presumption is that the note was given for value, as well as that the indorsee paid value for it. And it seems to me it would be an abusive stretch of the principle of notice by lis pendens to hold that this respondent could not give commercial paper in its business transactions pending that suit.

Incidental to this point, it is also insisted that Otis, the treasurer, had no authority to give these notes, and that they are therefore void. It is insisted that, by the by-laws of the company, all deeds and contracts are to be signed by the president, and that it is nowhere made the duty of the treasurer, nor is he permitted, either expressly or by implication, to sign notes. By the fourth by-law it is provided that an executive committee shall be elected, consisting of three members of the board of directors, "who shall have, and they are hereby authorized to exercise, all the power of the board of directors."

On the 5th of June, 1872, a meeting was held by this executive committee, at which the following resolution was adopted, and spread upon the records of this company:

"Resolved, that the notes already issued by the treasurer in the name of the company in part payment of a bill for $37,019.25, from the contractor, are approved, and that the treasurer is hereby authorized and directed to settle by note for any balance remaining due on said bill."

It was conclusively shown on the former trial that these notes were given for part of the bill referred to in this resolution, and also that Otis, the treasurer, had been in the habit of giving notes of this character for upwards of two years last prior thereto.

The power of this executive committee was plenary to the extent of the powers of the board of directors. The executive committee had sanctioned these notes, and directed them to be given, notwithstanding the by-laws provided that the president should sign the deeds and contracts of the company. I have no doubt that the board of directors or the executive committee may also authorize any other person as the agent of the company to sign contracts. Here Otis signed these notes in pursuance of a usage which would raise the presumption that he had authority to do so, and also by virtue of express authority. I do not think it lies in the mouth of the company to question his authority.

The distinction between the acts of an officer of a government or municipal body and the acts of an officer of a corporation created for business purposes, is obvious. In the case of a government official, the signature or indorsement of notes or bills of exchange is exceptional and outside the usual functions of such officer. In the case of a business corporation like this, the power to make commercial paper like this is a necessary incident to the business which the corporation is created to transact, and the usual executive officers of the company are presumed to act within the scope of their authority, and every intendment should be made to support the paper given, especially when given by the financial officer of the company. But suppose, for the purpose of the argument, that is was the duty of Hilton, under the circumstances, to have made inquiry into the consideration of this paper and the power of the treasurer of the corporation to execute it, the evidence shows that the actual consideration of the notes was money which Gage advanced to pay for material and labor which actually went into the construction of a telegraph line for the company, and that he advanced this money with the understanding and agreement that he was to have these notes as security therefor. Making the notes payable to Reeve was only a matter of form. The money was

paid by Gage for the wire and labor, and the company had the benefit of it—there was no profit to the contractor involved in it. The company then was in debt to Gage, and could, through any agent or officer, give an evidence of that indebtedness, so that inquiry into and knowledge of all the facts would only have strengthened all the presumptions of the law in favor of the validity of the paper.

As this case is of great importance to stockholders of the respondent, I have carefully reviewed the evidence on which the former adjudication was made, as well as the new proof submitted on the last hearing, and I feel compelled to adhere to the conclusion at which I arrived on the former trial.

It has seemed to me, from the outset, that undue stress has been placed by respondent's counsel upon the effect that the Terwilliger Case should have upon this proceeding. Here this corporation, through its de facto officers, has contracted certain debts, for which its notes—commercial paper—have been given, which may not have been equitable, or even valid, between the original parties. These notes have passed into circulation, and are now in the hands of bona fide holders, who ought not to be made to suffer for the bad faith which, it is claimed, these officers have shown toward their constituency. It is surely better that these stockholders should suffer by the fraud of their own agents, than that the loss should fall on those who are within the pale of protection by the rules of commercial law. The motion for setting aside the adjudication is, therefore, overruled.

NOTE. An insolvent debtor may have his notes discounted when done bona fide, and still the purchaser will be protected though he know of the debtor's insolvency. Darby v. Boatman's Sav. Inst. [Case No. 3,571]. Consult the following on the transfer of an insolvent's property in good faith with no intent to defraud: Wadsworth v. Tyler [Id. 17,032]; Darby v. Lucas [Id. 3,573]; In re Buse [Id. 2,221]. See further as to the binding effect of contracts made by the officers of a corporation when strictly beyond their power but under a usage: Commercial Mut. Ins. Co. v. Union Mut. Ins. Co., 19 How. [60 U. S.] 318; Odiorne v. Maxcy, 13 Mass. 178, 15 Mass. 39; Beers v. Phoenix Glass Co., 14 Barb. 358; Smith v. Hull Glass Co., 11 C. B. 897, 9 Eng. Law & Eq. 442; Allen v. Citizens' Steam Nav. Co., 22 Cal. 28; Butts v. Cuthbertson, 6 Ga. 166. Contra, where the powers of a treasurer are expressly limited by the by-laws, they cannot be extended by inference from course of business. Torrey v. Dustin Monument Ass'n, 5 Allen (Mass.) 327. An agent of a corporation authorized "to sign all notes and business paper," binds the principal by giving accommodation notes which pass into hands of bona fide holders before maturity. Bird v. Daggett, 97 Mass. 494.

[Previously an attempt had been made to have the circuit court review the proceedings of the district court, by means of a petition for review and motions based thereon, but this the circuit court refused to do. Case No. 5,739.]

GREAT WORKS MILLING & MANUF'G CO. (MITCHELL v.). See Case No. 9,662.

Case No. 5,741.

In re GREATHOUSE.

[4 Sawy. 487; 2 Abb. (U. S.) 382.][1]

Circuit Court, N. D. California. Feb. 15, 1864.

JURISDICTION—AMNESTY PROCLAMATION.

1. The court has jurisdiction to inquire into the legality of the imprisonment of a person held under its own sentence.

2. The proclamation of the president of December 8, 1863, extends to persons who at its date had been convicted and sentenced for the offences described in it. The proclamation embraces not only rebels in arms or in a situation to injure the government, but also such as are already arrested and incarcerated. It is the duty of the court to construe the proclamation like any other public act or law, and to apply to it the well settled rules of interpretation, irrespective of any opinion, or even knowledge, of the private but unexpressed intentions of its author. A prisoner confined under a legal sentence can voluntarily accept a conditional pardon.

Application for a writ of habeas corpus. The trial and conviction of Ridgeley Greathouse, for treasonable acts, is reported [Case No. 15,254]. Application was now made, on his behalf, for a writ of habeas corpus, to procure his discharge.

Alexander Campbell and Delos Lake, for petitioner.

W. H. Sharp, U. S. Atty., for the United States.

HOFFMAN, District Judge. A writ of habeas corpus is applied for on the part of Ridgeley Greathouse, a prisoner now in execution under the judgment and sentence of this court for the crime of engaging in and giving aid and comfort to the existing Rebellion. The legality of the conviction and sentence is not denied; but it is claimed that the prisoner is entitled to his discharge under the proclamation of the president, of December 8, 1863.

The application is resisted by the district attorney on two grounds:

First. That the court has no jurisdiction to award the writ or discharge the prisoner, even though it be clear that he is within the terms of the proclamation, and,

Second. That the proclamation does not apply to his and similar cases.

1. As to the jurisdiction of the court. The authority of the courts of the United States and of the judges thereof to issue writs of habeas corpus, is derived from the fourteenth section of the act of September 24, 1789 [1 Stat. 81]. That section provides that "either of the justices of the supreme court, as well as the judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. Provided,

[1] [Reported by L. S. B. Sawyer, Esq., and by Benjamin Vaughan Abbott, Esq., and here compiled and reprinted by permission. The statement is from 2 Abb. U. S. 382, and the syllabus and opinion are from 4 Sawy. 487.]

that writs of habeas corpus shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or committed for trial before some court of the same, or necessary to be brought into court to testify."

It is contended by the district attorney that the authority here given does not embrace cases where a prisoner is in custody under conviction and sentence. That the court, when sentence is pronounced, is functus officio, and has no further power over the case; that the marshal's return that he holds the prisoner by virtue of such conviction and sentence is conclusive; and that even a special pardon issued to the prisoner cannot be set up in answer to it.

For this position no authority is cited. It will be seen that, if correct, it would be the duty of the court to remand a prisoner to undergo execution of a capital sentence, even though he should produce a full and free pardon by the president, under the great seal of state. Even this result the district attorney did not hesitate to admit to be the necessary consequence of the principle contended for.

The terms of the statute embrace, it will be observed, all cases of commitment—and the proviso by implication includes not only cases of commitment for trial before some court of the United States, but also all cases where persons are in jail under or by color of the authority of the United States. It is evident that this language extends to all persons imprisoned under the authority of the United States, whether under the judgment of a court or the warrant of a committing magistrate.

The duty of the court, on the return of the writ, is plain. If it appear that the prisoner is held by virtue of a warrant issued by a competent officer, or by the judgment and sentence of a court of competent jurisdiction, he will be remanded. But if it appear that though the original commitment was lawful, yet, that in consequence of some subsequent event, his further detention is no longer lawful, he will be discharged. Thus, if he be committed until he pay a fine, which he has paid accordingly, and the return states the commitment only, the court will inquire into the fact and release the prisoner. "So, after a conviction, he may allege a pardon, or that the judgment under which he was imprisoned has been reversed." 1 Hill, 404. In People v. Cassels, 5 Hill, 167, Judge Bronson says: "The officers may also inquire whether any cause has arisen since the commitment for putting an end to the imprisonment, as a pardon, reversal of the judgment, payment of the fine, and the like."

That the court does not become, by passing sentence, functus officio, to all intents and purposes, is evident from the consideration that it is by virtue of the authority of the court and by force of its sentence that the prisoner is detained; and even when he has obtained a conditional pardon and been discharged, yet, if he violate the condition, he may be re-arrested and remanded by the court in execution of the original sentence. But the point is authoritatively settled by the supreme court of the United States.

In Ex parte Wells [Case No. 17,386], a motion was made in the circuit court for a habeas corpus on behalf of Wells, a prisoner convicted of murder and sentenced to death, but who had been pardoned by the president, upon condition that he be imprisoned during his natural life. Under this pardon, the prisoner claimed to be entitled to his discharge. The application was refused by the circuit court, and came before the supreme court by way of appeal [18 How. (59 U. S.) 307]. The questions debated were, whether the supreme court was not, in entertaining the application, exercising an original, instead of the appellate jurisdiction to which, in such cases, the constitution restricts it; and, secondly, as to the force and effect of the pardon and the legality of an imprisonment by virtue of the condition contained in it, and the prisoner's acceptance of it. It was held that the jurisdiction invoked was an appellate jurisdiction; and that the imprisonment pursuant to the condition of the pardon was legal. But no doubt seems to have been suggested—either by the court or at the bar—of the authority of the circuit court to award the writ; nor of that of the supreme court, provided the jurisdiction exercised was appellate and not original. In Ex parte Watkins, 7 Pet. [32 U. S.] 568, the court awarded the writ in the case of a person convicted of offenses against the United States, and sentenced to imprisonment and the payment of fines. It is nowhere suggested, in the case, that the authority of the circuit court, or that of the supreme court (if the jurisdiction was to be deemed appellate) to inquire into the force and effect of the sentence, and the legality of a further imprisonment under it, was open to controversy.

It is plain, from the foregoing, that it is the right and duty of the court in this case to inquire into the cause of commitment of the prisoner, and that if he is held by virtue of the sentence of this court, to ascertain and decide whether, by reason of any matter subsequent thereto, such as the payment of his fine, the expiration of his term of imprisonment, a pardon, or the like, he is now entitled to be discharged.

2. The pardon whereby it is claimed that the sentence of the prisoner is avoided is contained in the proclamation of the president of December 8, 1863. The part requisite to consider is as follows:

"Therefore, I, Abraham Lincoln, president of the United States, do proclaim, declare and make known to all persons who have directly or by implication participated in the existing Rebellion, except as hereinafter excepted, that a full pardon is granted to them,

and each of them, with restoration of all rights, if third parties shall have intervened, and upon the condition that every such person shall take and subscribe an oath, and thenceforward keep and maintain said oath, and which oath shall be registered for permanent preservation, and shall be of the tenor and effect following, to wit," etc.

The authority of the president to grant an effectual pardon to all persons embraced within the terms of this proclamation is not disputed. It is derived from the power confided to him by the constitution, and in this case is exercised in pursuance, as the preamble recites, of an express authority given by congress to the president, "to extend by proclamation to all persons who may have participated in the existing Rebellion in any state, or part thereof, pardon and amnesty, with such exceptions, and at such terms, and on such conditions as he may deem expedient for the public welfare."

The pardon and amnesty thus proclaimed is, therefore, a public and official act, of which the court will take judicial notice, and it corresponds to a class of pardons well known in England, pardons by act of parliament. Nor is it disputed that the crime described in the proclamation is the same crime as that whereof the prisoner has been convicted. The language of the proclamation is: "All persons who have directly, or by implication, participated in the existing Rebellion."

The offense of the prisoner, as charged in the indictment, is: "That he engaged in the existing Rebellion, and gave to it aid and comfort." The offense pardoned is, therefore, evidently the offense committed by the prisoner.

But it is urged by the district attorney that this proclamation does not extend to persons who, at its date, had been convicted and sentenced for the offenses described in it. In support of this position, he cites various ancient English authorities. It is not disputed that by the common law, if a man be attainted of felony, and get a pardon which doth not mention the attainder, the pardon will be ineffectual. So, also, it has been held that the pardon of a person convicted by verdict of felony, is void, unless it recite the indictment and verdict. It has even been questioned if the pardon of a person barely indicted of a felony, be good without mentioning the indictment. Bac. Abr. tit. "Pardon," D, and cases cited.

These and similar decisions are founded on the general principle that wherever it appears, by the recital of the pardon that the king was misinformed or not rightly apprised, both of the heinousness of the crime, and also how far the party stands convicted upon record, the pardon is void, upon the presumption that it was gained from the king by imposition. Any suppression of truth, or suggestion of falsehood, in a charter of pardon, was, therefore, held to vitiate it.

But it may be doubted whether, at the present day, such rules would be enforced in this country, or even in England. We learn from Barrington (Ob. St. 27, 231) that at the time of Magna Charta, and for many reigns subsequently, the abuse of the pardoning power by the king, and the impositions practiced upon him, were the subject of frequent and clamorous complaint. The ancient punishment for murder was a were gild, paid as a satisfaction to the nearest relative to the deceased. It was, therefore, a most crying abuse of power in the king not only to pardon this most heinous crime, but in consideration also of the mulct, which otherwise, should have been given to the relation who prosecuted. Bar. Ob. St. 27.

Hence, we find it enacted by statute 27 of Edw. III. that in every pardon of felony granted at any man's suggestion, the suggestion and the name of him that makes it shall be compared, and if it be found untrue the charter shall be disallowed, and the justices before whom the charges shall be alleged shall inquire of the same suggestion, and if they find it untrue shall disallow the charter. So, by statute 13 of Rich. II. it was enacted that no pardon for murder or rape shall be allowed, unless the offense be particularly specified therein, and especially in murder it shall be expressed whether it was committed by lying in wait, assault, or malice prepense.

In analogy to these statutory requirements, and to carry out the same policy, the courts held a pardon to be void whenever it might reasonably be presumed that the king was deceived; and they considered the omission to recite the fact that the person pardoned had been attained or convicted, or perhaps even indicted, as evidence that an imposition had been practiced on the king. How far these rules would now be enforced in this country is not very clear.

In Re Edymoin, 8 How. Pr. 478, a pardon was held on habeas corpus to be valid, although it appeared that a gross fraud had been perpetrated on the executive; that no notice of the application for pardon had been given to the district attorney as required by law; that the signatures of the officers of the prison to the application for pardon had been forged, as also a letter accompanying the petition purporting to be from the physician of the prison; and that on these papers the pardon was granted.

In Stetler's Case [Case No. 13,380] U. S. Cir. Ct. Phila., it was held by Judge Kane that where the pardon recited a conviction "at the June term" of the district court, of counterfeiting the silver coin of the United States, and a sentence of imprisonment for one year, and the record showed a conviction at the "May sessions" of two felonies, one counterfeiting and forging ten pieces of coin, and the other uttering and passing them, on which there was a sentence of fine as well as imprisonment—the pardon was ineffectual

to restore the competency of the party as a witness. Whart. Cr. Law, § 766, in notis.

Whether a similar inaccuracy as to the term at which the conviction was had, and the description of the offense as stated in the indictment, would, in a capital case, and in the face of the plain intention of the executive to pardon, be held to vitiate it, and the prisoner remanded for execution, may be doubted.

The case cited from the New York reports is clearly an authority that the fact that the executive was grossly deceived will not avoid the pardon; and if this be law, it follows that the omission to recite the fact of a conviction and judgment, which is in England adjudged to avoid the pardon only because it affords evidence that the king was deceived, would not have the like effect in this country. Independently of the presumption of deception, arising from a failure to recite a previous conviction or indictment, the absence of such recitals would seem to afford no ground for avoiding the pardon.

All pardons, except in cases of illegal convictions, etc., proceed upon the hypothesis of the legal guilt of the person pardoned. If he be not guilty, it is presumed that he will be acquitted, and he has no need of a pardon. The pardon is granted on considerations which satisfy the executive that, in the particular case, an offender, though guilty, should be pardoned.

It would seem, therefore, to be of slight importance, whether the guilt of the offender be judicially ascertained or not, provided the executive is fully apprised of the nature of the offense pardoned; for the pardon goes upon the presumption that the offender, if not already convicted, will be; else he would not need to plead his pardon to the indictment, but would be saved under his plea of not guilty.

It is believed, however, that in the United States few pardons have ever been granted until after conviction. But whatever be the rules with respect to private pardons by charter from the king, or special pardons by the executive in this country, it is very clear that they have no application, even in England, to general pardons by act of parliament.

This is evident on grounds of reason as well as on authority. The only reason assigned for holding void the pardon of a convict, which does not recite the conviction or indicting of a person indicted, is, that it appears from the omission that the king was not acquainted with the facts of the case. But this reason can have no application to general acts of amnesty and pardon, which are intended to include whole classes of offenders, and are in no respect founded on any consideration of the circumstances of particular cases, except of those which by name or special description may be excepted out of them.

They are like the amnesty bills passed on the accession of Henry VII. at the restoration of Charles II., and by William III. at the revolution of 1688, or in this country after the whisky rebellion, public and general acts dictated by motives of policy and considerations of state, as well as of clemency; but not founded, except as before stated, as to those excluded from their benefits, on any particular examination of the circumstances of individual cases. As to those included within their terms, there can be no reason to allege that the king was misinformed or deceived.

Neither can it, when an act of state of so great importance is contemplated, be presumed to be intended that the accidental difference in the situation of offenders—some of whom, perhaps the most guilty, may not have been arrested, or if arrested, not indicted or convicted; while others, perhaps less guilty, have been tried and convicted—should enable the former to avail themselves of the offer of grace, while the latter would be excluded. A moment's consideration of the operation of such a rule of discrimination between offenders at large and offenders in custody, will convince us of its unreasonableness.

The diligence of the district attorney has failed to discover a single case where the benefit of a general pardon, by act of parliament or by royal proclamation of amnesty, has been withheld on the ground that the party had already been convicted.

Baron Comyn says (Dig. § 53): "Also, it hath been adjudged that where an act of parliament expressly pardons such and such crimes from a certain day before the session, it thereby avoids all convictions and deprivations, and awards of costs and amerciaments for such crimes, whether such convictions were before or after the sessions, because it appears to be the intent of the parliament that such crimes shall in no way be punished which cannot take effect, if such convictions, etc., remain in force." And for this he cites numerous authorities.

It was even adjudged when a parson had been deprived for adultery, and by subsequent act of parliament, the offenses of adultery, inter alia, were pardoned, the sentence was thereby made void, and the parson reinstated in his living, notwithstanding that in the meantime, and while the deprivation stood in force, another had been admitted, instituted and inducted. 3 Coke, 6, 14. So if one be attainted of felony and afterward, by relation of a general pardon, the felony is pardoned, he shall be discharged, for he has not any remedy, by error or otherwise, to reverse the attainder. Plowd. 401a. It even seems that the ancient fiction by which acts of parliament were deemed to relate to the first day of the session, has been allowed to give a retrospective effect to an act of pardon enacted during the session, and to make utterly void sentences passed before the passage of the act.

On these authorities, and for the reasons assigned above, it appears to me indisputable that where by act of parliament or by royal proclamation of amnesty, certain kinds of offenses or classes of offenders, are pardoned, all offenders embraced within the description, and all persons included within the classes designated are, unless specially excepted, entitled to the benefit of the pardon.

If there be any case where the benefit of such a pardon or amnesty has been refused to a person otherwise within it, on the ground that his guilt had already been judicially ascertained, I have failed to discover it.

It is suggested by the district attorney that the proclamation was intended to apply only to rebels in arms, or in a situation to injure the government, and not such as are already arrested and incarcerated. But the language of the proclamation expresses no such limitation. A full pardon is granted "to all persons who have directly, or by implication, participated in the existing Rebellion."

It therefore includes not only those who have joined the Rebellion in arms, but those who have in any way been implicated in it. I know of no rule of construction which would authorize a court to interpolate into the language of a statute or public act a qualification such as is suggested by the district attorney.

It may be observed, in addition, that the interpretation contended for would degrade what was evidently intended as an act of mercy and conciliation into a mere bargain, by which the president barters away impunity for crime in consideration of an exemption from future attacks upon the government; and that it makes his clemency merely commensurate with his apprehensions. The active and dangerous rebel is to be pardoned if he will renounce his treasonable designs; but the terrors of the law are unmitigated for the impotent and harmless rebel, who is not formidable enough to be entitled to forgiveness. Such a construction of the proclamation seems to me too repugnant to reason and sound policy to be for a moment admitted.

It was also urged by the district attorney, that the president has himself given a practical construction to his proclamation, by issuing to Albert Rubery, a co-defendant with the petitioner, a special pardon, thereby showing that he did not consider him within the purview of the proclamation.

It has even been suggested that there are good, though private, grounds for the belief that the case of the Chapman prisoners was not intended by the president to be covered by the proclamation. But it is to be observed that the pardon of Rubery was granted as a mark of respect and good will to Mr. Bright, by whom it had been solicited, and on condition that Rubery should leave the country within thirty days. As Rubery was a British subject, the oath, the taking of which is the condition imposed by the proclamation, could not have been exacted of him, and he might thus, if unwilling to take it, have been deprived of the general pardon.

Whether or not the failure to except the case of the Chapman prisoners from the operation of the general terms of the proclamation arose from accident or inadvertence, the court cannot judicially know. Its plain duty is to construe the proclamation like any other public act or law, and to apply to it the well settled rules of interpretation, irrespective of any opinion, or even knowledge, of the private but unexpressed intention of its author. Such is the rule even with respect to a private pardon of an individual offender. "A pardon," says Mr. Chief Justice Marshall, "is an act of grace proceeding from the power intrusted with the execution of the laws which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed. It is the private, though official act, of the executive magistrate delivered to the individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system that the judge sees only with judicial eyes, and knows nothing respecting any particular case of which he is not informed judicially. A private deed not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on. The looseness which would be introduced into judicial proceedings would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding in ordinary cases would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages."

"Is there anything peculiar in a pardon which ought to distinguish it in this respect from other facts? We know of no legal principles which will sustain such a distinction. * * * The pardon may possibly apply to a different person or a different crime. It may be absolute or conditional. It may be controverted by the prosecutor, and must be expounded by the court. These circumstances combine to show that this, like any other deed, ought to be brought judicially before the court by plea, motion or otherwise." U. S. v. Wilson, 7 Pet. [32 U. S.] 161.

In the case in which these observations were made, the prisoner had declined to avail himself of a pardon which he had received. It was held that the court could not judicially notice the pardon, unless produced and brought before it. But if the court, though aware that a pardon has been granted, cannot know of its existence until it is judicially brought before it, how can it, when the pardon is produced, be governed in its construction or the expounding of its effect

by any extrinsic fact of which judicially it is ignorant? And especially in the case of a general pardon by proclamation or act of legislature, of which the court takes judicial notice, must it dismiss all knowledge of the intentions of the pardoning power, except such as is to be derived from the terms of the act of grace itself.

Finally, it is urged by the district attorney that the proclamation, or pardon contained therein, is of the nature of a contract, by which the president remits the punishment for the offense, in consideration of the oath to be taken by the offender that he will support the constitution. That the petitioner, being in prison and under duress, could not take such an oath, nor was he in a position to render the consideration exacted by the proclamation before its provisions can be availed of. This view of the proclamation has already been considered. It is not a contract between equals, each receiving an equivalent for what he surrenders. It is an act of clemency, grace, and conciliation. Its condition was intended, not as a consideration, but merely to exclude from its benefits the obdurate, and those who are not willing to renounce the future commission of the same offenses. The duty of supporting the constitution is of paramount obligation on every American citizen. The promise or the oath to perform this duty is no more a good or a valuable consideration for the remission of penalties incurred by its previous violation, than repentance and a resolution to amend are considerations for the forgiveness of all sins promised on those conditions by the divine goodness.

That a conditional pardon accepted by a convict is deemed to be accepted voluntarily, and not under duress per minas, or by imprisonment, has been expressly adjudged by the supreme court. "As to the suggestion that conditional pardons cannot be considered as being voluntarily accepted by convicts so as to be binding on them, because they are made while under duress per minas and duress of imprisonment, it is only necessary to remark that neither applies to this case, as the petitioner was legally in prison." Ex parte Wells, 18 How. [59 U. S.] 315.

If the petitioner in the case at bar had been sentenced to death, and had accepted a pardon which commuted his punishment to imprisonment for life, his acceptance would, under this decision, have been deemed voluntary, and his imprisonment for life legal. Can it be contended that when the condition is that he shall take an oath which binds him to discharge his duties as a citizen, and to refrain from the further committing of treason, his acceptance of the pardon is not voluntary and legal?

How far the promise of the petitioner, or any other person who may accept the conditions of the proclamation is sincere, and expresses a real determination to fulfill it, we cannot know. The president has seen fit to invite all persons guilty of treason (with certain exceptions) solemnly to assume anew their obligations as citizens, and, as an inducement, he has offered them pardon for past offenses. It appears to me plain that all persons not included in the excepted classes are to be deemed to be pardoned, on their complying with the required condition.

I have thus noticed, I believe, every objection or suggestion urged by the district attorney, to show that the petitioner is not within the operation of the proclamation. My conclusion is, that the punishment to which he was sentenced has been remitted by the executive, and his offense pardoned. He is consequently entitled to the writ prayed for, on the return of which, if nothing further appears, he must be discharged.

I reach this conclusion not without reluctance. The crime of the prisoner has been grave, for it involved not only the violation of the duty he owed as an American citizen to this country, but the breach of the allegiance he owed to this state, of which he has long been a resident and citizen, as well as an intended outrage upon his neighbors and fellow-citizens, whose property he proposed to plunder. I am perhaps justified in assuming that if the special circumstances of this case had been brought to the attention of the president, or had been in his mind when he was framing his proclamation, the petitioner and his associates would probably have been excepted from its operation. But my duty is to administer the law, and to construe this proclamation like a public statute, according to its terms and legal import. I am not at liberty to withhold its benefits from any persons embraced by its terms, whether they have been so embraced by inadvertence or design.

Case No. 5,742.

GREATHOUSE v. DUNLAP.

[3 McLean, 303.] [1]

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

PLEADING AT LAW—SUIT ON BOND—ILLEGAL CONSIDERATION.

1. A plea which does not traverse the facts averred in the declaration, but sets up new matter in defence, admits the case made in the declaration. So a demurrer to the plea admits all the facts of the plea which are well pleaded.

2. Want of consideration, on general principles, cannot be pleaded to a bond, nor fraud, except to the execution of the instrument. But under the statute of Ohio, both of these defences to a sealed instrument may be made.

[Cited in Hoitt v. Holcomb, 23 N. H. 555; Charter Oak Life Ins. Co. v. Hosmer 1 D. C. 302.]

3. To an action on a bond to pay the sum that shall be recovered in a certain action then pending, between different parties, a defence cannot be set up which might have been avail-

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

able in the first action. Fraud between the parties to such action might be shown.

[Cited in Gage v. Lewis, 68 Ill. 613.]

4. Bail cannot go behind the judgment against the principal.

5. The first judgment cannot be impeached collaterally.

6. The amount of the judgment is as conclusive against the bail as against the principal.

7. On a demurrer to any pleading, the court may go back to the first fault.

[See Bank of Illinois v. Brady, Case No. 883.]

8. A bond is good at common law, if entered into for a valuable consideration, and is not repugnant to any statute or the general policy of the law. It does not follow that a voluntary bond is void, where an individual undertakes to do more than the law requires.

9. A bond is void which shows upon its face an illegal consideration.

10. Every plea in discharge or in avoidance of a bond, should state particularly the matters of discharge or avoidance.

11. Where a bond is required in restraint of liberty, which the law does not authorise or require, it is void. But, in such a case, the facts must be specially alleged. They cannot be presumed.

12. Matters which make a deed void may be given in evidence, under the general issue of non est factum. But matters in avoidance must be pleaded.

At law.

Taft & Key, for plaintiff.

Mr. Hamer, for defendant.

OPINION OF THE COURT. This action of covenant is founded on the following instrument: "Whereas, there is now depending in the Mason circuit court, in the state of Kentucky, an action at common law, in which William Greathouse is plaintiff and John B. Mahan is defendant, in which the said Mahan has been and is confined in the jail of Mason county for want of special bail; and it is agreed by the said William Greathouse to discharge him from custody on condition that William Dunlap, of Brown county, in the state of Ohio, shall enter into this bond: Now, therefore, I, the said William Dunlap, do by these presents bind and oblige myself, my heirs, &c. that in case the said William Greathouse shall finally succeed in the said suit against the said John B. Mahan, that I, the said William Dunlap, will pay the amount of the recovery so finally had in the said suit against him the said Mahan, including all legal costs, dated the 22d of November, 1838." In each count it is averred, that on this bond being given Mahan was released from his imprisonment, and that in the case then pending there was recovered against Mahan the sum of sixteen hundred dollars in damages.

A special plea to the declaration was filed, which avers, "that the above bond was obtained by the fraud of Greathouse, in this, that on the 13th of August, 1838, at a circuit court held in the county of Mason, and state of Kentucky, he falsely and fraudulently procured a bill of indictment to be found a true bill by the grand jury then and there sitting against the said Mahan, charging him with aiding and assisting a certain slave, named John, the property of said Greathouse, to make his escape from his possession, to the state of Ohio, on the 19th of June, 1838, whereby the said Greathouse lost his said slave; that on the 22d of August, 1838, he made oath before a justice of the peace that the said Mahan was a resident of the state of Ohio; which oath, on being presented to the governor of Kentucky, a demand was made of the governor of Ohio, for the surrender of Mahan as a fugitive from justice, &c.; that he was surrendered through the procurement of the said Greathouse, and was committed to the jailor of Mason county aforesaid; whilst so imprisoned a civil suit was instituted against him by the said Greathouse, and upon such civil process issued the said Mahan was imprisoned in the said jail; and he avers that he was not guilty of the charges in the indictment, and was not a fugitive; that for fifteen years he had not been in the state of Kentucky; that the governor of Kentucky had no right to demand, nor the governor of Ohio to surrender him, &c.; that the surrender and demand were procured by the false and fraudulent misrepresentations of said plaintiff, made by him for the express purpose of removing said Mahan to Mason county, Kentucky, and confining him in prison, to enable him to harass and oppress said Mahan, and to induce his friends to become responsible for the unjust and unfounded claim set up by him against said Mahan, in and by said suit. All which was known to the said Greathouse before the finding of the indictment, the making of the affidavit, and the fraudulent procurement by him of said demand, arrest and imprisonment of said Mahan. That the bond was signed solely to release the said Mahan from said unjust and fraudulent imprisonment, so procured by said Greathouse in manner aforesaid. And therefore he avers the writing obligatory is void at law," &c. To this plea the plaintiff filed a general demurrer. No issue is tendered to the declaration by the plea. It sets up new matter in bar to the case made in the declaration, and, of course, admits its allegations. So the demurrer to the plea, admits all the facts which are well pleaded.

The plea sets up fraud in the consideration of the bail bond, on which the action is founded, and this, it is insisted, cannot be pleaded to a sealed instrument. The want of consideration cannot be alleged to a bond, on general principles, nor can fraud be pleaded, except to the execution of the instrument. Reynolds v. Rogers, 5 Ohio, 170; 2 Johns. 177, 179; 13 Johns. 430; 8 Wend. 615, 618; 9 Cow. 307, 311, 314. But the statute of Ohio, of the 24th of February, 1834 (Swan's St. 685), provides, that a failure or want of consideration of a sealed instru-

ment may be pleaded. Under this statute a fraudulent consideration may be shown, as that would be one mode of showing a failure of consideration. The condition of the bond is, that Dunlap, the defendant, will pay the amount which Greathouse shall recover against Mahan, in a suit then pending in the circuit court of Mason county, Kentucky. On giving this bond, Mahan was released from his imprisonment in that suit. A judgment against Mahan was recovered, and the question is, whether the defendant can go behind that judgment. There can be no doubt that he might show collusion between Mahan and Greathouse; but this is not pretended. Can he go into matter of defence which it might have been proper for Mahan to have set up in the former action, and which he failed to do? Mahan, by his counsel, defended that suit; but the matters of fraud now pleaded by the bail were not relied on in the defence. Can these matters be now examined, in an action on bail bond. If fraud had been established in the action against Mahan, no judgment could have been had against him. The plea avers a fraudulent proceeding by Greathouse, in procuring the bill of indictment, the demand of the governor of Kentucky, the order of surrender by the governor of Ohio, the imprisonment of Mahan in Mason county, Kentucky, all done for "the express purpose of removing said Mahan to Mason county, Kentucky, and confining him in prison, to enable the said Greathouse to harass and oppress said Mahan, and to induce his friends to become responsible for the unjust and unfounded claim set up against him in and by said suit." The plea is less definite, than it should have been, in charging the fraud in the civil suit; but it is not important to dwell on that point. The part of the plea above cited does, though not in very technical language, so charge the fraud. Whatever grounds there may be for the averments of the plea, there can be no doubt, they should have been set up by Mahan in the suit against him. The fraudulent acts were done against Mahan, and not against his bail. And as Mahan did not avail himself of these acts in his defence, although he acted in good faith towards his bail, can the bail now plead them? If the bail may go behind the judgment against his principal, on one ground, to show that it was unjust, may he not do so on every other ground? Must the original plaintiff, in his action against the bail, be prepared to show the grounds on which his judgment against the principal was obtained? In such a case, does the original case stand open on its merits, as it stood in the first action? This would be to regard the judgment as nothing, not even prima facie evidence. As regards the amount of the judgment, it is as conclusive against the bail as against the principal. It is final and conclusive between the parties, and it can be considered in no other point of view, when it is brought collaterally before the court, in an action against the bail. There are many conflicting decisions as to how far the admissions of the principal shall bind his surety. One class of cases holds that the acts and admissions of the principal, which constitute a part of the res gestae bind the surety, whilst another considers them binding beyond such limitation.

However courts may have differed as to the effect of the admissions and acts of principals in binding their sureties, none have doubted that special bail are bound by the judgment against their principal. And on the same principle, the bail must be bound in all cases where they undertake to pay, as in the case under consideration, the judgment that shall be obtained against their principal. If this be so, the plea in this case cannot be sustained. It not only goes behind the judgment in the case where the bail became bound, but the fraud in a prior and criminal case, is also alleged with the attending circumstances. This is not admissible by any known rule of pleading. But it is argued that the demurrer brings in review the declaration, in which the bond is copied at length, and by which its validity must be considered. It is true, that a demurrer, without regard to the party who has filed it, authorizes, and indeed requires, the court to notice the first defective pleading. In the first count of the declaration the bond is copied, and in the other two its terms are substantially stated, and the signature of the derendant. It is admitted that this is not a statutory bond, but it is important to see what provision the statutes of Kentucky have made in regard to appearance bail, and the extent of their liability. By the act of the 17th December, 1821 (1 Moreh. & B. St. Ohio, 195), "to abolish imprisonment for debt," &c., it is declared in the first section, "that all laws which authorize an execution against the body of the debtor are repealed." The 2d section provides that, "to entitle the plaintiff to bail on mesne process, he must swear that he verily believes the defendant will leave the commonwealth, or move his property out of the same before judgment," &c.

By the act of the 29th January, 1829 [1 Laws Ohio, p. 196], it is declared in the first section, "that when any person shall thereafter be held to bail in any civil action, according to the laws now in force, the undertaking of the bail shall be, that the defendant shall not remove his effects out of the commonwealth until the plaintiff's judgment, if one shall be recovered, is discharged." On the return of an execution, "no property found," under the second section of the same act, "a sci. fa. may issue suggesting that the defendant has removed his property out of the commonwealth." In Peteet v. Owsley [7 T. B. Mon. 130], 1 J. J. Marsh. 55, it was held, "that

bail, who entered into the recognizance after the act of 1821, abolishing the ca. sa. could not be made liable; for the bail could never be subjected to answer the debt or damages without a ca. sa. against their principal." But the remedy under the act of 1829 was referred to, where the recognizance had been taken as required by the statute. By the act of the 15th of January, 1827 [1 Laws Ohio, p. 630], the ca. sa. is revived in actions of trespass, vi et armis, in the action of trespass on the case, for words spoken or written, or for seduction. On the 29th of February, 1836 (3 Dig. 727, St. 58), a statute was passed, requiring the plaintiff to give bond and security, payable to the defendant, in a case where bail is required, "conditioned to pay all costs and damages which the defendant shall sustain, by the wrongful suing out the writ." And in the 2d section the same act provides, "that persons having no known place of residence in the commonwealth may be held to bail in any county in the state where they may be found." The bond required to be given by the plaintiff, as above, was given in this case. Whether the above act of 1836 has been so construed by the courts of Kentucky as to create a new liability by a defendant "who has no known residence in the commonwealth," does not appear. There is no reference to any such decision, in the Digest referred to, which was published in 1842. The affidavit filed by Greathouse, and on which bail was required, states, "that he verily believes the said Mahan will leave the commonwealth or move his property out of the same before judgment, or otherwise abscond," &c. As this oath conforms to the act of 1821, the application for bail is presumed to have been made under that act, and not under the act of 1836. If this be so, the special bail to which the plaintiff was entitled under the act of 1829, was "that the defendant should not remove his effects out of the commonwealth until the plaintiff's judgment, if one shall be recovered, shall be discharged." From the words of that statute, it would seem, that the form of bail, &c., was where it was required "under laws now in force." So that a subsequent law requiring bail to be given in a case which was not required to be done before, might not come under the act of 1829. From the proceeding in this case, as well as the words of the act of 1836, it is supposed that it has not been considered as affecting the conditions of the bail bond or recognizance under the act of 1829. The validity of the bond is rested by the plaintiff's counsel on the common law, and not on the statute.

In Rowan v. Stratton, 2 Bibb. 199; Cobb v. Curts, 4 Litt. [Ky.] 235; Stevenson v. Miller, 2 Litt. [Ky.] 306; Fant v. Wilson, 3 T. B. Mon. 342; Hoy v. Rogers, 4 T. B. Mon. 225; People v. Collins, 7 Johns. 554,—it is said, "that replevin and other bonds, required by statute, have frequently been decided by the court to be valid common law obligations, when not executed according to the statute." "And that the general rule is, that a bond, whether required or not by statute, is good at common law, if entered into voluntarily and for a valid consideration, and if not repugnant to the letter or policy of the law." 2 J. J. Marsh. 418; 3 J. J. Marsh. 437. In Justices of Christian Co. v. Smith, 2 J. J. Marsh. 472, it was held that "a bond for the construction of a bridge, made payable to the justices of the county, when the statute required it to be made payable to the commonwealth, was good at common law." The court say: "But as there is no statutory provision, making such a bond void, and the subject matter is such as the parties had a right to contract about, the bond is valid." And again, in 3 T. B. Mon. 392, the court say: "It is not necessary that the condition of an appeal bond should be in the form prescribed by the act of the legislature; if it have the same legal effect, it is sufficient." In the case of Postmaster General v. Early, 12 Wheat. [25 U. S.] 136, the court held a bond given by a postmaster to account, &c., was valid, although there was an express law requiring the bond to be given. In U. S. v. Linn, 15 Pet. [40 U. S.] 315, the court held that a receiver of public money having given an instrument in the form of a bond, but without seal, bound the sureties, and was valid, though the act of congress required a bond to be given. There are many other cases which might be referred to, in which voluntary bonds, which have not pursued the requisites of the statute, have been held valid as common law instruments; and also where they have been given without any express authority of law. If the subject be one about which the parties may lawfully contract, it being neither against any law or public policy, and a consideration has passed, courts have sustained and enforced such a contract. And it is insisted that such is the nature of the bond under consideration. It is said not to be inhibited by any law, and that the act of giving the bond should be construed as favorable to liberty, as through its means, Mahan was liberated from his imprisonment. On the other hand it is contended that the bond was against the policy of the law. That final process against the body of a defendant, except in two or three cases, having been abolished, special bail was only to be bound that the property of the defendant should not be removed out of the commonwealth. That the bond in this case having been given for the payment of the judgment which Greathouse might recover, being a greater obligation than the law required, must be held as against its policy, and consequently void.

It does not follow that the voluntary bond

of an individual is void, who undertakes to do more than the law requires. As, for instance, where no bond is required by a disbursing officer, and yet where one has been given, it has been held valid. And so where a bond does not pursue the precise form of the statute, it is good at common law. Where a bond has been given for a gambling debt, or on a sale of lottery tickets, the sale of which is prohibited, and the consideration appears on the face of the instrument, or is shown by plea, it is void. But this is not the case where the consideration does not arise out of an illegal and prohibited act. There is a class of contracts, which tend to a breach of the peace, the violation of good morals, &c., and though not prohibited by law, are, nevertheless void. But these belong to a different class from the one under consideration. In the case of U. S. v. Tingey, 5 Pet. [30 U. S.] 125, where a bond was given by a purser in the navy, which contained conditions beyond what the law required, the court considered the instrument, having been voluntarily given, as valid at common law. That bond, the court say, "was not limited to the duties or disbursements of Deblois, as purser, but creates a liability for all moneys received by him, and for all public property committed to his care, whether officially as purser or otherwise." The law required the bond for the faithful discharge of the duties as purser.

But in another part of the case the court, in considering the fifth plea, say that it was a complete answer to the action. "That plea, after setting forth at large the act of 1812 [2 Stat. 699], respecting pursers, proceeds to state that before the execution of the bond, the navy department did cause the same to be prepared and transmitted to Deblois, and did require and demand of him that the same with the condition, should be executed by him with sufficient securities, before he should be permitted to remain in the office of purser, &c., and that the condition is variant, &c., from the act of congress," &c. Under this plea, the court say: "There is no pretence to say that the bond was voluntarily given, or that though different from the form prescribed by the statute, it was received and executed without objection." And in the case under consideration if the defendant in appropriate terms had set out the imprisonment of Mahan under the civil process, the acts of Kentucky which require special bail to be given with the condition only, "that the defendant should not remove his property out of the commonwealth, until the judgment, if one should be obtained against him, should be satisfied;" and the plaintiff refused to liberate him until he procured the bond of the defendant, for the absolute payment of the judgment, should one be obtained against Mahan, it would have come, if the facts had been admitted by a demurrer, within the principle of the case of U. S. v. Tingey [supra]. It would then have appeared that the bond was not voluntarily given, but had been illegally coerced by Mahan's imprisonment. Now it is difficult to say that the bond under consideration, bears upon its face any higher evidence of its having been given against public policy or the policy of the law, than the bond of Deblois and sureties. In both cases the law pointed out what kind of an instrument should be given, and in both instances the bonds were given containing conditions, imposing a greater obligation than the statute imposed, and yet the court held, the purser's bond, being voluntary, was valid at common law. What is there in the facts of the two cases, which should make them differ in principle. In the one case the liberty of a citizen was concerned, and in the other the rights of a public officer. There was oppression under color of office, in one instance, and in the other, through the process of the court. In U. S. v. Bradley, 10 Pet. [35 U. S.] 343, some points were ruled which also have a bearing on the case under examination. That was an action brought on a paymaster's bond, which did not conform to the words of the act of congress under which it was given. And it was contended that as the conditions of the bond were prescribed, and no authority to take a different bond, there was a prohibition from so doing. But the court say: "Upon the face of the pleadings, this must be taken to be a bond voluntarily given by Hall and his sureties. There is no averment that it was obtained from them by extortion or oppression, under color of office, as there was in U. S. v. Tingey." "All the pleas assert, in substance, is that Hall never gave any such bond as is required by the act of 1816" [15 Laws Ohio, p. 3], &c. "Now, (the court say,) no rule of pleading is better settled, or upon sounder principles, than that every plea in discharge or avoidance of a bond, should state positively and in direct terms, the matters of discharge or avoidance. It is not to be inferred, arguendo; or upon conjectures." And they further remark: "It may be added, that the bond is not only voluntary, but for a lawful purpose, viz.: to insure a due and faithful performance of the duties of paymaster."

Now what is there upon the face of the bond before us, which shows it to be illegal? Mahan was in prison, and was released on the bond being given by the defendant. It may be that the defendant preferred giving such a bond as he did give, to the one required by the statute; and under such circumstances, would not the bond be valid? As was remarked in the argument, the law did not prohibit such a bond, or declare, if given, it should be void. The bond is not in violation of public policy; for any man may agree to pay the debt of another. If then it was voluntarily given, as must be pre-

sumed, unless the contrary appear, and the condition on which it was given was performed by the obligee, it is not perceived how the bond can be held invalid. If the bond was exacted as a condition to the release of Mahan, and the law authorized no such exaction, and the defendant, through the influence of Mahan, was induced to give the bond, it might not be considered a voluntary bond. But these facts must be set up by plea—they cannot be presumed. The special plea having been disposed of, the case stands as though a general demurrer had been filed to the declaration. And viewing the case under this aspect, the bond must be considered as having been given voluntarily and on a condition performed. Under such circumstances, it is not perceived on what principle the bond can be considered void. Mahan being imprisoned by due process, neither his release, nor the consideration which procured it, would seem to be against public policy. The rule is, "that, while matters which make a deed absolutely void, may be given in evidence under non est factum, those which make it voidable only must be specially pleaded." Com. Dig. tit. "Pleader," 2 W, 18. And it seems that in general, objections to the legality of the consideration on which a deed was founded are referable to the latter class; for it has been decided, that where a condition of a bond is in restraint of matrimony, that ground of defence is not evidence under non est factum. Cotten v. Goodridge, 2 Black [67 U. S.] 1108. And that where a bond is given to compound a felony, that is matter which must be specially pleaded. Harmer v. Rowe, 2 Chit. 334, 2 Starkie, 36. And it is a general rule that "any illegality arising from the prohibition of an act of parliament, as in case of usury or gaming, is matter for special plea." These authorities are cited, not to show what may or may not be given in evidence under the general issue, but to illustrate the principle, that where matter is set up in avoidance of a bond, it must be pleaded. Where the illegality appears upon the face of the instrument, it may be taken advantage of by general demurrer, in arrest of judgment, or by a writ of error.

The demurrer to the special plea is sustained. Judgment, &c.

Case No. 5,743.

GREATRAKE v. BROWN.

[2 Cranch, C. C. 541.] [1]

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

PROMISSORY NOTE—PARTNERSHIP—DEMAND OF PAYMENT—NOTICE OF DISHONOR.

1. In an action against the indorser of a promissory note, made in the name of a firm, it is not material that the partnership of the makers had been dissolved before the making of the note, it being the renewal of a note given during the existence of the partnership.

2. Demand of payment on one of the firm is sufficient to charge the indorser.

3. A written notice of the dishonor of the note, left at the dwelling-house of the indorser, is sufficient.

4. If the maker is not found at his office or his dwelling-house, on the last day of grace, so that payment of the note cannot be demanded, the note is dishonored.

Assumpsit against the indorser of a promissory note, signed "Van Zandt & Rockwell," at sixty days, dated April 9th, 1822. At the trial, the defendant [Daniel Brown], by his counsel, Mr. Lear, demurred to the evidence, and the plaintiff [Lawrence Greatrake], by his counsel, Mr. Fleet Smith, joined in demurrer.

The evidence was, that the note was made by Van Zandt, in the name of "Van Zandt & Rockwell," on the day of its date, and indorsed by the defendant before its was due. That, on the 11th of June, 1822, Michael Nourse, a notary-public, called at the office of Van Zandt & Rockwell, a little after 3 o'clock, and found it locked. That he then went to Van Zandt's house, and inquired for him, and was told by a servant coming out of the house, that Van Zandt had gone out to dine. That he made no further inquiry for Van Zandt, nor any inquiry for Rockwell, having an impression that Rockwell was absent in the western country, but had no knowledge of that fact. That the next day he called at Mr. Brown's, the indorser's, dwelling, to the best of his recollection, and delivered notice in writing, of the dishonor of the note, to his servant whom he believed to be a servant of the family, or some other person of the family, but has no recollection of the particular person; and that he never delivered, as he recollects, more than one notice to Mr. Brown, and he believes this to be the one which is filed in this cause. That Van Zandt & Rockwell had been in partnership, and that their partnership had been dissolved, and notice of such dissolution given in the public newspapers of Washington City on the 19th of February, 1822. That Rockwell was in the western country when the note became payable. That the office aforesaid of Van Zandt & Rockwell, where the notary called, is the same office in which they did business when in partnership. That the note, filed in this cause, was given in renewal of the former note made by Van Zandt & Rockwell, while in partnership.

Judgment for the plaintiff, on the demurrer. See Chit. 35, 37, 180; Cromwell v. Hynson, 2 Esp. 512; 5 Esp. 175; Chit. 236, note; Id. 409.

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

Case No. 5,744.

In re GREAVES.

[5 Law Rep. 25; 1 N. Y. Leg. Obs. 213.]

District Court, S. D. New York. April, 1842.

BANKRUPTCY—COSTS.

Petitioners for the benefit of the bankrupt law [of 1841 (5 Stat. 440)] are bound to dis-

charge all expenses incident to the prosecution of their application.

In this case the bankrupt [Alexander Greaves] presented an affidavit setting forth that he was poor and destitute of all means of support, or to pay the expenses of obtaining the benefit of the act, and that the general assignee had required an advance of ten dollars, previous to acting upon the decree of bankruptcy in this case. The affidavit stated further that he had no property or effects, and that none passed to the assignee by the decree. His counsel moved that the bankrupt be allowed to complete his proceedings, without any action of the assignee under the decree. The general assignee referred to the inventory of property filed by the bankrupt on presenting his petition, by which he represented his property to consist of one fifth of ten thousand acres of land in Kentucky, one half of one hundred acres in Essex county, N. Y., three lots of land in Pennsylvania, (unless sold for taxes), five shares in the Norfolk Granite Company, Quincy, N. Y., and also claims of debts amounting to seven or eight hundred dollars. The petition was sworn and filed March 1, 1842.

Mr. Edwards, for the bankrupt.

BETTS, District Judge. No provision is made by the bankrupt act enabling parties to conduct proceedings forma pauperis, and the act evidently contemplates that they shall discharge all expenses incident to the prosecution of their application. Indeed parties may well be regarded as bringing suits or actions to enforce in their own favor the provisions of the statute. This would properly characterize the proceedings in cases of involuntary bankruptcy, and there is no great incongruity or inaptness of expression in applying it to those of the voluntary bankrupt. He seeks to be declared exonerated from his debts by judgment of the court, and it would not be extraordinary or inequitable that he should provide for all expenses created in securing a decree so exclusively for his own benefit. These expenses except in case of opposition, could rarely exceed the costs in an ordinary collection suit. There are other considerations which will prevent granting the motion now made. It seeks to impose upon the court duties appropriate to the assignee. Upon the principle of this application, the court may be called upon in each case to withhold the matter from an assignee, by declaring there is no estate to collect or distribute, and that, therefore, the assignee need take no steps respecting it. This would abrogate a provision of the law, of great importance to creditors. The assignee stands as trustee in their behalf, stimulated by his personal interest, to search out and collect for their benefit every species of property belonging to the bankrupt; and most assuredly the court will be very cautious in interfering with this main protection to their interests provided by the law. Besides, the substitution of the court for the assignee would be inconvenient in the extreme, if the law allowed it to be done. The mere ex parte statements of the bankrupt would generally be all the evidence it could command, and instead of being aided by the vigilance and personal examination of an assignee, applied to the subject, questions respecting a bankrupt's estate and rights would have to be disposed of upon such representations as he might choose to lay before the court. The present case illustrates both the inconvenience of that method of proceeding and also the mischiefs that might result from it. The bankrupt, on presenting his petition, filed also a sworn inventory of property, which would seem to promise to yield something to his creditors. Possibly the expectation of benefit from the assignment may have induced them to acquiesce in a decree. After the decree is perfected, the bankrupt presents his affidavit, that the estate scheduled was not his property, but had been previously assigned or conveyed by him, and asks the court to take the decree out of the hands of the assignee and to give him the benefit of the act without having any investigation of his affairs or estate. The reason urged for so extraordinary an interposition is, that the assignee demands an advance sufficient to cover his expenses before he will act upon the decree; and this the bankrupt says, he is unable to furnish. If the demand of the assignee was shown to be unreasonable in amount, the court would take measures immediately to protect the party; but that some mode should be provided for indemnifying the officer in the execution of his duty, cannot be denied. The court might have required bonds of the bankrupts in all cases, to cover necessary charges; but it was thought more simple and more advantageous to them to leave them to arrange the manner of indemnification with the assignee. If any assets are realized, the expenses will ultimately fall on the estate, and if not, it is one of the charges the bankrupt must meet as necessarily incident to his proceeding. The court must be informed through the official report of the officer designated by the statute, that the bankrupt has delivered over his estate or furnished means by which it can be traced out, and called in before a decree of final discharge can properly pass. The assignee and his appropriate offices in this case, can no more be dispensed with, than any other branch or particular of the proceedings, directed by congress; and a bankrupt might with like propriety, because of his poverty or undeniable probity, solicit the court to decree him his discharge in the first instance, and dispense with every preliminary proceeding, as ask to be relieved from making an assignment and enabling the assignee to furnish the report to the court demanded by the rules.

Case No. 5,745.

Ex parte GREELEY.

[6 Fish. Pat. Cas. 575; Holmes, 284; 4 O. G. 612; Merw. Pat. Inv. 220.] [1]

Circuit Court, D. Massachusetts. Nov. 14, 1873.

PATENTS—NOVELTY OF DEVICE—METALLIC BUTTON-HOLES.

1. The device for which a patent is sought by complainant is not novel. It possesses the same elements, operating in the same way, to produce the same result as the device shown in the English patent, granted R. A. Brooman, in 1861, which is cited as a reference in the record of the case, in the patent office.

2. Form of bill and proceedings in a suit in equity for the grant of a patent under section 52 of the act of July 8, 1870 [16 Stat. 198].

[Cited in Re Squire, Case No. 13,269.]

Final hearing on pleadings and proofs.

Suit brought under section 52 of the act of July 8, 1870, for the grant of a patent, the same having been refused by the commissioner of patents. Greeley filed his application for a patent September 13, 1869, for "an improvement in metallic button-holes and links." His application was finally rejected by the examiner, February 28, 1870. He then appealed to the board of examiners-in-chief, and was rejected April 27, 1870. He thereupon appealed to the commissioner, and was rejected, September 17, 1871. He then appealed to the supreme court of the District of Columbia, and was there rejected, May 3, 1871. In August, 1873, he filed in the circuit court of the United States, for the district of Massachusetts, the following bill in equity:

"Bill of Complaint. To the Honorable the Justices of the Circuit Court of the United States for the First Circuit, within and for the District of Massachusetts, Sitting in Equity: Benjamin J. Greely, of Boston, in said district, and a citizen of the United States, complains and says: That he is the original and first inventor of a certain new and useful metallic button-hole and link combined, and of a certain new and useful combination of this combined button-hole and link, with a piece of webbing having a button-hole in or attached to its free end, and a slide, all as fully set forth and described in the application for letters patent, both presently referred to, a certified copy of which is now in court, produced and shown to your honors. That, being such inventor, he duly made application to the government of the United States for letters patent therefor; that his said application was duly filed in the patent office of the United States, September 13, 1869; that his said application was rejected finally by the examiner in charge, February 28, 1870; whereupon your orator duly appealed to the board of examiners-in-chief; but his said application was rejected by the said board of examiners-in-chief, April 27, 1870; whereupon your orator duly brought his application before the commissioner of patents in person, but it was rejected by the commissioner of patents in person, September 17, 1871; whereupon your orator took an appeal to the supreme court of the District of Columbia sitting in banc; and that your orator was refused a patent on his said application by the supreme court of the District of Columbia, upon appeal from the commissioner, on May 3, 1871; all which, by a certified copy of the file-wrapper and contents, and drawing in the matter of the said application, now in court produced and shown to your honors, will more fully appear. And your orator further shows unto your honors that he is entitled to a remedy by a bill in equity brought before this honorable court, by force of the statute in such case made and provided. Wherefore he brings this his bill in equity, and humbly prays your honors to adjudge that he is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for such part thereof as upon consideration may be found patentable, and for such other and further relief in the premises as the nature of the case may require, and to your honors may seem meet. And your orator will ever pray. (Signed) Benjamin J. Greely."

A copy of the bill was served on the commissioner of patents by mail, who accepted service of the same, as follows:

"To the Honorable the Justices of the United States Circuit Court for the District of Massachusetts, Sitting in Equity: I hereby acknowledge due service upon me of a copy of the bill in equity of Benjamin J. Greely, of Boston, in the district of Massachusetts, filed in the circuit court of the United States for said district, August 27, 1873; said copy being duly certified by Edwin T. Nash, deputy clerk of the said court, under the seal of the said court. In testimony whereof, I have hereunto set my hand and caused the seal of the patent office to be hereunto affixed, this 2d day of September, in the year of our Lord 1873, and the independence of the United States the ninety-eighth. (Seal.) M. D. Leggett, Commissioner of Patents."

The following letter was at the same time sent to the court by order of the commissioner:

"U. S. Patent Office, Washington, D. C., September 30, 1873. Dear Sir: I am an officer of this bureau; deputed by the commissioner of patents to attend to cases appealed from the patent office, and have received a copy of a bill of complaint filed in the clerk's office of the circuit court of the United States for the First circuit and district of Massachusetts, under section 52 of the patent act, by J. E. Maynadier, attorney for Benjamin J. Greely, in the matter of his application for patent for improved button-

[1] [Reported by Samuel S. Fisher, Esq., and by Jabez S. Holmes, Esq., and here compiled and reprinted by permission. Merw. Pat. Inv. 220, contains only a partial report.]

hole and link. Patent cases appealed from the office, being sui generis and ex parte, the United States court in this city has provided by rule that the commissioner may appear by attorney, in order to aid the court in obtaining a full, clear, and correct knowledge of the matters before it for adjudication. The commissioner has also been represented in other United States courts for the same purpose. It may be desirable, with the permission of the court, that I should file a brief or appear in person in the above-named case. Will you be so good as to inform me, if you can, of the time of hearing? Address the commissioner. Very respectfully, yours, Marcus S. Hopkins, Examiner.

"Clerk United States Circuit Court, District of Massachusetts."

By direction of the circuit court, the clerk wrote to the commissioner, under date of October 20, 1873, acknowledging the receipt of the foregoing letter, and stating that the court would be pleased to receive whatever aid the commissioner was able to give in the determination of the cause under consideration, either by oral argument from the commissioner in person, or such a representative as he might designate for that purpose, or the court would receive a brief. This course of proceeding applied also to any future applications of like nature which might be made to the circuit court of this district. This letter to the commissioner was replied to as follows:

"U. S. Patent Office, Washington, D. C., October 22, 1873. Sir: I am directed by the commissioner of patents to acknowledge the receipt of yours of the 20th inst., referring to the case of Benjamin J. Greely, set for hearing November 3d. I shall endeavor to prepare and file a brief before that time, should other engagements permit. In case I should not, however, the commissioner does not desire that the case should be delayed on that account. Very respectfully, Marcus S. Hopkins, Examiner.

"Clerk United States Circuit Court, Boston, Mass."

To support his bill, complainant filed, about October 10th, the following affidavit:

"Benjamin J. Greely, being duly sworn, doth depose and say: I am the complainant above named. I have been engaged in the manufacture of suspenders since 1858, and, during fully one-half of that time, that has been my sole business. I have obtained, I believe, ten patents during that time, of which five at least were for suspenders. In my opinion, I never invented anything for which I was more clearly entitled to a patent than the metallic button-hole and link mentioned in my bill of complaint, samples of which are hereto annexed, marked 'Exhibit A.' The only references given by the patent office as anticipating my invention were the patents to L. A. Kettle, dated August 24, 1869, and to J. R. Little, dated September 21, 1869; and third, the English patent to Brooman, No. 1,824, for 1860. The first two references are wholly different from my device, so much so that they were abandoned by the patent office; and my case was finally rejected on reference to the English patent alone. But I file herewith certified copies of all the references. It will be seen that the Brooman device is a metallic link and button-hole combined, as decided by the commissioner. See Decisions of Commissioner of Patents for 1870, page 106. I would here remark that the commissioner inadvertently quoted my claim as at first made, and made no mention of the narrower claim made by the amendment of February 17, 1870, filed in the office February 23, 1870. Had he not overlooked this amended claim, which was the claim he rejected, I believe that his decision must have been different. The Brooman device may be regarded, for the sake of analysis, as composed of the four pieces a, b, c, d, in the diagram No. 1. But, on applying the same analysis to my device, it will be found that the only thing it has in common with Brooman's are the pieces b and d. The piece a in my device, diagram No. 2, which shows my device, as well as Brooman's, differs wholly from the piece a in Brooman's device, for in the latter that piece a corresponds in function to the piece g in my device; that is to say, the web lies around the piece a in Brooman's device, and around the piece g in my device. The pieces b and d are the same in form in my device as in Brooman's, but wholly different in function. Brooman's piece c is not found in my device; and my pieces e, f, g, and h are neither of them found in Brooman's device, unless they be regarded as substantially the same pieces as the pieces a, b, c, and d of Brooman; but if so regarded, then Brooman lacks the pieces a, b, and d of my device as illustrated in diagram No. 3, which shows the two devices superposed so as to bring Brooman's link coincident with mine. These differences, of themselves, necessarily show a substantial difference between the two devices, in my opinion. But the differences in operation are equally clear, and even more substantial. Brooman's device can be used only with very limited sizes of buttons, the size of the device remaining the same; for the button must necessarily be of a diameter nearly twice the length of the dotted line x x in diagram No. 1; while any button can be used with my device whose diameter is equal to the dotted line y y in diagram No. 2. On the other hand, the larger the diameter of the button, the greater the length of Brooman's link, as in using his device the button is necessarily inserted edgewise through the link, and directly between the piece d and the web lying around the piece a; while, in my device, there is no connection whatever between the length of the link and the size of the button used. I can use very narrow web with large buttons, which Brooman can not. The button is very much more securely held by my device than by Brooman's. In fact, I

have no doubt but that Brooman's device is entirely unpractical, so far as its use with common buttons is concerned; and entirely useless, unless a special metallic stud be used with it; and then only where there is a constant pull. I produce herewith samples of Brooman's device, and of my suspender strap claimed in my first claim, marked Exhibits B and C. My reasons for my delay in bringing this bill of complaint are, that I was very much discouraged by the uniformly adverse results of all my efforts to obtain a patent; so much so that, although I was absolutely certain, in spite of all the rejections, that I was entitled to a patent, yet I began to doubt whether it would be wise to expend any more money in the effort to obtain one. At that time, also, I was out of the suspender business, having engaged in the manufacture of perfumery early in the year 1870, and continued that manufacture till into the spring of 1872. Moreover, I had not then practically demonstrated the great value of my invention, although I had great faith in it. I did not resume the suspender business until the summer of 1872, and since that time I have learned to appreciate more and more fully the value and importance of my invention; and have been convinced that I am fully justified in going to the necessary expense of establishing what I believe to be clearly my right. The diagrams are on paper, marked 'Exhibit Diagrams.' (Signed) B. J. Greely."

"District of Massachusetts, Suffolk, ss. Sworn to and subscribed before me, October 10, 1873. (Signed) Samuel W. Clifford, Notary Public. (Seal.)"

To this was attached the specification as last amended before the principal examiner, and on which amendment it was appealed. The case was fully argued by counsel for complainant and for the patent office upon the record thus made up.

J. E. Maynadier, for complainant.

Marcus S. Hopkins, for the commissioner of patents, amicus curiae.

SHEPLEY, Circuit Judge. This is an application for a patent for an alleged improvement in suspender-straps. The application was filed in the patent office, September 13, 1869, with two claims, which were rejected. On December 16th they were withdrawn, and two others presented in lieu of them. These were rejected and withdrawn, and on February 23, 1870, the present claims were presented. These claims were rejected by the examiner, February 28th; and, on appeal, by the board of examiners, April 27th; and by the commissioner, on appeal from the board, September 17, 1870; and by the supreme court of the District of Columbia, on appeal from the commissioner, May 3, 1871.

The bill in equity in this case is filed under the provisions of section 52 of the act of July 8, 1870, and is virtually an appeal from the decree of the supreme court of the District of Columbia rejecting the application for the patent.

The applicant claims, in the second and most material and important claim to be considered in his application, "the metallic button-hole and link combined, above described, consisting of a single piece of metal, shaped as shown, so that the button used may be of a diameter greater than the width of the device."

The first claim, which is for a combination of the combined button-hole and link, with a piece of webbing with a button-hole at its free end and a slide, must stand or fall with the second claim. The question presented is: Whether the references cited in the record anticipate the complainant's alleged invention of the metallic button-hole and link combined, as described and claimed in the second claim.

The English patent of R. A. Brooman, granted in 1861, and cited in the references on the record, is for a combined link and button-hole. It has, first, a link for the purpose of attachment to the web; second, an enlarged body of the device to admit the insertion of the button; third, a loop at the bottom for retaining the button. This loop at the bottom also performs the function of admitting the button to pass more easily through the enlarged opening made to receive the button, by receiving the shank of the button as the button is being passed through the opening.

The device of Greely has, first, a link for attachment to the web; second, an enlarged body of the device for the insertion of the button; third, the loop at the bottom for retaining the button. Each one of these stands in the same relation to the others, and performs the same function in Greely's as in Brooman's device. The same elements enter in the same relations into the same combination, and they operate in the same way, separately and as a combined device. In Greely's device the opening to receive the button has its greatest diameter in a direction at right angles with the link, while in Brooman's the longest diameter is in a direction parallel with the link, so as to admit the button-hole in a direction at right angles with the direction in which it is admitted in Brooman's. To accommodate this change of direction, loops are also made on each side of the opening, as well as on the bottom, to receive the shank of the button as it is being passed through the metallic loop. This adds much to the convenience of the device, and works better in use and receives a button sideways. It is contended that it is impossible to use a button with Brooman's device whose diameter is greater than the width of the device, and no change in the relative proportion of the parts will make it possible. Width is used by the claimant to express the shorter diameter of the device as a whole, and not the shorter diameter of the operative part. It is easy to see that Brooman's de-

vice may be elongated, so as to receive sideways a button of greater diameter than the width of Brooman's device. Neither of them will admit a button of greater diameter than the length of the opening. In its relation to the button, the parts of the device intended to receive the button are to be considered, and in each of them the opening made to admit the button is longer than the diameter of the button in the line of the plane through which the button enters, and less than the diameter of the button measuring at right angles with that line. The difference between the two devices are merely structural changes. Such structural changes of form and proportions, although they improve the operation, without changing the mode of operation, and produce a much better result, although one of the same kind, are only different and better forms of embodying the same idea, and illustrate the difference between mechanical skill and inventive genius.

As compared with Brooman's invention, the complainant's device, as a combined device, is not a novel one, but possesses the same elements, operating in the same way, to produce the same result, and is not patentable. Bill dismissed.

Case No. 5,746.

GREELEY v. SCOTT et al.

[2 Woods, 657;[1] 12 N. B. R. 248.]

Circuit Court, N. D. Florida. May, 1875.

HOMESTEAD LAW OF FLORIDA—WHAT IS INCLUDED UNDER.

1. The constitution of the state of Florida of 1868 reserves to each head of a family free from the claims of creditors, a homestead, without limit as to its value, of 160 acres, when the same is not in an incorporated city or town: *Held*, that the purpose of this provision was to preserve to the debtor, not only his shelter, but his usual means of employment for the support of his family.

2. In the case of a farmer the exemption embraces his house and farm not exceeding the number of acres limited, together with the improvements thereon. But a farmer's homestead would not embrace tenant houses, a sawmill, gristmill, or fullingmill, though erected on a portion of the tract of which the farm is a part.

[Cited in Mouriquand v. Hart, 22 Kan. 415.]

3. A mill owner who has a farm attached to his mill and cultivates it as a secondary business, could hold his residence and mill exempt, but not the farm also.

[Cited in Ashton v. Ingle, 20 Kan. 679.]

4. The owner of a sawmill who followed the business of sawing lumber, and whose mill was adjacent to his residence, would be entitled to hold the same as part of his homestead. But he could not retain as a part of his homestead those portions of the 160 acres of land which were not ancillary to his business as a lumberman.

[This was a bill in equity by J. C. Greeley, assignee of Joseph W. Scott, against Joseph W. Scott and wife and others.]

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

Submitted on motion for injunction. The facts appear in the opinion of the court.

H. Bisbee, Jr., for complainant.

J. J. Finley and E. M. L'Engle, for defendants.

BRADLEY, Circuit Justice. The assignee in this case filed the bill to prevent the debtor and his wife from setting up the right of homestead to a certain tract of land in the neighborhood of Jacksonville, which they claim as such. The whole tract consists of about forty acres in an unincorporated suburb called East Jacksonville, much of which has been laid out into building lots, and on which the bankrupt resides, and has a steam sawmill, which he has operated for many years as his principal business. The constitution of Florida, adopted in 1868, reserves to every head of a family residing in the state, his homestead and $1,000 worth of personal property, free from the claims of creditors. If not in an incorporated city or town, it may be a homestead to the extent of 160 acres of land; if in such city or town, half an acre, without any limit as to value in either case. The reservation, however, is only that of the homestead, and embraces no more, although the party may own more within the prescribed limit of quantity. It is very material, therefore, to know what is meant by and embraced in a homestead. Within the meaning of the constitution of Florida, however it may be elsewhere, it certainly embraces more than a house for a shelter; for it may extend to 160 acres of land, which could never be needed for that purpose alone. As 160 acres of land is the usual quantity for a farm in this country, the policy of the constitution seems to be to allow a man such quantity of land with his house as he is accustomed to use therewith in the pursuit of his occupation. In other words, the object seems to be, not only to preserve to the unfortunate debtor his house for shelter, but his usual means of employment by which to earn his livelihood and support his family. The state as well as the individual himself is interested in his labor and industry, and therefore takes care that he shall not be deprived of the power to employ them.

In the case of a farmer, therefore, it is clear that the exemption embraces his house and farm not exceeding the amount limited; of course it includes (and so the constitution declares) the improvements thereon. Those improvements, however, must be such as to make them properly a part of the homestead, such as outhouses, barns, sheds, wagonhouses, fences, etc. They would not embrace tenant houses, though built on the farm, for these would be no proper part of the farm homestead. They constitute capital separately invested. They produce a revenue of their own, distinct from that of the farm. For the same reason, the farmer's homestead would not include a sawmill, or a gristmill, or a

carding and fullingmill, though erected on a portion of the tract of which the farm is a part. These are separate enterprises in which the farmer has been enabled to invest his surplus capital. They are no part of the farm. If he runs them, he does it as a separate business from that of his farm, and he cannot claim both as appurtenant to and part of his homestead. They constitute the basis of outside and separate industries. A mill owner in like manner may have a farm attached to his mill, and work it as a separate and secondary business. He may claim his mill as a part of his homestead, but not the farm also. Otherwise, by multiplying his branches of business and trade, a man might have a large domain consisting of many establishments, and claim them all as incident to his homestead. This never could have been the intent of the constitution. It would be an unreasonable construction of its terms. Those terms must be fairly construed so as to fully carry out the policy of the constitution, and yet not to nullify all obligations of a debtor to pay his debts. That the preservation of a householder's means of carrying on his business, as well as a house for shelter, is within the constitutional purpose, is evident from the clause relating to city property, namely, that in a city or town the exemption shall not extend to more improvements or buildings than the residence and business house of the owner, showing that the business house as well as residence is included.

But while the cases, which we have supposed, are comparatively easy of solution, a great many others will arise presenting greater difficulty and embarrassment. The amount of property, which the necessary interpretation of the exemption will sometimes embrace, will undoubtedly appear as a great hardship and injustice to creditors. It is a great stride from that state of things in which the sanctity of a debt induced the legislature not only to take from the debtor all his property, but even his liberty itself. It may be a question whether it is not carrying the principle of exemption too far for the public welfare. It is true that the farmer without his farm, the blacksmith without his forge, the miller without his mill, the trader or business man without his shop, in fine, any citizen without his place to work and labor or pursue his ordinary calling, is deprived of the power to support himself and his family, and becomes a burden instead of a help to the community. These establishments or places of labor or occupation are respectively adjuncts of a man's homestead, and, within the intent and meaning of the constitution of Florida, form a part of it. Whether the provision is politic or impolitic is a question with which the courts are not concerned. In the eye of the philosophic economist, taking a broad view of the interests and objects of human society, it has many reasons in its favor; and the creditor cannot complain of injustice, for he understands the conditions when he gives the credit. It is a pure question of policy, namely: Whether the advantages obtained by the exemption are equivalent to the disadvantages arising from the unwillingness of capital to remain in a community where such an exemption exists; or whether from the latter cause, the law will not operate too depressingly upon enterprise. Speculation, however, is unnecessary. The people of the state of Florida have, in their constitution, declared what their will is on the subject, and that declaration is binding on both the people and the courts.

In the case under consideration, the debtor claims to follow the business and trade of sawing lumber, and asks to have his mill, which adjoins his dwelling, reserved as a part of his homestead. In our opinion, this claim is supported by the constitutional provision. The mill, in the sense of that constitution, is appurtenant to and part of the debtor's homestead. If it be objected that the value is unreasonably great, we answer that the constitution prescribes no limit of value and the courts cannot prescribe one. As before stated, we think that a man's shop, store or mill in which he pursues his usual trade or avocation (as well as the farmer's farm) if connected with and adjacent to his dwelling, is intended to be included in his homestead. It is the stand or place on which and by means of which he may continue to pursue his industrial labor and be a useful citizen, and is within the object which the constitution has in view. But the debtor cannot ask to retain those portions of the forty acre tract which are not ancillary to his homestead, considered as the homestead of a lumberman running a sawmill. Those portions will be for the assignee, under the direction of the district court, to separate from the rest. Under the circumstances, we do not think that the debtor has pursued such a course as to throw undue embarrassments in the way of the assignee, which need to be removed by the interference of a court of equity. The main thing which he claims, the sawmill, we think he is entitled to claim, unless there is some foundation for the allegation of the bill that debts to a large amount, which have been proved, were incurred in the erection of improvements on the mill, and for labor. As this, however, will be a matter which the district court can better investigate when marshaling the assets of the bankrupt estate and enforcing any liens which particular creditors may have on particular parcels of property, we do not think there is any call for the interposition of this court.

The motion for injunction is denied and the bill dismissed, without costs and without prejudice to the complainant as to any part of the property except the house and sawmill, and such reasonable extent of land about the same as may be necessary and proper for their enjoyment as a homestead by the debt-

or and his family, and without prejudice as to the effect of debts contracted for improvements and labor. We do not think that any decree should be made authorizing the assignee to sell the reversion of the homestead, as the constitution expressly declares that the exemption shall accrue to the heirs of the party having enjoyed or taken the benefit thereof. This, however, is also a question which the district court can as well decide as this court, and presents no ground for the interference of a court of equity.

Bill dismissed.

NOTE. Upon the subject discussed in the foregoing case, namely, the character of the premises in which a homestead right may subsist, the reader is referred to the following cases, collected by Mr. Thompson, the learned editor of the Central Law Journal, on page 363 of volume 2 of that periodical: Mayho v. Cotton, 69 N. C. 289; Hubbell v. Canady, 58 Ill. 425; In re Tertelling [Case No. 13,842]; West River Bank v. Gale, 42 Vt. 27; Buxton v. Dearborn, 46 N. H. 43; Martin v. Hughes, 67 N. C. 293; Williams v. Hall, 33 Tex. 212; Adams v. Jenkins, 82 Mass. [16 Gray] 146; Kresin v. Mau, 15 Minn. 116 [Gil. 87]; Bunker v. Locke, 15 Wis. 635; Tumlinson v. Swinney, 22 Ark. 400; Ragland v. Rogers, 34 Tex. 617; Sarahass v. Fenlon, 5 Kan. 592; Finley v. Dietrick, 12 Iowa, 516; Taylor v. Boulware, 17 Tex. 74; Bassett v. Messner, 30 Tex. 604; Woodward v. Till, 1 Mich. N. P. 210; Parker v. King, 16 Wis. 223; Campbell v. McManus, 32 Tex. 442; Thornton v. Boyden, 31 Ill. 200; Gregg v. Bostwick, 33 Cal. 220; Kelly v. Baker, 10 Minn. 154 [Gil. 124]; Clark v. Shannon, 1 Nev. 568; Mercier v. Chace, 11 Allen, 194; Goldman v. Clark, 1 Nev. 607; Mills v. Estate of Grant, 36 Vt. 269; Lazell v. Lazell, 8 Allen, 575; Brown v. Keller, 32 Ill. 151; Casselman v. Packard, 16 Wis. 119; Herrick v. Graves, Id. 157; Reinback v. Walter, 27 Ill. 393; Dyson v. Sheley, 11 Mich. 527; Moore v. Whitis, 30 Tex. 440; Walker v. Darst, 31 Tex. 681; Wassell v. Tunnah, 25 Ark. 101; McDonald v. Badger, 23 Cal. 393; Kurz v. Brusch, 13 Iowa, 371; Stanley v. Greenwood, 24 Tex. 224; Phelps v. Rooney, 9 Wis. 70; Pryor v. Stone, 19 Tex. 371; Hancock v. Morgan, 17 Tex. 582; Methery v. Walker, Id. 593; True v. Morrill, 28 Vt. 672; Cook v. McChristian, 4 Cal. 23; Taylor v. Hargous, Id. 268; Walters v. People, 18 Ill. 194; Rhodes v. McCormick, 4 Iowa, 368; Crow v. Whitworth, 20 Ga. 38; Rogers v. Hawkins, Id. 200; Pinkerton v. Turnlin, 22 Ga. 165; Delaney's Estate, 37 Cal. 176; Thorn v. Thorn, 14 Iowa, 49; Hill v. Bacon, 43 Ill. 477; Williams v. Jenkins, 25 Tex. 279; Beecher v. Baldy, 7 Mich. 488; Thomas v. Dodge, 8 Mich. 51; Helfenstein v. Cave, 3 Clarke (Iowa) 287.

Case No. 5,747.

GREELEY et al. v. SMITH et al.

[3 Story, 76.] [1]

Circuit Court, D. Maine. May Term, 1844.

CORPORATION—CITIZENSHIP—PLEADINGS—RULE TO AMEND—PRACTICE.

1. A corporation established by and in a state, and doing business there, is to be deemed a citizen of the state, and the citizenship of the corporators is immaterial to the jurisdiction of the courts of the United States.

[Cited in Re McKibben, Case No. 8,859.]

[See Bank of Cumberland v. Willis, Case No. 885.]

2. Where a suit is brought by or against a corporation in the courts of the United States, the state in which the corporation is created and established should be averred.

3. It is perfectly competent for this court to grant a motion to strike out the name of one of the defendants, where its jurisdiction might otherwise be ousted. The same practice also obtains in the supreme court of the United States, and is within the remedial action of the judiciary act of 1789, c. 20, § 32 [1 Stat. 91].

This is an action of trover, for two thirds of a certain brig, called the Walsan, and of two thirds of a certain other brig, called the Alfred. The defendants put in at the return term the following plea: "And now the said Joseph Smith, in his proper person, and the said president, directors and company of the Exchange Bank, by Ashur Ware, their president, in his proper person, come and defend the wrong and injury, &c., and say, that the court here ought not further to take cognizance of or sustain the action aforesaid, because they say, that one James Harris, of Boston, in the commonwealth of Massachusetts, and a citizen of said commonwealth of Massachusetts, was, at the time of the setting out of the plaintiffs' writ in this action, and still is a stockholder in the said Exchange Bank, one of said company, and a corporator; viz., an owner of twelve shares of the capital stock thereof, and one of the defendants in this action; and they further aver, that said commonwealth of Massachusetts, of which said Harris is a citizen, is the same state or commonwealth, of which the plaintiffs in their writ have averred themselves to be citizens; all which they are ready to verify. Wherefore, they pray judgment, if the court here will take further cognizance of or sustain the said action; and for their costs."

At the May term, 1843, the plaintiffs [Philip Greeley and another] moved to amend their writ by striking out from the same the names of the president, directors and company of the Exchange Bank, as defendants.

And at May term, 1844, the motion, being resisted, was argued by

Thomas A. Deblois, for plaintiffs.

John Rand, for defendants.

The following authorities were cited by the plaintiffs in support of their motion: Calloway v. Dobson [Case No. 2,325]; Anon [Id. 444]; Russell v. Clark's Ex'rs, 7 Cranch [11 U. S.] 69; Judiciary Act, § 32; Smith v. Jackson [Case No. 13,065]; Rev. St. Me. c. 115, § 19; Ordway v. Wilbur, 16 Me. 263; Ames v. Weston, Id. 266; Fogg v. Greene, Id. 282; and the 12th and 13th rules of court.

STORY, Circuit Justice. I have no doubt, whatsoever, that it is perfectly competent for the court to grant the present motion. It is often done in the circuit court in this circuit, where the jurisdiction of the court would or might be otherwise ousted. The same practice has been sanctioned upon the same ground by the supreme court of the

[1] [Reported by William W. Story, Esq.]

United States; and it is fully within the remedial operation of the 32d section of the judiciary act of 1789, c. 20. But I do not think this amendment is now necessary to sustain the jurisdiction of the court. The case of Louisville, C. & C. R. Co. v. Letson (decided at the last term of the supreme court of the United States) 2 How. [43 U. S.] 497, is decisive on the point. There it was held, after a full review of all the former decisions, that a corporation established by and in a state, and doing business there, is to be deemed a citizen of the state; an artificial person, indeed, but still a citizen; and that the citizenship of the corporators was immaterial to the jurisdiction of the courts of the United States. This decision puts an end to all controversy on the point, and also puts an end to what has long been felt by the profession, as well as the bench, to be an anomaly in our jurisprudence. But I think, that it ought, in strictness, to be averred, that the corporation is a corporation created by and established in the state of Maine. Perhaps the language used in the descriptive part of the present writ is sufficiently direct for the purpose, as the corporation is described to be "the president, directors and company of the Exchange Bank, a corporation in Portland in the state of Maine, and the stockholders of which, together with the said Smith, are inhabitants of and residents in said state of Maine, and citizens thereof." The plaintiffs may, therefore, have their choice to amend the writ as they by their motion ask, or simply amend it by adding the words above suggested, as they shall be advised. The amendment should be with costs simply of the term.

[NOTE. In Case No. 5,748 the surrender of the charter of the Exchange Bank was suggested, and it was decided that the suit against it was thereby abated. The other defendant thereupon (Id. 5,749) filed a plea of a former judgment in bar, to which plea there was a demurrer and joinder. The demurrer was allowed, and the case ordered to trial. The question was submitted to the court upon the findings of the jury, who gave judgment in favor of the plaintiffs for the value of the Alfred, secured in a certain bottomry bond under consideration. Id. 5,750.]

Case No. 5,748.

GREELEY et al. v. SMITH et al.

[3 Story, 657.] [1]

Circuit Court, D. Maine. May Term, 1845.

CORPORATION — SURRENDER OF CHARTER — ABATEMENT OF SUIT.

Where, during the pendency of a suit, a corporation surrenders its charter, which is accepted by the legislature, it becomes defunct, and the suit abates, unless the legislature, by some act, saves the right of action against the corporation.

[Quoted in First Nat. Bank of Selma v. Colby, 21 Wall. (88 U. S.) 615; Kelley v. Mississippi Cent. R. Co., 1 Fed. 569; Devereaux v. City of Brownsville, 29 Fed. 750.]

[Cited in Sturges v. Vanderbilt, 73 N. Y. 390; City Insurance Co. of Providence v. Commercial Bank of Bristol, 68 Ill. 350; Attorney General v. Chicago & E. R. Co., 112 Ill. 534, 538; McCartney v. Chicago & E. R. Co., Id. 621.]

[This was an action at law by Philip Greeley and others against Joseph Smith and the Exchange Bank.]

This case was formerly before the court upon a plea to the jurisdiction, which having been overruled, Rand for the defendants suggested, that by an act of the legislature of Maine; passed on the 7th of ——, 1840, the surrender of its charter by the Exchange Bank (one of the defendants,) was accepted, and thereupon it was declared, "that the same shall terminate when the act shall take effect;" and it was further enacted, that "the bank shall continue its corporate capacity during the term of two years from the time this act shall take effect, for the sole purpose of collecting the debts due to the corporation, selling and conveying the property, and estate thereof, and shall remain liable for the payment of all debts due from the same, and shall be capable of prosecuting and defending suits at law, and for choosing directors for the purposes aforesaid, and for closing its concerns." The act took effect from and after the sixth of April, 1840; and the two years expired after the sixth of April, 1842. The question, therefore, was, whether the suit could be further continued as to the Exchange Bank, and what was to be done, as to future proceedings.

Fessenden & Deblois, for plaintiffs.
Mr. Rand, for defendants.

STORY, Circuit Justice. The question comes shortly to this, that, during the pendency of the suit, the corporation becomes extinct by a voluntary surrender of its charter, and an acceptance of the surrender by the legislature. Under such circumstances it is asked, what is to be done, the corporation being defunct by operation of law? It was certainly a very unwise act for the legislature to accept a surrender of the charter, and not at the same time to save the rights of action of third persons against the corporation, and to continue the existence of the corporation quoad such rights. But the same case would have occurred, if upon a quo warranto a final judgment had passed against the corporation, declaring its franchises and privileges forfeited, and decreeing a seizure and resumption of the same by the government. Many of our banks are, by law, limited to a term of years for their corporate existence, and if there is no saving when the term expires, the corporation is de facto dead. Now I cannot distinguish between the case of a corporation and the case of a private person, dying pendente lite. In the latter case, the suit is abated at law, unless it is capable of being revived by the enactments of some statute, as is the case as to suits pending in the courts

[1] [Reported by William W. Story, Esq.]

of the United States, where, if the right of action survives, the personal representative of the deceased party may appear, and prosecute or defend the suit. Judiciary Act 1789, c. 20, § 31 [1 Stat. 91]; 2 Tidd, Pr. (9th Ed. 1828) 932; Com. Dig. "Abatement," H. 32-35. No such provision exists as to corporations; nor, indeed, could exist, without reviving the corporation pro hac vice; and therefore, any suit pending against it at its death abates by mere operation of law. It seems to me, therefore, that the attorney for the corporation may well suggest the death of the corporation by plea or otherwise on the record, and if the fact is admitted, the suit as to the corporation will abate by operation of law, and render all farther proceedings against it void.

[NOTE. In Case No. 5,747 the plaintiffs moved to amend their writ by striking out the names of certain officers of the Exchange Bank in order to give the court jurisdiction. The motion was granted. In Case No. 5,749 the other defendant filed a plea of a former judgment in bar, to which plea there was a demurrer and joinder. The demurrer was allowed and the case ordered to trial. The question was submitted to the court upon the findings of the jury, who gave judgment in favor of the plaintiffs for the value of the Alfred, secured in a certain bottomry bond under consideration. Id. 5,750.]

GREELY (ECFORT v.). See Case No. 4,260.

GREELY (NORCROSS v.). See Case No. 10,294.

Case No. 5,749.

GREELY et al. v. SMITH et al.

[1 Woodb. & M. 181.] [1]

Circuit Court, D. Maine. May Term, 1846.

PRIOR JUDGMENTS—PLEA OF IN BAR.

1. Where a former judgment is pleaded in bar, it cannot so avail, unless the parties appear to be the same, or are averred to have been privies in interest or estate.

[Cited in Perry Manuf'g Co. v. Brown, Case No. 11,015; Stillman v. White Rock Manuf'g Co. Id. 13,446.]

[Cited in Finney v. Boyd, 26 Wis. 370; Taylor v. Matteson, 86 Wis. 123, 56 N. W. 832.]

2. If the former judgment is pleaded to have been a nonsuit, and is not averred to have been on the merits or the point now in controversy, it is not a bar.

[Cited in Jay v. Almy, Case No. 7,236; Folger v. The Robert G. Shaw, Id. 4,899; Case of Snow, Id. 13,143; Sumner v. Marcy, Id. 13,609; Aurora v. West, 7 Wall. (74 U. S.) 93.]

This was an action of trover commenced January 10th, 1842, for a brig called the Watson. [Joseph] Smith pleaded not guilty, and also, by leave of the court, filed a plea in bar, that the plaintiffs [Philip Greely and another], on the second Tuesday of November, 1839, prosecuted in the supreme court of the state of Maine, one Joshua Waterhouse, a deputy sheriff, in a writ of replevin for this same vessel, and on an issue joined, denying that the property therein was in the plaintiffs, it was adjudged by said court on the second Tuesday of November, 1841, that the plaintiffs become nonsuit, and that said Waterhouse have return of the property. To this plea there was a general demurrer and joinder.

Mr. Deblois, for plaintiffs.

Mr. Rand, for defendant Smith.

WOODBURY, Circuit Justice. It is a well settled principle, that a former judgment cannot avail as a bar to another suit, unless it was between the same parties as well as for the same subject-matter. 1 Starkie, Ev. 191; Wood v. Davis, 7 Cranch [11 U. S.] 271; [Davis v. Wood] 1 Wheat. [14 U. S.] 6; 14 Johns. 83; 2 Mass. 338. The reason is, that unless the parties are the same, either personally or as privies, one had not an opportunity either to be heard on his rights, or to cross-examine witnesses, or put in his own evidence. Maybee v. Avery, 18 Johns. 352; 3 Cow. 120; 4 Cow. 559; 9 Mass. 1; 1 Pick. 105. When they are the same, the former judgment is of course conclusive as a general principle (Wright v. Deklyne [Case No. 18,076]; 1 Phil. Ev. 323, and authorities before cited), in order to put an end to litigation after one full and fair trial. The parties here are not the same, Waterhouse having been the defendant in the former action, and Smith and the Exchange Bank defendants in this. Nor is there any averment in the plea, either that the parties are the same, or that they are privies in blood, estate, or in law, which, if averred, might make the plea valid on its face. 11 Mass. 198; 17 Mass. 365; 10 Mass. 164; 5 Mass. 31; 4 Taunt. 18; 4 Day, 431; 2 Gall. 565; Johnson v. Bourn, 1 Wash. [Va.] 187; 3 Conn. 516; 1 Starkie, Ev. 194; 2 Vern. 827; Burrill v. West, 2 N. H. 190.

The whole gist of the bar is, that the same parties have before contested their interests in the subject; and hence, are not to be allowed to contest the matter over again, and thus cause a multiplicity of suits, and make them endless in duration, when it is for the interest of the republic to put a termination to litigation. "Interest reipublicae ut sit finis litium." The omission of such an averment is fatal on a general demurrer; and the plea in bar is, therefore, adjudged bad. There are some exceptions to these general rules, such as notice to those not parties, or vouchers in of warrantors, or trials of some public right, which may bind others than parties or those technically privies, but they rest on a principle somewhat similar, and do not arise, and need not be examined here. 2 N. H. 192, 193; Towns v. Nims, 5 N. H. 259, 263. There is another objection which shows the plea to be bad on the face of it, as it now stands, if not incurable. It avers, that the plaintiffs became nonsuit in the for-

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

mer action, and it is certain, that if this was before trial, or, at the trial, without a hearing and opinion on the merits by the court, that the proceedings could not in law be sustained as a trial, and an end of the dispute; and the judgment in it could not be considered as a just bar to a new action. Co. Litt. 139a; 3 Bl. Comm. 376, 377; 3 Wils. 153; 2 Tidd, Pr. 797.

It is not averred, that this nonsuit was by order of the court under a decision by them on the merits, or that it was in the nature of a retraxit (3 Bl. Comm. 294; Co. Litt. 139a; 1 Pick. 371); and hence, there is no ground, either in law or equity, for regarding the former action between the parties as a bar, unless it is substantially averred and shown to have been decided on the merits. It is doubtful, whether if a nonsuit be then a bar in law. 5 Me. 185; 2 Mass. 113; Ensign v. Bartholomew, 1 Metc. [Mass.] 274; Melchart v. Halsey, 3 Wils. 149, 153. Bridge v. Sumner, 1 Pick. 371, in point holds, that it is not. Most assuredly, therefore, if the nonsuit is not shown to have been on the merits, there does not appear to have been the trial of a right between the parties, at least once, which should put an end to further litigation. The point must also be the same in the former judgment; and though that question does not arise here, it bears on this by analogy. For there it must appear often on the face of the pleadings to be the same point, in order to bar the subsequent suit. It is not enough always, that by inference or arguendo, the same point must have been considered. Towns v. Nims, 5 N. H. 259, 262. Let the case proceed to trial on the other issue. Demurrer allowed.

[NOTE. In Case No. 5,747 the plaintiffs moved to amend their writ by striking out the names of certain officers of the Exchange Bank, in order to give the court jurisdiction. The motion was granted. In Case No. 5,748 the surrender of the charter of that bank was suggested and it was decided that the suit against it thereby abated. The case was finally submitted to a jury, and then to the court, to pass upon the effect of the verdict. The court gave judgment in favor of the plaintiffs for the value of the other vessel in controversy,—the Albert,—secured in a certain bottomry bond, of peculiar construction. Id. 5,750.]

Case No. 5,750.

GREELY et al. v. SMITH.

[3 Woodb. & M. 236.] [1]

Circuit Court, D. Maine. Oct. Term, 1847.

PRIOR JUDGMENT—BAR—BOTTOMRY BOND—WHEN VALID.

1. A prior judgment between parties not nominally the same, must be avowed and proved to be between privies in interest, or it is no bar.

2. So a prior judgment of nonsuit between the same parties on the same subject must be alleged to have been on the merits in order to prevent another recovery.

3. A bottomry bond is not valid as such unless the debt is risked on the loss of the vessel. Marine interest secured is one evidence of this risk, but is not alone sufficient to show the bond to be in bottomry.

4. If the person be still liable in the event the vessel is not lost, the obligation may be good in bottomry, but not so if the person is liable though the vessel is lost.

5. The last provision is fatal to the bond as in bottomry, unless it is included in the bond as additional security, and in that event may, perhaps, be waived, and the bond otherwise be good.

6. A bottomry bond should not be valid for a pre-existing debt, but only for advances to aid in repairs or outfits and cargo for the voyage.

[Cited in The Native, Case No. 10,054.]

7. When otherwise good, it is usually by special statute, or is good merely as a mortgage, where a mortgage, under like circumstances, is valid. It is not good as a mortgage if the vessel be left in possession of the former owner, and the state laws require it to be recorded to be good against a creditor, and it is not recorded when a creditor attaches a vessel.

[Cited in Stillman v. White Rock Manuf'g Co., Case No. 13,446.]

This case was drawn up by counsel, in the words following:

This is an action of trover for an alleged taking and converting, by the defendant [Joseph Smith], of the brig Albert and of two-third part of the brig Watson, on the 7th day of January, 1842; said vessel being alleged to be the property of the plaintiffs [Philip Greely, Jr., and others]. The writ is dated January 10th, 1842, and may be referred to by either party. Plea,—the general issue and joinder. It is admitted that Smith, the defendant, was at the time of the alleged taking, sheriff of the county of Cumberland. The plaintiffs read in evidence, the following papers, dated May 11, 1838, and October 26, 1839, viz:

"To all whom these presents shall come. I, Luther Jewett, of Portland, county of Cumberland, state of Maine, owner of the brig called the Albert, of Portland, of the burthen of about 214 tons, now lying in this port of Portland, and bound on a voyage hence to the port of Guyama, Porto Rico, and thence back to Portland or Boston, or a port of discharge in the United States, sendeth greeting. Whereas, I, the said Luther Jewett am under the necessity of borrowing the sum of $2,200 for the purchasing and fitting out of the said brig, for the said intended voyage; and Messrs. Greely and Guild, merchants of Boston, have lent and advanced to me, the said Luther Jewett, the said sum of $2,200, viz., $1000 in cash, and two acceptances of theirs of this date, each for $600, payable in sixty days and grace, at the rate of two and one-half per cent. on said sum, for the purpose of purchasing and fitting out the said brig, as aforesaid. Now, know ye, that I the said Jewett, do, by these presents, for myself, my executors and administrators, covenant, grant and agree, to and with the said Greely and Guild, that the said brig called the Albert shall, with the

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

first fair wind set sail and depart from this port of Portland, after being loaded, and proceed directly to the port of Guayama, and from thence return back to a port of discharge in the United States, and here end her intended voyage. And I, the said Luther Jewett, for and in consideration of the said money and acceptance to me in hand paid by the said Greely and Guild, at and before the ensealing and delivery of these presents, the receipts whereof is hereby acknowledged, do bind and obligate myself, my heirs, executors and administrators, my goods and chattels, and particularly the said brig Albert with her hull or body, together with her tackle and apparel and freight, to be earned for the said voyage, to pay the said Greely and Guild, their executors, administrators or assigns, the said sum of $2,200; provided the acceptance of said Greely and Guild paid by them as so much of the $2,200 as may be paid by them within sixty days next after the safe arrival of the said brig Albert at her port of discharge in the United States, from the said intended voyage; together with six per cent. interest thereon, amounting together to the sum of $2,320. And I, the said Luther Jewett, for myself, my heirs, executors and administrators, covenant, grant and agree, to and with the said Greely and Guild, their executors administrators, by these presents, that I am the true and lawful owner of the said brig, and that I have good authority to charge and engage said brig as aforesaid; and that the said brig shall at all times after the said voyage, be liable and chargeable for the said sum of $2,320, with the interest thereon as aforesaid, until paid. In witness thereof, I have hereunto set my hand and seal this 11th day of May, in the year of our Lord, 1838. Luther Jewett. (L. S.)

"Signed, sealed, and delivered, in presence of George Jewett.

"Cumberland, ss. Then personally appeared the above named Luther Jewett, and acknowledged the above instrument to be his free act and deed, this 11th day of May, A. D. 1838. Before me, R. W. Lincoln, Jus. Pacis."

"Know all men by these presents, that, I Luther Jewett, of Portland, county of Cumberland, state of Maine, am held and firmly bound unto Messrs. Greely & Guild, of Boston, commonwealth of Massachusetts, in the just sum of $3,600, money of the United States of America; for the payment of which sum well and truly to be made, I hereby bind myself and respected heirs, executors and administrators, by these presents. Dated at Portland, aforesaid, this 26th day of October, in the year of our Lord one thousand eight hundred and thirty-nine. Whereas the said Greely and Guild have this day lent and advanced unto the said LutherJewett, the sum of $3,600, at bottomry, on the body, tackle and furniture, of the brig Albert, of Portland, whereof —— Beanderly is at present master, and said Luther Jewett being sole owner of said brig Albert. Now the condition of this obligation is such, that if the said Luther Jewett, his heirs, executors or administrators, shall and do within one year from the date of this instrument, well and truly, or cause to be paid unto the said Greely and Guild, their successors or assigns, the above sum of $3,600, the amount loaned, together with marine premium and interest thereon at the rate of six per cent. per annum; if during any voyage of said brig Albert, an utter loss of said vessel by fire, enemies, men-of-war, or any casualty shall unavoidably happen and to said Luther Jewett, his heirs, executors or administrators, shall, and do well and truly account for upon oath if regained, and pay unto said Greely and Guild, their successors or assigns, the whole salvage on said brig Albert, the vessel and appurtenance, then their obligation to be void; otherwise to be and remain in full force and virtue; and in consideration of, and as security for said bond, premium and interest, the said Luther Jewett does by these presents assign, pledge, mortgage, set over, transfer and convey said brig Albert, the vessel and appurtenances to the said Greely and Guild. It being mutually understood and agreed, that in case the amount of said loan, premium and interest, or any part thereof, according to the terms of these presents, shall remain due and unpaid to said Greely and Guild, after the expiration of one year from the date of these presents, the said Greely and Guild may take possession of said brig Albert, the vessel and appurtenances, and sell the same at public auction in order to satisfy what may then remain due, without any proceedings in court, or otherwise, for the purpose of authorizing such sale, and therefore may execute and deliver a sufficient bill of sale to transfer completely to any purchaser or purchasers, all title and property in and to the said brig Albert, the vessel and appurtenances, to the said purchaser or purchasers, as owner or owners thereof now belonging. The said Greely and Guild thereupon to account to the said Luther Jewett for any surplus of proceeds of such sale after paying all charges and expenses and all demands which said Greely and Guild may then have against said brig Albert. The said Greely and Guild discounting interest for anticipating the payment of the demand not then presently due; and in case of such sale aforesaid, the said Luther Jewett, his heirs, executors, administrators or assigns, shall, whenever they are requested, make, execute and deliver to said purchaser or purchasers another bill of sale of said brig, the vessel and appurtenances, in which the register shall be recited, or any further documents that may be necessary for transferring completely to said purchaser or purchasers, all the right, interest and claim of said Luther Jewett, his executors, administrators or assigns, as owners of said brig

Albert the vessel and appurtenances. Luther Jewett. (L. S.)

"Signed, sealed, and delivered in presence of George Jewett, James C. Jewett."

Also, a bond of the same tenor and date, (Oct. 26, 1839,) executed by Luther Jewett to Greely and Guild, of two-thirds of the brig Watson, for $2,000.

George Jewett, a witness called by plaintiffs, testified that he witnessed the bond of May 11, 1838, and the two bonds of October 26, 1839. Luther Jewett, a witness called by plaintiffs, testified that he owned the Albert and two-thirds of the Watson, on May 11, 1838; that he sent the bond of May 11, 1838, to the plaintiffs, by mail, and has a letter of the plaintiffs' dated May 12, acknowledging its receipt. The 1839 bonds were sent to plaintiffs October 26; thinks he put them in the mail that day; sent them by plaintiffs' previous request. The arrangement was made in Boston with the plaintiffs; has not paid to the plaintiffs the amount loaned. The second bond on the Albert was a renewal of the first, (of May, 1838,) the plaintiffs lending me about $1,400 more, to make up the $3,600. The $2,200 named in bond of May, 1838, was used to buy the vessel. The property was insured, and the policy assigned to plaintiffs; does not recollect whether he received any money at the time of giving the bond on the Watson, or whether it was given on general account for previous arrangement for bottomry. The bond on the Watson was made under an arrangement that the plaintiffs should make further advances on the brig, and they were to advance me $10,000 more in the West Indies. In, or about October, 1839, I received enough from Greely and Guild to purchase outfits for the Albert, and a bond was executed to cover the advances. I cannot say whether the sums loaned me by Greely and Guild were charged to me in account or not; I do not recollect whether anything was said about my being personally liable for the money in case the vessel was lost. The plaintiffs had the whole control of the Albert while I was in the West Indies. I stated to Greely and Guild that if they would make me the advances in October, 1839, I would put the vessel into their hands as security. I have no recollection of anything being said between us about money advanced being exposed to risk.

The plaintiffs also read in evidence a written demand made by the plaintiffs upon the defendant, dated January 6, 1842, which, with the written reply of the defendant thereto, is hereto annexed, and makes part of this case. The defendant then proved that the vessel now in controversy was attached upon a writ in favor of the Exchange Bank against Luther Jewett, as the property of said Jewett, on the 29th day of October, 1839; that said vessels were afterwards replevied by the plaintiffs in suit commenced by them against Joshua M. Waterhouse, the attaching officer; that the judgment was rendered in said action of replevin in favor of said Waterhouse, at the November term (1841,) of the supreme judicial court of the state of Maine, holden within and for the county of Cumberland, and a writ of return issued December 24, 1841; that judgment was rendered at the same term of said supreme judicial court in favor of the plaintiffs, in the suit Exchange Bank against Luther Jewett, and execution issued against said Jewett on the same 24th December, 1841; that said writ of return against said Greely and Guild the plaintiffs in this suit, in said execution against said Jewett was duly delivered to the defendant, as sheriff of the county of Cumberland, to be executed; that by virtue of said writ of return the defendant demanded said brigs Albert and Watson of said Greely and Guild, who duly delivered the same to this defendant; that said brigs were thereafterwards duly sold by this defendant, as sheriff of the county of Cumberland, upon the execution in favor of the Exchange Bank against said Jewett.

A copy of the judgment of the supreme judicial court of Maine in the suit Greely and Guild against Waterhouse; also a copy of the writ of return issued upon said judgment, with the defendant's official return thereon; also a copy of the writ sued out by the Exchange Bank against Luther Jewett, with the sheriff's official return thereon; also a copy of the judgment of the supreme judicial court of Maine, in suit Exchange Bank against Luther Jewett, with a copy of the execution issued upon said judgment, and the sheriff's official return thereon, may be referred to by either party as a part of this case. The defendant also read in evidence a letter from Luther Jewett to Greely and Guild, dated October 28, 1839, and a letter from Greely and Guild to Luther Jewett, dated October 29, 1839, which letters may be referred to by either party. The defendant also read in evidence the deposition of Luther Jewett, taken in the suit Greely and Guild against Waterhouse, which deposition may be referred to by either party. It is admitted that Smith, the defendant, was sheriff of the county of Cumberland at the time of the alleged taking; and that Waterhouse was not an officer at that time, but ceased to be a deputy sheriff in February, 1841. The plaintiffs read in evidence two letters from Greely and Guild to Luther Jewett, dated October 22 and 24, 1839, which letters may be referred to by either party.

The court submitted to the jury the following questions, to which the jury returned the answers annexed:

1st. Were all of these bonds, or any of them, given for advances and acceptances of drafts, under a promise at the time, by Jewett, to execute the bonds in question as security for those advances and acceptances? If any and not all of them, were not executed under this arrangement, but for debts

existing before any such arrangement, please to state which. 2d. Were the advances and acceptances made, the obligees in fact relying on the bonds as charging the vessels? and not relying on Jewett's personal credit? If only a part of them were so made, please to state which.

Circuit Court, U. S. Oct. Term, 1846. Philip Greely et al. v. Joseph Smith. The jury find that the advance of thirty-six hundred dollars was made under a promise that a bond of the brig Albert should be made and executed by Luther Jewett to Greely and Guild as security for said advance of thirty-six hundred dollars. And that advances were not made and executed by said Greely and Guild to said Jewett under a promise that a bond of the brig Watson should be made and executed to said Greely and Guild as security for said advances, but the bond of the Watson was made and executed to secure the payment of a debt existing before that time. Answer to second question.—We also find that the plaintiffs did not intend to relinquish their personal claim on said Jewett, but received the bond as collateral security for the aforesaid advances and claims. Nathaniel Crockett, Foreman.

It is agreed that the value of the brig Albert at the time of the alleged taking, was one thousand and fifty dollars, and the value of two-thirds of the brig Watson, nine hundred and five dollars. The whole case is now submitted to the court upon the above evidence, under the finding of the jury upon the questions submitted to them, to enter such judgment as the law requires.

Deblois and Fessenden, for plaintiffs.
Mr. Rand, for defendant.

WOODBURY, Circuit Justice. The chief question in this case is, in whom was vested the property of the vessels sued for, at the time of the alleged conversion of them. If it was in the plaintiffs, they are entitled to recover. If not, no wrong has been done to them, as they had not the actual possession of the vessels; and either such a possession or property, and a right to possession founded on property, are necessary to enable a party to sustain trover. 4 Pick. 158; 5 Pick. 255; 7 Metc. [Mass.] 259. The plaintiffs set up property under three bonds, executed to them by Luther Jewett before the supposed conversion. These bonds are considered by them to be valid as bottomry bonds, so as to pass the title to these vessels. It is admitted on both sides, that this title was in Jewett before these bonds were executed—on the 11th of May, 1838, and 26th of October, 1839. The defendant justifies taking the vessels by another officer under a precept against Jewett, October 29th, 1839, in favor of the Exchange Bank, Jewett being then in the actual possession and use of them. For this last reason it is necessary that those bonds should be valid as in bottomry, because if valid only as mortgages of the vessels, they were not recorded in conformity to the requisitions of a special statute in Maine concerning such mortgages, nor possession delivered to the mortgagee as required by the same statute, and therefore they did not pass the title as mortgages, so as to prevent the creditors of Jewett from attaching the vessels while in his possession.

Now, in respect to the validity of these bonds in bottomry, it is first objected, that their validity has heretofore been settled against the plaintiffs in a previous action of replevin between them and J. M. Waterhouse. On a writ or return, afterwards issued in favor of said Waterhouse, on that decision, the defendant as sheriff for the county of Cumberland, took and sold the vessels in controversy to satisfy the original debt in favor of the Exchange Bank against Jewett, and hence the present action has been instituted. But no plea in bar has been put in here, setting out this matter and averring that the parties in that action and this were the same in law, or the same in interest as privies. Nor is there any averment that the former judgment, being on a nonsuit of the plaintiff, was so after and on a hearing of the merits, so as to be a bar to another action for the same cause. See this case as first presented reported Greely v. Smith [Case No. 5,749]. Nor on this trial has any evidence to sustain those facts been gone into and discussed, though if offered and not rebutted it might avail the defendant probably notwithstanding the nominal parties are different. But on this for these reasons I give no opinion; nor whether the defendant, being a new sheriff, is privy to Waterhouse; nor whether in that action of replevin, the right to possession and not the title was alone settled as is now argued. 15 Me. 273. Perhaps, however, no injustice will be done as the case now stands, considering that new facts are said to be developed in the trial of this action, which did not appear in the other.

The facts in the other and the opinion of the state court thereon may be seen in Greeley v. Waterhouse, 19 Me. 9.

Let us then examine all which now appears in respect to the validity of these bonds. The principal new part here is, that the personal security relied on and the pre-existing debt, which create difficulties, existed only in the case of the third bond. In the examination of these debts, and of the old and new facts which are material, it may be useful to look first to the bond, executed May 11th, 1838. This was of the brig Albert for the sum of $2200, recited to be borrowed for the purpose of fitting her out for a voyage then contemplated. The interest was at the rate of 2½ per cent.; and the brig and her tackle, &c., were stated to be bound to pay the amount and to be

chargeable for the same at all times after her return. There is another clause in this bond, stipulating not clearly, as is argued, for the payment of a certain sum "within sixty days next after the safe arrival of the said brig Albert at her port of discharge in the United States," &c. But it seems to be to pay said sum "provided" certain acceptances are paid within sixty days, &c., and six per cent. interest thereon, equalling in all, $2,320.00.

I am strongly inclined to the opinion, that this bond does not mean to risk the debt at all on the loss of the vessel. If it does, the intention is doubtful and is expressed very indirectly and inartificially. It seems in one place to contemplate marine interest at 2½ per cent. though in another 6 per cent. It seems also to charge the vessel with the debt. But it nowhere indicates in express terms that the debt is to be lost if the vessel is lost; and the indirect reference of this kind, as to payment of a certain sum within sixty days after her safe arrival, seems as just mentioned, to be rather to the amount paid on the acceptances than the whole amount of the bond; and if meant to embrace all, is rather the fixing a time when the personal liability may be prosecuted than a condition, which must happen before that liability begins. Now, it is essential that the debt and interest appear clearly to be risked on the loss of the vessel, in order to make the bond one in bottomry. See cases cited in Leland v. Medora [Case No. 8,237]; [Conard v. Atlantic Ins. Co.] 1 Pet. [26 U. S.] 386; The Draco [Case No. 4,057], Mass., 1835; 2 Hagg. Adm. 48, 52, 65; 11 Pick. 187; Abb. Shipp. (5th Am. Ed.) 166, note; 3 Barn. & Adol. 50; 4 Bing. 244; Greeley v. Waterhouse, 19 Me. 9; The Mary [Case No. 9,187]; Rucher v. Conyngham [Id. 12,106]; 2 Dod. 8, 9. If risked on the bottom of the vessel, whether it be called "bottomry" or "bottomree," or neither, in the bond itself is wholly immaterial. 2 Hagg. Adm. 54, 55. The substance is regarded rather than the form. Simonds v. Hodgson, 3 Barn. & Adol. 50. When, however, it is not called bottomry in the bond, as it is not in this first one, this raises some presumption, if other matters are doubtful, that no bottomry was intended.

The next bond is dated October 26th, 1839, and is for $3,600. That sum is recited to have been advanced on the Albert, and is expressly stated to be "at bottomry;" and at marine interest, (though called 6 per cent. per annum,) and the debt is clearly risked on the loss of the vessel, Jewett paying over any salvage obtained on her. It further contained a power to sell the brig in case payment was not made within a year. The jury have also found that this whole amount was advanced under a promise by Jewett to execute a bottomry bond of the Albert therefor.

Under all these statements, therefore, in the bond itself, and under the finding by the jury, I see no sufficient reason for holding this bond to be invalid. The vessel itself is pledged. The advances were made on the promise of this pledge. Marine interest is reserved. The parties call the bond one in "bottomry," and the debt is expressly to be void if the vessel is lost. Though a prior bond had been executed for a part of the amount of this, a new one for the whole may be valid; and if valid in all respects would probably supersede or annul the first when the security is on the same matter. The Draco [Case No. 4,057]; [The Aurora], 1 Wheat. [14 U. S.] 96; [Conrad v. Atlantic Ins. Co.] 1 Pet. [26 U. S.] 435; 11 Pick. 183. If the personal liability was still to continue by the finding of the jury, it appears to me to relate rather to the next bond, than this—two-thirds of the Watson than this. The second bond is then valid. But how is the third on the Watson? It differs as to the kind of loan and the personal security. Such personal liability, when the vessel is not lost, (which is the fair construction of the case, under the express provisions in the bond, that the whole debt or bond should be void if the vessel was lost,) does not impair the bottomry. Jordan v. White, 4 Mart. (N. S.) 340. It is only a personal liability in case the vessel is not lost, which is harmless and common.

It is held in some cases that every maritime hypothecation includes a personal obligation. De Lovio v. Boit [Case No. 3,776]; 3 Burrows, 1394. And the borrower is of course personally liable if the ship arrives. Abb. Shipp. 163; 2 Bl. Comm. 457; 2 Hagg. Adm. 48; The Draco [supra]. That personal liability of the owner is proper in such case, for reasons set out in 11 Pick. 183; Marsh. Ins. 632; 2 Browne, Civ. & Adm. Law, 196, 197; Abb. Shipp. 126, note. In some countries the rule goes further. The Nelson, 1 Hagg. Adm. 176. But when a bond, in such language as here, is the sole evidence of a debt, no personal claim could be enforced after the loss of the vessel in such case. So, if the bond was considered collateral security, and was not the original debt or the sole evidence of it, then the original personal liability would remain, though the collateral security should in such case perish or become a nullity. In such a case the bond may be discharged, or not, and still leave the principal personal liability binding. It would be like the innocent loss of property mortgaged or of pledged property—the original debt would still remain. In this view, whether the bond now under consideration is void, or not, is the question, looking to the fact that it was given on account of the previous personal debt, and that this debt was to remain, though the bond and vessel became lost. Such is the case, piercing into the heart and essence of the transaction. The gist of the objection to the validity of such a bond in bottomry is, that the personal debt or liability is not put at risk on the loss of the vessel, but still survives though the vessel be lost. Here and in Europe it is settled that the per-

son is not and must not in bottomry, in case of a loss of the vessel, be bound for the debt, (though if any materials or salvage come into the owner's hands they must answer for that.) See cases before cited, and The Virgin, 8 Pet. [33 U. S.] 554; The Nelson, 1 Hagg. Adm. 169, 176; [The Tartar] Id. 1, 13; Rucher v. Conyngham [Case No. 12,106]; [Conard v. Atlantic Ins. Co.] 1 Pet. [26 U. S.] 446; 3 Barn. & Adol. 50; The Watchman [Case No. 17,251]; 3 Kent. Comm. 358; 1 Dod. 283, 411.

The only plausible answer urged to this, is, that it has been held in some cases that if the person is looked to, as well as the vessel, it may be deemed good as to the last and void as to the first, being void only pro tanto. The Nelson, 1 Hagg. Adm. 169, 176; Rucher v. Conyngham [supra]; The Virgin, 8 Pet. [33 U. S.] 554. For a bottomry bond may, on several accounts, be good in part and bad in part. 1 Hagg. Adm. 169, 176; Id. 1; The Packet [Case No. 10,654]; 2 Hagg. Adm. 68; [The Divina Pastora] 4 Wheat. [17 U. S.] 69; 2 Dod. 139, 147; Id. 288, 466. Thus it is if part of the consideration is good in bottomry and part not. The Packet [supra]; [The Virgin] 8 Pet. [33 U. S.] 538; [The Aurora] 1 Wheat. [14 U. S.] 107. It might be possible then to obviate the effect of the personal liability—in any event in this way—if it was contained in the bond itself; and not as here in the contract dehors the bond, and did not constitute the gist of the whole consideration, and had been released or abandoned by the obligee before the trial or the controversy. Thus, if the master put into a bond the personal liability of the owner, the latter may be waived by the obligee, and the bond continue good. Abb. Shipp. 160, note. But even then the obligee must himself abandon and separate what is bad. [The Aurora] 1 Wheat. [14 U. S.] 96; The Hunter [Case No. 6,904]. There, too, the original consideration is valid in bottomry, and only the personal security for it becomes void. But here, the whole original consideration for the bond itself, though good enough for a mortgage, was bad for a bottomry, being to remain as a personal pre-existing liability; not to be lost as such, though the vessel should be lost. Thus the original advance was made by the plaintiffs on personal security of the obligor. The bond, as a bottomry, was given sometime after, voluntarily, and only as a guarantee to the pre-existing debt, resting merely on personal security. See verdict, and 19 Me. 9. The personal obligation for the whole was not given up. The bond was collateral to that, rather than the personal security being collateral to the bond. It is usual to go into facts dehors the bond in these cases where creditors contest it, to see whether, in truth, the transaction was one of real bottomry, or not. 20 Pick. 242; 19 Me. 9. All the facts are to be examined and are competent for consideration.

On these explanations of the facts then the original debt appears to have been not risked on the ship but still retained on the person, and only the collateral security of the ship risked. 19 Me. 9; Jennings v. Insurance Co., Semb. 4 Bin. 244. A fortiori, therefore, the debt did not become one in bottomry, and discharged, if the ship was lost, because the facts were just the other way, showing the former still to be held and relied on. So particular are the books to separate personal liabilities from these bonds risked on the ship, that even a bottomry bond otherwise good will be void, if made by a master, where the personal liability of the owner had first been relied on. 1 Dod. 283; The Hunter [supra]; 2 Dod. 139. So, if any other security than the bond is taken, it must be collateral to the bond; and not the bond collateral to that, as to a bill of exchange. And it must be lost or discharged if the vessel is lost. This is the case with a bill of exchange taken beside a bottomry. The Hunter, 1 Dod. 486; The Hunter [supra]; The Zephyr [Case No. 18,210]; 1 Hagg. Adm. 179; Id. 1, 10.

It is proper to allude a moment to another objection to this last bond, pledging two-thirds of the Watson. The jury have found it was not executed to secure advances made for that voyage, or under a previous promise for such a bond, but to secure a pre-existing debt. It is not necessary to decide, whether this alone would avoid the bond, or not, but I cannot permit this point to pass without notice, lest an inference may be drawn as to my views on it, which is not true. If the money be obtained on the pledge of the ship, and for her repairs, though it be used for other purposes than fitting her out by the owner or master, the bond may still be good in bottomry. The lender can look only to the apparent necessity for it. 3 Barn. & Adol. 50; 19 Me. 14; 2 Browne, Civ. & Adm. Law, 186; The Fortitude [Case No. 4,953]. But, I understand, that on principle the loan should then be obtained professedly for the vessel. See Abb. Shipp. 162. In Blaine v. The Charles Carter, 4 Cranch [8 U. S. 328], it seemed to be admitted that a bottomry bond by the owner would not hold unless made for advances connected with the ship. Semb. Boreal v. Golden Rose [Case No. 1,658]; Putman v. The Polly [Id. 11,482]; Hurry v. The John & Alice [Id. 6,923]; Rucher v. Conyngham [supra]; 2 Browne, Civ. & Adm. Law, 196; Hurry v. Hurry [Case No. 6,922]; 1 Dod. 2, 3; 2 Bl. Comm. 457. See Leland v. The Medora [Case No. 8,237]. If the debt be pre-existing and not advances to aid the ship, and if the master hypothecate the vessel for it, by a bond, the latter is undoubtedly invalid. The Aurora, 1 Wheat. [14 U. S.] 96; The Mary [Case No. 9,187]; Abb. Shipp. 203, 204; The Draco [Case No. 4,057]; Hurry v. The John & Alice [supra]; The Virgin, 8 Pet. [33 U. S.] 550; Walden v. Chamberlain [Case No. 17,055]; 2 Dod. 8, 9;

Liebart v. The Emperor [Case No. 8,340]; Hurry v. Hurry [supra]; The Draco [supra]; The Randolph [Case No. 10,837]. I do not see why the same rule should not apply to the owner, though for another reason. If not, the case is not one of a charge on the ship's bottom for aid to the ship, which is the original idea of bottomry, whether by the master or owner. So, why can the master not pledge the ship, except for necessities to the ship? Because he has charge of the ship and the debt is merely to supply the necessities of the ship. Why can the owner do it and legally agree to give, and the lender receive over six per cent. interest? "Usura maritima." Marsh. Ins. 633. Because it may be necessary to obtain means to secure the ship and the voyage, and in this way better to furnish and virtually insure the cargo to the extent of the payment. 3 Kent, Comm. 354; 1 Dod. 278. The reasons are different but the result the same. In any other view, all the statutes of usury could be easily in this way avoided. The interest secured might be twenty per cent. on an old or new loan, disconnected with supplies to the ship, and the vessel be insured at any office for one or two per cent. only. I should come to the conclusion then at once, that a bond for a pre-existing debt like the third one, and perhaps a part of the consideration of the second one, so far as concerning the first bond, was void on that account, also, were it not for the decision in case of The Draco [supra], and adopted as it is in 3 Kent, Comm. 361. But they seem to me in some degrees erroneous by resting on an analogy to cases of respondentia bonds where the general rule is stated to be that they are binding, though for an old debt. [Conard v. Atlantic Ins. Co.] 1 Pet. [26 U. S.] 437; U. S. v. Delaware Ins. Co. [Case No. 14,942]; Atlantic Ins. Co. v. Conard [Id. 627]. They are often, also, given on a mere personal liability. 3 Kent, Comm. 354. I apprehend, likewise, that some error has been run into by confounding bottomries and mere mortgages, as the latter may of course be for old debts and those disconnected with supplies to the ship like mortgages of other property than ships. Hurry v. The John & Alice [supra]; Hurry v. Hurry [supra]. Hence the owner may mortgage the ship for old debts, but why should he be allowed to give bottomry bonds for them, and a door thus be opened wide to usury and oppression? why, unless to aid the ship in an emergency, and not for a former and disconnected transaction or debt? It is conceded, also, that the French law is against such a bond. The Draco [supra]. The bond being given after the ship sails is no exception when given to get money to pay for the advance. Marsh. Ins. 645. The general description of bottomries in most of the elementary treatises fortifies this view. It defines them as given for advances to aid in fitting out the ship on whose bottom they are founded. 2 Emerig. Ins. 385; 2 Bl. Comm. 457; Poth. Cont. act 1, note; Park. Ins. 410; 2 Marsh. Ins. 733–736. The case of The Mary [Case No. 9,187] was a bottomry by an owner to obtain funds for the purchase of a cargo and held to be valid. It is doubtful if for an old independent debt, whether it would have been good except as a mere mortgage. The advances may be from time to time, and not at once, but still they must be in respect to the vessel. The Virgin, 8 Pet. [33 U. S.] 538. Many cases likewise speak of an hypothecation of a vessel being valid, when it is valid only as a mortgage and not as a bottomry. And the distinction in some cases and states is immaterial as to the parties, yet in this instance, in this state, where bottomries need not be recorded and mortgages must be, the distinction is vital as to these plaintiffs in a suit with attaching creditors.

It seems to me that the views in the case of The Draco [supra] do not accord with the current of decisions before cited on this point any more than with sound reasoning as regards the origin of bottomries and the danger of usury, and the admitted inability of the master to give such a bond in such a case. Again, the decision in 19 Me. 9, has been in this case already for the attaching creditor and against the bonds, so far as given for a pre-existing debt for which personal liability was still held, and it is entitled to respect, though not binding as not given on a local statute. See Thomas v. Hatch [Case No. 13,899]; Williams v. Suffolk Ins. Co. [Id. 17,738]; Hancox v. Fishing Ins. Co. [Id. 6,013]; Flagg v. Mann [Id. 4,847]; Smith v. Babcock [Id. 13,009]. So, although in Pope v. Nickerson [Id. 11,274], it was held that bottomry bonds are to be construed liberally for the obligee. So, 6 Bing. 114; 3 Barn. & Adol. 50; 1 W. Rob. Adm. 124; Abb. Shipp. 158. Yet I am inclined to think even an owner cannot make a good technical bottomry bond, unless for advances in some way connected with the vessel. The finding of the jury on this is strong proof that the last transaction was not at the time a commercial consequence of borrowing money to fit out that ship, the brig Watson, which is one of the elements in bottomry. 2 Hagg. Adm. 48. On the contrary, the last bond looks merely an ordinary taking of collateral security for a pre-existing debt, not incurred under a promise of bottomry nor agreed to be thus secured. It is not even recited in the bond, as is done in the first one, that it was executed for advances to this ship or any other. Such a course may answer in cases of respondentia like Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 436, but it certainly does not accord with the technical principles, or the spirit of a bottomry undertaking. In a case like this, however, I should not, after the views of Judge Story, sanctioned by Chancellor Kent and sustained as some suppose by the Case of Conard, Id., dispose of a case is hostility to what seems thus settled. But I feel bound to express my dissent from

their conclusions, and some of the reasons for it, but enforce the doctrine they have maintained till overruled by the supreme court of the United States.

The other objection against the last bond, as to personal liability, is sufficient without this, and on that it must probably be deemer invalid as a bottomry. Nor is this objection cured or aided by the reservation of marine interest in the bond. Marine interest is some evidence that a bottomry was intended, but alone does not make it a bottomry bond. 2 Hagg. Adm. 65; Simonds v. Hodgson, 6 Bing. 114; The Mary [Case No. 9,187]. Some cases hold it to be an indispensable part (The Draco [Id. 4,057]; 1 W. Rob. Adm. 124; 2 W. Rob. Adm. 110), though marine interest may be fixed at 6 per cent. (The Draco [supra]), and, if not expressed, will be implied in the principal (The Mary [supra]; 19 Me. 14; [Conard v. Atlantic Ins. Co.] 1 Pet. [26 U. S.] 420). This makes the question of interest a nose of wax. The validity of the last bond is then too doubtful, on sound principles of bottomry, to justify a judgment on it in favor of the obligee, to the injury of bona fide creditors, who first attached and first took possession of the vessel, and that also without any notice proved to be brought home to those of the pre-existence of such a bond. I would uphold bottomry obligations in legitimate cases, coming clearly within commercial principles; but these unrecorded and unnotified liens on property left in the possession of former owners are not to be encouraged, nor extended beyond established precedents. See Packard v. The Louisa [Case No. 10,652]. Not feeling then entirely satisfied that judgment ought to be rendered on the last bond, as strictly a bottomry bond, it must be made up for only the amount of the second one, with interest; or the value of the Albert secured in that bond, and interest, if they be less in value than the second bond. But it must be only six per cent. This rate of six per cent. results from the present cause running so near the wind in another respect. The risk of the vessel here never took place. But the bond being good in form and substance, and the voyage and risk in course of the execution, I think if the voyage was defeated by third persons, as here, while the matter was executory, the bond is still good. Marsh. Ins. 647, 648. A ship has been held, even if the voyage is defeated by the owner. Wilmer v. The Smilax [Case No. 17,777]; 2 Browne, Civ. & Adm. Law, 530; The Draco, [supra]. But the interest allowed must be only 6 per cent., as the marine risk never actually began. Marsh. Ins. 647; Williams v. Steadman, Holt, 126; Skin. 345; 3 Kent, Comm. 357. The obligation remains good, like a mere mortgage, sometimes, though becoming bad, as a bottomry by the risk never being incurred. Thorndike v. Stone, 11 Pick. 188. But here the bottomry on the Albert was good till obstructed and the voyage defeated by the attachment and sales by the defendant and those he acts under, and consequently it must prevail.

[NOTE. In Case No. 5,747 the plaintiffs moved to amend their writ by striking out the names of certain officers of the Exchange Bank, in order to give the court jurisdiction. The motion was granted. In Case No. 5,748 the surrender of the charter of that bank was suggested, and it was decided that the suit against it thereby abated, leaving Smith the sole defendant, who thereupon (Id. 5,749) filed a plea of a former judgment in bar, to which plea there was a demurrer and joinder. The demurrer was allowed, and the case ordered to trial.]

GREELY (WILKINSON v.). See Cases Nos. 17,671 and 17,672.

Case No. 5,751.

In re GREEN.

[7 Biss. 338;[1] 15 N. B. R. 198.]

District Court, W. D. Wisconsin. Jan. 19, 1877.

GAMING CONTRACTS — NOTES VOID FOR WANT OF CONSIDERATION.

1. Contracts of sale that do not contemplate the actual bona fide delivery of the property by the seller, nor the payment by the buyer, but are intended to be settled by paying the difference in price at some future time are gambling contracts, and the broker stands in no better position than the seller to recover differences.

[Cited in Third Nat. Bank v. Harrison, 10 Fed. 249; Ward v. Vosburgh, 31 Fed. 15.]

[Applied in Barnard v. Backhaus, 52 Wis. 604, 6 N. W. 252, and 9 N. W. 595.]

2. If there is no legal liability to pay a claim, notes given therefor are void for want of consideration. Various cases cited and commented upon.

[Cited in Clarke v. Foss, Case No. 2,852.]

[Cited in Justh v. Holliday, 2 D. C. 353; Whitesides v. Hunt, 97 Ind. 196.]

[In bankruptcy. In the matter of John Green.]

H. M. Lewis, for assignee.

Gregory & Pinney, for creditors.

HOPKINS, District Judge. Richard Green proved a claim of $7,715.16 against the bankrupt's estate, and James Norris of $1,877.23. The assignee moves to expunge Norris' claim and to reduce Green's. The grounds upon which the motion is made are, that the contracts upon which the claims are based were void, first, by the statute of frauds, and second, that they were gaming contracts. In the view I have taken of the case, it is only necessary to consider the latter. There has been considerable testimony taken, and it is in some respects quite contradictory, but I think the conflict is more apparent than real. The proof shows that the part of the claim of Richard Green which is objected to, and all

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of Norris' claim, arose out of losses on wheat contracts, and it is claimed that no wheat was in fact bought or intended to be bought, but the transactions were only purchases of options—wagers on the price of wheat at a future day, and void under the statute of this state on the subject of betting and gaming. Taylor's St. p. 1881, § 16. If the contract for the purchase and sale of wheat was only colorable and neither party intended to deliver or accept the wheat, but only to pay differences according to the rise and fall of the market price, it would be a gaming contract and void. The form of the contract would not be conclusive. Courts would look into the matter and determine whether the parties really meant to purchase and sell, or whether the transaction was but a mere bet upon the future price of the article. This must be determined by the evidence and circumstances attending the making of the contract and the conduct of the parties in reference to it. The form of the contract would not control or be very material if the transaction itself was illegal. Add. Cont. (Cave's 7th Ed.) p. 209; Pickering v. Cease [79 Ill. 328]; Kirkpatrick v. Bonsall, 72 Pa. St. 155; Cassard v. Hinman, 1 Bosw. 207; Grizewood v. Blane, 73 E. C. L. 526, 20 Eng. Law & Eq. 290; Rourke v. Short, 25 Law J. Q. B. 196; Enderby v. Gilpin, 5 Moore, 571. The court in 72 Pa. St. 155, after stating that gambling must not be confounded with mercantile speculation, for that is proper, says, "merchants speculate upon the future price of articles in which they deal, and buy and sell accordingly. They forecast the future and buy and sell in a bona fide way, which is unobjectionable. But," (the court says) "when ventures are made upon the turn of price only, with no bona fide intent to deal in the article, but merely to risk the difference between the rise and fall at a future time, the case is changed. No money or capital is invested in the purchase, but so much only is required as will cover the difference or margin as it is figuratively termed. The bargain represents not a transfer of property but a mere stake or wager upon its future price. * * * Such transactions are destructive of good morals and fair dealings, and of the best interests of the community."

Against such transactions the statute is aimed, and when they are proven, the parties must in this state be left without remedy. They are unlawful and void as contravening a sound public policy as well as the statute of the state. Our statute has gone further than the English statutes on this question; ours makes void all agreements and contracts to pay money lost on a wager either to the party winning or to a party who advances it to aid in the enterprise. It is unlawful to bet and equally so to lend money for that purpose. No cause of action arises in favor of a party to an illegal transaction nor will the law lend its aid to enforce any contract which is in conflict with the terms of a statute or a sound public policy or good morals. Ruckman v. Bryan, 3 Denio, 340; Armstrong v. Toler, 11 Wheat. [24 U. S.] 258; Hooker v. Knab, 26 Wis. 511.

It has also been held that where a stakeholder pays over the money to a winner by the direction of the loser after the bet is decided that it will not prevent a recovery back of him by the loser. Ruckman v. Pitcher, 1 N. Y. 392. Having ascertained the law applicable to such transactions, the question recurs upon the evidence: Did the bankrupt intend or mean to deal in the property, or only pay the difference in price at a future day? If the latter, the contract within the decisions above referred to is void.

It is insisted that both the claimants acted as agents only for the bankrupt in buying, and were not the parties selling, so that, conceding the rule of law to be as above stated, they do not fall within it; that they paid the money to the parties selling to the bankrupt, and although the purchase was made through them as agents of the bankrupt in the usual way of trade, and with knowledge of the illegal nature of the contract, still the bankrupt is liable to them for money paid to third parties for the differences, and that it is in the nature of a claim for money paid at his request, and is not within the prohibition of the act. Reliance was placed upon the case of Rosewarne v. Billing, 109 E. C. L. 316, to sustain this claim. That was an action by a broker to recover of his principal money paid by him for differences on illegal contracts for the purchase of shares of railroad stock made by the broker for the principal. The court say that no action could be maintained to recover the differences on such time contracts, but that when such losses were paid by a party at the request of the defendant, such party could recover. The court hold that such contracts are void, but not illegal, and not being illegal, a party paying at the request of the defendant could recover. But this is not the doctrine of the courts of this country. They hold them to be illegal; they say they are unlawful as in conflict with sound morals and public policy as well as inhibited by the statute. But this is not all. Our statute is broader than the English statute. The statute of this state declares all contracts, notes or agreements for reimbursing or repaying any money knowingly advanced for any betting or gaming at the time or place of the gaming or betting to be void. These parties, it seems to me, fall within that statute. They advanced the margins at the time to make the gaming contract, and without their aid in that respect the contracts would not have been made. So if these contracts are gaming contracts, they must be held to have advanced the money for margins to make them, and their claim for repayment falls within the prohibited class mentioned in the act. They made the illegal contracts and advanced the money re-

quired to give them colorable validity. To take their case out of the statute would be establishing a most flagrant evasion of its provisions.

If the bankrupt had requested a party to pay the difference for him after the loss, and such party had not been an actor, nor aided or assisted in the unlawful dealings out of which the loss grew, there would be some reason in allowing him to recover. He would be an innocent party. Jessopp v. Lutwyche, 10 Exch. 614. In such a case the consideration would not, as to him, be illegal; he would not be chargeable with the act declared to be illegal. But here the statute, as before stated, declares all promises or notes to repay money advanced at the time and place, void. The money here was advanced at the time and place. The contracts of purchase were in the names of these claimants. Their claims are not for money loaned to the bankrupt to pay differences, but for money paid by them for differences and for which the bankrupt was not liable.

The case of Steers v. Lashley, 6 Term R. 61, very closely resembles this. That was an action on a bill of exchange by an indorsee with knowledge of the consideration. In that case the defendant had engaged in several stock jobbing transactions in which Wilson was employed as his broker and had paid the differences. Wilson drew the bill for a part of those differences, which defendant accepted; it was then indorsed to the plaintiff but with knowledge of the facts. Lord Kenyon before whom the case was tried ordered nonsuit. A motion to set it aside was made on the ground that as the broker had paid the difference for his employer, which was the consideration, the bill was not vitiated by the original transaction, citing Faikney v. Reynous, 4 Burrows, 2069, and Petrie v. Hannay, 3 Term R. 418. Lord Kenyon denied the motion, and said that in the cases referred to, the money had been loaned to pay the difference, and afterwards the securities were given for the money so loaned. "But here (he said) the bill on which the action is brought was given for the very differences which Wilson could not enforce payment of himself," and as the plaintiff took the bill with knowledge he occupies no better position.

If the law was correctly stated in that case, it settles the question that a broker who transacts the illegal business, and pays the differences, cannot recover of the principal the money thus paid; a proposition so clear to my mind that it would hardly seem necessary to quote authority to sustain it. But, plainly as it appears, the case of Rosewarne v. Billing, supra, cited by the claimant's counsel, seems to sanction a different doctrine. But I do not think that case can be regarded as the law upon this point in England. There are cases in conflict with it, so I think it may be safely asserted that the weight of English authorities is with Steers v. Lashley, supra.

If transactions like these are illegal I know of no reason why the broker should be favored, or exempted from the usual consequences that attach to other parties aiding or assisting in the commission of unlawful acts. It makes their business quite hazardous, but that grows out of its illegal character. They can refuse to aid in transactions of such a character, and if they would do so, a great deal of that kind of gambling would stop. Parties like this bankrupt living in the country without means or privileges upon the exchange boards could not embark in such gambling business without their aid. Through brokers and commission men they get access to the exchange boards, and by reason of such facilities are enabled to engage in these gaming contracts which generally end like this, in ruin and bankruptcy.

To their complaint of hardship it is a sufficient answer that they should not aid and assist parties in transactions condemned both by the law and the principles of sound morality. If they do, they must take the consequences like other transgressors.

Having ascertained that contracts of sale that do not contemplate the actual bona fide delivery of the property by the seller nor the payment by the buyer, but are intended to be settled by paying the difference in price at some future time, are held to be gambling contracts and that the broker stands in no better position than the seller to recover differences, it only remains to examine the testimony and see whether the contracts in this case were such. And upon this point I do not intend to go over the testimony in detail. It is self evident from the testimony and the condition of the parties that these sales were not bona fide. The bankrupt was not a dealer in grain. He was a country merchant of little or no means; had no money to invest in wheat, that is to pay for wheat, which fact both Richard Green, his brother, and Norris knew. The idea that they bought for him several thousand bushels of wheat with the expectation that he was to pay for it is preposterous. He swears they did not and it is apparent that he could not, and they knew it.

He did not put up any money even for margins, or but a small amount, if any, and made no arrangements with them to do so. Norris says the wheat was bought for him in their firm name. That probably may have been so in the sense that term is used "on change," but that there was a bona fide purchase, with the intention that he would take and pay for such large quantities of wheat I do not believe. The purchase it is claimed was made in the name of Norris & Spencer, the brokers, not the bankrupt's, and that they had a number of contracts and perhaps some warehouse receipts for grain is quite probable, and that they might have considered such contracts as the property of the

bankrupt, and charged the wheat to him on their books on receiving his order to buy, so as to make a colorable sale, is not improbable, but that they expected payment for the whole, the testimony completely negatives. The fact that the parties charged the bankrupt with the price of the grain when he ordered it purchased and credited him with the price sold for, when sold, does not prove what the real transaction was. That only represents the form, not the nature of the transaction. It was as well to keep the account in that way when the real intention was to speculate in and pay only the differences as when the sale was of the article itself. The books would show the differences if it was to pay them, and the profit or loss if it was a genuine sale. The books were properly kept in either case, and do not therefore furnish any evidence as to what the contract was.

But it is said that the bankrupt settled with Norris, and gave him notes, and that these notes are good, if the account was not. That is not so. If there was no legal liability on the part of the bankrupt to pay the claim, the notes given therefor are void for want of consideration. This point is expressly ruled by the supreme court in Hooker v. Knab, 26 Wis. 511. See, also, Steers v. Lashley, 6 Term R. 61. The question whether the bankrupt could have defended on this ground as against a bona fide holder of the notes, does not arise here, as the original parties are alone before the court. The claim of Norris is therefore invalid, and his proof is rejected.

As to Richard Green's claim, the pretended contracts of purchase were made in his name, and not in the name of the bankrupt, and the testimony shows that as between them, all that either ever contemplated was the payment of differences. Under the evidence this is too plain to admit of question or discussion. His claim so far as such differences on grain contracts, are included, is disallowed and the proof is rejected. But as there are some other items of account that are proper and should be allowed, it will be referred to the register to take and admit proof of such other items. The motion of the assignee to expunge the proof of such parties is therefore granted.

Consult Ex parte Young [Case No. 18,145]; also, Clark v. Foss [Id. 2,852].

Case No. 5,752.

GREEN et al. v. The ADELAIDE.

[Taney, 575.] [1]

Circuit Court, D. Maryland. Nov. Term, 1857.

COLLISION—BETWEEN SAILING VESSELS—SIGNAL-LIGHTS.

1. A vessel at anchor in a public channel, on a dark and stormy night, without having the proper signal-lights set, can have no claim for damages sustained from a collision with another vessel.

[Cited in J. W. Everman, Case No. 7,591.]

2. But where such lights are set, and are not seen by the vessel under weigh, until within fifty yards of the other vessel, and unskilfulness is displayed in the measures then used by the vessel under weigh, to avoid a collision, she will be held responsible for the consequences thereof.

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

This was a proceeding in rem, instituted by the owners of the brig Laurel and the owners of her cargo, against the schooner Adelaide, to recover damages sustained by a collision between the two vessels, on the 8th of December, 1856. The libellants charged, that on the 8th day of December, 1856, about five o'clock a. m., the said brig being at anchor near Willoughby's Point lightship (below Hampton Roads), under the charge of the pilot, and all hands being on deck with the pilot, preparing to weigh anchor, with a signal lantern hoisted at the forestay; a vessel was perceived coming down upon the brig. As soon as the last-mentioned vessel was perceived thus bearing down, the crew of the brig, or some of them, commenced hailing, to warn the strange vessel, and continued hailing until just before the collision occurred. Captain Hays, the master of the brig, likewise kept waving a hand-lantern on deck for the same purpose, until the collision occurred. The collision took place, and by it the brig had her mainmast carried away, and her covering-board, plank shears, water-ways, and bulwarks broken, and suffered other damage, which she was compelled to put into Norfolk to repair; whereby the cargo also suffered damage by the delays and expenses incident thereto. The colliding vessel proved to be the schooner Adelaide, of Plymouth, Massachusetts; and if she had kept a proper watch she must have seen the brig lying at anchor, and have heard the hailing from her in time to have prevented the collision.

The defence taken in the answer was, that the schooner had encountered, during the night, a severe storm, and lost her flying-jib, which rendered her unmanageable, and was making for Hampton Roads for an anchorage. About five o'clock in the morning, before day, when about two miles east from Willoughby's Point light-boat, the wind still blowing very fresh, and in squalls, from the N. N. W., all hands and officers being on deck, the mate tending the jib-sheets, and keeping a look-out, a vessel was discovered ahead, which proved to be the brig Laurel. The atmosphere was thick and hazy, particularly towards the land, in which direction the brig was, and objects could not be seen far off; the brig had no lights discernible to any one on board the schooner, and the master, and all hands on board the respondent's vessel, thought that the brig was under weigh, and on a different tack from the schooner, and that they would at every moment be

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receding further and further from each other. The brig, however, was not more than fifty yards off when first seen, and in order to avoid, as far as might be, all possibility of collision, the mate, who was the first person to see the said brig, the moment he saw her, cried out, "Heave the helm up," which order was instantaneously obeyed; the schooner began to fall off directly, but the wind was very flawy, and a flaw struck her as she was going off, and prevented her doing so. Soon after the brig was descried, a light was perceived moving about on board of her, which confirmed the impression of those on board the schooner that the brig was in motion; a cry was heard from the brig which those on board the schooner could not understand, and in a moment after another cry, "Keep off;" but inasmuch as everything had been done which was possible on the part of those on board the schooner, from the moment the brig was first seen, to avoid a collision, the warning was of no avail. That the said schooner having lost her flying-jib, and being a flat-bottomed boat, it was impossible to make her tack, except after long and repeated trials, and the last time it had been attempted before the collision, she had failed four times; and the order so given and obeyed, as aforesaid, was the best way of avoiding collision, and would have prevented one, if it had been in the power of those in charge of the said schooner, by any possible means, to do so; but in spite of the most skilful management on the part of those in charge of said schooner, in consequence of the direction and violence of the wind, and the sudden flaw striking her as she was beginning to fall off, she was driven against the said brig. That everything that prudence could suggest was done to avoid collisions and danger of every sort, by those on board the schooner, and inasmuch as a diligent look-out was kept by them during the night, they must have seen any lights properly set on board the brig, but as they did not see them, there could not have been any such. The libel was dismissed by the district court (Giles, J.) [case unreported], and an appeal was taken to this court. A great deal of conflicting testimony was taken, the substance of which is stated in the opinion of the court.

Brown & Brune, for appellants.
Wallis & Thomas, for appellees.

TANEY, Circuit Justice. This is a case of collision; in cases of this description, it almost always happens that there is a conflict in the testimony; and the case before the court is not altogether free from that difficulty. It is admitted, that the brig Laurel was at anchor in the Chesapeake Bay, about two miles below the lighthouse on Willoughby's Point, the lighthouse bearing west from the brig; it appears, that it is usual for vessels to anchor at that place, and also for smaller vessels, like the schooner, to sail over it. The collision took place about five o'clock, or a few minutes before, in the morning of December 9th, 1856, when the day had not yet dawned; the wind was heavy from N. N. W., and squally, with frequent flaws; the night was starlight with a few scuds; the brig headed about N. N. E., being swung round a little by the flood-tide, it being, as the pilot on board the Laurel says, near the last of the flood.

The first question in dispute is, whether the brig had a signal-light hung out at the proper place; and upon this point there is some contrariety in the testimony. If she had not such a light, the fault was undoubtedly on her part, and she would have no claim for the damage she sustained by the collision. But I think the proof on behalf of the Laurel, is conclusive on this question. The testimony of every witness who was on board the Laurel, concurs in establishing this fact; and it is impossible to doubt it, without imputing to them a concerted plan of misrepresentation; they all speak positively as to the particular period of time at which they noticed the light, and the pilot says he saw it there immediately after the collision. I see no sufficient ground for doubting their truth, or the accuracy of their several statements.

There is some apparent conflict between this evidence and that offered by the respondents, but none, I think, that can impair its weight. These witnesses say they saw no light before the collision, except the lamp brought up by the captain of the Laurel when he heard the alarm. All of this may be very true, they may not have observed the signal-light forward, in the moment of excitement and alarm at the impending collision; their attention was fixed upon the position of the ship which they were so nearly and rapidly approaching, and not upon the manner in which she was lighted. The pilot of the Laurel himself says, that when he came on deck, at the first alarm, he did not observe whether the signal-lamp was burning or not, because his attention was fixed upon the approaching schooner; but went forward immediately after the collision, and saw that it was burning and in its proper place. The mate of the schooner, indeed, says, that after the collision was over, and the schooner had anchored, he saw the light and also one aft, put up; the amount of this is nothing more than that he then saw them up; not, I presume, that he saw them in the act of going up; and if he is even understood to mean that he saw when they were actually going up, his testimony would hardly be sufficient to outweigh the concurring testimony of so many witnesses to the contrary; for, it must be remembered, that this witness was the look-out at the head of the schooner, and had strong temptations to acquit himself of the charge of neglect of duty, in not observing a signal-light, until he was within fifty yards of the vessel.

I think, therefore, that no negligence or

fault can be imputed to the brig; and the question remains to be examined, whether there was negligence or fault on the part of the schooner. In this part of the case there is no material conflict of testimony; and I take the facts as stated by the witnesses for the respondents.

It appears, that the Adelaide had been all that night beating into the capes, and up the bay, against a heavy head wind; she had lost her flying-jib, and was less manageable on that account, and was endeavoring to reach an anchorage in Hampton Roads; she had made her way so far up as to be nearly abreast of the light-boat on Willoughby's Point. The wind, as the captain of the schooner states, was about N. N. W., when the Laurel was first seen, and before the helm was put up, the schooner was heading W. N. W., being closehauled to the wind and with all her sails set; she was standing across the bay from the eastern side, and the Laurel, it appears, was lying at anchor about two miles below, east of the light-boat, and directly in the track of the Adelaide. It was a starlight night, in which a vessel under sail could have been seen at the distance of more than a mile, although she carried no light; the Adelaide was seen by those on board the Laurel at that distance; yet it appears, and is proved by the testimony of the respondents, that no one on board the schooner saw the Laurel, until they had come within fifty yards of her. I do not see how this can be accounted for, except by the want of a proper look-out. It is true, that the mate was stationed, it is said, as a look-out ahead; but it is not sufficient that a person should be stationed as a look-out, and be called a look-out; he must perform that duty, and perform it diligently; and it is impossible to believe that a vessel like the brig, with a signal-light up, could not have been seen by a diligent look-out on board the Adelaide, long before she approached within fifty yards. The mate says he is an experienced and competent look-out; this may be so; and it may have happened, and probably did happen, that heading a little to the windward of the Laurel, she was hid from their sight by the sails of their own vessel, as they stood upon or walked on the deck; and being unaccustomed, as he says, to the navigation of the Chesapeake, he may have supposed that no vessels anchored in that wide water, and kept his look-out rather for vessels which, with that wind, might be expected to come down the bay. But this is no excuse for the omission; it was his duty to keep a vigilant look-out to the leeward as well as to the windward and ahead, and if he had done so, he could not have failed to see the light at a much greater distance. As this negligence produced the collision, the fault was on the part of the schooner, and she is responsible for the consequences. His want of acquaintance with the usages of navigation in the Chesapeake, and the usual places of anchorage, would be no excuse for his omission; he was bound to know, or to have some one on board who knew, the usages and customs of vessels accustomed to navigate these waters, and the places at which they occasionally anchored.

Some testimony has been offered for the purpose of showing, that the light may have been obscured, and the mate of the schooner prevented from seeing it, by a haze on the water, and by an obscurity and darkness produced by contiguous land. As to the haze on the water, the mate himself says he saw the light after the Adelaide had anchored, after the collision; and the pilot on board the Laurel says, that the Adelaide anchored at the distance of about three hundred yards. And surely if the haze on the water did not prevent him from seeing the lights, after the collision, at the distance of three hundred yards, he ought to have seen them before the collision, at an equal distance, and might and would have seen them, if he had looked out for them in the proper direction. And as to shadows or obscurity supposed to be occasioned by the vicinity of the land; there was no land to the west, to which point she was standing at the time, nor indeed, anywhere else nearer than five miles, and all of it low, with no elevated points; it is impossible that it could have exercised any influence in obscuring the light. I take the distance of the land, as well as of the anchorage of the schooner after the collision, from the testimony of the pilot; he is undoubtedly the most competent judge, and he can have no personal feeling, as his conduct is not impeached on either side.

But even if those on board the Adelaide could acquit themselves of the charge of negligence in relation to the look-out, their conduct, after they discovered the Laurel, would render their vessel responsible for the damage; for, it is obvious, upon their own testimony, that the collision could even then have been avoided by proper seamanship and ordinary precaution. When they saw the Laurel, it seems, they supposed her to be under weigh on the opposite tack, and from the manner in which she was heading, supposed they would pass each other safely, by putting the helm of the schooner hard up, so as to make her fall off from the wind, and say, they would have cleared her, if the Adelaide had not been struck by a flaw of wind which checked her in falling off. Now, they knew from the experience of the night, that the wind was squally; they knew that she had her mainsail, foresail and jib, all set and drawn nearly flat, as they were sailing close upon the wind; they knew also, that the pressure of the wind upon the mainsail had a constant tendency to prevent her falling off, and to make her luff, when a flaw of wind struck her, and with all this knowledge, they relied altogether upon the rudder to make her fall off, and

took no measures to assist or hasten it, by removing the counteracting influence of the mainsail. If that sail had been lowered, or the main sheets let go, the wind would have pressed altogether on the head sails, the schooner would have fallen off much more readily, and the flaw of wind which struck her would have aided her motion in that direction instead of retarding it. This precaution was rendered still more necessary and obvious, because she had lost her most important head sail, her flying-jib; and did not, therefore, so readily obey the rudder when the helm was put hard up. And when the vessels were so near, and the danger of collision so imminent, it was the duty of the schooner to have brought the sails to the aid of the rudder, and to have removed the strong counteracting influence of the mainsail drawn, as it was, nearly flat.

The neglect of these means can only be accounted for, by the mistake they made in supposing the Laurel to be under weigh and heading to the windward of the Adelaide upon the opposite tack; they seem, therefore, to have been under the impression, that a very slight falling off by the schooner would clear them of each other. It is difficult to imagine how practised seamen, like the master and mate, could have committed this mistake, when they were within fifty yards of the vessel, with her sails all furled, and on a starlight night; such a mistake can hardly be an excuse for running into her, when it might have been avoided by proper exertions, although she was at anchor. The mate says he was considerably excited, when he first saw the Laurel so near and directly before him; this was natural enough; but it ought not to have deprived him of his calmness and self-possession, nor prevented him from observing the true position of the vessel, and doing everything that seamanship could accomplish to prevent running into her. And if there had been no previous negligence in the look-out, the omission after she was seen, to use the means in their power to avoid the collision, would, of itself, make the Adelaide responsible. Upon each of these grounds, therefore, I think the decree of the district court is erroneous, and the libellants entitled to recover the full amount of the damages sustained by the Laurel.

Case No. 5,753.

GREEN et al. v. ALLEN.

[2 Wash. C. C. 280.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1803.

JUDGMENT—LIEN.

The lien of a judgment which bound real estate, is not lost, if after a testatum fieri facias has been levied and returned, the plaintiff in the writ, ordered further proceedings to be stayed. Aliter, if personal property is levied upon, and suffered to remain in the hands of the defendant in the execution.

[Cited in Trapnall v. Richardson, Waterman & Co., 13 Ark. 543.]

Judgment was obtained by the plaintiffs, in this court, on the 10th of December, 1807. A fieri facias issued, returnable in April, 1808, which was levied on the personal and real estate of the defendant: the personal being sold, and being insufficient to discharge the debt, the real estate of the defendant, lying in Bucks county, was, upon an inquest taken by the marshal, returned to be insufficient by its rents, to pay the debt in seven years. Upon this return, a venditioni exponas issued, returnable to the present term, by virtue of which the real estate was sold, and the money is now in the hands of the marshal. In December, 1806, James M'Culloch brought a suit, and in March, 1807, obtained a judgment in an action of debt on a promissory note against the same defendant, in the court of common pleas of Philadelphia county. On the 19th of August, 1807, a testatum fieri facias issued to the sheriff of Bucks county, on this judgment, who levied it on the same land, and returned, on the 25th, that it had that day come to hand, and that further proceedings had been stayed by order of the plaintiff. No further proceedings appear to have been taken.

On a rule obtained, by Meredith, counsel for the plaintiff, to show cause why this judgment should not be satisfied, (it appearing that the sale of the land is not sufficient to satisfy both judgments,) THE COURT were of opinion, that the levy made in August under M'Culloch's execution, gave him a prior lien, which the suspension of further proceedings did not impair, so as to give a preference to the plaintiff in this motion. This is not like an execution levied on personal property, where the property is suffered to remain in the hands of the debtor. Rule discharged.

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

Case No. 5,754.

GREEN v. The CITY OF BRIDGETON.

[9 Cent. Law J. 206; 20 Alb. Law J. 257.] [1]

District Court, S. D. Georgia. May, 1879.

CIVIL RIGHTS—COMMON CARRIERS — REASONABLE REGULATIONS—CASE IN JUDGMENT.

1. Congress has enacted no law which forbids inter-state common carriers by water or land from regulating the business of their vessels or vehicles in such manner that the accommodations for colored passengers and their respective conveyances may be distinct and separate from those assigned to white passengers. Colored persons are, however, entitled to accommodations as suitable as those designated for the exclusive use of white passengers.

[1] [Reprinted from 9 Cent. Law J. 206, by permission. 20 Alb. Law J. 257, contains only a partial report.]

2. The libellant, a colored woman, went on board a steamboat and took her position as a passenger on the upper deck aft, a portion of the boat assigned to the exclusive use of white passengers. She was directed by one of the officers of the boat to the cabin on the lower deck, a place affording substantially the same accommodations as the place where she now was, but designed especially for colored people. She refused to do so, and tendered the customary fare, which was declined. Having been threatened that she would be put off the boat at the next landing place if she persisted in remaining where she was, she voluntarily left the boat at such landing place. *Held*, that she had no cause of action for such exclusion.

In admiralty.

ERSKINE, District Judge. The libellant states that the steamboat, City of Bridgeton, in September, 1878, the time of the alleged tort, was a common carrier of freight and passengers for hire, at certain specified rates, between the city of Savannah and Palatka, in the state of Florida, and intermediate points, including the port of Darien, in this district; that said steamboat being at the wharf of Darien, and libellant desiring to go to Savannah, went on board, carrying with her a three-year-old child, her nephew, and took her position as a passenger, with said child, on the upper deck aft, which was the only place or portion of the steamboat having any comforts or conveniences for passengers; that those who were willing to travel without the usual comforts and conveniences, were transported on the lower deck, but that said place was unfit for libellant and child; that some time after leaving the wharf the purser of the steamboat came to libellant, and declining to take any passage money from her, directed her to go to the lower deck, and, on her declining to do so, he informed her that he would put her off at Doboy wharf, to which place the said steamboat was drawing near; that she then appealed to the captain of said vessel, but obtained no substantial justice or protection; that on reaching Doboy, a port within this district, and having previously tendered the customary fare, which had been declined, the purser insisted that she should ride on the lower deck or that he would have her put off. Under these circumstances, and libellant not deeming the lower deck a fit place to occupy, and not desiring to be ejected from the steamboat with violence, yielded to the forced alternative, and with the child went out upon the wharf at Doboy and was compelled to remain there nearly six hours, when she was taken off by a passing steamer, and reached Savannah the next day; and by reason of said officers not allowing her to enjoy and receive the benefits of a first-class passage upon said boat, and by reason of their not performing their duties to carry her safely and properly, she has been damaged one thousand dollars. And also, that by reason of said illegal and unjustifiable actions of the said officers, and the manner in which she was forced to leave said steamboat, and the pain, indignity and humiliation thus done to, and inflicted upon her, she has suffered damage to the amount of two thousand dollars, in addition to the damages hereinbefore referred to, etc.

The answer of Lawrence, the claimant and agent, denies that libellant was entitled to the accommodations or particular privileges claimed by her, or that the lower deck was an unfit place for her to occupy as a passenger, but admits that the purser did tell her to go to the lower deck; that the purser gave her the option to accede to the rules and regulations or to go ashore at Doboy; that she went ashore there of her own volition and without paying any fare; that the rules and regulations of the boat, for the protection of passengers, and for the separation of the white and colored passengers, were reasonable and necessary for the prosecution of the business of the boat; that the upper deck and the cabin thereon were used solely by, and exclusively appropriated for white passengers, and the lower deck and cabin assigned for colored passengers and respectable people; and that these regulations were known to libellant at that time; that the lower cabin and deck were well ventilated, the state-rooms perfectly private and well fitted up, and the accommodations good and ample; that the accommodations offered to her, and which would have been provided for her, but for her own conduct in insisting to ride on the upper deck, were good, ample and sufficient for her, and all she had a right to expect or demand. Another reason given by respondent for the purser's telling her to leave the upper deck, was that he had been informed by a passenger that she was a person of immoral character. But the evidence adduced, legally viewed, does not sustain this averment. Neither does it show any defamatory intention on his part. Therefore, I leave this matter entirely out of view in deciding the cause. I may remark that I find no material discrepancy between the answer of Lawrence and the testimony of Richardson, the purser.

The libellant testified that while on the upper deck aft, the purser asked her if she had a ticket; she said "No;" that he then told her she must go down stairs and ride with the other colored people; that from this order she appealed to the captain, but without success; that she tendered the purser the fare, five dollars, but he declined it, telling her that the rules of the boat forbade her riding on the upper deck or in the upper cabin, for they were appropriated exclusively for the white passengers, and that if she did not go down stairs he would put her off at Doboy; that, declining to obey the order, on the arrival of the boat at Doboy she asked the purser if he meant to put her ashore, and he said "Yes;" that then she went ashore and remained there some five hours, and then took another boat for Savannah. On her cross-examination she said: "I demanded

to ride in the same cabin with the white people and on the same deck, and demanded the same and equal accommodations which the white people enjoyed, with the exception of going to the first table. * * * I insisted on riding up stairs in that cabin, and the purser insisted that if I did he would put me ashore at Doboy; I went ashore because I was afraid, from the way he spoke to me, that he would put me off, and having my nephew I was afraid one or the other of us would fall overboard. Nobody laid hands on me to put me ashore. * * * I did not ask him if he could furnish me a state-room down stairs, nor did I care whether he could or not, as I was unwilling to ride on the deck when out of my state-room. I would have refused any state-room he offered me down stairs, unless he would have allowed me to ride up stairs; by up stairs I mean the cabin, which the purser told me was allotted to white people. There were plenty of white passengers on board. I know the reason I went ashore at Doboy; it was because I insisted on riding in the cabin up stairs, and the purser would not allow me to do so. But for that refusal I would not have gone ashore at Doboy."

Lawrence, the claimant and agent, testified that there are two other decks and cabins besides the one referred to by libellant in her testimony; one deck, or a portion of it, is for deck passengers; on the other deck are four state-rooms, which are generally set apart for colored passengers, but when there are none, and the boat is crowded, white passengers are placed in them; that if libellant had been content with these accommodations she could have had a state-room. These, he states, are perfectly private and convenient, and the fare from Darien to Savannah is five dollars for first-class, white or colored passengers. That in the cabin set apart for colored passengers, no one is allowed to ride except those who have first-class tickets and are colored, unless no colored passengers occupy that deck, and the boat is crowded, as stated; that the fitting up of these state-rooms is equally as comfortable as that in the upper cabin, the painting the same, carpets not as comfortable as in the white cabin, but the bedding is exactly the same in both cabins.

The testimony of Fleetwood, the master of the steamboat, is of like purport and effect as that of Lawrence. The master also testified the libellant while on board, was noisy and exhibited much passion; that she had been playing on the piano, waltzing around the cabin, and making herself generally conspicuous, and that when she was going ashore at Doboy he saw and heard her threatening the purser, and daring him to come out on the wharf, saying what she would do with him. And the purser swears that libellant was not, to his knowledge, treated rudely or roughly while on board, and that it was his purpose to get along pleasantly with her. The libellant swears that she was treated by the purser rudely and harshly, not decently or respectfully. "He used no abusive language to me, with the exception of the tone of his voice, just as if I was a brute or something. The way he treated me as a brute was, he came to the passengers and collected the fare politely and turned to me and said, 'Say, have you a ticket?' and I said, 'No, but here is the money.' And he said, 'Go down stairs, or I will put you off at Doboy.' "

If, indeed, there is any imperfection in the laws regulating commerce among the states, more especially—looking to the controversy under consideration by this court—in regard to the transportation of white and colored passengers in the same cabin or apartment of steamboats, or other public conveyances engaged in inter-state commerce, then this "inaction" (by congress), as was said by Mr. Justice Field, speaking for the court, in Welton v. State, 91 U. S. 275, "is equivalent to a declaration that inter-state commerce shall remain free and untrammelled," and as it has not thought proper to declare that steamboats enrolled and licensed to ply between ports and places of the several states shall be compelled to carry white and colored passengers in the same cabins and staterooms, this court must turn to the common law to ascertain whether the rule of the proprietors or officers of this vessel, the City of Bridgeton, in requiring colored passengers to occupy separate cabins, saloons and state-rooms from those assigned to white passengers, is a reasonable regulation and one, which of right, the common carrier may prescribe and enforce. The right of a passenger to a passage on board of a steamboat is not an unlimited right. The passenger is bound to obey the orders and regulations of the proprietors, unless they are oppressive and grossly unreasonable. Whoever goes on board under ordinary circumstances impliedly contracts to obey such regulations, and may justly be refused a passage if he or she willfully resists or violates them. The City of Bridgeton was held out to the world as a common carrier of passengers, for hire, consequently free to all proper persons who sought transportation to ports or places agreed on within the termini of her route. But the vessel being thus open to passengers did not strip the owners or master of the right to make such suitable regulations as would promote the interests of the owners, and preserve order and decorum. Nor, on the other hand, could the proprietors, or master, be required to put passengers in the same cabin or stateroom, who would be repulsive or disagreeable to each other. See Hall v. De Cuir, 95 U. S. 504. In West Chester & P. R. Co. v. Miles, 55 Pa. St. 209, the court decided that a common carrier may separate passengers in his conveyance, and that it was not an unreasonable regulation, for it prevented contacts and collisions arising from natural and well known repugnances, which

are likely to breed disturbances where white and colored persons are huddled together without their consent.

In the recent case [of Bertonneau] against the board of directors [Case No. 1,361], published in the Atlanta Constitution, of February 26, 1879, and which involved the question as to whether colored children were entitled, as a matter of right, to be educated in the same school with white children, the United States circuit court for Louisiana answered the question in the negative. Said Mr. Justice Woods, in delivering the opinion of the court: "Equality of right does not involve the necessity of educating children of both sexes or ages in the same school. Any classification which presumes substantially equal school advantages, does not impair any rights, and is not prohibited by the constitution of the United States. 'Equality of rights does not necessarily imply identity of rights.'" In Hall v. DeCuir, 95 U. S. 485, in error to the supreme court of Louisiana, Benson, the master of a steamboat, had refused a colored passenger, Mrs. DeCuir (the plaintiff below), the privilege of the cabin set apart for white passengers, notwithstanding the law of Louisiana had declared that common carriers of passengers should make no discrimination on account of race or color. Chief Justice Waite, in delivering the opinion of the supreme court of the United States, said that: "Congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat while pursuing her voyage within Louisiana or without as seemed to him most for the interest of all concerned. * * * We think this statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation, it must come from congress, and not from the states." And Mr. Justice Clifford, in a concurring opinion, said: "It is clear that a steamer carrying passengers may have separate cabins and dining saloons for white persons and persons of color, for the plain reason that the laws of congress contain nothing to prohibit such an arrangement."

The steamboat City of Bridgeton, like all vessels engaged in transporting passengers for hire between the several states, is ranked as a portion of the national marine, and consequently within the governing power of the national legislature. Congress has not deemed it necessary or essential to the welfare of the colored citizen to enact any law forbidding inter-state common carriers, by water or land, from regulating the business of their vessels or vehicles in such manner that the accommodations for colored passengers on their respective conveyances, may be distinct and separate from those assigned to white passengers, yet colored passengers are entitled to accommodations as suitable as those designated for the exclusive use of white passengers. And I am of opinion, upon perusal of the evidence adduced, that the cabin and state-rooms reserved for colored passengers on the City of Bridgeton were substantially equal to those from which the libellant was excluded by the rules and regulations of the boat; and these, so far as they were enforced, were reasonable and highly proper, imposing neither burdensome nor impossible conditions on libellant. And as to the other question for decision, namely: the alleged illegal and unjustifiable manner in which the libellant was, as she says, forced to leave the boat, and the pain, indignity and humiliation inflicted upon her by the officers of the boat, this must be determined by the simple weight of evidence as in other civil cases, and thus guided, my judgment is that she has failed to establish her asserted grievances and mental sufferings. It is therefore ordered, adjudged and decreed that the libel be dismissed with costs, to be taxed by the clerk.

Case No. 5,755.

GREEN et al. v. COLLINS.

[3 Cliff. 494.] [1]

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

ACTIONS ON CONTRACTS—ILLEGALITY—KNOWLEDGE OF VENDOR—LIQUORS.

1. The general rule is, that in an action to recover the price of goods sold, it is no defence that the vendor knew that they were purchased to be sold in another jurisdiction in violation of the law of that jurisdiction, provided it was not part of the contract that they should be used for that purpose, and provided also that the vendor neither did nor agreed to do anything in aid or furtherance of the unlawful design, beyond the mere sale with knowledge of the intent of the purchaser.

[Cited in Graves v. Johnson, 156 Mass. 213, 30 N. E. 818. Followed in Hill v. Spear, 50 N. H. 278.]

2. Contracts in evasion of fraud of the laws of any state are invalid in our courts.

3. If it forms part of the contract that the seller shall do some act in furtherance of the illegal intention of sale by the vendee, such as concealing by packing the liquors, then the seller is a participant in the illegal transaction, and cannot enforce recovery.

[Cited in Tyler v. Carlisle, 79 Me. 212, 9 Atl. 356; Anheuser-Busch Brewing Ass'n v. Mason, 44 Minn. 321, 46 N. W. 558.]

4. The vendor must yield no other aid to the intended illegal sale than the act of selling and delivery. If the vendor takes part in the adventure, he cannot recover.

5. Sale in Rhode Island of liquors to be carried into the state of Massachusetts, of which vendor was aware. In the absence of anything on the part of vendor, except mere knowledge of the vendee's intention to sell the goods in Massachusetts, that sale was valid, and seller could recover in this court in Massachusetts, the sale being valid in Rhode Island, notwith-

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

standing a statute in Massachusetts providing that no action should be maintained in any court of the state for the price of liquor sold in any other state for the purpose of being brought into this state.

[Cited in Almy v. Greene, 13 R. I. 353.]

The plaintiffs [William H. Green and others] were citizens of the state of Rhode Island, doing business at Providence in that state, and the defendant [Bernard Collins] was a citizen of this commonwealth, doing business at Milford in this district. On the 20th of May, 1867, he purchased a bill of liquors of the plaintiffs, valued at $2289.62, and he having neglected and refused to pay for the same, the plaintiffs, on the 13th of February, 1868, brought an action of assumpsit against him in the circuit court for this district to recover the amount. Service having been made, the defendant appeared and pleaded the general issue. Evidence was introduced by the plaintiffs, tending to show that the defendant purchased the liquors of the plaintiffs at the time and place alleged in the declaration, on a credit of thirty days, and that the plaintiffs shipped the same to Woonsocket in that state, by order of the defendant. They were importers and wholesale dealers in liquors, and the proofs showed that they were duly licensed, and that the sale was valid by the laws of the state where it was made. Much testimony was introduced by the parties, which is not important to notice, as the only questions involved were presented in the refusal of the court to instruct the jury as requested by the defendant. Three prayers for instruction were presented by the defendant, which were in substance and effect as follows: (1) That the sale of the liquors in this case as made by the plaintiffs was a void sale; that the plaintiffs could not recover if the sale was made in violation of chapter 86, § 61, Gen. St. Mass., or with the understanding, on the part of the plaintiff, and the defendant, that the liquors were purchased by the defendant for the purpose of re-selling the same in this state, in violation of the laws thereof. (2) That the repeal of that provision since the commencement of the suit did not deprive the defendant of the defence to which he was entitled at the time the suit was commenced. (3) If the liquors were sold upon the understanding that they were to be sold here in violation of any law of the state, the plaintiffs are not entitled to recover, although the law may have been repealed since the commencement of the suit.

Caleb Blodgett, Jr., for plaintiff.

(1) The first part of the defendant's first prayer for instructions, ending with the words "eighty-sixth chapter of the General Statutes of this state," was properly refused, whether the ruling as to the effect of the repeal of the same chapter was correct or not. The contract was made in Rhode Island, and the sale was valid by the laws of that state. Such a sale is not prohibited by the statutes of this state, and could not be. Bligh v. James, 5 Allen, 106. (2) The latter part of the first prayer and the second prayer are together substantially the same as the third, and all were properly refused, if the effect of the repeal of the statute is as the plaintiffs claim. "Any law," as used in the third prayer, must mean the eighty-sixth chapter of the General Statutes, which was the only law affecting the subject-matter of this suit at the time of the sale in Rhode Island, and also at the time the suit was commenced. If there is any defence to this suit it is given by section 61 of the chapter last named, and aside from this section, it is not true "that if the liquors were sold by the plaintiffs to the defendant upon the understanding that they were to be resold here in violation of law," the plaintiffs cannot recover. There must be something more than understanding or knowledge on the part of the plaintiff of the defendant's illegal design. Holman v. Johnson, 1 Cowp. 341; McIntyre v. Parks, 3 Metc. [Mass.] 207; Webster v. Munger, 8 Gray, 584.

Charles R. Train, for defendant.

The ruling of the court refusing the instructions prayed for was erroneous. The plaintiff undertook to enforce a contract made in Rhode Island, injurious to the public rights, offensive to the morals, contravening the policy, and violating the law of the state of Massachusetts, and such a contract cannot be enforced here, either in the state or federal courts. 2 Kent, Comm. (10th Ed.) 616; Story, Confl. Laws, § 253, and sub.; Webster v. Munger, 8 Gray, 584, and cases cited; Blanchard v. Russell, 13 Mass. 6; Greenwood v. Curtis, 6 Mass. 358; Powers v. Lynch, 3 Mass. 77; Pearsall v. Dwight, 2 Mass. 84. If the plaintiffs, when the contract was made, knew or understood that the liquors were purchased by the defendant with the intent to resell them in Massachusetts in violation of the law, and in contravention of the rights and policy of that state, the contract cannot be enforced. Webster v. Munger, 8 Gray, 584; Bligh v. James, 5 Allen, 106. If the contract was made upon the understanding of the parties that the same were designed to be resold in Massachusetts, then the sale was made with a view to such illegal design, and for the purpose of enabling the defendant to effect it, and if so, the contract cannot be enforced. Webster v. Munger, above cited; Merchants' Bank v. Spalding, 5 Seld. [9 N. Y.] 53; Foster v. Thurston, 11 Cush. 322, and cases cited in the opinion. The plaintiffs, having knowingly participated in a transaction intended to accomplish a purpose forbidden by law, cannot maintain this action. The case of McIntyre v. Parks, 3 Metc. [Mass.] 207, is not to be regarded as law since the case of Webster v. Munger, above cited. The revenue laws of the United States expressly recognize the law of the states regulating the traffic in intoxicating liquors. It is submitted that the case of Holman v. John-

son, 1 Cowp. 341, is authority only in cases affecting revenue laws, and does not conflict with the doctrine claimed by the defendant.

CLIFFORD, Circuit Justice. Errors of the court in improperly refusing to instruct the jury, as requested by either party, may be corrected on motion for new trial, as well as errors committed in rejecting proper testimony, or in admitting that which was improper, or in giving erroneous instructions to the jury. Certain prayers for instructions to the jury were presented in this case by the defendant, and the court refused to instruct the jury as he requested; and the verdict of the jury having been for the plaintiff, the defendant moved the court that it be set aside, and for a new trial, upon the ground that the prayers for instructions were improperly refused.

Provision was made by section 61, c. 86, Gen. St. Mass., that all payments or compensations for spirituous or intoxicating liquors sold in violation of law shall be held to have been received without consideration, and against law, equity, and good conscience. No action of any kind, it is also therein provided, shall be had or maintained in any court for the price of any liquors sold in any other state for the purpose of being brought into this commonwealth, to be here kept or sold in violation of law, under such circumstances that the vendor would have reasonable cause to believe that the purchaser entertained any such illegal purpose. Gen. St. Mass. p. 448. Whether the plaintiffs knew or had reasonable cause to believe that the defendant purchased the liquors with the intention of transporting the same into this state, "to be here kept or sold in violation of law," was a matter in issue between the parties at the trial, and there was some evidence introduced on both sides of the question. Strong doubts were entertained by the court whether the affirmative of the issue was proved; but it must be assumed, for the purpose of this investigation, that the evidence was sufficient to warrant the jury in finding the issue for the defendant. Conceded as the fact is, that the contract of sale and purchase was valid at the place where it was made, it is unnecessary to enter into any inquiry or discussion upon that subject; and the plaintiffs contend, inasmuch as the sale of the liquors was valid where it was made, that the evidence introduced by the defendant is not an answer to the action, even if it does show that they had knowledge at that time that he intended to remove the liquors into this state, to be kept and sold in violation of the law of the state. Both the manufacture for sale and the sale of spirituous or intoxicating liquor, or of mixed liquor, part of which was spirituous or intoxicating, were at that time prohibited in this state by section 28 of chapter 61 of the General Statutes of the state; and section 30 provided that whoever sold such liquor in violation of the provisions of that chapter should pay ten dollars for the first offence, and be imprisoned not less than twenty nor more than thirty days. Gen. St. Mass. p. 442. Such prohibition was also extended by section 37 of the act, to the bringing of any spirituous or intoxicating liquor into the state, or to the conveying the same from place to place within the state, with intent to sell the same, or have it sold by another, and the person who did those acts was declared to be liable to the prescribed penalty and punishment if he had reasonable cause to believe that the liquor was intended to be sold in violation of that chapter. Nothing of the kind was done by the plaintiffs, but the defendant contends that they are not entitled to any remedy in the circuit court, sitting in this district, because they knew, or had reasonable cause to believe, at the time they sold the liquors, that he, the defendant, intended to transport the same into the state, to be here kept and sold in violation of that enactment of the state legislature. Stated as above, the proposition is not in the precise language of the prayer for instruction; but it is not contended that the prayer for instruction meant anything more than the proposition, as the sale was an absolute one, and it is not pretended that there was any arrangement between the parties as to the place where the liquors should be sold.

Generally speaking, the validity of a contract is to be decided by the law of the place where it was made, unless it was agreed, either expressly or tacitly, that it should be performed in some other place, and then the general rule is that the contract, "as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." Story, Confl. Laws, §§ 242, 280; U. S. Bank v. Donally, 8 Pet. [33 U. S.] 372; Wilcox v. Hunt, 13 Pet. [38 U. S.] 379; Andrews v. Pond, Id. 65; Don v. Lippmann, 5 Clark & F. 13; Fergusson v. Fyffe, 8 Clark & F. 121. Contracts valid by the law of the place where they are made are generally valid everywhere jure gentium, and by tacit assent. 2 Kent, Comm. (Ed. 1866) 454. Remedies, therefore, are the same whether the suit is brought in the district where the contract was made, or in another district of the same circuit, or in any other federal court having jurisdiction of the parties and of the subject-matter in controversy. Viewed in the light of these several suggestions, the principal question presented is whether the evidence which shows that the plaintiffs knew, or had reasonable cause to believe, that the defendant at the time of the sale, intended to transport the liquors into this state, to be here kept and sold in violation of the law of the state then in force and unrepealed at the time the suit was commenced, constituted a defence. Marked differences of opinion are observable in the determination of courts of justice in

cases where the facts were in most respects the same as in the case before the court; but the better opinion appears to be that the mere knowledge by the vendor that the vendee at the time of the purchase of property intends to use it for an illegal purpose will not, as a general rule, prevent the vendor from recovering from the vendee the value of the property.

Exceptional cases may arise in which a different rule must be applied, as where the property purchased is intended for treasonable purposes, or to commit murder, or to promote some other offence of such enormity, and so violative of the fundamental laws of society that silence on the part of the citizen is itself a crime, or would be evidence tending to show that the seller was an accessory before the fact to the commission of the offence. Many cases may doubtless be cited where it is held that a contract cannot be enforced which contemplates what the law forbids, whether the act forbidden be malum in se or only malum prohibitum, but those cases do not apply to a contract of sale which is valid by the law of the place where it is made, and where the only circumstance imputed as affecting its validity, is the mere fact that the seller knew, or had reason to believe, that the purchaser intended to remove the property purchased into another jurisdiction, and to sell it there in violation of the law of that jurisdiction. U. S. Bank v. Owens, 2 Pet. [27 U. S.] 527; Harris v. Runnels, 12 How. [53 U. S.] 79; Kennett v. Chambers, 14 How. [55 U. S.] 38.

Such exceptional cases may doubtless arise, but the general rule, and the one by which this case must be governed, is that in an action to recover the price of goods sold, it is no defence that the vendor knew that they were purchased to be sold in another jurisdiction, in violation of the law of that jurisdiction, provided it was not a part of the contract that they should be used for that purpose, and provided also that the vendor neither did nor agreed to do anything in aid or furtherance of the unlawful design, beyond the mere sale, with knowledge of the intent of the purchaser. Tracy v. Talmage, 14 N. Y. 167–210; Curtis v. Leavitt, 15 N. Y. 15–47. Contracts made in evasion or fraud of the laws of another state are invalid everywhere in our courts, as if a contract is made to transport spirituous or intoxicating liquors, not entitled to protection as an imported article, in the original package, from one state into another in violation of the laws of the latter state, every such contract is void, even in the state where it was made, whether the sale is there prohibited or not; but the mere knowledge of the illegal purpose for which the goods are purchased will not have any such effect upon the contract of sale, as between the purchaser and the seller. Story, Confl. Laws, § 253.

Sales under the circumstances last suggested, and contracts, are valid, but if it enters at all as an ingredient into the contract between the parties that the goods shall be so transported to another state, and there be sold in violation of the law of that state, or that the seller shall do some act to assist or facilitate the illegal intention of the purchaser, such as packing the liquors in a way to conceal their character, or any other act to promote the illegal design of the purchaser, then the seller will be deemed a participant in the illegal transaction, and the contract will not be enforced. Waymell v. Reed, 5 Term R. 599; Lightfoot v. Tenant, 1 Bos. & P. 551.

Participation of the vendor in the illegal design, as a general rule, renders the sale invalid as between the seller and purchaser, but that principle as exemplified in some of the cases, is extended quite as far as it ought to be carried, as, for example, it was held, in the case of Langton v. Hughes, 1 Maule & S. 593, that a person who sold drugs, well knowing that they were intended to be used in the brewing of beer, contrary to an act of parliament, might be said "to cause or procure, quantum illo, the drugs to be mixed," and used for that purpose. Much reason exists for supposing that the inference in that case was extended beyond what is authorized from the fact proved, but if not, then the decision was correct, because if it enters at all as an ingredient into the contract of sale that the seller shall do some act to assist or facilitate the illegal intention of the purchaser, the contract will not be enforced for his benefit. Public policy dictates that the law will not lend its aid to any party whose cause of action is founded upon an immoral or illegal act, and if the seller of goods, even in a state where the sale of such property is lawful, enters into an arrangement with the purchaser as an ingredient of the contract of sale, that he will assist or facilitate the purchaser in selling the same in another state in violation of the law of that state, such a sale, as a general rule, is thereby rendered invalid, subject to certain exceptions which it is not important to notice in this investigation. Where the contract of sale is complete, and the seller has nothing to do with the disposition which the purchaser intends to make of the goods, Lord Mansfield held that the mere knowledge on the part of the seller that the purchaser intended to export them for sale in violation of the laws of the country where they were to be transported, would not debar the seller of his right of action to recover the value of the goods of the purchaser. Holman v. Johnson, 1 Cowp. 341. Precisely the same point was ruled nearly forty years later in the case of Hodgson v. Temple, 5 Taunt. 181, where it was expressly held that a person who sells goods, knowing that the purchaser intends to apply them in an illegal trade, is nevertheless entitled to recover the price if he yields no other aid

to the illegal transaction than that of selling and delivering the goods.

Certain cases decided between those dates are sometimes referred to as sustaining a more stringent rule, but it is clear that they rest upon the qualification plainly admitted and explicitly annexed to the principle advanced in those two cases, that is, the seller of the goods yielded or rendered some other aid to the illegal transaction than that of selling the goods. Biggs v. Lawrence, 3 Term R. 454; Waymell v. Reed, 5 Term R. 599; Clugas v. Penaluna, 4 Term R. 466. Where the seller takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels, he must take the consequences of his own act, but Lord Abinger held, in the case of Pellecat v. Angell, 2 Cromp., M. & R. 311, that "merely selling to a party who means to violate the laws of his own country" is not a bad contract. Exactly the same rule was laid down in the case of McIntyre v. Parks, 3 Metc. [Mass.] 207, where it was held that the sale of lottery-tickets made in another state, where the sale was lawful, to a citizen of this state, is a lawful transaction, although the seller knew that the purchaser intended to sell the same in this state, where the sale was prohibited. But if the illegal use to be made of the goods enters into the contract, and forms the motive or inducement in the mind of the vendor to the sale, he cannot recover the price, provided the goods are actually used to carry out the illegal design. Kreiss v. Seligman, 8 Barb. 439. The express ruling of the supreme court of this state, in the case of Dater v. Earl, 3 Gray, 482, was to the same effect, where it was held that a sale of goods in another state, the seller knowing but not participating in the intent to sell them again in violation of the laws of that state, will support an action in this state for the price. Equally explicit, also, is the rule laid down by the highest judicial authority of certain other states. The price of goods sold and delivered in a state where such sale is legal, say the court in Smith v. Godfrey, 8 Fost. [N. H.] 379, can be recovered in another state where such sale would be illegal if nothing remained to be done by the vendor to complete the transaction, and the seller is not in any way to be further connected with it; but if it be an ingredient in the contract that the goods shall be illegally sold, or that the seller shall do any act to assist or facilitate the illegal sale, or if the goods are to be delivered in the place where the sale is prohibited, the rule is otherwise. McConihe v. McMann, 27 Vt. 95; Backman v. Wright, Id. 187; Jameson v. Gregory, 4 Metc. (Ky.) 363. Cases very nearly allied, it must be admitted, have been differently decided, but if they are carefully examined and compared one with another, the particular features by which they were distinguished are, with few exceptions, plainly to be seen.

Expressions are certainly to be found in the opinion of the court in the case of Webster v. Munger, 8 Gray, 587, which warrant the conclusion that the organ of the court on that occasion was of the opinion that a sale made with the knowledge of the seller that the purchaser intended to use the thing sold in violation of law, was illegal, and irrespective of the question whether it was an ingredient of the contract that the goods should be so sold, or that the seller should do any act to assist or facilitate the intended illegal use or sale, but the expression of such views was not necessary to the discussion of the case, as the statement shows not merely that the plaintiff had knowledge of the illegal purpose of the defendant, but that he sold with reference to it, and for the purpose of enabling the purchaser to effect it; and the court here agrees with that court in the conclusion that the instructions given in that case, if viewed in that light, were "thoroughly sound in principle," and that they "do not conflict with the cases decided." Unless viewed in that light, the decision is directly opposed to the rule laid down in the case of Sortwell v. Hughes [Case No. 13,177], decided by Judge Curtis, and which is an authority in this circuit, and in the judgment of this court expresses the true rule upon the subject. Bligh v. James, 6 Allen, 572.

Reference is also made to the case of Cannan v. Bryce, 3 Barn. & Ald. 179, as opposed to that rule; but the court is of a different opinion, as the chief justice who gave the opinion says in express terms that he is speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for "the express purpose of accomplishing that object." Even the price of goods furnished to facilitate an immoral object, it was at one time held, might be recovered of the purchaser, unless it appeared, among other things, that the seller expected to be paid from the profits of the immoral vocation; but since the decision in the case of Pearce v. Brooks, L. R. 1 Exch. 217, it must be regarded as well settled that no recovery can be had in such a case, if the goods were sold with knowledge of the use to which they were to be applied, and that they were furnished to facilitate that object. Bowry v. Bennet, 1 Camp. 349.

Articles, either of equipage or dress, sold or rented to a female keeping a house of ill fame for the purpose and of a character to enable her to make a display, will furnish no cause of action to the seller or lessor of the articles, as the act of supplying a female engaged in such immoral practices, would warrant a jury in finding that the articles were intended to facilitate the objects of her vocation. Sales under such circumstances may well be presumed to have been made with the intent to facilitate the objects of the purchaser, and if so, then the contract is clearly void, and it is upon that ground

that the decision of the court is placed. Different rules also have sometimes been applied in the construction of contracts made for the sale of goods in one country which are intended to be exported and sold in another in violation of the revenue laws of the latter country, but it is unnecessary to enter that field of inquiry, as there is nothing in the case to raise any such question. Suppose, however, that the legal conclusion here adopted cannot be sustained, still it is clear that the requested instructions were properly refused for other reasons, which will be briefly explained.

Unsupported by any legislative provision, the objection to the ruling of the court in refusing to give the instructions, would be without any foundation, but the argument is that the defence must prevail in this court because no such action could be maintained in the state court at the time this suit was commenced. Confessedly, no action of the kind could be maintained in the state court at that date, but the provision containing that prohibition on the 22d day of May, 1868, was unconditionally repealed, and consequently at the time of the trial there was no such prohibition in the state law as is supposed. Sess. Acts Mass. 1868, p. 115. By the docket entries it appears that the parties went to trial on the 4th of June, 1869, and the record shows that the verdict was rendered for the plaintiffs on the following day. Before considering the effect of that repeal it should be repeated that the sale in this case was made in the state of Rhode Island, and that such a sale was valid by the law of that state, as expressly decided by the supreme court of this state. Bligh v. James, 5 Allen, 106; Merchant v. Chapman, 4 Allen, 362. When a statute is repealed, the general rule is that it must be considered the same as if it had never existed, except as to such transactions as are past and closed, or such as are saved by the repealing statute. Surtees v. Ellison, 9 Barn. & C. 750, 4 Man. & R. 586; Key v. Goodwin, 4 Moore & P. 341. Authorities may certainly be cited which assert that the repeal of a prohibitory statute does not make valid a contract entered into in violation of the statute repealed, but that rule of law has no application to the case before the court, as the contract was made in a place where it was legal, and the only supposed obstacle to a recovery by the plaintiff is that clause of section 61 of chapter 86, which provided that no action should be maintained in any court of the state for the price of any liquor sold in any other state, for the purpose of being brought here under the circumstances therein described. Attempt is made in argument to bring the case within the rule laid down in Wright v. Oakley, 5 Metc. [Mass.] 406, but the attempt is a vain one, as more than a year elapsed after the repeal of the first provision before the second was enacted. Sess. Acts Mass. 1869, p. 724; Steamship Co. v. Joliffe, 2 Wall. [69 U. S.] 458. Certainly the power of the legislature to pass the repealing statute will not be questioned, as the defendant could not have any vested right to set up the defence that the plaintiff should not have a right of action to recover on a valid contract. Satterlee v. Matthewson, 2 Pet. [27 U. S.] 380; Watson v. Mercer, 8 Pet. [33 U. S.] 108; Welch v. Wadsworth, 30 Conn. 156; Cooley, Const. Lim. 293; Way v. Hillier, 16 Ohio, 107; Syracuse Bank v. Davis, 16 Barb. 190; Hepburn v. Curts, 7 Watts, 300; King v. Tirrell, 2 Gray, 331; Gerry v. Stoneham, 1 Allen, 320; Garfield v. Bemis, 2 Allen, 447. Satisfactory proof was introduced by the plaintiffs that they were duly licensed to sell such liquors at their place of business, and, it being conceded that the contract was valid at the place where it was made, it is clear that the provision in question, even if unrepealed, could not have any effect in the circuit court to defeat the plaintiffs' right of action in this case, as they are citizens of another state. Doubts may at one time have existed upon the subject, but it is now well settled that a state law cannot discharge or suspend the obligation of a contract made in another state, if it was legal where it was made and was a contract with a citizen of another state, not even if it was to be performed in the state whose law is invoked to defeat the remedy. Baldwin v. Bank of Newbury, 1 Wall. [68 U. S.] 236; Demeritt v. Exchange Bank [Case No. 3,780]; Hunt v. Danforth [Id. 6,887]; Suydam v. Broadnax, 14 Pet. [39 U. S.] 74; Union Bank v. Jolly, 18 How. [59 U. S.] 503; Watson v. Tarpley, Id. 520; Hyde v. Stone, 20 How. [61 U. S.] 175.

Contracts are to be construed and carried into effect according to the intention of the parties thereto, and they are presumed to contract with reference to the law of the place where they reside and transact business, unless a different intention is manifest from the terms which they employ. Judd v. Porter, 7 Greenl. 337. The law of the contract travels with it wherever the parties thereto are to be found, and into whatever forum resort is had for its enforcement. Motion for new trial overruled. Judgment on the verdict.

GREEN (COMMERCIAL BANK OF COMMERCE v.). See Case No. 3,059.

Case No. 5,756.

GREEN v. DYERSBURG.

[2 Flip. 477.] [1]

Circuit Court, W. D. Tennessee. July 5, 1879.

MUNICIPAL BONDS — RAILROAD SUBSCRIPTION — CONST. TENN. ART. 2, § 29—ACT 1842, CH. 117 (CODE, § 1142)—IMPLIED POWER TO ISSUE BONDS CONDITION PRECEDENT—RULES OF CONSTRUCTION—REASONABLE TIME.

1. Where a town is authorized by statute to subscribe to the capital stock of a railroad company and is required to pay the subscription in "not exceeding" six annual installments, and is further authorized to anticipate the collection of taxes by issuing "short bonds" bearing six per cent. interest: *Held*, that the proper construction of the act requires the bonds to mature at a date not longer than the assessments of taxes are due and payable; and that bonds payable in ten years and bearing seven per cent. interest are unauthorized by the act. These requirements are not directory only, but imperative, and must be complied with by the town. The bonds on their face show non-compliance with the statute, and there can be no bona fide holder for value of such bonds.

[Cited in Kelly v. Town of Milan, 21 Fed. 858.]

2. Neither section 29, of article 2 of the constitution of Tennessee of 1870, nor the act of January 23, 1871, c. 50 (Code, § 491a), passed to enforce it, confers any power upon municipal corporations to issue bonds in payment of a stock subscription to railroads. The only effect of that act is to require a three-fourths vote of the citizens of the town as a pre-requisite, and to designate the county court or the board of mayor and aldermen as the agents to execute whatever powers exist in the particular case. The powers must be found elsewhere in the statutes. Nor does the first clause of the second sub-section of the act confer any power to issue bonds under the second clause of the sub-section relating to stock subscriptions, even if the first clause can be held to authorize in itself bonds to be issued, when "credit is given or loaned" in aid of a railroad. Giving or lending credit, and subscribing stock, are essentially different.

3. This act, as modified by the constitution and subsequent legislation, is the general law under which all corporations must act in subscribing stock to railroads. It confers no express power to issue bonds in payment of the subscriptions, and unless such power is conferred by some other enactment no corporation can issue bonds in payment of a subscription to capital stock, but must pursue the requirements of this act. There is no statute conferring any express power on the town of Dyersburg to pay its subscription to the Paducah & Memphis Railroad Company's capital stock in ten years' bonds, bearing seven per cent. interest, and none can be implied from the authority conferred upon it by this act and its amendments.

4. There is no implied power in a municipal corporation to issue negotiable bonds in payment of a debt which it is authorized to contract. No decision of the supreme court of the United States or of the supreme court of Tennessee has so adjudicated; and, in the absence of any controlling decision to that effect, this court holds that the power must be expressly conferred, or necessarily implied, from some power given other than the bare authority to contract a debt for a particular purpose, whether it be a corporate purpose or not. Public safety requires that the implications in favor of such power shall not be extended beyond the point to which they have already gone. Bona fide holders will be protected against the irregular exercise of granted authority, but the authority itself should not be created by judicial decree upon unnecessary implication.

[Cited in Kelly v. Town of Milan, 21 Fed. 855; Norton v. Taxing Dist. of Brownsville, 36 Fed. 102.]

5. Where a bond upon its face promises to pay a sum of money to a railroad company "upon the express condition, however, that said railroad shall be constructed to the town of Dyersburg, Tennessee, and have a depot of said railroad located within half a mile of the court house in said town," it is a condition precedent to the payment of the money, and not a mere covenant of the railroad company to so construct the road, for the breach of which compensation in damages is the remedy. No holder of the coupons can recover on them without showing either the performance or a readiness to perform the condition. The bond itself charges the purchaser with notice of the condition, and it is he that trusts the railroad company, and not the town.

6. It is a universal rule of construction of such instruments that the actual intention of the parties will prevail over that reached by any technical rules prescribed for ascertaining the intention. And, therefore, neither the rule that, if part of the money be payable before the covenant on the other side is to be performed; nor the other rule that, if the promisor has received part of the consideration, the covenants shall be held to be independent of each other, will override the intention manifested by the contract that the railroad should be built before the money can be demanded. These rules have always yielded to a clear manifestation of a different intention. The rule as to payment by installment does not apply to installments of interest, but only where the principal is so payable. The rule as to part performance does not apply where the part unperformed is the essential consideration.

7. If no time be specified for the performance of the condition to construct the road, the law implies a reasonable time. And, when the amendment to the charter of the company of January 27, 1870 (chapter 49, § 5), required the road to be completed within seven years from that date, this will be taken as the time within which the condition should be performed, the bonds being dated on the 10th of May, 1873, and subsequent to the amendment.

On the 21st day of March, 1878, in the United States circuit court at Memphis suit was brought upon past-due coupons of bonds, issued by the town of Dyersburg, of which the following are samples, both of the bonds and coupons:

"(Coupon $8.75.)

"The mayor and aldermen of Dyersburg, Tenn., will pay the bearer on the 10th day of Nov., 1873, eight dollars and seventy-five cents, being the semi-annual interest due on Paducah & Memphis Railroad bond No. 9654. C. P. Clark, Mayor.

"W. C. Doyle, Recorder."

"(Bond No. 9654.) ($250.00.)

"The mayor and aldermen of the town of Dyersburg, in the state of Tennessee, a corporation duly chartered by act of the general assembly of the state of Tennessee, by the qualified voters of said town, under the provisions of an act of the legislature empowering them so to do, by this bond promise to pay to the holder hereof, ten years after the date hereof, the sum of two hundred and fifty dollars, with interest at seven

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

per centum per annum from this date, payable semi-annually at the city hall in Dyersburg, on presentation of the coupons hereto attached, to aid in the construction of the Paducah & Memphis Railroad; upon the express condition, however, that the said railroad shall be constructed to the town of Dyersburg, Tennessee, and have a depot of said railroad located within half a mile of the court house in said town.

"In testimony whereof, etc., this the 10th day of May, 1873.

"(Seal.) C. P. Clark, Mayor.

"W. C. Doyle, Recorder."

The defendant corporation filed six pleas to the declaration:

1. The first plea sets out the application of the railroad company for a subscription of $50,000 to its capital stock to be paid in ten-year coupon bonds, at seven per cent. interest, to aid in the construction of the road through Dyer county; the passage of an ordinance submitting the proposition to the voters of the town to subscribe and pay for the stock upon certain conditions, among others the following: "The above subscription is made on the condition that the Paducah & Memphis Railroad is to be located and built to Dyersburg, and a depot of said road to be located within one-half mile of the court house without which condition accepted by the said railroad company, this subscription to be void and no bonds shall be issued; and this condition shall be written or printed if deemed necessary, by the mayor on the face of said bonds. The acceptance, by the officers of said railroad company of any portion of the bonds herein authorized to be issued shall bind said company fully to the terms and conditions of said subscription, as set forth in all the sections of this ordinance; the ratification of this proposition, by the voters at an election; the passage of an ordinance authorizing the mayor to subscribe for the stock upon the condition imposed by the ordinance; the application to the company to subscribe on the terms and conditions mentioned; the acceptance by it of the proposition and the spreading on the minutes of the railroad company of the proceedings of the board of mayor and aldermen of the town at the time of this acceptance." The plea then avers that the conditions upon which the town was authorized to become a stockholder, have never been complied with by the railroad company, without which the defendant corporation had no authority to issue the bonds, and the coupons sued on are not its act and deed.

2. The second plea is a simple plea of non est factum.

3. The third plea, after setting out the same facts as those stated in the first plea, avers that the bonds had printed on their face, the said condition, in the following words, to-wit: "Upon the express condition, however, that said railroad shall be constructed to the town of Dyersburg, Tennessee, and have a depot located within half a mile of the court house in said town;" that there was no other or different authority to issue the bonds, and no other or different consideration than that set out in the plea; that the bonds were delivered to the plaintiff [Thomas Green] or his assignors by the railroad company without the knowledge of or consent of the defendant corporation and without any authority from it; that at the time of said delivery, the company had not built its road to Dyersburg, nor located a depot within half a mile of the court house, nor has it at any time since done so, of all which the plaintiff had notice; that the coupons sued on are the coupons of the said bonds and none other; that the stock of the company had become worthless and the corporation dissolved by the foreclosure of a mortgage made by it, and on the purchase of its property and franchises by a new company; and therefore that the consideration had wholly failed, of which plaintiff had notice.

4. The fourth plea craves oyer of the coupons and bonds and sets them out in haec verba, and then avers that the defendant corporation had never been authorized by any law of the general assembly of the state of Tennessee, nor by any election of the qualified voters of the town to lend its aid to said railroad company by the issuance of the bonds aforesaid, as required by the 29th section of article 2 of the constitution of the state, of which plaintiff had notice.

5. The fifth plea craves oyer and sets out the bonds and coupons, and avers that the whole series of $50,000 bonds was delivered to the railroad company on the express condition that they were not to be negotiated, nor to become due and payable, except upon the express condition that the railroad should be constructed to the town of Dyersburg and a depot located within half a mile of the court house, and avers that this never has been done.

6. The sixth plea avers that the defendant corporation did not undertake and promise in manner and form, etc.; to which plaintiff has joined issue.

The plaintiff demurs to the first five pleas, and assigns the following grounds:

1. To the first plea, that the conditions mentioned, that the railroad should be built to Dyersburg, and its depot located within half a mile of the court house, were not conditions the execution or performance of which were precedent to the issuance of the bonds, nor to the liability of the defendant on them, but only a condition that the company should accept the terms of the subscription by agreeing to build the road to the town and locate the depot within half a mile of the court house.

2. To the second plea, that being a plea of non est factum it is not sworn to.

3. To the third plea: First, the same ground of demurrer as that taken to the first plea, as above stated, viz., that the plea shows that the company accepted the terms of the subscription which was the only condition precedent to the issuance of the bonds as shown by the plea; second, that the plea is double in pleading a want of compliance with an alleged condition precedent, and at the same time a failure of consideration; third, that on the averments of the plea itself the plaintiff is shown to be an innocent purchaser for value without notice.

4. To the fourth plea: That on the face of the plea it is shown that an election was held, and that the legislature of Tennessee had by law authorized the bonds to be issued.

5. To the fifth plea: That it appears by the plea that the plaintiff was an innocent purchaser for value without notice.

The charter of the railroad company authorizes corporations, cities and counties to subscribe stock, but contains no authority for municipal corporations to issue bonds unless it is implied from the power to subscribe. Chapter 42, § 30; Acts 1858, p. 79. The general railroad subscription laws, authorizing all counties and incorporated towns to subscribe for stock, contains no express power to issue bonds in payment of such subscriptions, but requires the levy of a tax to meet the installments of subscription, as made, and directs the tax collector, as fast as he makes collections, to pay the amounts over to the company. And to meet unexpected contingencies, the corporation may anticipate the collection of the railroad tax by issuing warrants bearing six per cent. interest, payable at such times as may be desired by the railroad company, the warrants to be received in payment of the stock. Thomp. & S. Code, §§ 1142–1165. By an act of March 13, 1868 (chapter 72, § 4), section 1148 of the Code was amended by adding to it the words "and shall issue the bonds when called for;" and by an act (found among the Private Acts) of December 9, 1868 (chapter 11, § 26), said section 1148 was subsequently and further amended by omitting the words "and shall issue the bonds when called for," thereby leaving the section as it was before the amendment of March 13, 1866, except as to matter not pertinent here. By section 29, art. 2, of the constitution of 1870, which went into effect May 5 of that year, is is ordained that "the credit of no county, city or town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder with others in any company, association or corporation except upon a like election and the assent of a like majority." The act of January 23, 1871, entitled "An act to enforce section 29, article II., of the constitution," c. 50 (Thomp. & S. Code, § 491a), enacts that the counties and incorporated towns in the state may impose taxes for county and corporate purposes upon the conditions named therein, one of which is—"Second: The credit of no county, city or town shall be given or loaned to or in aid of any person, company, association or corporation, except, first, upon the consent of a majority of * * * the board of mayor and aldermen * * * of such city or town, and upon an election afterwards held by the qualified voters of said * * * city or town, and the assent of three-fourths of the votes cast at said election; * * * and if the assent of three-fourths of the voters of such * * * city or town is had, then the * * * board of mayor and aldermen * * * shall have full power to make and execute all necessary orders, bonds, and payments in order to carry out such loan or credit voted for as prescribed in this act; nor shall any county, city or town become a stockholder with others in any company, association or corporation, except upon a like election and the assent of a like majority as prescribed in this act." By the act of February 26, 1869, c. 59, § 20 [Acts Tenn. 1868–69, p. 311], it was enacted "that it shall be lawful for the town of Dyersburg to make a corporate subscription to the capital stock of the Mississippi River Railroad Company (afterwards the Paducah & Memphis Railroad Company) not to exceed fifty thousand dollars in amount, payable in not exceeding four years, by annual assessments levied by the board of trustees of said town, and collected as other moneys are, and bonds of the town may be issued in anticipation of such collections, collected for town purposes," with a proviso that there shall be a previous election, and the subscriptions authorized by a majority vote. By the act of February 8, 1870, c. 55, § 18 [Acts Tenn. 1869–70, p. 363], relating to the subscription of Haywood and Dyer counties to the Brownsville & Ohio, and to the Mississippi River Railroad Companies, it was enacted: "That stock which had been subscribed, or may hereafter be subscribed by any county, city or incorporation to said railroad companies, may be payable in six annual payments; and it shall be lawful for county courts and the corporate authorities of any city or town, making such subscription, to issue short bonds, bearing interest at the rate of six per centum per annum, to said railroad companies in anticipation of the collection of annual levies, if thereby the construction of the roads can be facilitated." By the act of December 16, 1871, c. 122 [Acts Tenn. 1871, p. 133], where an election previously held, had authorized a subscription to the capital stock by as much as three-fourths of the qualified voters, so that the election would be within the constitutional requirement as to the number of votes to authorize a subscription, "such sub-

scription shall be deemed a valid and legal subscription," notwithstanding the same was in excess of the amount authorized by the Code, § 1142 et seq.; this act also allowed a new vote to be taken in case of doubt. And by the act of December 15, 1871, c. 129 [Acts Tenn. 1871, p. 142], these sections of the Code were still further repealed and modified as to the restrictions on the amount of subscriptions authorized, but neither of these acts authorize in terms any bonds to be issued. The averments in the pleadings do not show that anything was done under the special act of February 26, 1869 (chapter 59, § 20), but it is stated in argument and does appear by the record of the proceedings of the town, which is referred to in the pleas, that on the 12th day of September, 1871, an election was held authorizing a subscription to this railroad company of $50,000, which "was held" to be illegal because excessive in amount; but it does not appear by said record of town proceedings that the subscription voted on that day was to be paid in bonds. This appears to be the fact, however, as to the election of July 5, 1872, on the result of which these bonds were in fact issued.

Humes & Poston and J. P. Meux, for plaintiff.

Harris, McKisick & Turley, for defendant.

HAMMOND, District Judge. Some of the grounds of this demurrer, as stated, are rather in the nature of replications, but I shall treat it as raising the questions made in the argument.

The first question is, as to the power of the town to issue these bonds. The supreme court have declared that "a municipal corporation cannot issue bonds in aid of extraneous objects without legislative authority, of which all persons dealing with such bonds must take notice at their peril." Town of South Ottawa v. Perkins, 94 U. S. 260–262. And they are equally invalid in the hands of innocent purchasers. Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676. The argument of the defendant's counsel denying the legislative authority to issue these bonds is based upon a distinction between paying for a subscription to the capital stock of the railroad company by levying taxes and paying the money, and issuing bonds in payment of the subscription; and it is contended that there being no express power granted to issue bonds in payment of subscription to stock, none will be implied; and the case of Police Jury v. Britton, 15 Wall. [82 U. S.] 566, and the cases cited in Dill. Mun. Corp. § 407, and note, and Folsom v. School Dist. [91 Ill. 402], are relied on. The plaintiff contends that the statutes referred to in the statement of the case, confer express power to issue these bonds, and, if not, then that the power is a necessary implication from the authority given to make the subscription to the capital stock of the railroad company.

The act of March 13, 1868, amending the Code, would undoubtedly have been sufficient to support these bonds, if it had not been subsequently modified by the act of December 9, 1868 (chapter 11, § 26). The act of December 16, 1871, does not confer any new power, or enlarge the powers of the town in the matter of issuing bonds. It clearly contemplates subscription under the Code, § 1142 et seq., and only removes the restrictions there found as to the amount allowed to be subscribed by the town. The recital in the record of the town proceedings referring to the election of September, 1871, and the act of December 16, 1871, authorizing them to re-vote the subscription, shows conclusively that the town authorities supposed that they were making this subscription under the provisions of the Code, § 1142 et seq., as modified by the special acts relating to this particular town, as no doubt they were. Neither is there anything in the act of December 15, 1871 (chapter 129), which confers on this town the power to issue these bonds, nor anything from which such power may be implied.

The act of February 26, 1869 (chapter 59, § 20), as modified by the act of February 8, 1870 (chapter 55, § 18), unquestionably authorizes the town to issue short bonds, whatever that may mean, bearing six per cent. interest, "in anticipation of the collection of the annual levies." By the very terms of these acts the subscription is payable in four or six years, and I think the proper construction is, that the bonds shall not be longer running to maturity than the time within which the subscription is payable. The bonds are only to anticipate the annual collections of taxes to pay the subscription, which must all be paid "in not exceeding" four or six years. The legislature did not contemplate that the people should be burdened with a long debt, bearing interest from date, when the statute required that the taxes to pay the subscription should be levied and paid within a time specified in the act itself. If bonds were issued under the power conferred by these statutes, necessarily they must be payable when the taxes levied to pay them are collected, for it is not to be supposed that the town would be required to levy and collect the taxes and keep them in the treasury idle to meet bonds maturing years after the collections are made. It is not like the case of State v. Anderson Co., Sup. Ct. Tenn. 1874, at Knoxville [8 Baxt. 249], where the statute authorized thirty years' bonds to be issued, and the county in exact compliance with the statute issued bonds for that time, but upon a vote of the people proposing to pay the subscription in six annual installments. At the time the vote was taken in that case, the statute made no other requirement as to the time of payment than that not more than thirty-three and one-third per cent. of the subscription should be collected in one year. Act 1852, c. 117, § 8 [Acts Tenn. 1851–52, p. 163], Code, § 1154. Here the requirement of

the statute was that the amount should be paid in six years. There a subsequent statute varied the terms which the vote had fixed; here the vote varies the terms which the statute has fixed. Nor is this like the case of Louisville & N. R. Co. v. Davidson Co., 1 Sneed, 638, where it was held that the act of 1852 did not prohibit the county from making more than three installments. A comparison of section 8, c. 117, of the act of 1852, with section 20, c. 59, of the act of 1869, and with section 18, c. 55, of the act of 1870, shows that while, under the act of 1852, there was no other restriction than that the time was not to be less than three years, under the two latter acts the time fixed is "not exceeding" six years. This is the necessary construction of the two acts of 1869 and 1870 taken together, even if it be admitted that the act of 1870,. applying to "any city or incorporation" was intended to modify the special act of 1869 applying only to the town of Dyersburg. In this view the departure from these acts cannot be regarded as falling within the fourth resolution of the court in Louisville & N. R. Co. v. Davidson Co., supra. The principle of directory statutes cannot be applied here, and the authority conferred must be pursued in its material requirements. Winston v. Tennessee & P. R. Co., 1 Baxt. 61.

Besides these acts only allowed six per cent. interest, and the bonds here bear seven per cent. This cannot be a change within the discretion of the town to make—it is an additional burden, not a beneficial modification of the requirements of the statute. I am not unmindful of the conventional interest act of February 23, 1870, c. 69 [Laws Tenn. 1870, p. 87], allowing an increase by contract to any rate, not greater than ten per cent. It will be observed that the first of these Dyersburg acts fixed no rate of interest for the bonds, and the second, limiting the rate to six per cent., was passed only a few days before the conventional rate of interest act just referred to, the latter being a general public law and the former a special private act. I do not think, under the general law, the town could enlarge the rate of interest. It was a municipal corporation acting under a special grant of power which could not be exceeded. The result is that these bonds, being for a longer time and greater rate of interest than allowed under these two acts, cannot be supported by them. Bell v. Mobile & O. R. Co., 4 Wall. [71 U. S.] 598; New Albany v. Burke, 11 Wall. [78 U. S.] 96. The case does not come within the case of Township of Rock Creek v. Strong, 96 U. S. 271, and Commissioners of Marion Co. v. Clark, 94 U. S. 278, where there was a substantial compliance with the legislative requirement. Dill. Mun. Corp. § 414. It may be that if the bonds had been issued according to the terms of the act they would be valid pro tanto for six per cent. interest, as ruled in City of Quincy v. Warfield, 25 Ill. 317; but in the exercise of these special powers to impose the burdens of taxation upon a community, corporations should be held to a strict exercise of them, particularly in view of the peril to which the community is subject by a fraudulent use of such powers. Any purchaser of these bonds in looking to these statutes would see at once that the bonds were not such as the statutes contemplated. Marsh v. Fulton Co., supra.

The remaining claim for express power to issue these bonds is based on the act of January 23, 1871, c. 50 (Code, § 491a). It is argued for the plaintiff that the last clause of the second sub-section of section 1 of that act authorizes a town to subscribe for stock, and that the clause, immediately preceding, authorizes the board of mayor and aldermen to issue bonds in payment. It is manifest, however, that this construction is strained and wholly unauthorized by either the grammatical structure of the section or by any natural interpretation of it. The section follows identically the language of the constitution in its restrictive clauses, and it is evident that both intend to indicate two corporate methods of giving aid to other persons or corporations; one of these methods—that of becoming a stockholder in a company—had been, so far as relates to encouragement of railroad building by stock subscriptions, regulated by a general law, since the act of January 22, 1852 (chapter 117); often, however, modified by special acts in particular cases (section 1142 et seq.), the other method, that of giving or lending the credit of the city or town, had never been the subject of any general statute, and was always regulated by special acts in particular cases. The two methods are entirely distinct in their nature and essential ingredients. Louisville & N. R. Co. v. State, 8 Heisk. 663, and cases cited arguendo, p. 667. It happens that as to railroad building, they both aid and encourage it; but the constitution and the act apply to all corporate contracts within the scope of "corporate purposes" and to none other. Neither confers any authority either to lend credit or subscribe stock. But if the authority exists elsewhere this act regulates its exercise according to the constitution and designates the county court or the board of mayor and aldermen as the agents who shall issue the bonds when credit is lent or given. The validity of these railroad bonds and subscriptions all depend on the construction given by the supreme court to the old constitution, that the promotion of railroads is a legitimate "corporate purpose," and not upon any legislative power to authorize corporations to engage in extraneous enterprises. Nichol v. Mayor, etc., of Nashville, 9 Humph. 251; Louisville & N. R. Co. v. Davidson Co., supra.

Interpreting the constitutional restrictions of 1870 and this act passed to enforce them by the previous legislative and judicial decisions, this giving or lending the credit of a county, city or town to some other person,

company, association or corporation means supporting the credit of such other person, etc., by guaranties, indorsements or contracts of like character, and possibly donations or loans in aid of the enterprise, which must be a corporate purpose. Dill. Mun. Corp. § 393; Nichol v. Mayor, etc., of Nashville, 9 Humph. 251, and cases cited in Cooper's edition; Louisville & N. R. Co. v. Davidson Co., supra. The credit cannot be given or lent nor the subscription be made upon the authority of this act, for it confers none. It regulates in certain respects the general subject, and harmonizes all the statutes with the constitution. When the corporation subscribes for stock, it must follow the general law on that subject, or some special law provided for it. The only effect of this act, or the constitutional provision referred to in it on the general law—and it so affects all special laws as well—is to abrogate all provisions allowing the subscription for stock to be made on less than a three-fourths vote of the qualified electors, voting at the election in favor of it. In all other respects the statutes authorizing subscriptions remain as they were before this act was passed. I am, therefore, of opinion that there is no express authority given by any statute to the town of Dyersburg to issue these bonds.

It is insisted by the plaintiff that there is a power to pay the subscription in bonds to be implied from the authority to make the subscription, whether we look to the authority as contained in the railroad charter or to the general law authorizing such subscriptions. The authorities on this question are conflicting. Dill. Mun. Corp. §§ 83, 106; Dill. Mun. Bonds, § 62; Daniel, Neg. Inst. §§ 1530, 1532, 1533. I do not think there is any case decided by the supreme court of the United States which supports such an implied power under a general law containing the restrictions found in these Tennessee statutes. Code, §§ 1142–1165. And where the mode of payment is pointed out as is done here, I hold that any other mode is excluded, and that a bare power to subscribe for stock does not imply a power to pay for it in negotiable bonds issued to the railroad company on such terms as the parties may agree upon. The intimation in Hitchcock v. Galveston, 96 U. S. 341, if it does not militate against such an implied power is the latest indication in favor of it, but I find no decision of that court sustaining it. In Seybert v. Pittsburg, 1 Wall. [68 U. S.] 272, the implication was upon an act authorizing a subscription "as fully as any individual," and in Meyer v. Muscatine, Id. 384, the implication was upon a power "to borrow money," coupled with a general law authorizing railroads "receiving bonds of any city" to sell them at a discount. Id. 221. In Rogers v. Burlington, 3 Wall. [70 U. S.] 654, and Mitchell v. Burlington, 4 Wall. [71 U. S.] 270, the implication was upon a power "to borrow money for any public purpose," and in Smith Co. v. Sac, 11 Wall. [78 U. S.] 139–156, the statement of the proposition appears in the dissenting opinion only, the case being decided on other grounds. In Lynde v. Winnebago Co., 16 Wall. [83 U. S.] 6, the implication was upon a statutory power to borrow money. In the Tennessee statutes, now under consideration, there is no power given to borrow money, nor to subscribe for stock as fully as an individual. On the contrary, the subscription for stock is regulated by a statute prescribing the mode of payment. The power to borrow money will not be implied. Mayor v. Ray, 19 Wall. [60 U. S.] 468, 475. It may be doubted if any case hereafter will extend this implication of power to issue bonds any further than it has already gone. 2 Daniel, Neg. Inst. §§ 1523, 1532; Dill. Mun. Bonds, § 6.

The legislative construction in Tennessee is against any such implied power; and ever since the act of January 22, 1852, granting power to subscribe stock as therein specified, it has been the constant practice to confer express power to issue bonds to pay for stock subscriptions whenever thought advisable, as was done by the act of December 30, 1853, amending the general act of January 22, 1852, to allow Sumner county to pay her subscriptions. Louisville & N. R. Co. v. Davidson Co., 1 Sneed, 661. Very many such acts have been passed, and as we have seen, there is special legislation as to Dyersburg. This would seem to exclude any legislative sanction of the doctrine of an implied power based on the general authority given to make these subscriptions. It is said by the supreme court of Tennessee in Moss v. Harpeth Academy, 7 Heisk. 283, of a private corporation, that there is an implied power to borrow money to carry out the purposes of its organization, and it is shown by a note to that case, that other courts have applied this doctrine to municipal corporations, notably the case of State v. Pinto, 7 Ohio St. 358, cited by counsel here. And see, also, Dill. Mun. Corp. §§ 106, 107, and notes, and § 407.

There seems to me to be a vast distinction between using private funds, and implying this power to borrow money upon negotiable bonds against a body of people who have organized a municipal corporation with limited powers of taxation for special purposes. Yet, the supreme court of Tennessee have said in the case of Adams v. Memphis & L. R. Co., 2 Cold. 645–650, that there is an implied power to borrow money for corporation purposes belonging to municipal corporations. And, relying upon the settled doctrine in Tennessee that railroad building is a corporate purpose, the learned counsel for plaintiff presses with great earnestness the doctrines of that case. We are asked, upon its authority, to imply a power to borrow money for this corporate purpose, and then again to imply from the power to borrow money the power to issue negotiable bonds. In Nashville v. Ray, 19 Wall. [60 U. S.] 479, it is said that this declaration of the supreme court of Ten-

nessee in Adams v. Memphis & L. R. Co., supra, was not necessary to the decision of the case, as it clearly was not. The case of Nichol v. Mayor, etc., of Nashville, supra, does not support the implied power to issue bonds where authority to subscribe stock is given under a statute appointing the mode of payment. In that case there was express power to issue the bonds, and even if it had been necessary to their support to rely on any implication of power, the charter of the railroad company in that case authorized corporations to subscribe stock "with all the rights of any other stockholder." This is directly within the case of Seybert v. Pittsburg, supra, where the words were "as fully as any individual." Here there are no such words, either in the railroad charter or in the act of 1852, under which this town acted. There are decided expressions in the case (pages 262, 263) in favor of powers by construction, but confessedly they did not arise, and we have the authority of the same court for saying that "the reasoning, illustrations or references contained in the opinion of a court are not authority, not precedent, but only the points in judgment arising in the particular case before the court." Louisville & N. R. Co. v. Davidson Co., supra. The case of State v. Anderson Co., supra, is much relied on by plaintiff. This is also a case in which there was express power to issue the bonds, and they were issued in exact conformity to the statute. There is a very strong expression in the opinion in this case in favor of the incidental right to issue bonds or other commercial evidence of debt, wherever the power to contract is given, but it is manifest that the case is not an adjudication on the point, and it could not have been, for there was no want of a positive grant of power to issue the bonds, and the decision is put upon that ground. I am unwilling to adjudicate in the absence of a controlling authority that a municipal corporation has power to issue coupon bonds in payment of any debt it is authorized to contract. No case that I have found decided, either by the United States supreme court or the supreme court of Tennessee, has gone that far as an adjudication. And after a most patient and deliberate examination of the subject, I am of the opinion that the defendant corporation had no power to issue these bonds to be implied from the authority to subscribe stock. This judgment is supported by the reasoning in the case of Gause v. Clarksville [Case No. 5,276], where the question is examined by Judges Dillon and Treat upon authority and principle. The opinion of one of the learned judges in that case, as shown in the second division of the opinion, would seem to be against the views here expressed, but I think there is here in Tennessee no universal practice to issue bonds without special authority, as in Missouri, in payment of stock subscriptions. And I have endeavored to show that the United States supreme court have not yet decided in favor of any such implication of power. Until it decides the point, I cannot yield my own strong convictions against the doctrine, acquired by this investigation.

I have also considered the other question, raised by the pleadings, as to the effect of the condition mentioned in the face of the bond. These coupons not containing on their face the condition expressed in the bonds, unless the reference to the number of the bond is to be so taken, the first question argued is, whether they are affected by the recital in the bond? If this can be regarded as an open question since the case of McClure v. Township of Oxford, 94 U. S. 429, it is not raised by the demurrer. Harshman v. Bates Co., 92 U. S. 569. The third, fourth and fifth pleas aver that the plaintiff had notice of the condition and its breach. He may have had such notice otherwise than by the expression of this condition on the face of the bond. The demurrer admits this averment of notice, and the only question is, whether the facts stated constitute a defense. It is not denied by the plaintiff that, if this be a condition precedent to the payment of the bonds, they are not negotiable and are subject to all the defenses which could have been made against them in the hands of the original holder. Indeed, as the pleas charge notice of the failure to comply with the contract on the part of the railroad company, the case must be treated as if the railroad company itself were the plaintiff. So many decisions have been made upon the vexed question of what are, and what are not, dependent covenants, that, being irreconcilable with one another, they rather perplex than aid the judgment in determining a given case. That the intent of the parties is to control is a universal rule. Officer v. Sims, 2 Heisk. 501; Grant v. Johnson, 5 N. Y. 247, 255. The intention is to be ascertained from the contract; there is nothing technical in it. The parties have a right to make their agreements dependent or independent, and as they make them the courts are bound to enforce them. Commissioners of Clermont Co. v. Robb, 5 Ohio, 491. Where parties have made an express contract none can be implied, is an axiom in the law particularly applicable to this subject. Cutter v. Powell, 2 Smith, Lead. Cas. 1; Hudson Canal Co. v. Pennsylvania Coal Co., 8 Wall. [75 U. S.] 276. In the notes to Pordage v. Cole, 1 Saund. 319, 320a, Sergeant Williams has deduced from the cases certain rules for ascertaining the intention, which have all the force of judicial decision because they have been referred to and adopted by almost every court considering the subject from that day to this. But in the application of these rules the courts have great difficulties, and there is no subject in our jurisprudence more beset with conflicting decisions. The difficulty is determining whether one promise be the consideration for another, or whether the

performance and not the mere promise be the consideration. As in this case, was the construction of the railroad to Dyersburg or the undertaking of the company to construct it to that place the consideration of these bonds? It is said that this is to be determined by the intention and meaning of the parties as shown in the face of the instrument, and by the application of common sense to each particular case. Chit. Cont. (11th Ed.) 1082; Stavers v. Curling, 3 Bing. N. C. 355; Taylor v. Mason, 9 Wheat. [22 U. S.] 327. The court will not confine itself to particular expressions but will collect the intention from the whole instrument. Chit. Cont. 122. And every part must have its effect. Id.; Henschel v. Mahler, 3 Denio, 428, 431; Heywood v. Perrin, 10 Pick. 228. Where there are mutual covenants or acts they are construed to be dependent, unless a contrary intention appears, and there is good sense as well as practical convenience in the rule. McNeill v. Magee [Case No. 8,915]. The supreme court of the United States have said that although many nice distinctions are to be found in the books upon the question "whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent; yet, it is evident the inclination of courts has strongly favored the latter construction, as being obviously the most just. The seller ought not to be compelled to part with his property without receiving the consideration; nor the purchaser to part with his money without an equitable return." Bank of Columbia v. Hagner, 1 Pet. [26 U. S.] 455, 465. This is said in a case of vendor and vendee of an estate, but it applies as well to all contracts. It is undoubtedly true that in cases involving the forfeiture of estates, and perhaps in ordinary commercial contracts, where the language of an agreement can be resolved into a covenant, the judicial inclination is to so construe it. And where a party has another remedy for an injury inflicted by the non-performance of a condition, which may be compensated in pecuniary damages, he will be remitted to that remedy. Paschall v. Passmore, 15 Pa. St. 295, 307. The reason of this distinction is stated to be that the other consideration prevents the court from dealing out justice to the parties according to the equities of the case. Front Street, M. & O. R. Co. v. Butler, 50 Cal. 575. But this doctrine appertains rather to courts of equity than those of law, and can never be invoked to destroy the clear intention of the parties, and where the enforcement of the rule would operate to inflict injustice on the other side. In a case like this there can be no compensation in damages. How could this town be compensated in damages by a failure to build a railroad to it? Nothing less than money enough to build the entire road from Paducah to Memphis would answer as compensation, in case of total failure to build it. The object of this subscription was to secure the road to that town, and whatever they may have technically expressed by their contract. I have no doubt they intended to secure the construction of this road by making their contribution dependent upon the performance of the condition, and did not intend to rely upon any mere covenant on the part of the railroad company secured against a breach by an action for damages. Where the acts stipulated to be done are to be done at different times the stipulations are to be construed as independent of each other. Goldsborough v. Orr, 8 Wheat. [21 U. S.] 217. This rule is not inflexible but yields wholly or in part to the intention of the parties, and the good sense and equity of the case. Cunningham v. Morrell, 10 Johns. 203, and cases cited in note to Wilks v. Smith, 10 Mees. & W. 360, by Hare & Wallace. A more practical test for all cases is, whether the defendant reasonably appears to have looked to the plaintiff's covenant, or to its performance as the consideration and condition of his being bound. Id. Here, however, no time is fixed for building this railroad to Dyersburg. The law implies that a reasonable time was intended to be given. Chit. Cont. 1062; Davis v. Gray, 16 Wall. [83 U. S.] 204, 231; Cock v. Taylor, 2 Tenn. [Overt.] 49. The act of January 27, 1870 (chapter 49, § 5), allowed seven years from the date of the act for the completion of the road. The bonds being issued subsequent to that amendment the parties are supposed to have contracted with reference to it, and this fixes the time within which this condition should have been performed, and it had expired when this suit was brought, and about six years before this money was payable; so that the rule operates the other way, unless the fact, that some of the coupons fell due prior to that time, changes it. The town may have been willing to pay the coupons falling due prior to the date designated by statute as the time for the completion of the road; relying upon the security which the condition gave as to the remainder. They could make this contract if they chose, and we have seen that the rule yields to the actual intention.

There are some cases which hold that, if part of the money be payable before the act is to be done by the other side, the respective promises are independent as to the installments of interest; but these cases have, in their peculiar facts, furnished other evidences of such intention, such as delivery of possession of the thing sold. Generally, however, the cases have been those where the principal money was payable in installments. Wilks v. Smith, 10 Mees. & W. 355; Mattock v. Kinglake, 10 Adol. & E. 50; Dicker v. Jackson, 60 E. C. L. 103; Edgar v. Boies, 11 Serg. & R. 445; Chit. Cont. 1082, and cases. It was held in Loan Ass'n v. Topeka, 20 Wall. 656, that the mere payment of interest would not work an estoppel, and I think the application of this rule of part pay-

ments to installments of interest, aside from other controlling circumstances is a perversion of the rule itself, and often would operate to defeat the intention. It should only be applied where the mode of payment of the principal money indicates that the parties could have had no other intention than that the promises should be independent. Gardiner v. Corson, 15 Mass. 500, shows that annual payments of interest do not bring the case within the rule of payment by installments. The plaintiff here also relies on the rule that where an essential part of the consideration has been paid, the party receiving it will not be allowed to defeat a recovery against him because some remaining portion of the whole consideration remains unperformed, the argument being, that the town has received the stock of the railroad company for which it subscribed, and because the whole consideration has not been received it cannot refuse payment. Chit. Cont. 1092. This question might become important if the railroad company were in a condition to tender performance of its undertaking, but the pleas aver that it has been foreclosed and its property and franchises sold under a mortgage. If a party has disabled itself from fulfilling the contract, there is already a breach, and the contract is at an end. Chit. Cont. 1079–1084. And the non-performance of one part of a contract is not excused by showing performance of another part. Id. 1079. Cutter v. Powell, 2 Smith, Lead. Cas. 1, and notes, is a case that discusses this doctrine; and it will be found that the rule does not apply where the main and essential part of the consideration remains unperformed. Here, the chief consideration was the railroad facilities to be acquired by the construction of the road to the town. It is well known, that in these days, stock in railroad companies, as property, is not of much value, and the shares are not, in this class of cases, any very essential part of the consideration.

The case of Humboldt Tp. v. Long, 92 U. S. 642, is not like this case. The bond did not show any condition, and therefore the subsequent use of the words "upon the performance of this condition" had no force. If the bond had said "payable upon express conditions that the road be constructed through the township," it would have been this case, but it does not so say. In Pendleton Co. v. Amy, 13 Wall. [80 U. S.] 305, the condition was precedent to the issuance of the bonds, and its performance was presumed from the recitals in the bonds and the fact of their issuance. But here the condition is attached to the payment of the money.

Usually, these bonds are issued in aid of the road without incumbrance as to conditions, and it would have been better for the railroad company had these bonds have been so issued. But the parties could attach this condition to their contract, and the bonds were not valueless if the condition has been performed. It was simply a transfer of confidence in the railroad company from the town to the capitalist, who takes the bonds. It is he who trusts the railroad company in this case, and not the defendant corporation. It was a wise contract on the part of the town, and it has taken the precaution to inform persons dealing in the bonds of the fact that it had attached the condition to the contract by this recital. The language of the proposition as voted, and the proceedings of the town authorities do not indicate any other condition than that shown on the face of the bond. But if they did, the expression in the bond itself is not ambiguous. The case of Miller v. Pittsburg & C. R. Co., 40 Pa. St. 237, falls directly within the case of a contract for payment before the road was to be built, and to build it. The principal money—the subscription itself—was all due two years before the road suspended. Here it is deferred for ten years, and the charter of the company required the road to be completed six years before these bonds were due The case of Brooklyn v. Aetna Life Ins. Co. [99 U. S. 362], decided by the United States supreme court, October term, 1878, is a clear recognition of this defense as a good one. And there can be no doubt that if the bonds in that case had on their face given notice, as in this case, the plaintiff would have failed. The case of Town of Concord v. Portsmouth Sav. Bank, 92 U. S. 625, is directly in point in favor of this opinion. There the act of the legislature attached the condition to the subscription; here the contract of the parties attached it. There the bonds were void; here the condition, being broken, the bonds became valueless. The case of Nashville & N. W. R. Co. v. Jones, 2 Cold. 574, is also an authority directly in favor of this conclusion.

The importance of this case demands, and has received my most careful consideration, and the defenses set up have raised some of the most perplexing questions known to the law. This must be my apology for the delay in deciding it, and the fullness of the opinion. Demurrer overruled.

Case No. 5,757.

GREEN v. FRENCH. SAME v. SMALLEY. SAME v. VAN WINKLE. SAME v. GARDINER.

[4 Ban. & A. 169;[1] 16 O. G. 215; 2 N. J. Law J. 148.]

Circuit Court, D. New Jersey. March 25, 1879.

PATENTS—INJUNCTION TO PREVENT INFRINGEMENT—LACHES.

1. The question of laches, as bearing upon an application for a preliminary injunction, discussed.

2. Whether acquiescence can be inferred from failure to bring suit against defendant, during the pendency of other suits, against other par-

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

ties, to determine the patentee's rights under the patent, considered.

3. Where the validity of the complainant's patent has been established by protracted and expensive litigation, and the proof of the infringement is clear, the court has no discretion, but is bound to grant a preliminary injunction. Gibson v. Van Dresar [Case No. 5,402], cited and followed.

[Cited in Cary v. Lovell Manuf'g Co., 24 Fed. 143; Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co., 54 Fed. 679; Coats v. Merrick Thread Co., 149 U. S. 562, 13 Sup. Ct. 970.]

[This was a bill by Benjamin F. Green against Phineas French, William L. Smalley, Daniel G. Van Winkle, and William E. Gardiner, for the infringement of reissued letters patent No. 4,372, granted to N. W. Green, May 9, 1871, the original patent, No. 73,425, having been granted January 14, 1868.]

Joseph C. Clayton and A. Q. Keasbey, for complainant.

Van Winkle & Maxon, for defendants.

NIXON, District Judge. This is an application for a preliminary injunction. The validity of the complainant's patent has been established by two adjudications—one in the Second circuit, in the strongly contested case of Andrews v. Carman [Case No. 371], before Judge Benedict, and the other in the Eighth circuit, in Andrews v. Wright [Id. 382], before Judges Dillon and Nelson, the case not yet reported.

The answering affidavits of the defendants in this case substantially admit the infringements, in fact, although they deny it in words, and the only question is, whether there has been such an acquiescence of the complainants in the use of these wells by the defendants as to make it proper for the court to deny an interlocutory injunction. The general principle of equity jurisprudence which underlies applications of this sort is, that the court will not lend its help, by way of preliminary injunction, in those cases where it appears that the complainant has acquiesced in the infringement and unreasonably delayed suit against the infringers. When patentees sleep over their rights, without an excuse, they must not rely upon the extraordinary aid of the court when they awake from their slumbers, but must be satisfied with such relief as may be afforded by the ordinary course of practice, after final hearing.

The reissue on which this action is based was granted May 9, 1871 [No. 4,372]. Within one year from that date the owners of the patent began a suit against an alleged infringer in the Eastern district of New York, which grew into such large proportions that three weeks were allowed and taken in the final argument, and which resulted, in 1876, in a decree sustaining the validity of the patent. The complainant explained his delay in the present case by showing that the suit above referred to was regarded by himself and many others as a test case, and that he had not the pecuniary means to prosecute all infringers, nor was he disposed to promote litigation by a multiplicity of suits, until the vital questions raised by the pleadings and evidence in that case were settled by the decision of a competent tribunal.

A delay in bringing actions against infringers, when satisfactorily accounted for, is not to be treated as laches. It would be a great hardship to require patentees, who are generally poor, to institute legal proceedings as soon as an infringement was ascertained or lose the right to the protection which an interlocutory injunction affords. Judges Nelson and Betts, in Van Hook v. Pendleton [Case No. 16,851], held that the owner of a patent was not to be charged with acquiescence in an infringement because he withheld suit during the pendency of other suits to determine his rights under the patent. They say: "It is contended * * that an injunction ought not to be granted, on the ground that the plaintiff has acquiesced in the use of this machine by the defendants; that he has known of its use and has not interfered to prevent it. We do not think this objection can prevail. It does not satisfactorily appear that the plaintiff knew how the defendants' machine was constructed, or how far it infringed upon his; and, if he did know, we do not hold that he forfeited his right to protection by injunction against the infringement, because he did not apply sooner. He brought other suits, one against one of these defendants, to vindicate his rights; and he is not to be charged with acquiescence because he proceeded first against that which was a more palpable and obvious violation of his right, or because he had not brought suit against all the machines which infringe upon it."

It may be further observed that the affidavits of the defendants do not disclose the fact that the complainant has had any knowledge of the existence of the defendants' driven wells. They allege generally, that for several years he has had personal information and knowledge that various parties were engaged in the business or occupation of sinking driven wells in North Plainfield, in the county of Somerset, and that not until within the past few weeks has he taken any proceedings to restrain any of said parties from the sinking of such wells.

The complainant, on the other hand, says, that there has been no acquiescence on his part except what may be implied from his not bringing suits against known infringers; that he has warned and cautioned all of whom he has heard against the consequences of infringement, and demanded the payment of the established royalties, before he commenced prosecutions; that in some cases the parties have agreed to pay the royalties, and have thus saved to the complainant, and to themselves, the expenses of litigation, while, in other cases the right of the complainant

has been, at first, recognized and payment promised, and afterwards refused.

The case falls within the principle announced by Judge Nelson as governing the court in the Second circuit in Gibson v. Van Dresar [Id. 5,402], to wit; that the court has no discretion, but is bound to grant a preliminary injunction where the validity of the complainant's patent has been established by protracted and expensive litigation, and the proof of infringement is clear.

An injunction is ordered in the above stated case, and also in the several suits pending against William L. Smalley, Daniel G. Van Winkle, and William E. Gardiner, until final hearing, or further order of the court.

[For other cases involving this patent, see note to Andrews v. Denslow, Case No. 372.]

Case No. 5,758.

GREEN et al. v. FRY.

[1 Cranch, C. C. 137.] [1]

Circuit Court, District of Columbia. July Term, 1803.

ACTIONS ON JUDGMENTS—JUSTICE OF THE PEACE.

Indebitatus assumpsit lies upon the judgment of a justice of the peace.

Assumpsit [by Green & English] for the amount of two judgments given by a justice of the peace in May, 1801.

A. B. Woodward offered the warrants and judgments in evidence.

Mr. Baker, for defendant, objected that the action ought to be debt; and that the judgments are not evidence in assumpsit.

Mr. Woodward, in reply. The judgments are not matter of record, and are good consideration for assumpsit.

At December term, 1803, judgment was rendered for the plaintiff. KILTY, Chief Judge, doubting. FITZHUGH, Circuit Judge, contra. CRANCH, Circuit Judge, clearly for the plaintiff.

GREEN v. GARDINER. See Case No. 5,757.

Case No. 5,758a.

GREEN v. GARDNER et al.

[5 N. J. Law J. 174; 22 O. G. 683.]

Circuit Court, D. New Jersey. May 1, 1882.

PATENTS—DRIVEN WELLS.

A person who used a driven well for household or other purposes on his property *held* liable to an injunction and accounting; but one who boarded with his mother, and contributed to the expenses of the family, *held* not liable for the use of a well on the premises.

[This was a bill in equity by Benjamin T. Green against William E. Gardner and others for an injunction and an account.]

Jos. C. Clayton, for complainant.

Wm. B. Maxson and James Buchanan, for defendants.

NIXON, District Judge. The above-named complainant had twenty suits pending in the court against alleged independent infringers of the driven well patent. While the testimony was being taken for the final hearing, the solicitors of the respective parties entered into and filed in the court the following stipulations in all the cases: "(1) this cause shall be heard and determined upon the proofs, oral, documentary and written, taken and to be taken in the similar cause of Green v. French [Case No. 5,757], now pending in this court. Said proofs shall be read and considered with the same effect as if proven in this cause. (2) This cause shall be argued and submitted at the same time as the said case of Green v. French. (3) The respondent may introduce proofs on the question of infringement, subject to rebuttal by complainant and reply of respondent." After argument and a decree in favor of the complainant, a final decree, to the form of which the counsel of the defendants made no objections, was entered in twelve of the cases. The remaining eight were not in the same position, inasmuch as testimony had been taken under the above stipulation, on the question of infringement, and the counsel of the defendants insisted that the complainant's prima facie case of infringement had been fully met and rebutted. The parties have agreed that I should take up these cases and examine them in the light of additional evidence, and pass a decree only in those cases where the court is satisfied that the testimony warrants it.

I find the proof to be in the several cases as follows: (1) That Chas. E. Austin is not the owner of any real estate; that his wife has the title for two dwelling houses in North Plainfield, one of which is now occupied by the defendant and his family. It has a driven well in the cellar, which has been used by him and his family since the occupancy of the house. The other dwelling house is unoccupied. It has also a driven well in the cellar. The defendant, before he moved into his present residence, lived there, and used the well for the general purposes of the family. (2) That Chas. E. Dunham lives in rented premises in North Plainfield, in which there is a driven well which is used by himself and family; that within a few years he has been the owner of two properties in Plainfield, on which there were driven wells; that about five years ago he sold one to Capt. Rybing, and about three and half years ago the other to Mrs. Phineas M. French. (3) That Alfred Berry, from 1872 to 1877, owned a place at the corner of Gregg and Somerset streets, on which there was a driven well, supposed to have been put down by A. Sebring, in 1868 or 1869; that on the premises now occupied by him in North

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

Plainfield, there is a driven well, which he moved from under the house to the outside, and is used by his family, principally for washing. (4) That John W. Schenck owned property to about two years ago in North Plainfield, on which there was a driven well; that he has owned none since, but lives on premises belonging to his wife, on which there is a driven well, used by his family for all domestic purposes. It was put down by A. Sebring in 1872. (5) That James T. Pierson lives at Westfield, N. J., and rents a storehouse at the corner of Broad and Elm streets; he uses a driven well to procure water for general purposes in connection with his store business. (6) That Wm. E. Gardner, in 1876, purchased a property in Plainfield, on which there was a driven well, that he never personally occupied the premises, and sold them some months before the date of this examination to one John D. Bartine, Ex'r, for the mortgage upon the land; that he rented out the property, whilst he held it, and when the injunction in the suit was served upon him, he removed the pump. (7) That Judson O. Brown lives on the premises in North Plainfield, on which there is a driven well in the kitchen of the house; that the property is owned by his wife; that before he moved there he rented a house on the opposite side of the street, and paid one-half of the expenses of putting down a driven well, his landlord paying the other half; the work done by John Rafferty, and the well was used by the defendant, whilst he remained on the property. (8) That Russell Johnson owned no property in New Jersey; that his mother for many years had been the owner of a house in North Plainfield, in which she lived, and in which there was a driven well; that during one or two summer seasons he boarded with his mother, furnishing, in connection with his brother, Andrew W. Johnson, the expenses of the table, in consideration for their board.

In view of the foregoing facts, I am of the opinion that there should be a decree for an injunction and accounting against all of the defendants, except the said Russell Johnson, and that in his case the bill should be dismissed with costs.

[Patent No. 73,425 was granted to N. W. Green, January 14, 1868; reissued May 9, 1871 (No. 4,372). For other cases involving this patent, see note to Andrews v. Denslow, Case No. 372.]

Case No. 5,759.

GREEN et al. v. HANBERRY.

[2 Brock. 403.] [1]

Circuit Court, D. Virginia.[2] Nov. Term, 1830.

ADMINISTRATOR DE BONIS NON—LIABILITY FOR MONEY COLLECTED BY AN AGENT—ADMINISTRATION BOND.

1. In a suit by sundry creditors, against the estate of their debtor, after great delays resulting from the number of parties, and the complexity of the case, a decree was rendered, establishing several of the claims, and adjusting their priorities. The administrator de bonis non of the debtor, at the date of the decree, was also executor of a former administrator of the estate, and claimed a large balance to be due to the estate of his testator, from the estate of his intestate, on his administration account. The commissioner made a favourable report on this claim, but the proper parties not being before the court, no decision was made on its validity. The decree referred to, added:—"And the court, without deciding that there is at this time, assets of the estate of" the debtor, "in the hands of the administrator de bonis non, or, on the claim of" the administrator, &c., "to retain out of the assets in his hands, the balance he claims to be due, &c., to his testator, doth decree, &c., that the said administrator, &c., out of any assets in his hands, or to come to his hands, applicable to the claims hereby established: and the receiver of sundry effects and securities, &c., of the debtor's estate, &c., pay, &c." Under this decree, the receiver, without authority from the administrator de bonis non, transferred some securities for money due to the estate of the debtor, to the agent of one of the plaintiff creditors. To prevent the remittance of the money secured by these bonds, beyond the jurisdiction of the court, until the debt, (which, if established, would be of the highest dignity,) due to the estate of the former administrator, should be established, the legatees of that former administrator obtained an injunction. On the motion to dissolve this injunction, *held*: That it was immaterial whether the decree, under which the receiver acted, was final or not. The object and end of the injunction was, not to alter or modify the decree, but to secure the execution of that decree according to a sound construction of its import, and to prevent its violation under the semblance of being carried into execution.

2. The decree only ascertained the amount and priorities of the debts respectively, without averring assets or directing payment, leaving it to the administrator to determine on the applicability of the assets; and the receiver, being subordinate to the administrator, had no right to apply the assets, unless authorized by him to do so. Motion to dissolve continued.

3. An administrator who employs an agent to manage the estate of his intestate, collect debts, &c., is responsible for the money so collected, and creditors are not bound to pursue the agent; but if there is reason to believe that the account of the agent has not been correctly settled, the administrator should be permitted to show cause against the report, in that particular.

4. Where an administration bond is joint, each administrator is a surety for the other, and is bound for the whole. But if the representatives of the co-administrator against whom a balance is reported, are not before the court, the report is ex parte as to them, and cannot bind them, and, consequently, cannot affect his co-administrator.

This was a motion to dissolve an injunction awarded at the suit of the plaintiffs, legatees of the late Peter Lyons, to restrain John Wickham, one of the defendants and the attorney at law, and in fact, of the representatives of Capel and Osgood Hanberry, from paying away, if collected, a sum of money claimed by him under a decree of this court, pronounced in December, 1828, in a suit depending between Lidderdale's Executors et al. v. Robinson's Administrator; the ultimate object of which suit is to distribute the estate of John Robinson, deceased, among his creditors, according to law. The suit was

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

[2] [District not given.]

brought, originally, by Lidderdale's executors, against Edmund Pendleton and Peter Lyons, the administrators of the said John Robinson, to recover a sum of money due to the estate of the plaintiffs' testator. The administration accounts of the defendants on the estate of their intestate, were referred to one of the commissioners of this court. These accounts being unusually complicated, and the suit being, on account of their complexity, long depending, the other creditors of Robinson have filed bills, asserting their respective claims on his estate. These several claims were also referred to the commissioner, with directions to report the amount and dignity of each, in order to enable the court to distribute the legal assets of the intestate, among the creditors, according to their respective priorities. This report having been made, the cause came on to be heard again in December, 1828, when a decree was pronounced, establishing the amount of debt payable to several of the creditors, and, also, establishing their respective priorities. The debt of lowest dignity thus established, was one due to the representatives of Capel and Osgood Hanberry, which was a simple contract debt, amounting to $17,415.16. While the suit was depending, Peter Lyons, the surviving administrator of John Robinson, departed this life, and the suit was revived and continued against James Lyons, administrator de bonis non of John Robinson, and also executor of Peter Lyons, deceased. A claim to a large amount was made by the executor of Peter Lyons, deceased, as being due to him as administrator of John Robinson, deceased, and this debt, if established, would, of course, be of higher dignity, than the debt due to Hanberry's executors. A large balance was reported by the commissioner in his report of June, 1824, as due to the estate of Peter Lyons, from the estate of his intestate; but this debt was controverted on various grounds, by the counsel for Hanberry. The exceptions filed to this item of the report, are discussed by the chief justice in the case of Lidderdale v. Robinson [Case No. 8,337], to which the reader is referred, but no decree was rendered establishing this debt, the proper parties not being before the court. After detailing the several claims which it established, the decree of December, 1828, adds: "And the court without deciding that there is, at this time, assets of the estate of Robinson, in the hands of his administrator de bonis non; or, on the claim of the said James Lyons, to retain out of the assets in his hands, the balance he claims to be due, from the estate of Robinson to his testator Peter Lyons, doth decree and order that the said James Lyons, administrator de bonis non, of the said John Robinson, out of any assets in his hands, or to come to his hands, applicable to the claims hereby established; and James Lyons, Jr., the receiver of the sundry effects and securities of the said Robinson's estate, under the order of the court in this cause on the 15th of December, 1825, out of the funds by him received, or to be received, from said effects and securities, should either, or any of the creditors whose claims are hereby established, be willing to take such effects or securities at their nominal amount in discharge of their claims, pay, &c." Under this decree, the receiver, without any authority from the administrator de bonis non of John Robinson, has transferred some securities for money to the estate of the said Robinson, to John Wickham, the agent of Hanberry's representatives. Among other securities assigned to Hanberry's agent, was a debt due from the estate of John Lyons, deceased, and his executor, Peter Lyons, the younger, executed two bonds for the amount of the debt, of rather more than $5,000 each, to Mr. Wickham, and executed to him a deed of mortgage, to secure the payment thereof. It was to prevent the remittance of the money, secured by these bonds and mortgage, to the creditors beyond the jurisdiction of this court, until the debt due to Peter Lyons's estate from the estate of Robinson, should be established by a decree of the court, in order that it might be, in the first instance, applied to the payment of this debt of superior dignity, that the injunction was awarded. The parties, plaintiffs to the bill of injunction, were the legatees of the said Peter Lyons, deceased.

Mr. Wickham, on behalf of Hanberry's executors.

Chapman Johnson, for plaintiffs.

Mr. Wickham contended:

(1) That the decree of December, 1828, which is partly recited above, in favour of Hanberry's representatives, being in full satisfaction of their claim on Robinson's estate, was a final decree as to them, and that they thenceforward ceased to be parties to the cause. There being no allegation or proof of fraud or collusion between Hanberry's representatives and James Lyons, the elder, the executor of Peter Lyons, deceased, and administrator de bonis non of John Robinson, or the receiver who assigned the securities in satisfaction of the decree, the complainants, claiming only as legatees of Peter Lyons, can have no right to arrest or open any proceedings in law or equity. The defendants are entitled to the benefit of the established rule of equity, that when a creditor has recovered of an executor or administrator, a sum of money, in a fair course of legal proceedings, no other creditor of the deceased, nor a legatee, or distributee of that creditor, has a right to interfere and compel a repayment of the money so recovered. (2) That Peter Lyons was not a creditor of Robinson's estate, but, that on the contrary, he was largely a debtor to that estate. It is true, that by the report of the commissioner, it appears that on a separate account raised by the commissioner between the estate of Peter Lyons and that of John Robinson,

Peter Lyons's estate is made a creditor; but there is a special statement by the commissioner, in which, by charging the estate of Peter Lyons with a balance reported in the same account to be due from Edmund Pendleton, his co-administrator, and one due from George Brooke, an agent employed by the administrators to aid them in the transaction of their business, there is a large balance due from the estate of Peter Lyons, to that of Robinson. These two charges, I maintain, are properly to be opposed to any claim on Robinson's estate, by the representatives of Peter Lyons, as the administration bond executed by Lyons and Pendleton was a joint bond, and George Brooke was employed by them in the collection and payment of debts, and in doing the business, which they, as administrators, were themselves bound to do, or else, to be answerable for his acts. But if this were not so, it is apparent from the report, that if the accounts were properly stated by the commissioner, Peter Lyons would be found on other grounds, so far from being a creditor, to be a debtor to Robinson's estate. For a considerable period during Lyons's administration, there were no vouchers produced to sustain the accounts. The commissioner states, that the report was made up on a former report of Commissioner Hay, to the court of chancery, which report was never confirmed. The counsel insisted, that neither the administration books, nor such a report, was a legal ground for reporting a balance in favour of Peter Lyons.[3] Again.—Hanberry's judgment, when assets, was rendered in June, 1767; yet the commissioner has allowed credits to a large amount for payments made in discharge of debts subsequent to that period, due from Robinson's estate, some of them, it is believed, of no higher dignity than Hanberry's debt, and on which no judgments, or subsequent judgments were obtained. Now, I insist, that when a judgment, when assets, is obtained by a simple contract creditor, no payment to a creditor by simple contract, who has not obtained a judgment, can be set up against the creditor who has. Finally, the report itself, furnishes strong internal evidence, that Peter Lyons never could have been so largely in advance to an estate, in debt to an enormous amount, without any certain prospect of reimbursement. In the year 1799, and for several succeeding years, Peter Lyons received large sums of money for Robinson's estate, besides upwards of $5,000 borrowed by him from the estate, under the direction of the court of chancery, and, that during this period, except a payment of upwards of £300, his payments were trifling. The commissioner manages to sink these receipts, and make a large balance due to Peter Lyons's estate, by crediting him with large advances made in the early part of his administration, and this, without any legal evidence, and relying solely on the administrator's books, and Commissioner Hay's report, which was never sanctioned or confirmed in any manner. It is incredible that these large advances could have been made by the administrator, to an estate universally understood to be insolvent. But if the court will entertain jurisdiction of the cause, and permit the complainants to proceed, it is insisted by the counsel, who is also the counsel for Lidderdale's executors, that they shall be compelled to make Lidderdale's executors parties defendants, and as the complainants allege that James Lyons, the administrator de bonis non of Robinson, and executor of Peter Lyons, is dead, insolvent, that they may be compelled to pay out of the moneys and effects received by them from the said James Lyons, as legatees of Peter Lyons, whatever balance shall be found due from the estate of Peter Lyons, to that of Robinson.

Mr. Johnson in reply, said he could not perceive how it was important, whether the decree enjoined was final or interlocutory? This question can only affect the form in which its error, if there is error, is to be corrected. Whether the parties to this bill, who are not parties to the decree, may impeach it, is another question. They are the legatees of Peter Lyons, deceased, and it may be, that the administrator is the proper representative of that estate, to correct the errors in the decree. The legatees had certainly sufficient interest to justify them in staying the money in this country during vacation, till by motion or bill of review, the decree could be examined and corrected. Now, the administrator de bonis non of Peter Lyons, may be regularly heard to ask a correction of the decree. If the court thinks the decree interlocutory, then, on his behalf, I submit the motion to correct it: if the court thinks the decree final, then, a bill of review will be submitted, assigning the same error. James Lyons ceased to be the executor of Peter Lyons before his death, and the sheriff of Hanover, James Underwood, is the administrator de bonis non, in whose behalf the proceeding is had. The error we complain of, is this: That without deciding the amount due to the estate of Peter Lyons, and without ascertaining that there would be assets remaining to satisfy that amount, the court has directed payment of the simple contract debt due to Hanberry. The commissioner's report shows a large balance due to Peter Lyons, one of the administrators of

[3] The question of the admissibility of this evidence, in such a case, had already been investigated by the chief justice, in considering the exceptions to this identical report. The chief justice said that under the circumstances of this case, after so great a lapse of time, he was strongly inclined to the opinion, that vouchers to sustain this administration account, ought not to be required; but that the books of the administrator, when they appeared to have been fairly kept, and a commissioner's report founded upon them, ought to be received as prima facie evidence of its correctness. See Lidderdale v. Robinson, already referred to.

Robinson, and there are no apparent assets to satisfy it. The report, it is true, is excepted to, but these exceptions have not been decided: and can it be right, with a report of a commissioner, uncondemned by the judgment of the court, that there should be a decree disregarding it?

Mr. Wickham urges various objections, to the balance reported as due to Peter Lyons's estate. (1) It should be reduced by charging him with Brooke's balance. The answer to this is, that he is charged with a moiety of Brooke's balance, and still there remains due $13,980 11. (2) He is liable for the balance due from the estate of his co-administrator, Edmund Pendleton. Pendleton's representatives are not parties to the cause, and, therefore, his balance can have nothing to do with the case. They will be ready to answer that balance, whenever they are brought before the court. I have looked into Pendleton's account, and will be able to show, when his representatives are before the court, that he is a creditor, not a debtor. (3) There are no vouchers to sustain the account in favour of Peter Lyons. Answer.—If, instead of settling the account, as the commissioner of this court has done, by reference to the report of Commissioner Hay, we are to proceed upon the exhibition of vouchers, then, the court must decide that point, and send us before the commissioner for the exhibition of these vouchers. The debts and the credits have both come from Commissioner Hay's report, and if that is to be discarded, we will soon produce from the archives of state, evidences of payment into the treasury, sufficient for our purpose. At present, however, until the court decides upon the exceptions to the report, we must hold its balances as our guide, in relation to all the parties before the court. (4) There is internal evidence in the account itself, that the enormous balance reported in favour of Peter Lyons, is not correct. He would not have been so largely in advance to an estate, regarded as insolvent. In answer to this objection, it is sufficient to observe, that an inspection of the account will show, that the balance due to Peter Lyons, is far short of his commissions, with interest upon them, and that the sums received by him, in the latter part of his administration, have not been more than enough to sink the interest upon the arrears of his commissions. He has, therefore, not advanced money from his pocket, but has only omitted to retain his full commissions. (5) As Hanberry's judgment was rendered in 1767, when assets, the disbursements made since then, to debts due by simple contract, are a devastavit. Answer.—It does not appear that there are any such disbursements, and if this fact is to be discussed, it must be before a commissioner, when the evidence must be adduced. Those disbursements do not appear to have been objected to, before the commissioner. It is not to be presumed, against the commissioner's report, that the administrators, both legal men,[4] and men of business, have committed a devastavit by paying debts, without regard to legal priority. It appears to me, that the report must be taken as correct, or it must be sent back to a commissioner; and if any thing is claimed, on account of Mr. Pendleton's supposed balance, his representatives must be made parties. I am their counsel, and will consent to bring them before the court without delay, and have their account settled.

But Mr. Wickham insists, that the plaintiffs in the injunction case, must make all necessary parties, on pain of having the injunction dissolved. This we cannot think right; Peter Lyons's administrator de bonis non, has a right to be heard; he is a necessary party to the decree. He demands to be heard. He has a right by motion, or bill of review, to examine the decree, and have the errors corrected. It is a consequent right, to stay the money in this country, which that decree is about to send out. And the court would not impose upon him the necessity of becoming plaintiff, taking the labouring oar, and paying all expenses. He is defending himself; defending the claim of his intestate, to assets which ought to satisfy his demand. And there is no precedent for holding over him the penalties of an erroneous decree, to compel him to manage the plaintiffs' cause. If Lidderdale wishes to pursue his claim, let him take the proper steps. If he thinks Peter Lyons a debtor, and that he can recover any thing from his legatees, let him make those legatees defendants. But he has no right to use Hanberry's decree, in order to coerce Lyons's legatees to make him a defendant. For these reasons, we oppose the discharge of the attachment, and if it is discharged as to the present plaintiffs, upon any formal objections to the mode of relief which they seek, then, we ask it, or its equivalent, on behalf of the administrator de bonis non.

Mr. Wickham, in reply to the remarks of the plaintiffs' counsel, observed, that, whether the decree in favour of Hanberry be final or not, the complainants can have no right to impeach it, except on the ground of fraud and combination between those who were parties to the decree. He understands the uniform course of decision to be against such right; and in the case of creditors, whose right is preferable to that of legatees, he believes no case can be found, where a creditor has ever been held entitled to impeach or hinder the effect of a judgment in favour of another fair creditor, on the ground that there are not effects for both, and that his debt is of superior dignity. The reasons for the rule rest on settled principles of law and equity, and if it were not established, the counsel for the plaintiffs, might easily support his position by authority—but this he certainly cannot do.

[4] Edmund Pendleton and Peter Lyons were both judges of the court of appeals of Virginia.

The counsel for Hanberry's executors, considers the decree in their favour final. A sum of money is decreed to be paid, by the assignment of debts, in satisfaction of their demand. The debt of Peter Lyons, the younger, has been satisfied by the taking of a new security from him. The difference between a final interlocutory decree, relates to the power of the court. In the former case, the party against whom it is entered, must file a bill of review, and show error in the decree, before he is entitled to relief. If the decree be interlocutory, the court can, for good cause, on motion, set it aside. Whether the present administrator of Peter Lyons can file a bill of review, is not the question; he has not done so, and the legatees have no right to set aside the proceedings in a suit fairly conducted, to which they were not, and ought not, to have been parties. But even if the administrator of Peter Lyons were before the court, on a bill of review offered by him, there could not be the least ground for setting aside or suspending the operation of the decree at his instance, there being no evidence in the cause, that the estate of Robinson is in debt to that of Peter Lyons, but direct proof to the contrary. The reports of Commissioner Ladd have been excepted to by the counsel for Hanberry, but not by the administrator of Lyons. Now, admitting the report to be right throughout, Peter Lyons's estate, at the date of the report, was indebted to that of Robinson $6248 98, besides $5034 42, borrowed from the court of chancery on the 19th of November, 1807, amounting, with interest, to $9902 21, the whole amounting to $16,151 19, as will appear by the report, page 248. It is true, this balance is obtained, by charging him with the balance due from George Brooke, his agent, and that from Edmund Pendleton, his co-administrator, for whom he was security. Now, as Brooke did the business of the estate for him, as his agent, he is, undoubtedly, liable immediately, and directly, for Brooke's acts; and as for the balance due from Pendleton, he was undoubtedly liable, and never could claim any thing from the general fund. The creditors are entitled to that, and it is the business of his administrator to go against Pendleton's estate. It is remarkable, that the commissioner, page 70, makes Pendleton's estate debtor $11,809 29, and in page 173, makes Brooke's estate debtor $16,839 61, the aggregate of which is, $28,648 90, instead of $20,229 09, which the commissioner states it to be in page 248. This plain error in the addition of these two sums, of $8419 81, is to be added to the balance due from Peter Lyons's estate, so that it was in debt to that of Robinson's, at the date of the report, $24,571, instead of $16,151 19. With regard to Edmund Pendleton's debt, he would add, that if Peter Lyons, on his own transactions, was an admitted creditor of Robinson's estate, and preferred his claim as a creditor, and he was an admitted debtor to the estate as surety for another person, solvent or insolvent, for a larger sum, he never could recover on his separate claim in law or equity; one debt being set-off against the other, he would, with respect to the debt for which he was security, be left to his remedy against his principal. Whether this statement is right in its details or not, there cannot be any doubt on the face of the report, that Peter Lyons's estate is largely in debt to that of Robinson. It is, therefore, only by showing error on the face of the report, that the plaintiff, Green, can ask a suspension of the decree, even admitting that he can stand in the place of Lyons's administrator. Now, the report (as well it might be) was so satisfactory to the administrator of Peter Lyons, that he never filed a single exception to it, and the legatees have no right (except on the ground of fraud, which is not alleged) to step in his place, and raise objections which he did not make. It may be said, that as the suit is still depending, it is not too late to except. It is a sufficient answer to say, that by omitting to except, when the decrees in favour of Hanberry and the other creditors were asked for, he admitted that he had no objections to the report, that could affect their rights.

It is urged, that the court ought not to have decreed in favour of Hanberry, until it had decided on the report and exceptions. The answer is, that Hanberry's claim stands, in this respect, precisely on the same footing as that of every other creditor, whose claim had been previously allowed. The counsel for the plaintiff, Green, will contend, and perhaps justly, that if Peter Lyons was a creditor of the estate for advances properly made, he had a lien on the fund for the balance, and a priority over every creditor, including those of the highest dignity. Now, in deciding on the claims that were allowed, the court virtually determined, that other claims, not allowed, were either not established, or to be postponed to those allowed. But in point of fact, Lyons's account was repeatedly brought before the court, not by his administrator, who knew that he could not sustain a claim to any part of the fund; but by the counsel for Hanberry, who urged for a decree against Lyons's estate, first for the balance reported due from him in the report, including his responsibility for Mr. Pendleton, and then, for such further sum, as the exceptions that should be sustained, would give a right to. The court refused to decree against Lyons for Pendleton's balance, unless the representatives of Pendleton were made parties. This he did not choose to do, as it might delay the case, and there was ground to believe, that the fund would be sufficient to satisfy the claim of his clients. It was one thing to refuse a decree against Lyons without other parties, and another and very different one, to decree in his favour on his separate account, while he was

liable for a much larger sum, on account of his responsibility for Mr. Pendleton and for Brooke; and it certainly never occurred to any one, that Lyons's administrator could ever recover any thing, out of the funds under the direction of the court.

But the counsel for the plaintiffs now insists, that the representatives of Lyons, have nothing to do with Pendleton's accounts. Yet the former was answerable, on the administration bond, for Pendleton's balance, and he and Roane, representatives of Lyons, are plaintiffs, and Hanberry's representatives are now entitled to all the rights of defendants in equity. It is suggested, however, that Pendleton's account is incorrectly stated, and that he may be found a creditor. Of this there is not the smallest evidence in the cause, and it is remarkable, that the complainants, relying solely on the report for an enormous balance alleged to be due to Peter Lyons, for advances to an insolvent estate, without any probability of reimbursement, (for all the funds have since come in from the lead mine property, which was a very doubtful and litigated claim, and from Byrd's estate, which was long considered insolvent, and becoming otherwise from the rise of Richmond property), should consider this report of no authority with respect to Pendleton's estate. But even if Pendleton's account should be thrown out of the case, Lyons's estate will be found in debt, if it is charged, as it ought to have been, in the first instance, with Brooke's balance. Brooke was the mere agent of Lyons, (or perhaps of Lyons and Pendleton jointly), and his account should have formed a part of that of the administrators; as they employed him to do their duty, his acts were theirs. It is evident from the report, that the very great balance, reported in favour of Lyons, against all probability, rests only on a report of Commissioner Hay, which has never been confirmed or acted on, and on Lyons's own books. On this, the counsel for the plaintiff remarks, that Lyons's commissions amount to a very great sum, and that vouchers sufficient for the purposes of the estate, can be got from the treasury. With regard to commissions, they are always a regular and proper charge. When Mr. Lyons received money, his commission was a proper and regular charge, and the amount was his, as much as any other part of his property, and he would be just as unwilling to lose property, thus acquired, as any other; and as to his getting vouchers enough for this purpose, from the treasury, it is considered that this idea is founded on a misapprehension of an established rule of equity. Every administrator is bound by his duty and his oath, to return an inventory of goods, debts, &c., and an account. He is chargeable for all the items of account rendered by him, and can only discharge himself by vouchers; we have a right to take the debit side of his account as he renders it, and call on him for vouchers in support of the credits he claims. All his commissions are allowed him, and it is not pretended, that any credits for payments in the treasury, or any others, are omitted in the account. He will only add, that if, contrary to the evidence in the cause, and to all probability, Peter Lyons's estate should be found in advance, there cannot be a doubt, that the funds in the hands of the receiver, absolutely secure, as he, (one of the representatives of Peter Lyons) will say, amounting to upwards of $10,000, will be much more than sufficient to answer the claim. Relying that the injunction will be dissolved, and the attachment discharged, the counsel for defendants submits, that if the suit goes on, proper parties should be made, and if an account is directed, there should also be an account of the estate of Pendleton, in the hands of his devisees. The complainants allege, that the executor is dead, insolvent, and if the estate of Lyons is indebted to that of Robinson, which there is every reason to believe, the creditors of the latter, ought to receive satisfaction in this suit, out of Lyons's estate. Lidderdale's executors, for whom he is counsel, who are the only creditors before the court whose claims have not been adjudged, are as much interested in every question in the cause as Hanberry's executors, except that the latter have got their decree. Whether Lidderdale's executors can be made formal parties, is perhaps no great matter, provided the complainants are held to the necessity of abiding the result of the account, if it should be against the estate of Lyons.

MARSHALL, Circuit Justice. The motion to dissolve this injunction, is supported on several grounds, which will be separately considered.

1. It is contended, that the decree of December, 1828, was final, as to the representatives of Capel and Osgood Hanberry, and they ceased to be parties to the cause; consequently, the decree, as to them, cannot be changed by the court, in the manner now asked, on the part of the representatives and legatees of Peter Lyons, deceased. Were it to be admitted, that the decree is final, and that the court cannot now modify it, this admission, would not, I think, avail the present defendant. This court is not asked to modify or alter its decree; but to restrain the defendant from placing beyond its reach, a sum of money which the plaintiff claims, and which he insists the decree does not give to the defendant. To estimate the value of this argument, it becomes necessary to look at the decree itself, and to ascertain its extent. It does not positively assert the right of the representatives of Capel and Osgood Hanberry, to a single dollar, nor positively direct the payment of a single dollar to them. It ascertains the amount of the debt due to each individual, and the relative dignity of those debts; but does not aver the

existence of assets for the payment of any one of them, and, consequently, does not direct the payment of any one of them. The court, in express terms, refuses to decide that there are assets in the hands of the administrator de bonis non, which are applicable to the payment of the claims thus established, and assigns as the reason of this refusal, that no decision had been made on the accounts of Peter Lyons, the former administrator of Robinson, or on the claims of James Lyons, his executor, and the administrator de bonis non of Robinson, to retain the assets in his hands to satisfy the debt to his testator. The court, therefore, directs the payment, not absolutely, but out of such assets as may be applicable to the claims which had been established: obviously, leaving it to the administrator to determine the applicability of the assets. The decree then proceeds to direct the receiver to pay the claims out of the money which may come to his hands, or to transfer the securities to any creditor, who would be willing to receive them at their nominal amount. The part of the decree which is addressed to the receiver, is obviously subordinate to, and dependent on, that part of it which is addressed to the administrator. The administrator must decide on the applicability of the assets, before the receiver can apply them; this is submitted to the judgment of the administrator, and might safely be submitted to him; because, being the executor of Peter Lyons, he would be careful to retain in his hands assets to satisfy that claim. If, then, the receiver, unauthorized by the administrator, proceeds to transfer the assets to the agent of Capel and Osgood Hanberry, the injunction which detains this subject within the power of the court, is not an alteration of the decree of December, 1828, but an order to insure the execution of the decree according to a sound construction of its import; an order to secure it from being violated under the semblance of being carried into execution.

2. The defendants insist, that Peter Lyons is not the creditor of his intestate on his administration account. Some exceptions are taken to the report, which I have not critically examined, and upon which, the state of the cause does not require an immediate decision; but there is one important point which the court ought now to notice. The administrators of John Robinson, employed George Brooke as their agent, who transacted the business of the estate to a very great extent. The commissioner reports a large balance against Mr. Brooke; the representatives of Capel and Osgood Hanberry insist, that the administrators themselves are responsible for the sum in the hands of their agent, and must settle his accounts. That the creditors of Robinson are not bound to pursue him. This is true. But the case furnishes reason for the opinion, that Brooke's account may not have been accurately settled, and the court thinks, that the representatives of Robinson's administrators ought to be permitted to show cause against the report in this particular. Whether Peter Lyons alone, should be held responsible for the whole sum, which may be due from Brooke, or whether it should be divided between the administrators, is a question which need not be decided, till the sum shall be ascertained.

3. But the counsel for the representatives of Capel and Osgood Hanberry insists, that the same report which shows Peter Lyons to be a creditor of Robinson's estate, shows Edmund Pendleton to be a debtor, and Peter Lyons is responsible for the debt due from Edmund Pendleton, because their administration bond is joint, and they are consequently sureties for each other. This is true, and if the balance against Edmund Pendleton was regularly established, no doubt could be ascertained of the liability of Peter Lyons for it. But this balance is not established. The report, as to the representatives of Edmund Pendleton, is entirely ex parte, and cannot bind those representatives. The report, therefore, establishes nothing against the estate of Edmund Pendleton, and cannot be brought to bear on Peter Lyons. I perceive, therefore, no sufficient cause for dissolving the injunction, at present. The plaintiffs in the original suit may either proceed with the investigation of the accounts of Peter Lyons, holding him responsible for his own transactions, or may make him responsible for the transactions of Edmund Pendleton, by bringing the representatives of Edmund Pendleton before the court. The motion is continued.

A question of considerable importance has not been suggested, but ought to be taken into view. James Lyons, the executor of Peter Lyons, and the administrator of John Robinson, is dead, it is said, insolvent. If he died indebted to the estate of his intestate, it is an inquiry of serious import, whether the money he thus owes, ought not to be considered as so much received by him, as the executor of Peter Lyons.

Motion to discharge the attachment, and dissolve the injunction overruled, with leave to renew it; and the several reports made in the cause re-committed with directions to re-consider and report thereon, and settle, state, and report the accounts of the administration of Edmund Pendleton, deceased, on the estate of John Robinson, deceased, and the accounts of George Brooke, agent of the administrators of Robinson.

GREEN (HEAD v.). See Case No. 6,292.
GREEN (JAYCOX v.). See Case No. 7,237.
GREEN (NEAL v.). See Case No. 10,065.
GREEN (RYAN v.). See Case No. 12 186a.
GREEN (SAM v.). See Case No. 12,275.

Case No. 5,760.

GREEN v. SARMIENTO.

[Pet. C. C. 74;[1] 3 Wash. C. C. 17.]

Circuit Court, D. Pennsylvania. Oct. Term, 1810.

CONTRACTS—LAW OF PLACE—DISCHARGE UNDER BANKRUPT LAWS—CONCLUSIVENESS OF A JUDGMENT.

1. The law of the country, where the contract is made, is the law of the contract wherever performance is demanded; and the same law which creates the charge, will be regarded, if it operate a discharge of the contract.

[Cited in Taylor v. Carpenter, Case No. 13,785; Phillips v. Preston, 5 How. (46 U. S.) 291.]

2. A debt contracted in one country, cannot be discharged by the bankrupt laws of another country.

[Cited in Le Roy v. Crowninshield, Case No. 8,269; Towne v. Smith, Id. 14,115; Re Shepard, Id. 12,753.]

3. A judgment in a state court, is conclusive in every other state, and extinguishes the original ground of action.

[Approved in Field v. Gibbs, Case No. 4,766. Cited in Campbell v. Claudius, Id. 2,356; Sarchet v. The General Isaac Davis, Id. 12,357; Whitaker v. Bronson, Id. 17,526; U. S. v. Reese, 92 U. S. 251.]

[Cited in Hazzard v. Nottingham, Tapp. 146; Cole v. Driskell, 1 Blackf. 18; Wyman v. Campbell, 6 Port. (Ala.) 619; Kittredge v. Emerson, 15 N. H. 262; Wood v. Watkinson, 17 Conn. 502; Sessions v. Stevens, 1 Fla. 233; McDade v. Burch, 7 Ga. 559; Warren v. Lusk, 16 Mo. 112; Baltzell v. Nosler, 1 Iowa, 588; McGilvray v. Avery, 30 Vt. 539; Dunham v. Downer, 31 Vt. 262; Bank of North America v. Wheeler, 28 Conn. 439; Barnes v. Gibbs, 31 N. J. Law, 320; Lowry v. Inman, 46 N. Y. 123; Glass v. Blackwell, 48 Ark. 50, 2 S. W. 253.]

This was an action of debt, brought on a judgment recovered in the mayor's court of New York, in an action of assumpsit against the defendant and Mahony, as partners, on a contract stated to have been made at Madeira. Plea nil debet, and bankruptcy of defendant in 1801, and a certificate of discharge at Teneriffe. By the New York record, it appears, that the capias ad respondendum, was executed upon the defendant, but not on Mahony. The defendant entered an appearance by counsel, and, in 1795, pleaded non assumpsit. In 1796 he was called, and not appearing, a jury was impanelled to try the issue, who found a verdict for the sum now demanded, and in 1797 judgment was entered for the plaintiff. The bankruptcy of the defendant, and the proceedings against him, according to the law and usage of Spain, in the island of Teneriffe in 1801, and his certificate and discharge, were fully proved.

For the plaintiff it was argued: First, that it is not to be presumed, that the original contract was made at Teneriffe, or in a country subject to Spain; and that to make the proceedings on that ground, operate as a discharge, it was necessary for the defendant to prove this fact. Doug. 1; 1 East, 6. Second, that though it were made at Teneriffe, still the judgment merges the original contract, and affords a new consideration for the assumpsit, even though the judgment should be considered as only prima facie evidence. 6 Rep. [Coke] 44b. Third, but most certainly so, if the judgment be conclusive, and that the constitution and act of congress make it conclusive. Armstrong v. Carson [Case No. 543]. All these points were controverted by the defendant, and the cases below were cited: 2 Kame, Eq. 367, 365, 374; Camp. 63; 1 Caines, 460; 1 Johns. 424; 1 Mass. 401; [James v. Allen] 1 Dall. [1 U. S.] 191; [Phelps v. Holker] Id. 261; 5 East, 124; Coop. Bankr. Law, Append. 27, 30; [Millar v. Hall] 1 Dall. [1 U. S.] 229; 6 Johns. 287; 5 Johns. 132; 9 East, 192; 5 Johns. 37; Coop. Bankr. Law, 361–373; 8 Term R. 609.

WASHINGTON, Circuit Justice (charging jury). I shall consider the validity of the plea of bankruptcy, and discharge at Teneriffe, first, in relation to the original debt, independent of the judgment on which this action is founded; and secondly, as it may affect that judgment.

First, the rule is, that the law of the country where a contract is made, is the law of the contract, wherever performance is demanded; and the same law which creates the charge, will be regarded, if it operate a discharge of the contract. The laws of one country, can have in themselves no extra-territorial force, except so far as the comity of other nations may extend to give them effect; and where is the nation that will, or ought to acknowledge the validity of foreign laws, legislating over persons not within the jurisdiction of such foreign country, and affecting contracts entered into elsewhere, and with a view to other laws? It is said, that France acknowledges the binding force of foreign bankrupt laws, to discharge the foreign debtor, from all his contracts, wherever made. If this be so, I can only say, that the comity of that nation, is marked by a whimsical, and I think an irrational opposition, to that which obtains in most other countries. She disregards the decisions of foreign prize courts, so far as they affect the subjects of France; although they are courts of the law of nations, and although all the world are nominally parties to the causes they decide, and the captor and captured, are, in reality, the immediate parties; and yet she submits to foreign municipal laws, affecting the interests of French subjects, upon the ground of a mere fiction, which in reality favours only the subjects of the country, where the law operates to the unjust exclusion of her own subjects. It is said, that the rule observed in the state of Pennsylvania, is different from that which is approved by the court as the general rule; and to prove this, the case of Millar v. Hall, 1 Dall. [1 U. S.] 229. has been cited and relied upon. In the case of Banks v. Greenleaf [Case No. 959], decided

[1] [Reported by Richard Peters, Jr., Esq.]

ten or twelve years ago in the circuit court of Virginia, upon the ground that a contract made in Virginia, was not discharged by the insolvent law of Maryland, Millar v. Hall was cited. It was then, and continues to be my opinion, that that case is consistent with the rule before laid down; the debt having accrued at Baltimore, where the goods were sold, and the money received. If then the general rule be correctly stated, it is essential to the support of the defendant's defence, set up in this cause, in relation to the original contract, to prove, that it was made at Teneriffe, or in some place governed by Spanish laws. No direct proof of this fact has been given, and certainly the circumstance of the defendant, having generally resided at Teneriffe, from the year 1790 to the year 1810, furnishes a very slender ground for presuming it. Occasional absences have been admitted, at which times the contract in question, might have been made at Madeira; or it may have accrued there, although the defendant had never left the island of Teneriffe; since it does not appear where Mahony, the other partner, lived; and since the debt might have been contracted, in a variety of ways at Madeira, though both partners had always resided at Teneriffe. If then this debt was not contracted at Teneriffe, the cause is against the defendant, independent of any change produced by the judgment; but as it is possible the jury may not view the evidence in the light it is seen by the court, it may be necessary to consider the second point; which is, did the judgment so far alter the nature of the original contract, that it could not be discharged by the proceedings it Teneriffe, on the bankruptcy of Sarmiento?

It is contended by the counsel for the plaintiff, that the original contract is so completely extinguished by the judgment, that it cannot be noticed in reference to any question, to which it might previously have given rise; and therefore, that the debt must be considered as having accrued under the judgment, in the state of New York. This is certainly true, where the judgment is conclusive and not subject to examination in a court of coordinate jurisdiction; nor does the court mean to intimate that the rule would not be the same, in a case where the judgment is only prima facie evidence of a debt. But, since this latter point has not been considered, and the court is prepared to give an opinion upon the great question, which has been discussed, of the conclusiveness of a judgment of a state court, in every other state of the Union; it is thought best to decide it now, that the point may be put at rest in this court, as well as elsewhere, in case it should be deemed proper to take the opinion of the supreme court upon it. We never expect to hear the question more ably argued.

The first section of the fourth article of the constitution of the United States, declares, "that full faith and credit shall be given in each state, to the public acts, records and judicial proceedings of every other state. And that congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." This section has three distinct objects: First, to declare, that full faith and credit shall be given in each state, to the records, &c. of every other state; secondly, the manner of authenticating such records, &c.; and thirdly, their effect when so authenticated. The first is declared and established by the constitution itself, and was to receive no aid, nor was it susceptible of any qualification, by the legislature of the United States. The second and third objects of the section, were expressly referred to the legislature of the Union, to carry them into effect in such manner, as to that body might seem right; and it will presently be seen how very correct this reference was. That the intention of the constitution, to invest congress with the power to declare the judgments of the courts of one state, conclusive in every other, and even to clothe them with a still more extended force and effect, corresponded with the strong and unambiguous expressions used in this article, will appear from the following considerations. First, it is presumable, that the enlightened framers of that instrument knew, that by the general comity of nations, and by the long established rules of that country, whose decisions were once of binding authority in the United States, and to a certain period, were still observed and adopted; a foreign judgment might be made the foundation of an action here, and was prima facie evidence of its own correctness. It is highly probable, therefore, that the constitution intended something more, than merely to recognize an established rule of law, which without such a declaration, would allow in each state, at least as much faith and credit to the judgments of a sister state, as to those of a country foreign to the United States. If nothing more was meant, the provision was certainly unnecessary. It would on the contrary seem more natural that the constitution, which was intended to "form a more perfect union," and a more close and intimate connexion of the states, than had existed under the confederation; would consider the judgments of the several states, in relation to each other, as domestic rather than foreign judgments.

Secondly, the change of the language of this section of the constitution, from the parallel section of the articles of confederation, affords a strong reason for the opinion, that the former was intended to give to the judgments of each state within the other states, a more extensive force and effect, than the rule of law, founded on mere comity, had allowed to foreign judgments. The fourth article of the confederation, goes no farther than to declare, that "full faith and credit shall be given in each state, to the records, acts, and judicial proceedings of the courts

and magistrates of every other state;" whereas the constitution proceeds to add, that congress may declare what shall be the effect of such records, acts, and judicial proceedings. And what reasonable objection, let me ask, can be offered against extending to the judgments of each state, in every other state, the rule which is applicable to domestic judgments within the same state? Does it consist with the peace of society, with the interest or security of individuals, that a question which has once been fairly tried and decided, should be litigated again and again, before other tribunals of co-ordinate jurisdiction, as often as one of the parties may chuse to withdraw himself from the jurisdiction of the state, where the decision has been made? Is it right to open again the door of litigation, which has once been regularly closed, and to re-examine the original cause of action, when possibly by the death or absence of witnesses, or the loss of other testimony, the justice of the case can no longer be reached? But, it is objected, that the judgment may be unjust, upon the merits of the case, or erroneous in point of law; and ought such a decision, it is asked, to be submitted to, by the courts of another state? I answer, that the contrary of all this ought to be presumed; and let me ask in return, which is the state that stands so pre-eminent for virtue and knowledge, as to say with confidence, that the judgments of her courts would be more just, or more consonant to law, than those of her sister states? I admit that the supposed case, upon which the objection is founded, may sometimes happen; but I am far from conceding, that in all cases the evil would be remedied, by a re-examination of the cause, before another tribunal, in another state; and the general good forbids that this should be done.

I now proceed to enquire, in what manner congress have exercised the power confided, by the above section of the constitution, to that body. As a key to the intention of the legislature, the title to the law, which is now to be examined, deserves peculiar regard. The will of the people, expressed in the section of the constitution, before mentioned, remained unfulfilled, until congress should have made provision, respecting the two objects which that section had referred to them; and the title declares in explicit terms, the determination of that body to act upon both. The words are "an act to prescribe the mode in which the public acts, records and judicial proceedings, in each state, shall be authenticated, so as to take effect in every other state." The law then proceeds to make provision for the first of these avowed objects, by prescribing the mode of authentication, and then declares, "that the said records and judicial proceedings so authenticated, shall have such faith and credit given to them in every court, within the United States, as they have by law or usage in the courts of the state from whence they shall be taken." It has been contended, that this latter sentence, (for there are but two in the enacting part of the law) means no more than that full faith and credit shall be given to the record, so authenticated; as evidence, that such proceedings were had, and such judgment rendered, as the record imports. But the sentence does not go so far as this; for it does not give full faith and credit, but such faith and credit, as the record has in the state from whence it is taken. Now, congress had no authority to declare, that full faith and credit should be given to such public acts and records, as a matter of evidence; because the supreme law of the land, had already pronounced upon that subject; and a similar declaration, by this subordinate body, would have been idle, if not mischievous. If this sentence meant to qualify and restrain the credit, to which such evidence is entitled under the constitution, by referring it to the rule of the state laws and usages; then such intention would be a palpable violation of the constitution, which gives to such evidence, full faith and credit. It is impossible, therefore, to rescue the legislature from the charge of folly or usurpation, but by confining the last sentence of the law, to one of the two objects, referred to that body by the constitution; and since the mode of authenticating public acts and records, had been provided for, by the first sentence, the conclusion is inevitable, that this sentence was intended, and could only have been intended, to declare the force and effect to be given to records and judicial proceedings, when so authenticated. Under this view of the subject, the power to limit the effect of such judicial proceedings, is undoubted; and it was wisely left to the discretion of congress, to regulate the degree of force to be given to such proceedings. For, if the constitution or the law, had declared generally, that the judgments in one state, should be conclusive in every other; very embarrassing questions would have arisen, as to the degree to which they were conclusive. If not conclusive in the state where the judgment was rendered, it might have been attended with mischievous consequences, to declare them so in other states. In some of the states, perhaps, judgment up on an attachment, may be conclusive only as to the thing attached; in others, it may be so as to the matter decided, and to operate against the person and estate of the defendant generally. In others again, the judgment may be so far inconclusive, that it may be opened and examined upon the performance of certain conditions, within a limited period. The present case, affords a strong illustration. The judgment is against Sarmiento and Mahony, although process was not served on the latter, nor did he appear or take defence. Is the judgment by the law of New York, conclusive as to Mahony? Possibly it may be so, upon the ground, that it was a partnership transaction; and that as one partner may bind, so he may defend his as-

sociate. But a different course of reasoning might prevail in other states, and the law might consider it only prima facie evidence, or no evidence at all, against the defendant, who was not served with the process. These, and a variety of other cases, which might be put, show the wisdom of the legislature, in giving to such judgments, only such credit, as they possess in the state where they were rendered.

Now let me ask this question of those who deny the conclusiveness of the judgment. If a court in Pennsylvania, should declare, that a judgment of a court of New York, is evidence only that such a judgment was rendered, and that the same is only prima facie evidence that a debt is due or not due; does that court give as much faith and credit to such judgment, as is given to it, by the laws and usages of the state of New York; which pronounce it to be evidence, and conclusive evidence, not only of the existence of the judgment, but of the right which it has decided? If then you deny to such judgment, the force and effect given to it, by the laws of New York; you deprive it of the same faith and credit, which the same laws attribute to it; and in truth, the latter expressions, as used in the act of congress, are synonymous with the former. Nothing remains, but to answer some of the objections made to this construction. It is said, that the judgment which thus claims an exemption from re-examinations, may have been exparte; the defendant having had no opportunity to make his defence. If the law of the state does not prohibit such an outrage upon the immutable dictates of justice; then the court which inadvertently gave the judgment, or a superior court, would provide the redress. If the law or the courts, should leave the injured party without a remedy, I will not say, (because in this case it is unnecessary,) whether the courts of another state would be bound to consider such a judgment, as conclusive or not. But, if they should be so found, then I can only say, that the act of congress was not passed with sufficient consideration; and that it may, and ought to be so amended, as to give a conclusive effect to judgments, only in cases where the trial was perfectly fair, and where both parties were, or might have been heard. But the supposed case, although it might form an exception, furnishes no just ground of objection to the rule itself.

As to the second objection, it is said the judgment on which this action is founded was exparte, erroneous and unjust. The answer to this is, that there is no foundation for the complaint, that the judgment was exparte; because the defendant was served with process, and pleaded to the action. If the judgment be not erroneous, it would doubtless have been reversed, if the defendant had thought proper to carry it before an appellate court. If the plaintiff's claim was unfounded, for which, by the bye, we have only the defendant's assertion; he has no one but himself to blame for not having proved it so, at the trial of the cause.

Third objection. If the judgment is to have such effect in this state, as it has in the state of New York, it would create a lien on lands lying in this state; an execution might issue from the mayor's court, where the judgment was rendered into this state, or a scire facias might lie. These, if they be evils, are altogether imaginary. The judgment of itself, has no extra-territorial force; the laws of New York can give it none, nor does it obtain it from the act of congress. The courts of the other states, are enjoined to give such faith and credit to it, as it is entitled to in the state of New York. If it be conclusive evidence of the right it establishes, in the courts of New York, it is conclusive here; and this is all that the act of congress requires. There however is no doubt in my mind, but that congress may give to the judgments of one state, all the effect which it is complained may follow from the rule laid down by the court; and I confess that I can see no good reason, why such an effect may not in part be given. Why ought not an execution to issue, upon a judgment rendered in one state, against the person and effects of the defendant, found in any other? It is unnecessary, however, to moot the policy of the measure, which must rest with congress in its wisdom to adopt, if it should seem right to that body to do so.

Upon the whole, it is the opinion of the court, that this judgment is conclusive, and amounts to a complete extinguishment of the original contract, wherever it might have been made; and consequently, upon the rule first laid down, the bankruptcy, certificate and discharge of the defendant at Teneriffe, afford no bar to the plaintiff's present demand, and your verdict ought to be for the plaintiff.

Verdict for plaintiff.

GREEN v. SMALLEY. See Case No. 5,757.

GREEN (STANWOOD v.). See Case No. 13,301.

Case No. 5,761.

GREEN v. TAYLOR et al.

[3 Hughes, 400.] [1]

Circuit Court, E. D. Virginia. May 5, 1879.

ACTIONS AGAINST HUSBAND AND WIFE—COMPETENCY OF HUSBAND AS A WITNESS IN WIFE'S FAVOR—"SALE IN GROSS."

1. In a case, in which an abatement was claimed for an alleged deficiency in the sale of a tract of land, in which the husband and wife were both made parties defendant, but the wife was not a necessary party defendant, *held*, that the husband is a competent witness to testify in favor of any interest of the wife, but is

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

incompetent to testify against any such interest.

2. The words "sale in gross," when applied to the land itself, are synonymous with "contract of hazard," and preclude any claim for abatement in the purchase-money.

In equity. In the early part of December, 1872, W. A. S. Taylor was in Hampton. Whilst there he was approached by A. B. Green, who desired to purchase of him a tract of land near Newport News, of great prospective value, on account of being near the expected terminus of the Chesapeake and Ohio Railroad; land which he derived from his wife. Taylor agreed to write him from Norfolk (Taylor's home) a response to his proposition. On his return he wrote Green as follows: "Norfolk, Va., December 3d, 1872. Dear Sir: Mrs. Taylor can be induced to take for the farm $25,000, that is, about $62½ per acre (399⅔ assessed). She would entertain no proposition based simply on its agricultural value. I write in response to your request of yesterday. Of course, we do not hold the proposition open longer than your prompt reply. Yours truly, W. A. S. Taylor. P. S. Please keep offer to yourself. I desire no one to know it. W. A. S. T." This letter was never answered, and that negotiation terminated with it. About two weeks after this, one Titlow, a real estate agent of Hampton, the county-seat of the county where the land lay, made renewed overtures to Taylor, which were rejected; but Green denies Titlow's agency. Afterwards, on the 1st of January, 1873, Mr. Thomas Tabb, a prominent lawyer of Hampton, acting as the agent of Green, renewed negotiations with Taylor for the purchase of the land, offering $25,000, which was accepted. The deed was drawn by Mr. Tabb in Taylor's presence, and the boundaries furnished by Mr. Tabb, who was familiar with the property. In drawing the deed, Mr. Tabb inserted the clause "containing 400 acres more or less." Taylor refused to execute a deed guaranteeing any particular quantity, and insisted upon the insertion of a clause protecting him from any trouble on that score. Mr. Tabb then inserted the following clause, declaring that it would be sufficient to meet Taylor's purpose (Taylor not being a lawyer): "The said tract of land is sold in gross and not by the acre, and embraces the tract of land devised to Martha, the wife of the said William A. S. Taylor, by will of her father, the late Edward Parrish, and also the tract acquired by her under the will of her uncle, the late John Parrish." A third of the purchase-money was paid in cash, and the balance evidenced by two bonds secured by deed of trust on the land. The first bond was paid at maturity, and part of the second. After the greater portion of the second bond had been overdue, some two years or more, Taylor directed Mr. Tabb, the trustee, to sell under the trust deed. Thereupon Green filed a bill of injunction, in which he alleged a deficiency of 80 acres in the quantity mentioned in the deed, and claimed abatement therefor, making Taylor and wife and Tabb parties defendant. Mrs. Taylor had joined, according to the mode prescribed by law, in the deed of Taylor and wife to Green, but the bonds for the deferred payments were made payable to Taylor individually. Taylor answered the bill, claiming that the contract was a sale in gross, and denying Green's right to any abatement. A survey taken by order of court in this suit showed a deficiency of 63 acres. Taylor's deposition was taken in support of his answer, in which he detailed the conversation between himself and Tabb, held at the time of the execution of the deed. To this deposition the plaintiff excepted, on the ground that the husband could not testify either for or against his wife's interest, in a case where both were parties. The exception was overruled.

HUGHES, District Judge. Depositions of Taylor, the defendant, have been taken and filed in the cause, which are excepted to by complainant's counsel, on the ground that Taylor is an incompetent witness in consequence of his wife being a party to the cause. No objection is made by Green to the validity of Taylor's title to the land mentioned in the bill of complaint. In that bill Green prays for an injunction against the sale of the land which had been advertised under a trust deed after default in the payment of the last instalment of the purchase-money. Taylor was simply proceeding to collect a chose in action, in which his wife has no interest. Green's objection to the sale is that the tract of land does not contain as many acres as it was represented by Taylor to embrace, and he claims an abatement of price. He does not seek to avoid the contract of sale for fraud or otherwise. The deposition of Taylor relates to what transpired between himself and Green on the subject of the quantity of land at the time of Green's purchase of the land. Mrs. Taylor seems to have no interest in the controversy, and is merely a formal party to the cause, made so by Green in his bill; which the defendant, however, did not demur to on that ground. The incompetency of husband or wife as a witness in cases where the other was party to a suit, was by the old law based upon two grounds, viz., 1st, that of interest; and 2d, that of public policy. But section 858 of the Revised Statutes of the United States (passed in 1864, which is a substantial adoption of Lord Denman's act), removes the first ground in the federal courts of this country, and allows parties to a suit interested in the result to testify as competent witnesses.

The other ground of objection to the testimony of husband and wife is also wellnigh abolished in all civil cases in England; namely, the ground that the admission of their testimony would be against public policy.

Before the acts of parliament in England which were designed to remove this objection, the decisions of the English courts had greatly relaxed this rule, even in criminal cases. See Rex v. Inhabitants of All Saints, 6 Maule & S. 194; Rex v. Inhabitants of Bathwick, 2 Barn. & Adol. 647; Reg. v. Williams, 8 Car. & P. 284. But see also Rex v. Gleed, 3 Russ. Crimes (4th Eng. Ed.) 631. These cases go upon the distinction between incompetency and privilege. In this country the old rule in regard to the impolicy of such testimony remains, but I think I hazard nothing in holding that it is so much relaxed that it is not enforced except in cases where the testimony of husband or wife would be against the other in civil cases. See William & Mary College v. Powell, 12 Grat. 382; also, Stein v. Borman, 13 Pet. [38 U. S.] 209. The testimony of Taylor in this case cannot, under any sort of conjecture or by any possibility, be injurious to his wife. She is a party merely in form, having no interest in the recovery. If by possibility she have an interest, the testimony of her husband is in support of that interest, and not against it. The reason of the rule of evidence in question does not, therefore, apply here. Cessante ratione, cessat et ipsa lex. I see no sufficient ground, therefore, for the exclusion of Taylor's evidence.

Thereupon the case came on for hearing upon the issues of law raised by the bill and answer, and was argued by Legh R. Page, for complainant; and by Burroughs & Brother, and Sharp & Hughes, for defendant Taylor.

The briefs of the other counsel have been taken from the papers in this cause. That of Sharp & Hughes was as follows:

Brief of Counsel for Defendants.

The questions in this case are: (1.) If Green is entitled to any abatement, should it be for seventy-five acres, the amount of deficiency shown by defendant's survey, excluding the part between high- and low-water mark from being counted in the amount named in the deed, or for only sixty-three acres, the amount of deficiency including that between high- and low-water mark in the deed? (2.) Is he entitled to any abatement, admitting the deficiency?

1. The first question is tantamount to this: Does a deed describing land as bounded by a navigable river (not as included between certain metes and bounds), convey the lands to high-water mark or to low-water mark? That is, does the ownership of riparian proprietors extend to high-water mark or to low-water mark? We maintain that the twelve acres should be included in the amount of land named in the deed. It is well settled in Virginia that the ownership of riparian proprietors extends to low-water mark. If not settled by the present statute (Code Va. c. 62, § 2), on the ground that the words "right and privileges" do not mean ownership, the original statute (1 Rev. Code 1819, c. 87, p. 341; Acts 1819, c. 28) shows this to have been the meaning of the legislature. The original statute reads: "Hereafter the limits or bounds of the owners shall extend to ordinary low-water mark," and the present statute, which is but an abstract of the original one, evidently intends to pursue the same policy. And in the case of Hundley's Lessee v. Anthony, 5 Wheat. [18 U. S.] 374, the United States supreme court expressly decides that the ownership of riparian proprietors extends to low-water mark. This view was subsequently confirmed in Garner's Case, 3 Grat. 655; in French v. Bankhead, 11 Grat. 159, 160, and is stated by Prof. Minor (2 Minor, Inst. p. 20) to be the settled law of Virginia. The law is plain enough. But there are in the papers a couple of affidavits to the effect that it is the special custom in that locality to include land only to high-water mark. What are those affidavits worth? A special custom in the sense of a local law cannot exist in Virginia, especially in contravention of an express statute. Harris v. Carson, 7 Leigh, 632; Mason v. Moyers, 2 Rob. [Va.] 606; Gross v. Criss, 3 Grat. 262; 2 Minor, Inst. 493, 495. Nor can such a custom be proved or admissible in evidence to vary a written contract. Authorities, supra, and 2 Minor, Inst. 95, 168, 169, 955, 956. But even supposing such a custom admissible in evidence, it has not been proved in this case. An affidavit can no more prove a custom than it can prove any other fact. We are as much entitled to a cross-examination as we would be if the question of quantity itself was to be proved by deposition. On no ground can the twelve acres between high and low-water mark be excluded from the land conveyed by the deed.

2. Next, is Green entitled to any allowance for the deficiency? He says in his bill that he was misled as to quantity by Taylor's representations, and that whether they were innocent or not, he should be relieved from this mistake. We deny that Taylor made any representation as to quantity. Green, by accepting the form of deed which was given him, precluded himself from any allowance for the deficiency. In other words, it is a sale in gross or contract of hazard. By accepting a deed for a sale of this character Green defeated all chance of compensation. It is well settled that in sales of this character no allowance is made for deficiency. Quantity is supposed to be no part of the contract, to be mere matter of immaterial description, and not a matter of representation. We admit that the presumption is against such contracts, and that in doubtful cases courts will incline to construe them cases of sale by the acre. But when we examine the cases decided in Virginia, and see what doubtful cases have by them been construed to be sales in gross, or contracts

of hazard, we can entertain no doubt of the result of this case, where the deed expressly provides that "this is a sale in gross and not by the acre." It is useless to quote or investigate English authorities on the subject, for the numerous decisions of the court of appeals of Virginia, nearly thirty in all, and the philosophical treatises contained in such works as Minor's Institutes and Lomax's Digest, settle the law for Virginia independently of any other decisions. Sales of land are divided into three classes:

(1.) The first class is the sale of a specified number of acres at a named price per acre, commonly designated as sales by the acre. In this class, in cases of excess or deficiency, relief will be granted, for here the quantity is of the essence of the contract, and in case of a deficiency the vendee did not get what he bargained for. To this class belong the cases of Carter v. Campbell, Gilmer, 170; Neal v. Logan, 1 Grat. 14; Triplett v. Allen, 26 Grat. 722; Bierne v. Erskine, 5 Leigh, 59.

(2.) The second class is of sales of an estimated number of acres for a gross sum. This class is commonly known as sales by estimation or sales for a gross sum. In this class also relief is allowed for errors too great to be imputable to mistakes in survey, for in this class also the parties are influenced by the quantity to a material extent in assessing the price, and quantity is of the essence of the contract. The cases under this class are Quesnel v. Woodlief, 6 Call, 238; Bedford v. Hickman, 5 Call, 236; Nelson v. Carrington, 4 Munf. 332; Nelson v. Matthews, 2 Hen. & M. 164; Duvals v. Ross, 2 Munf. 290; Blessing v. Beatty, 1 Rob. [Va.] 304; Crawford v. McDaniel, Id. 448; Walsh v. Hale, 25 Grat. 314; Hoback v. Kilgores, 26 Grat. 442.

(3.) The third class is of sales of a gross tract of land, as by specified boundaries, or described as "that parcel obtained by inheritance," or "that parcel mentioned in a certain survey." The technical name of this class is a sale in gross or a contract of hazard. The cases in the Virginia Reporters comprised under this class are Jollife v. Hite, 1 Call, 301; Pendleton v. Stewart, 5 Call, 1; Hull v. Cunningham, 1 Munf. 330; Grantland v. Wight, 2 Munf. 179; Fleet v. Hawkins, 6 Munf. 188; Tucker v. Cocke, 2 Rand. [Va.] 51; Foley v. McKeown, 4 Leigh, 627; Keyton v. Brawford, 5 Leigh, 39; Russell v. Keeran, 8 Leigh, 9; Seamonds v. McGinnis, 3 Grat. 319; Jones v. Tatum, 19 Grat. 735; Caldwell v. Craig, 21 Grat. 132.

The confusion which long shrouded the subject was caused by confounding the last two classes. In the second class it is well settled that relief is granted; in the last class, of sales in gross, it is equally well settled that mistake in quantity is no ground for relief. In the second class quantity is of the essence of the contract. In the last class the vendee desires a specified tract, and quantity is mere matter of description, not a matter of warranty, and not supposed to influence the price to any material extent. Green may say in his bill that he relied on Taylor's representations as to quantity, and intended to buy so much. But by his acceptance of a deed of that form, the law makes him say the opposite. It makes him say that he did not care about the quantity, and only desired the tract. In the words of Judge Staples in Caldwell v. Craig, 21 Grat. 136: "It is difficult to imagine a case where the purchaser, in the price he agrees to pay, is not influenced by his estimate of the quantity. And if a mistake of this sort affords ground for equitable relief, it is clear there could no longer be a contract of hazard. We know, however, that such contracts, when fairly made and clearly established, are uniformly enforced by the courts. Nor is there any injustice in this principle of equitable jurisdiction. If the vendee encounters the hazard of a deficiency, the vendor incurs that of an excess; and it is impossible to say that this very hazard did not constitute an important element of the price. For whether the case be one of excess or deficiency, the mistake is not in the substance of the contract, but in relation to the very risk in the contemplation of the parties." And the case of Pendleton v. Stewart, 5 Call, 1, also decides that in sales in gross the quantity is not of the essence of the contract, but is mere matter of description. The authorities are remarkably unanimous in holding that relief is denied in cases of sales in gross or contract of hazard, for, in Russell v. Keeran, 8 Leigh, 19, and Blessing v. Beatty, 1 Rob. [Va.] 304, and in the very last case decided (Watson v. Hoy, 28 Grat. 704) these two phrases are everywhere used as synonymous, and are stated to mean, ex vi termini, the same thing. There is not a case of a sale in gross in which relief was decreed on the ground of mistake in quantity. Any fraud, such as that in Bedford v. Hickman, 5 Call, 236, and Duvals v. Ross, 2 Munf. 290, or any eviction by title paramount might be ground of relief even in sales in gross. But in the case of fraud, that would afford a distinct ground of equitable intervention. There is, however, in this case no proof or even hint of fraud. And in case of eviction by title paramount, relief would be decreed; for, besides the fact that it would fall under the covenant of general warranty, the vendee might lose the best portion of the tract of land that he contracted for, and be frustrated in the main object of his purchase. But these are the only grounds for relief in cases of sale in gross; for mistake in quantity, an immaterial matter of description, where a tract of land is bought as a tract, frustrates no object of the vendee, works no hardship upon him, or at least none which he has not expressly waived, and to which the vendor was not equally liable.

All the cases where relief has been allowed

on the ground of mistake were either sales by the acre or else sales by estimation, or as they are sometimes called, sales for a gross sum, and it is admitted that in such cases relief is proper. Quesnel v. Woodlief and Blessing v. Beatty [supra] were both cases of this class, and neither of them extends the doctrine to sales in gross. The latter case grants relief on the express ground that the case at bar was a sale for a gross sum, and in a dozen different passages uses the words "sale in gross as synonymous with contract of hazard," and states that were the case at bar such a case, no relief would be granted. As for example (page 300), "This (stipulation) changes a sale by the acre into a contract of hazard, and necessarily excludes the interposition of equity on the ground of mistake." And again (page 301): "We must bear in mind that upon the question of compensation, the substantial distinction is between a sale that is a contract of hazard and one that is not. When 'a sale in gross' is used as equivalent to a contract of hazard, the term is properly applicable not to the price but to the subject; for a sale by the acre may be a contract of hazard, and a sale for a gross sum may not. A sale in gross when applied to the thing sold means a sale by the tract without regard to quantity, and in that sense is (8 Leigh, 19) ex vi termini, a contract of hazard."

The very latest case reported (Watson v. Hoy, 28 Grat. 704) says that the sale of a certain tract is a contract of hazard. Page 704 et seq. This is just the ground on which we stand in this case. We maintain that the words "sale in gross," are in this deed synonymous with "contract of hazard." We so hold because the manner in which it is used in the deed shows it to have been so intended. The deed expressly provides, "This is a sale in gross and not by the acre, and embraces all that tract left to the wife of the vendor by her father." The case of Hull v. Cunningham, above quoted, decides that a description of a tract as "that inherited," etc., shows that the sale of a tract in gross was intended. The cases of Grantland v. Wight, 2 Munf. 179; Foley v. McKeown, 4 Leigh, 627; Seamonds v. McGinnis, 3 Grat. 319, decide that when land is sold by metes and bounds, the sale of a tract in gross is intended. In this deed the words "sale in gross" are evidently applied to the thing sold and not to the price, and consequently mean, ex vi termini, a contract of hazard. This is the regular legal meaning of the words as shown by their continual use in that sense in Minor's Institutes (volume 2, p. 626, and also pages 794, 795), Lomax's Digest (volume 2, marg. pages 61–68), and all the cases quoted at the beginning of class No. 3. This being the legal sense of the words, we may with confidence invoke the well-settled rule of construction (2 Minor, Inst. p. 951), that parties are presumed to use technical or legal words in their technical or legal sense, a presumption which is strengthened by the proof of the circumstances under which the deed was made. The deed was drawn by an experienced and distinguished lawyer (Colonel Tabb), who certainly knew the legal meaning of the words employed by him. It is in evidence that when the statement of quantity was inserted the vendor stopped him, and refused to warrant the quantity; that Colonel Tabb then inserted the above-quoted sentence for the express purpose of protecting Mr. Taylor from any future trouble on that score; that until those words were inserted Taylor refused to accept the deed, and that it was accepted by both Mr. Taylor and Colonel Tabb, Mr. Green's agent, as a guarantee against any future litigation. The very fact that the round number of 400 acres was used, is of itself pregnant proof that it was mere matter of immaterial description, and that a contract of hazard was in contemplation. These are the surrounding circumstances admissible in evidence as placing the court in the exact position of the contracting parties, and thus enabling it to form an unerring judgment of their intention. All the evidence, both circumstantial and positive, shows that both parties contemplated a contract of hazard, and it is perhaps useless to quote any more authorities to show that relief cannot be granted. It may, however, be well to quote a few extracts from the leading cases to substantiate this view of the law. In the case of Tucker v. Cocke, 2 Rand. [Va.] 51, Judge Green (pages 65–67) says: "This was therefore a contract of hazard, without any fraud, concealment, misrepresentation, or negligence on the part of the vendor. The error in respect to the quantity of land was mutual, and was not in relation to the substance of the thing contracted for; but in relation to the very hazard contemplated by the parties, the question is whether the disappointed party is in such case entitled to relief. . . . If relief could be given in such a case as the case at bar, a fortiori, it should be given if the vendor knew of the deficiency and concealed it. So that in both cases, when the vendor knew and when he was ignorant of the deficiency, relief being given, there could no longer be a contract in which a purchaser could take the risk of a deficiency effectually upon himself. The court of appeals have uniformly recognized the validity and obligation of such a contract, and in all cases in which they have given relief it has been founded on circumstances either of fraud, misrepresentation, or concealment, or mistake in whole or in part in relation to the substance of the thing contracted for. . . ." So also in Jollife v. Hite, 1 Call, 326, 327. "If it was meant to change or set aside a real contract for the sale of a tract of land in gross, at the risk of the purchaser for gain or loss by a deficiency or excess in the quantity it was supposed to contain by both parties, I do not hesitate to say that it was car

ried too far, being an interference with fair contracts which no court has a right to make, since there was no mistake in the contract, whatever there might be in the estimate contemplated. Such contracts are made every day for the purchase of tracts of land in gross."

To the same effect are the cases of Pendleton v. Stewart, 5 Call, 1, and especially Caldwell v. Craig, 21 Grat. 136–140. And this view is the view taken by Lomax, in 2 Lomax, Dig. 61–68, and by Professor Minor, in 2 Minor, Inst. 626, and also 793–795, in which latter passage all the Virginia authorities are classified and digested so philosophically and accurately that those three short pages are a complete epitome of the law, and render useless any reference to the original cases. Without insulting the court by any further argument on a doctrine so well settled in view of the preceding authorities, we may safely maintain that in cases of contracts of hazard no relief is granted for mistake in quantity on the sole ground of mistake; that sales in gross and contracts of hazard are synonymous terms, and that the contract embodied in the deed from Taylor to Green was a contract of that description, and that an abatement in the purchase-money cannot on that ground be decreed. Nor is the deficiency in this case greater than in many of the cases in which relief was denied. Including the part contained between high- and low-water mark, the deficiency would be 75 acres, or about one-fifth. But the counsel for the plaintiff will hardly dispute in seriousness the proposition that this should be included in the tract, and this would reduce the deficiency to 63 acres, or about one-seventh. In Jollife v. Hite [supra] the statement was 578, the true amount 512, a deficiency of more than one-ninth. In Pendleton v. Stewart the stated amount was 1100, the true amount 940, a deficiency of one-seventh. In Fleet v. Hawkins the stated amount was 370, the true amount 338, a deficiency of one-eleventh. In Tucker v. Cocke the stated amount was 10,000 or 12,000, the true amount 9000, a deficiency of one-tenth or one-fourth. In Foley v. McKeown, the sale of a town lot, the deficiency was nearly half. In Keyton v. Brawford the stated amount was 340, the true amount was 290, a deficiency of one-eighth. In Russell v. Keeran the stated amount was 405, the true amount 290, a deficiency of one-third. In Seamonds v. McGinnis the stated amount was 140, the true amount 200, an excess of one-third. In Caldwell v. Craig the stated amount was 1000, the true amount 800, a deficiency of one-fifth. The above authorities dispose of the claim for relief on the ground of mistake. The claim on the ground of misrepresentation is equally futile. For if innocent it comes under the head of mistake, and the above authorities are applicable. There was, however, no representation of quantity made. The only one was the first letter of Taylor containing an offer which was not accepted by Mr. Green, and the negotiations ensuing, which fell through completely. This, therefore, had nothing to do with the contract effected long after, for in the words of Judge Roane, in Jollife v. Hite, 1 Call, 307: "In a contract every serious and deliberate communication which has taken place between the parties relative thereto, so far as a former one has not been revoked by a latter, must be considered as forming the basis of the contract, with this exception, that the treaty must not at any intermediate time have been at an end."

But even if, despite all the above authorities, Mr. Green was entitled to an abatement, his long delay in asking for it precludes him from obtaining it. He pays the first instalment promptly; he makes no objection to the deficiency; he takes no steps to ascertain the deficiency; and now when years have elapsed and when the troubles of the Chesapeake and Ohio Railroad show him that he has engaged in a losing speculation, he adopts this plan of getting out of his bargain. But he is too late. Equity will not help those who sleep upon their rights; will not lend its aid towards fomenting strife; will do nothing that can tend to increase litigation; and will not be the instrument of disappointed speculators. The interests of society, which demand the quiet and security of titles and the end of litigation, cannot be sacrificed in favor of those who delay their complaints until the eleventh hour. These principles alike of policy and justice have been reaffirmed numberless times in the various cases above quoted, e. g., in Jollife v. Hite, 1 Call, 315. And if Green were not precluded from praying relief by his laches, he would be by the subsequent acquiescence, both implied and actual, which characterizes this case. The failure for so long a time to take steps to ascertain whether any deficiency existed, even if he had no knowledge of any deficiency, is, on the authority of the cases above cited, an implied acquiescence and a convincing argument to show, independent of that inferred from his acceptance of the deed, that he considered it a sale in gross, and thought it useless to set up any claim for deficiency. But it is in evidence that he thought there was a deficiency not long after the contract was made; that, though he often complained of it, he never set up any claim for abatement therefor; that, knowing and having long known of it, he nevertheless, after some time spent in asking further time of Taylor, entered into new arrangements to pay the entire purchase-money without once suggesting or asserting any right to demand an abatement. Not until he had failed to fulfil the new contract, and the property was advertised for sale under the trust deed, did he assert such a claim, and only as a last resort. What stronger acquiescence could be demanded than this?

HUGHES, District Judge. The chief reliance of complainant is on Taylor's letter of December 3d, stating the quantity of the land at about 400 acres. But the negotiation of which that letter was a part fell through. The negotiation which was carried into effect was that of January following. This negotiation was commenced by Mr. Tabb, as agent of complainant and trustee in the trust, who was fully as conversant, probably even more conversant with the property, its title and its quantity, than Taylor. It is difficult to suppose that Mr. Tabb could have been imposed upon by Taylor on that subject; and Mr. Tabb was agent of Green, the purchaser; Green standing there in the presence of Tabb, possessing as full knowledge of the subject of the sale as Taylor possessed. The letter, therefore, is no part of the res gestae. We can look only to the deed. That this sale by Taylor to Green was a contract of hazard is written in the deed. The deed conveyed a certain tract of land, bounded on the south by Hampton Roads, and by the lands of several named landowners on the north, east, and west, "containing 400 acres, more or less." No metes and bounds by courses and distances were set out. It contained a recital that "the tract of land is sold in gross and not by the acre, and embraces the tract of land devised to Martha, the wife of the said W. A. S. Taylor, by will of her father, the late Edward Parrish, and also the tract acquired by her under the will of her uncle, the late John Parrish." This language fulfils all the requirements which have been held by the courts to constitute a contract of hazard. The language quoted was inserted by a skilful and learned lawyer of the highest standing and reputation, who was acting at the time as the agent of Mr. Green; who was fully cognizant of the technical meaning of the language which he used; who was acquainted with the character of the land and the previous negotiations of the vendor and vendee; and who inserted the language in consequence of the refusal of the vendor to execute the deed unless this clause, making the sale a contract of hazard, was inserted. The clause was a matter of mutual consent between the vendor and the vendee's agent; and was put into the instrument in order to make clear the intention of the parties to be that this was a sale in gross and contract of hazard. If this is not a contract of hazard, it is difficult to imagine what can be such a contract. In law it is binding upon the parties as such.

I do not see that the plaintiff has much equity on his side. The deficiency of sixty-three acres shown by the survey in a tract thought to have contained about 400, is not as great as has been repeatedly held by our court of appeals not to entitle a vendee to an abatement of price; and there is no evidence that complainant's objection on this score was made with such promptness as to indicate a sense of wrong on the discovery of the deficiency. The sale was made in January, 1873, and I see nothing to indicate dissatisfaction with the quantity before 1877, after several instalments of purchase-money had been paid, and after he had been allowed an extension upon other instalments by the vendor. If his equity were clear, this would be gross laches. A court cannot undertake to set aside solemn contracts as deliberately made and as long acquiesced in as this was, where there is no fraud and no intentional deception practiced. The bill must be dismissed.

GREEN (TURNER v.). See Case No. 14,256.

GREEN (UNITED STATES v.). See Cases Nos. 15,255–15,257.

GREEN v. VAN WINKLE. See Case No. 5,757.

GREEN, The ANN. See Case No. 414.

GREEN BAY (MYGATT v.). See Case No. 9,998.

Case No. 5,762.

GREENE v. BATEMAN.

[2 Woodb. & M. 359.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1846.

SALE—PRICE—COSTS.

1. Where shingles were sold and delivered at $3.25, but there was a dispute as to whether the $3.25 was for a bunch or for a thousand; it was *held*, that, unless both parties had understandingly assented to one of those views, there was no special contract as to the price.

[Cited in Hughes v. Mercantile Mut. Ins. Co., 55 N. Y. 269; Cummer v. Butts, 40 Mich. 325; Miller v. Tracy (Wis.) 56 N. W. 868.]

2. After the dispute on this point arose, the vendee offered to return the shingles, or pay for them by the thousand; but the vendor refused to accept them, and insisted on being paid by the bunch, and then the vendee kept and sold them. *Held*, that the rule of damages in assumpsit, by the original vendor, was the amount of the proceeds of such sale, after deducting a fair compensation for the services of the vendee, and not the whole value of the shingles.

[Cited in Harran v. Foley, 22 N. W. 837.]

3. The plaintiff having recovered on them less than $500, the court declined, under the circumstances, to allow costs to the defendant. Costs are not allowed to defendants in such cases, unless for special reasons.

[Applied in Miller v. Tracy, 86 Wis. 336, 56 N. W. 866.]

This was assumpsit for the payment for one hundred and twenty-one bunches of shingles sold by the plaintiff [Oliver F. Greene] to the defendant [William P. Bateman] in June, 1846, as he alleged, at the price of $3.25 per bunch. The defendant pleaded, that he never promised, and at the trial here this term, the delivery of the shingles was admitted; but the defendant insisted, that he bought them at $3.25 per thousand, in-

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

stead of $3.25 per bunch; and as there were but five hundred in a bunch, that the plaintiff ought to recover only at that rate. Much evidence was offered to prove what the parties meant as to the price when the shingles were delivered. The plaintiff was shown to be resident in Albany, N. Y., where shingles are sold by the bunch, and the defendant in Providence, R. I., where they are sold generally by the thousand; and several witnesses who were present, and others who conversed with the plaintiff beforehand, were introduced on both sides to show, whether the plaintiff meant to sell at $3.25 per bunch, or $3.25 per thousand. It further appeared in evidence, that after the delivery of the shingles, and the defendant came to pay for them, the plaintiff refused to receive $3.25 per thousand, contending that he expected and sold them for $3.25 per bunch. And the defendant, denying that he so understood the bargain, offered to the plaintiff that he might take the shingles again; but the plaintiff declined that, insisting that he had sold them for more. The parties separated on this, the defendant not having brought the shingles back and tendered them, but proceeded to sell them at retail for the price of $4.50 per thousand. The plaintiff having at once brought this suit, the defendant, during the present session, paid into court $202, in full of what he was bound to pay, but offered no costs, as is required under the rule on this subject.

D. J. Pearce, for plaintiff.
R. Greene, for defendant.

WOODBURY, Circuit Justice, instructed the jury, that the parties in this case relied upon a special contract made at the time of the delivery of the shingles; and if one was then actually made in fact and in law, the amount recovered must conform to it. But in order to constitute such a contract and make it binding on the parties, the minds of both must have assented to the same terms. If they did not, there was no aggregatio mentium, no agreement or understanding of both to one sum or stipulation. If one agreed to $3.25 per bunch, and the other to $3.25 per thousand, only half as high a price, there was in truth no contract, as it takes two, we all know, both in fact and in law, to make a contract. Had nothing been said as to bunches or thousands, and the sale was of shingles at $3.25, it might be presumed that the parties meant per thousand, as it was shown to be usual to sell by the thousand at Providence; and it surely would be so presumed if a knowledge of this usage had been brought home to the plaintiff, or if he as well as the defendant had resided at Providence, and thus been likely to know and conform to the usage. But neither of these last were proved. The evidence was in truth the other way; and it also appeared, that the plaintiff spoke of bunches during the trade, and his price per bunch; and the defendant spoke of thousands.

The question then arises, whether the jury are satisfied that both parties assented to the price of $3.25 per bunch, or of $3.25 per thousand, or to neither of them. If one party assented to the first, and the other did not; or if one party assented to the second, and the other did not; then no special contract was made, which binds them; but if both assented to either, and when they came to settle one of them attempted to change the terms and prove tricky, he is not to be exonerated, if the property was delivered on terms which both assented to at that time. And in this last event it will be the duty of the jury to find for the plaintiff the $3.25 per bunch or thousand, as they conclude one or the other was agreed on by both, when the shingles were delivered. If the jury, however, think there was an honest and mutual mistake, and both of them never assented to the same terms, the idea of a special contract, as either sets it up, must be abandoned.

How do the parties then stand, in such an event, as to their rights? The defendant, when he came to make payment, finding that he had not understood the price as the vendor professed to, proposed that the sale be abandoned, and the plaintiff take back the shingles. This was declined to be done, and payment at $3.25 insisted on. The counsel for the defendant argue, that, under such circumstances, the plaintiff must be presumed to have agreed, that the defendant keep the shingles at only $3.25 per thousand. But the plaintiff, insisting that he was entitled to more, and would make no arrangement without being paid more, repels any inference, that he agreed to receive less. Such an inference might have arisen had he been silent, and left the property without demanding more, but not when he did the contrary. Had the defendant then gone further and returned the articles to him, or set them apart, and given notice that he should not keep them, and had afterwards never intermeddled with, nor sold them, then, in law, he would not be made liable for the shingles, except on some special contract duly proved. But, instead of doing that, the defendant took the shingles and afterwards sold them. Under such a state of facts, if no special contract is satisfactorily shown, the defendant in this action of assumpsit can be made liable for the price received for them, deducting usual charges and commissions. He is in that view, in the action of assumpsit, treated like a trustee or agent of the plaintiff, selling on his account and for his benefit, and it is equitable and legal for both parties, that having received the money, he should pay it over to the owner, after retaining a due compensation for his own services. If the plaintiff, on the ground that the special contract had never been understandingly completed, or if it had been, was refused to be fulfilled, and was re-

pudiated or rescinded by the defendant, had gone and demanded the property, and on its not being delivered, had brought trover, he might perhaps have been entitled to recover its whole value, but not so in this form of action, and on the state of facts existing here.

The plaintiff is admitted to be entitled to recover something, as the defendant has paid into court over two hundred dollars for him; but not under the rule with costs. You, therefore, will take no notice of that in your verdict, but find for him as the facts require under these instructions, either $3.25 per bunch, or $3.25 per thousand,, as the contract may be satisfactorily proved either way. But if it be not so proved, you will find the sum which the defendant sold the shingles for, after deducting a proper compensation for his services. In either event, you will allow interest from the time the defendant was bound to pay. The jury returned a verdict for $3.25 a thousand, and interest, and the defendant moved, that the plaintiff receive no costs, and pay costs to him, under the provision of the judiciary act of congress, passed September, 1789 (section 20). The words relating to this subject are, —if plaintiff in the circuit court "recovers less than the sum of $500," "he shall not be allowed, but at the discretion of the court may be adjudged to pay costs." 1 Stat. 83. Without this provision, the court could not probably give costs to either party in a case like this (Harthshorn v. Wright [Case No. 6,169]; Hulsecamp v. Teel [Case No. 6,862]; [Livingston v. Moore] 7 Pet. [32 U. S.] 483; [Gordon v. Longest] 16 Pet. [41 U. S.] 97); because the declaration on its face claims less than $500, though the ad damnum in the writ is for more; and if the court has jurisdiction by the ad damnum, it is probable when it does not conflict with the declaration; and hence in such case of no jurisdiction it could, as a general principle, give costs to neither side any more than the debt. See cases collected in Burnham v. Rangeley [Case No. 2,177]. But here the court is empowered to give judgment for the debt, and also in its discretion to give costs to the defendant, but not to the plaintiff, if he recovers less than $500. Lister v. Green, 8 Cranch [12 U. S.] 224.

It is a sort of penalty imposed on the plaintiff to lose his costs; and a discretion is given to the court to increase the penalty, so as to make him pay costs to the defendant in all proper cases, if he recovers less than $500. We are referred to no precedents in this district, or elsewhere, of the court in its discretion imposing this additional burden on the plaintiff in such a case. Generally it is a sufficient punishment to a party in such case, having an honest debt, to lose all his costs; and generally it is a sufficient remuneration to the defendant for being summoned into a higher and more expensive court to pay what he justly owes, to exonerate him from paying any costs whatever. I can conceive of cases where, without any precedent, it might be a sound exercise of the discretion given to us on this subject, to punish the plaintiff more and remunerate the defendant more. Thus, if the claim of the plaintiff was a trivial or frivolous one, and not as here over $200 in amount as recovered, and more than double that as proved by some of his witnesses. Or if the suit seemed brought in this court for vexation, or the plaintiff having doubtfully a real residence elsewhere, and the defendant dragged far from home for trial at unnecessary and aggravated expense, and not as here, the plaintiff permanently a citizen of another state, and the defendant sued at a court holden in the same city where he resides, and tried with as little expense, inconvenience, or delay as practicable. In either of these events, and some others, which might be supposed, it might be discreet and just to allow the defendant all or a part of his costs, though found indebted for something. But here, though the defendant has not evinced a litigious spirit himself, and has made advances towards settling the matter at the time, and since, by bringing money into court, and thus probably has received a favorable and low assessment of damages from the jury, yet he has on neither occasion done enough in law to exonerate himself from liability; and the sum recovered against him is not a trifling claim, and he has not been harassed by its being sued and tried at a distance. We are not satisfied, therefore, that either substantial justice to him, or any misbehavior of the plaintiff, require us to make the latter, besides losing his own costs, pay those also of the defendant. Enter judgment then for the plaintiff for his debt, as found by the jury, but allow costs to neither party.

Case No. 5,763.

GREENE v. BISHOP.

[1 Cliff. 186.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1858.

EQUITY — MASTERS IN CHANCERY — COPYRIGHT — INFRINGEMENT.

1. Exceptions to the report of a master should be so framed as not merely to allege error in general terms, but should indicate the particulars in which the error consists, in order that the court may understandingly decide upon each point in dispute.

2. An exception which merely alleges that the master has arrived at a wrong conclusion upon the evidence, without pointing out any specific portion of the testimony to support the allegation, and makes no suggestion of mistake, fraud, or undue influence, cannot in general be considered as sufficient to put the finding of the master in issue, or to require the court to revise the

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

same, in a matter depending entirely upon the weight of evidence.

[Cited in Bridges v. Sheldon, 7 Fed. 35; Jaffrey v. Brown, 29 Fed. 480; Sheffield & B. C., I. & Ry. Co. v. Gordon, 151 U. S. 285, 14 Sup. Ct. 344.]

3. The party excepting to a master's report should require the evidence which furnishes the ground of the exception, to be stated by the master; if this is not done, the court will not enter at large into the evidence in order to ascertain if the master was correct in his conclusion.

[Cited in Welling v. La Bau, 34 Fed. 42.]

4. The law does not require that the subject of a book should be new, or the materials original, in order to entitle the author to a copyright, for there may be a valid copyright in the plan of a book, as connected with arrangement and combination of the material, though all the materials employed, and the subject of the work, may be common to all other writers.

[Cited in Lawrence v. Dana, Case No. 8,136.]

[Cited in Carter v. Bailey, 64 Me. 461.]

5. Copying is not confined to literal repetition, but includes also the various modes in which the matter of any publication may be adopted, imitated, or transferred, with more or less colorable alteration to disguise the piracy.

6. It is not necessary that the whole or the larger portion of a work protected by copyright should be taken in order to constitute an infringement, but if so much is taken that the value of the original is materially disminished, or the labors of the original author appropriated to an injurious extent, such appropriation would amount to an invasion of the copyright.

[Cited in Lawrence v. Dana, Case No. 8,136; Reed v. Holliday, 19 Fed. 327; Farmer v. Elstner, 33 Fed. 499.]

[7. Cited in Yuengling v. Schile, 12 Fed. 100, to the point that when a party comes into a court of law or equity seeking protection of a copyright, he must show that he is the author of the work, or that his title is derived from one sustaining that relation to the publication.]

This was a bill in equity praying that the respondent [William Bishop] might be restrained from selling, or exposing for sale, copies of a certain book entitled "Covell's Digest of English Grammar," and that he might be ordered to render an account of the copies already sold. The bill alleged the complainant [Samuel S. Greene] to be the author and proprietor of a certain book or treatise on the structure of the English language called "Greene's Analysis"; and of another, entitled "Greene's First Lessons in Grammar,"—both secured by copyright; that the respondent, in violation of the complainant's copyrights, published and sold copies of "Covell's Digest of English Grammar," which contained matter adapted from complainant's books, describing and setting forth his new system for the division and subdivision of sentences into various classes, with new divisions and subdivisions, invented and applied by the complainant; that they defined, adopted, and used, in the same manner with the complainant, the new names invented and employed by him, to express and distinguish the new classes, divisions, and subdivisions of sentences; and, that they also imitated the form and use of the exercises, as composed and arranged by the complainant, for the purpose of teaching and illustrating the composition of sentences; and, finally, that the books, as published and sold by the respondent were substantially of the same motive and plan throughout as the books of the complainant, and intended to supersede him in the market with the same class of readers and purchasers, without introducing new matter and with only colorable variations. The answer, admitting the sale of a certain number of the second edition of "Covell's Digest of English Grammar," denied any infringement of the complainant's copyrights, and alleged, moreover, that the complainant was not the author or inventor of the materials, ideas, principles, knowledge, information, and exercises contained in his books; that the plan of the "Digest of English Grammar" was essentially different from that of the complainant's books; and that, by reason of a better arrangement and treatment of the subjects, and by reason of various subject-matters contained therein, whereof he was the author, and of which he had the copyright, the respondent's book was better suited and adapted for general use. When the cause came on for final hearing, it was ordered to be referred to a master, to examine the pleadings and proofs, and to report to the court, whether the plan of the respondent's book, or any parts or matters therein, were similar to the plan of the complainant's books, or any parts or matters therein, and if so, to specify the same; also, to report whether the same, or any part thereof, and which part, were original with the complainant; and also, whether the use in the respondent's book of the parts or features taken from the complainant's books, and original therein, tended to prejudice, and to what extent, the sale of the books of the complainant.

The master reported as follows: 1st. That, of the books stated in the bill to have been sold and exposed for sale by the defendant, the only books so sold or exposed were certain copies of "Covell's Digest of English Grammar," of each of the second, third, and fourth editions, and that the contents of the copies of these several editions are the same. 2d. That the plan of the defendant's book, taken as a whole, is not similar to the plan of either of the plaintiff's books, but that, in that part of the defendant's book which treats of analysis, and which is contained between sections 138 and 181 inclusive, the system on which the materials are arranged, the logical order in which the subject is displayed, and the mode by which it is set forth, and illustrated by copious models and examples, are similar to those of the plaintiff's entire book, entitled "Greene's Analysis." 3d. That the parts and matters of the defendant's book, specified in the schedule hereto annexed, marked A, are similar to the parts and matters contained in the plaintiff's book, also specified in the schedule hereto annexed, marked B. 4th. That the parts and matters named in Schedule B, in the logical connection in which they stand in

the plaintiff's book, and in which they are taken and used by the defendant, form an original part of an original system of grammar, set forth in the plaintiff's said book; the schedules annexed indicate the order in which these parts and matters appear in the respective books. 5th. That the use of said parts and matters, by the defendant, tends to prejudice the sale of the plaintiff's book, called "Greene's Analysis," to the extent of preventing the sale of as many copies of the plaintiff's book, called "Greene's Analysis," that there are sold copies of the defendant's books, called "Covell's Digest." The schedules referred to in the report are not necessary to a proper understanding of the points decided by the court, and are therefore omitted.

To this report the respondent excepted as follows: First Exception. For that in said report it is reported that in that part of the defendant's book which treats of analysis, the plan on which the materials are arranged, the logical order in which the subject is displayed, and the mode in which it is illustrated and set forth, by copious models and examples, is similar to those of the plaintiff's entire book Analysis. Second. For that it does not appear by said report wherein the plans of the two books correspond, nor in what the alleged similarity in the logical order in which the subject of analysis is displayed, and the mode in which it is set forth and illustrated by examples consist. Third. For that the system of grammar and instruction in the plaintiff's books, so far as the same is similar to that in the defendant's book is not original with the plaintiff, nor an original part of his work. In support of which exception the defendant refers to the proofs taken in the case, which are the same with those produced before the master; and also to the books of the parties, and to those of George Crane, De Lacy, and Kühner, produced before the master and made a part of the case as exhibits therein. Fourth. For that the plan on which the materials are arranged in the plaintiff's entire book Analysis, the logical order in which the subject is displayed, and the mode by which it is set forth and illustrated by copious models and exercises, so far as the same are similar to that part of the defendant's book which treats of the subject of analysis, are not original with the plaintiff's, in support of which exception the defendant refers to the books and proofs above mentioned. Fifth. For that said report does not indicate, specify, or show what parts or matters of the plaintiff's books, if taken out of their connections, are original with the plaintiff, or what parts or matters are collated from treatises mentioned in said report. Sixth. For that the resemblance between the books of Greene and Covell is not other or greater than necessarily or properly belongs to two books on the same subject written for the same purpose, and treating of a department of learning within the course and studies of education, and it does not involve the borrowing by one of these authors from the writings of the other, as will appear by reference to proofs in the case, and by the examination of the several books of the parties. Seventh. For that it appears by the proofs that all the matters in Greene's book similar to Covell's book were contained in previous publications of other authors, and were not original with Greene. Eighth. For that it appears by the proofs that Covell framed his book of his own ample general knowledge of the subjects treated, and from wide studies in previous books, and not from the works of Greene. Ninth. For that in said report it is reported that the use of the parts and matters mentioned tends to prejudice the sale of the plaintiff's books, and to the extent mentioned. Tenth. For that the report does not clearly and definitely show what matters of Covell's book similar to Greene's are original with Greene. Eleventh. For that it appears by the master's report, and the schedule annexed to it, that the said Covell's book does not use the language of the plaintiff's books, but simply expresses and condenses the views of the plaintiff, and is not an infringement of his copyright. Twelfth. For that in said report it is reported that certain passages in the defendant's book, in the connection in which they stand, are similar to certain passages in the plaintiff's books in the connection in which they stand, and original with the plaintiff in their connection. The arguments were upon these exceptions.

Sidney Bartlett and Lemuel Shaw, Jr., for complainant.

B. R. Curtis and Thornton K. Lothrop, for respondent.

CLIFFORD, Circuit Justice. Twelve exceptions are taken by the respondent to the report of the master. Excluding the eleventh, which deserves a separate consideration, all the residue may conveniently be divided into three classes. First, such as merely express dissatisfaction with the report in the form of general objections to the conclusions of the master upon the evidence, or to the results arrived at by him, and are in substance and effect nothing more than an appeal from the determination of the master to the court to revise and reverse his decision, or rather to determine the matters in controversy on a review of the testimony, as if no order had been passed or report made, and precisely as in case of final hearing upon pleadings and proof without reference. To this class belong the first, third, fourth, ninth, and twelfth exceptions, as numbered in the printed copy of the same.

Second, such as allege directly or indirectly that certain other matters are omitted or in sufficiently stated in the report, which it is alleged the order of reference required should

be reported. This second class includes the second, fifth, and tenth exceptions.

Third, such as complain in effect that certain other matters are omitted in the report which it is alleged appear in the proof, without affirming whether or not they are required to be reported by the order of reference, or even suggesting that the master was required to include them in the report. All the remaining questions, except the eleventh, are included in this class. Exceptions to a master's report are written enumerations of the errors alleged by the complaining party, and of the corrections he requests to have made; and they should be so framed as not merely to allege error in general terms, but should be sufficiently definite and explicit to enable the court understandingly to decide on each point in dispute. Such appears to be the just and convenient rule to be deduced from the best considered modern cases upon the subject, and it is one of great importance in this class of legal investigations, and ought in general to be strictly enforced. Were it otherwise, the reference to the master would be of little or no avail, as it would involve the necessity for the court to look into the whole testimony laid before him, and to decide the controversy as upon final hearing, without reference as on appeal.

General allegations of error, without pointing to any particulars, are clearly insufficient, for the reason that, if allowable, the losing party might always compel the court to hear the cause anew, and should that practice prevail, references such as made in this case would become both useless and burdensome, as they would only operate to promote delay and increase the expenses of litigation, without relieving the court from any of the labor of the trial, or ever accomplishing anything of value to either party. Marshall, C. J., said, in Harding v. Handy, 11 Wheat. [24 U. S.] 126, that the report of the master is received as true when no exception is taken; and the exceptions are to be regarded so far only as they are supported by the special statements of the master, or by the evidence which ought to be brought before the court by reference to the particular testimony on which the excepting party relies; and the same court held, in Story v. Livingston, 13 Pet. [38 U. S.] 366, that exceptions to the report of a master in chancery are in the nature of a special demurrer, and the party objecting must point out the error; otherwise the part not excepted to will be taken as admitted. That doctrine had been previously recognized in Wilkes v. Rogers, 6 Johns. 592, and in Dexter v. Arnold [Case No. 3,858], and is not different from the rule which generally prevails in chancery courts. Da Costa v. Da Costa, 3 P. Wms. 140. Applying these principles to the present case, it is quite obvious that the first exception of the respondent cannot be sustained. He objects to the report in that exception, because it finds that, in the particular part of his book which treats of analysis, the plan on which the materials are arranged, the logical order in which the subject is displayed, and the mode in which it is illustrated, and set forth by copious models and examples, are similar to those of the entire book of the complainant, entitled "Greene's Analysis," without specifying any particular whatever in which the report is erroneous. It merely alleges that the finding of the master is erroneous and unsatisfactory, without attempting or pretending to specify any particulars in which the error consists, or even suggesting what correction ought to be made, and omits altogether to refer to any portion of the testimony to support the allegation. Assuming the rule of law to be as heretofore stated, that a mere general assignment of error cannot be supported, it clearly follows that the exception under consideration is not well taken, and it is accordingly overruled. More importance is attached to the third exception, which is the next in the series embraced in the first class, and it deserves to be more carefully considered. It directly controverts the correctness of the fourth finding of the master, and alleges that the system of grammar and instruction, so far as the same is similar to that of the respondent's book, is not original with the complainant, nor an original part of his work.

In support of the allegation, the respondent refers to the proofs in the case, and avers that they are the same with those before the master. Beyond question, this exception refers to a branch or element of the controversy expressly referred to the master, and which was clearly within his jurisdiction. He was directed by the order of reference to report whether the plan of the respondent's book, or any parts or matters therein contained, are similar to the plan of the complainant's books, or any parts or matters therein set forth; and if so, to specify the same, and also to report whether the same or any part thereof, and which, are original with the complainant. Following the directions of the order, he accordingly specified the parts and matters which were similar, as described in the schedule annexed to the report, which constituted part of the same, and reported that the parts and matters so specified and described in the logical connection in which they stand in the book of the complainant form an original part of an original system of grammar, as therein set forth. These references to the order under which the master acted, to the report made in pursuance thereto, and to the nature and character of the objection to the finding, will be sufficient to demonstrate the proposition, that the only question that can arise under the exception is, whether the master has duly considered and properly weighed the evidence submitted to his consideration. It is therefore in every sense an appeal from the decision of the master, in a matter of fact properly referred to him, and clearly within

the scope of the power conferred in the order of reference, and in substance and reality requires the court to review the whole evidence, and to revise and reverse the decision of the master upon a question depending entirely upon the weight and effect of the testimony on which the decision was made. It should be observed that the exception under consideration contains neither suggestion of mistake nor gross error, nor imputation of undue influence or fraud; and I hold that an exception like the present, unaccompanied by any such suggestion or imputation, and which merely alleges that the master has arrived at a wrong conclusion upon the evidence, without pointing out any specific portion of the testimony to support the allegation, cannot in general be regarded as sufficient to put the finding of the master in issue, or to require the court to review and revise the same in a matter of fact dependent entirely upon the weight and effect of the evidence submitted to his consideration. Exceptions irregularly taken may properly be overruled, without any examination of them in connection with the report of the master. Story v. Livingston, 13 Pet. [38 U. S.] 386. Nevertheless, if the court were satisfied that any error had been committed by the master in the finding referred to in the exceptions, it would be competent for the court to recommit the report, in order that the error might be corrected; and in a case where the error was satisfactorily and clearly shown, it would become the duty of the court to adopt that course. Such questions, however, bear a strong analogy to motions for a new trial at common law, in which it is not usual to interfere in a matter of fact unmixed with any question of law depending upon the weight and effect of the evidence, unless it is clearly shown that there has been manifest error. My opinion is, that there has been no such error in the present case; after a thorough examination of the books both of the complainant and the respondent, and a careful consideration of the testimony introduced upon the one side and the other, and a comparison of the same with the report of the master, I am satisfied that the finding is correct, and the exception is accordingly overruled. All the remaining questions included in the first class must also be overruled for the same reasons.

Sufficient has already been remarked to show that no one of the exceptions included in the second class can be sustained. Their great and controlling error consists in the theory of fact upon which they are respectively based. Every one of the reasons, which it is alleged in the second exception are omitted, are sufficiently and satisfactorily stated in the respective schedules annexed to the report, and which necessarily constitute a part of the same. In effect, they describe the plan of each book, and distinctly give the order in which the subject of analysis is therein displayed, and state the mode in which it is set forth and illustrated by examples; and the report expressly affirms that the respective schedules indicate the parts and matters specified as similar in the respective books, showing conclusively that the facts assumed in the exception are not correctly stated. All the answer that need be given to the fifth and tenth exceptions is to say that every matter and thing therein alleged to have been omitted by the master will be found to be stated in his findings, and to refer to the report in verification of the remark. They are accordingly overruled.

It is admitted by the counsel for the respondent that the sixth, seventh, and eighth exceptions, constituting the third class, cannot be sustained, and they are respectively overruled without further remark. Judge Story, held, in Donnell v. Columbian Ins. Co. [Case No. 3,987], that, when exceptions are taken to the report of a master in chancery, the evidence which furnishes the ground of the exception should be required by the party excepting to be stated by the master; and in effect declared that, unless it be done, the court will not enter at large into the evidence in order to ascertain whether or not the master was wrong in his conclusion. Masters are required, in a case like the present, to report conclusions; and, in general, it is irregular for them to incorporate the details of the evidence into their reports, without the direction of the court. They should, however, especially when it is requested by either party, specify and identify the evidence, and refer to it in such a manner as to inform the court on what state of facts their conclusions are based. It was so held by Chancellor Walworth, in Ex parte Hemiup, 3 Paige, 307; and such appears to be the purport and spirit of the requirement contained in the eighty-sixth rule, regulating the practice in equity suits. Of all the objections to the draft report, only one contains a request to the master to report any portion of the evidence, and no one of the exceptions alleges, or even intimates, that the report, as made, does not constitute a satisfactory compliance with the request. No application was ever made to the court; and in the absence of any suggestion that any injustice has been done in this behalf, it must be assumed that the master has well and truly performed his duty.

With these remarks, all of the exceptions may be dismissed but the eleventh, which remains to be considered. It alleges that it appears by the master's report, and the schedule annexed to it, that the book of Covell does not use the language of the complainant's books, but simply expresses and condenses the views of the complainant, and is not an infringement of his copyright. Some doubt exists in the mind of the court as to what is meant by the exception, aris-

ing out of the vagueness of the language employed, and the involved manner in which the ideas are expressed. It does not allege that Covell's book does not use the language of the complainant's books, nor that it simply expresses and condenses his views, but only affirms that it so appears from the report of the master, and the schedule annexed to the same. Unless its meaning be such as is supposed, the exception might well be overruled as too vague and indefinite to constitute the foundation of a decree. Assuming that the purpose and intent of the pleader has been correctly defined, then it is certain that it does not directly challenge any comparison of the respective books with each other, or with the findings of the master, but refers to the report, and the materials set forth in the schedule, on the basis that they were correct; and, if so, it is clear that the exception cannot be sustained, as it rests upon a theory of fact expressly negatived by the report, and, in the judgment of the court, the materials set forth in the same fully warranted the conclusions reported by the master. For these reasons the eleventh exception is also overruled; and the report of the master must be confirmed.

At this stage of the case, the complainant moves for an injunction, and that the respondent may be ordered to render an account in pursuance of the prayer in the bill of complaint. That motion must be considered and determined on the basis that the report of the master is correct, and wholly irrespective of any matters alleged in the exceptions. Any argument founded upon such matters cannot now avail, as the exceptions have been overruled, and the report of the master confirmed. For the purposes of any further examination of the case, and especially in determining the question under consideration, it must be assumed that the facts are as they have been found to be in the report of the master. Matters not included in the findings, and not embraced in the order of reference, if any, will depend upon the evidence, and must be heard and determined by the court, as in other cases, upon final hearing. All the matters found by the master, and embraced in the order of reference, must now be taken to be true. These findings show in effect that the system on which the materials are arranged in that part of the respondent's book which treats of analysis, as well as in the logical order in which the subject is displayed, and the mode by which it is set forth and illustrated, are similar to those of the entire book of the complainant, entitled "Greene's Analysis"; that the parts and matters of the respondent's book specified in the schedule are similar to the parts and matters in the complainant's book, which are also specified in the opposite schedule; and that the parts and matters thus specified in the logical connection in which they stand, and in which they are used by the respondent, form an original part of an original system of grammar set forth in the complainant's book; and they also show that the use of those parts and matters by the defendant tends to prejudice the sale of so many copies of the same as there are sold copies of the respondent's book. On that state of the case the counsel for the respondent contend:

1. That the system of analysis and classification of sentences set forth in the complainant's book is not original with the complainant.

2. That the respondent, or those he represents, did not copy from the complainant's book what in judgment of law was exclusively secured to the complainant.

3. That the use made by Covell of the analysis of the complainant, if any, was in the fair exercise of his powers as an author engaged in good faith in composing an original work, and fairly availing himself of ideas and terms found in other scientific treatises upon the same subject; and that he did not servilely copy from the complainant's work so much thereof in quantity and value as amounts to an infringement of his copyright.

4. That the complainant is not entitled to an injunction or to an account, under the circumstances of this case.

Some additional observations upon the objection embraced in the first proposition may be useful and necessary, notwithstanding it is identical in principle with the third exception, which has already been considered and overruled. By the first section of the act of the 3d of February, 1831 [4 Stat. 436], it is provided that the author of any book "shall have the sole right and liberty of printing, reprinting, publishing, and vending such book"; but it is undoubtedly true, as contended by the counsel for the respondent, that when a party comes into a court of law or equity, seeking protection to a copyright, he must show that he is the author of the work, or that his title is derived from one sustaining that relation to the publication. Curtis, Copyr. p. 169, c. 5. An author, as was remarked by Grier, J., in Stowe v. Thomas [Case No. 13,514], may be said to be the inventor or creator of the ideas contained in his book, and the combination of words to express them. But when he has published his book, and given his thoughts to the world, he can no longer have their exclusive possession, for the reason that such an appropriation then becomes impossible, and inconsistent with the object of the publication; and he accordingly held to the effect, that when an author has published and sold his book, he ceases to have any exclusive claim to the ideas, sentiments, or thoughts therein expressed, considered merely as abstractions, and dissevered from the language, idiom, style, or the outward semblance or exhibition of them to the eyes of another; and that the only property which he reserves to himself, and which the law gives him under

such circumstances, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to others the ideas intended to be conveyed. Assuming the doctrine there laid down to be correct, of which, as a general proposition, or as one applicable to that case, there can be no doubt, it by no means follows, as seems to be supposed, that an author who has compiled and written a new work upon a new and original plan, arrangement, and combination of materials, not servilely copied or evasively imitated from another, is not entitled to a copyright for the work, even though all the materials employed by him were old. Elementary writers and jurists concur that the law does not require that the subject of a book should be new, or the materials original, in order to entitle the author to a copyright; and all appear to admit that there may be a valid copyright in the plan of a book, as connected with the arrangement and combination of the materials, and the mode of displaying and illustrating the subject, although all the materials employed and the subject of the work may be common to all other writers. Reference to two or three decided cases upon the point will be sufficient at the present time, although there are several others which assert the same doctrine; and it will be observed that one of the examples put by Mr. Curtis, in his valuable work on Copyright, to illustrate the doctrine, is that of a scientific treatise written and published for the purposes of instruction. Speaking of the question under consideration, he says, in effect, that the author of a book, who takes existing materials from sources common to all writers, and arranges and combines them in a new form, and gives them an application unknown before, is protected in the exclusive enjoyment of what he has thus collected and produced, for the reason that he has exercised selection, arrangement, and combination, and thereby has produced something that is new and valuable. Curtis, Copyr. pp. 179, 180; Gray v. Russell [Case No. 5,728]; Emerson v. Davies [Id. 4,436]; Lewis v. Fullarton, 2 Beav. 6; Story v. Holcombe [Case No. 13,497]. Judge Story held, in Emerson v. Davies [supra], that every author of a book has a copyright in the plan, arrangement, and combination of his materials, and in his mode of illustrating his subject, if it be new and original in its substance; and remarked that if no book could be the subject of copyright which was not new and original in the elements of which it is composed, then there could be no ground for any copyright in modern times. All the well-considered cases upon the subject show that the state of facts found by the master are sufficient to entitle the books of the complainant to protection under his respective copyrights; and, as before remarked, the evidence in the case fully warrants the findings of the master.

Little more need be remarked respecting the second proposition than to refer to the findings of the master, and what has already been said in determining the one which precedes it, and which involves the same general considerations. Copying is not confined to literal repetition, but includes, also, the various modes in which the matter of any publication may be adopted, imitated, or transferred, with more or less colorable alterations to disguise the piracy. In all such cases, says Mr. Curtis (Curtis, Copyr. 253), the main question is, whether the author of the work alleged to be a piracy has resorted to the original sources alike open to him and to all writers, or whether he has adopted and used the plan of the work which it is alleged he has infringed, without resorting to the other sources from which he had a right to borrow. Within these principles, both the report of the master, and the evidence on which it is founded, show that the respondent has copied what in judgment of law was exclusively secured to the complainant, under and by virtue of his respective copyrights.

Great difficulties oftentimes surround the inquiry, whether an alleged act of copying from an original author amounts to piracy, or whether it may or may not be justified on the ground of fair quotation, or that the use made of the book or its contents does not exceed what the law permits to another engaged in composing a new work upon the same subject. None of those difficulties, however, arise in the present case, as all the authorities agree that it is not necessary that the whole, or even the larger portion, of a work, should be taken in order to constitute an invasion of a copyright; and they affirm the doctrine, that if so much is taken that the value of the original is sensibly and materially diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that such taking or appropriation is sufficient in point of law to maintain the suit. Folsom v. Marsh [Case No. 4,901]; Wilkins v. Aiken, 17 Ves. 424; Mawman v. Tegg, 2 Russ. 385; Roworth v. Wilkes, 1 Camp. 94; Saunders v. Smith, 3 Mylne & C. 711; Lewis v. Chapman, 3 Beav. 133; Webb v. Powers [Case No. 17,323].

Whatever doubts may have been formerly entertained, says McLean, J., in Story v. Holcombe [supra], it is now clear that a book may in one part of it infringe the copyright of another book, and in other parts be no infringement; and, in such a case, the remedy will not be extended beyond the injury; and the same learned judge held that extracts made for the purpose of a review, or for a compilation, are governed by the same rule; but that they cannot be so extended in either case as to convey the same knowledge as the original work, nor can the privilege be so exercised as to supersede the original book. Bramwell v. Halcomb, 3 Mylne & C. 738. Apply these principles to the facts stated in the last finding of the

master, and it is clear that this proposition cannot be sustained. Whether a fair and bona fide abridgment of an original work is, or is not, an invasion of the copyright of the original author, is not a question at the present time, nor is it necessary on the facts of this case to determine, or even consider, what constitutes such an abridgment in the sense of the law. It is clear that the mere copying a portion of the materials, without any essential condensation of the same, cannot be held to bring the work within the legal description of such a publication; and it will not change the rule of law if the new publication also contains the system on which the materials are arranged, the logical order in which the subject is displayed, and the mode by which it is set forth and illustrated in the prior work. One other suggestion of the counsel for the respondent deserves to be considered before leaving this branch of the case. They also contend, in effect, that the respondent is an original author, without having copied or had access to the complainant's books. On this point it will be sufficient to remark, that the weight of the evidence is greatly otherwise, as appears from the testimony of the witnesses, as well as from the inspection of the book and the colorable alterations made in the second edition.

Two grounds are assumed in support of the fourth proposition, which will now be briefly considered. First, that the complainant is not entitled to relief on account of the delay in instituting the suit, and because it is prosecuted against the vendor of the book, and not against the author or publishers. Second, because it is brought merely for a technical violation of the legal right, and because the facts show that the complainant has suffered injury only to a nominal amount. A few remarks respecting each of these suggestions will be sufficient at the present time. Both the bill and the answer disclose the fact that the first edition of the respondent's book was published in 1852, in another state; and the second, in 1853, by the same publishers, while the complainant was residing in this district, and this bill was filed during the following year. At what time the complainant became possessed of the knowledge of these publications does not appear; and there is no evidence tending to show that he ever in any manner acquiesced in the claim of the respondent, or recognized the validity of his acts, except what may be inferred from the omission to prosecute. No other laches appear on the face of the bill, and no such defence is set up in the answer. Attention is drawn to two cases, decided in this court, to show that it is incumbent upon the complainant to set forth in the bill the circumstances, if any, which explain the delay to institute the suit. One is the case of Stearns v. Page [Case No. 13,339], in which the bill prayed for an account of an intestate's estate after a lapse of more than twenty years; and the other is the case of Fisher v. Boody [Id. 4,814], which prayed to set aside a conveyance of land, after an acquiescence in the validity of the sale for a period of nine years. Without entering into any further examination of the numerous authorities bearing upon the question, or attempting at this time to lay down any general rule upon the subject, it will be sufficient to say that the cases cited are not applicable to the facts of this case, and that the point cannot avail the respondent as a defence to this suit. Wagner v. Baird, 7 How. [48 U. S.] 234; De Lane v. Moore, 14 How. [55 U. S.] 268. Vendors are liable for the sale of a book which invades the copyright of another, on the same principle, and for the same reasons, that the vendor of a machine or other mechanical structure, in the case of patent rights, is held liable for selling the manufactured article without the license or consent of the patentee; and no reason is perceived for withholding from the complainant the common remedies for the injuries he has suffered by the acts of the respondent, merely because he has elected to seek redress in this district, instead of going into another circuit to pursue it against the publishers. Decided cases have been cited by the counsel for the respondent, which show that when the invasion of a copyright is slight, and the copying consists of indefinite or small parts, so scattered through the work that it is difficult or nearly impossible to estimate either the amount of the injury to the complainant, or the profit to the respondent, relief in equity has sometimes been refused, and the party turned over to his remedy at law. Those decisions were doubtless correct as applied to the facts and circumstances under which they were made; but it is clear, both from the finding of the master and all the evidence on which it is based, that no such difficulty can arise in this case; and consequently I hold that the complainant is entitled to an injunction, to be limited according to the second finding of the master, and also to an account.

Case No. 5,764.

GREENE v. BRIGGS et al.

[1 Curt. 311;[1] 15 Law Rep. 614.]

Circuit Court, D. Rhode Island. Nov. Term, 1852.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—CRIMINAL PROSECUTION—TRIAL BY JURY—JURISDICTION OF JUSTICE OF PEACE.

1. The words, "the law of the land," in the tenth section of the first article of the constitution of Rhode Island, mean due process of law; in which is included the right to contest the charge and be discharged, unless it is proved.

[Cited in Den v. Hoboken Land & Imp. Co., 18 How. (59 U. S.) 280; Re Ludwigson, Case No. 8,601; Santa Clara Co. v. Southern

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

Pac. R. Co., 18 Fed. 420; Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 294.]

[Cited in Hibbard v. People, 4 Mich. 129; East Kingston v. Towle, 48 N. H. 60; Dunn v. Burleigh, 62 Me. 30.]

2. An act of the legislature of that state, which authorizes a criminal prosecution upon a complaint against no person in particular, and not containing a charge of the substantive facts necessary to constitute the offence, is inoperative, because such a complaint is not due process of law.

[Cited in The J. W. French, 13 Fed. 919.]

[Cited in Copp v. Henniker, 55 N. H. 194; Hunt v. Lucas, 99 Mass. 406.]

3. The legislature cannot make the right to a trial by jury, in a criminal case, dependent on giving a bond, with surety, for the payment of the penalty and costs.

[Cited in U. S. v. Three Tons of Coal, Case No. 16,515.]

[Cited in Fisher v. McGirr, 67 Mass. (1 Gray) 7; Allen v. Staples, 72 Mass. (6 Gray) 492; Hapgood v. Doherty, 74 Mass. (8 Gray) 374; State v. Peterson, 41 Vt. 508; State v. Doherty, 60 Me. 506; Chapin v. James, 11 R. I. 90; State v. Cloran, 47 Vt. 283; Mathews v. Tripp, 12 R. I. 259.]

4. An order, made by a justice of the peace, upon a matter not within his jurisdiction, is merely void. He must not only have jurisdiction over the subject-matter, but of the process; and if the law, conferring jurisdiction, is in conflict with the constitution, so far as it respects the process, the jurisdiction does not exist.

[Cited in State v. Gurney, 37 Me. 162; Thurston v. Adams, 41 Me. 421. Distinguished in Re Liquors of McSoley, 15 R. I. 613, 10 Atl. 659.]

This was an action of replevin. The defendants, in answer thereto, filed the following avowry:

"And the said defendants come and defend the force and injury when, &c., and well avow the taking of the goods and chattels in the declaration aforesaid above-mentioned, in the said place in which, &c., and the detention thereof, &c., and justly, &c., because they say that the said Nathan M. Briggs now is a police constable of the city of Providence, in said district, and for a long time before, namely, ever since the 25th of February, A. D. 1852, was a police constable as aforesaid; and that on the third day of September, A. D. 1852, at said Providence, Daniel K. Chaffee, George W. Wightman, and Warren G. Slack, all then and there voters in said Providence, did, before Samuel W. Peckham, Esq., then and there one of the justices of the court of magistrates of said Providence, make complaint under oath, in writing, in the words and figures following, to wit: See the paper hereunto annexed, marked A, which is hereby made a part of this plea. Whereupon the said Samuel W. Peckham, Esq., justice as aforesaid, did then and there issue a warrant of search, in the words and figures following, to wit: See the paper hereunto annexed, marked B, which is hereby made a part of this plea. And that, by virtue of said warrant, the said Briggs did then and there proceed to search the premises described in said warrant, and did then and there seize the goods and chattels aforesaid, and did then and there convey them to some proper place of security; and that the said Briggs did then and there summon Moses K. Holbrook, of said Providence, as the owner or keeper of said goods and chattels, to appear at the next regular session of said court of magistrates, to be holden on the 4th day of September, A. D. 1852, at which time and place said Holbrook appeared. And that the said Briggs, on the 4th day of September, A. D. 1852, at said Providence, did return said warrant to said court of magistrates, with his doings thereon, in the words and figures following, to wit: See the paper hereunto annexed, marked C, which is hereby made a part of this plea. And that, on the 7th day of September, A. D. 1852, at said Providence, said Holbrook appeared before said court in person, and then and there made answer to said complaint, in the words and figures following, to wit: See the paper hereunto annexed, marked D, which is hereby made a part of this plea. And that the said [William H.] Greene, on said 7th day of September, 1852, at said Providence, made claim, in writing, before said court, to a portion of said goods and chattels, in the words and figures following, to wit: See the paper hereunto annexed, marked E, which is hereby made a part of this plea. And that one Albert A. Hall, of East Greenwich, in said district, on the —— day of September, A. D. 1852, at said Providence, made claim, in writing, before said court, to a portion of said goods and chattels, in the words and figures following, to wit: See the paper hereunto annexed, marked F, which is hereby made a part of this plea. And that said two last-mentioned claims were then and there ruled out by said court, on the ground that said court would take notice of no claim to said goods and chattels, unless the claimant appeared in person. That, on said 7th day of September, A. D. 1852, at said Providence, and before proceeding to trial, the said complainants moved said court of magistrates, then and there to amend said complaint, by inserting the words 'then and there' before the words 'intended for sale;' and also the words, 'to the complainants unknown,' after the words 'by a person;' which motion was then and there opposed by said Holbrook, (who was then and there before said court in person,) by his said attorney, Thomas A. Jenckes, Esq.; and the said Holbrook then and there moved said court, by his said attorney, to quash said complaint; which said last-mentioned motion was then and there dismissed by said court, and said first-mentioned motion was then and there granted by said court, and said amendment was then and there made by said court. See said paper, hereunto annexed, marked A, with said amendment interlined, which is hereby made a part of this plea. That, on the 15th day of September, A. D. 1852, at said Providence, and subsequent to the introduction of said

complainant's testimony, by which it appeared that the store on Broad street was entered about five o'clock in the afternoon, the doors being open; and that the door of the Orange street store was broken open about seven o'clock in the evening of the third of September, 1852, and that the goods and chattels aforesaid were carried from both stores between nine and ten o'clock the same evening, said Holbrook, who was then and there present in person, moved said court, by his said attorney, to quash said complaint, which said motion, upon argument, was, on the 20th day of September, A. D. 1852, overruled by said court. That afterwards, to wit, on the 27th day of September, A. D. 1852, at said Providence, said court, after hearing the pleadings, evidence, and arguments of said parties, rendered judgment thereon, in the words and figures following, to wit: See the paper, hereunto annexed, marked H, which is hereby made a part of this plea. And that said court thereupon, on the 27th day of September, A. D. 1852, at said Providence, delivered to said Briggs an order, in the words and figures following, to wit: See the paper, hereunto annexed, marked I, which is hereby made a part of this plea. And this they are ready to verify. And so the said defendants well avow the taking and detention aforesaid, and pray judgment and a return of the same goods and chattels to be adjudged to them, and that the said Briggs may proceed and destroy said liquors, in the presence of said Hudson, as ordered by said court of magistrates, and for their damages and costs. By their attorney, J. M. Clarke."

(A.)

Complaint and Search-Warrant.

To Samuel W. Peckham, Esquire, one of the Justices of the Court of Magistrates, in the City of Providence, in the County of Providence, in the State of Rhode Island, and Providence Plantations.

Daniel K. Chaffee, Warren G. Slack, and George W. Wightman, voters in the city of Providence, in said county, on oath complain, in the name and behalf of the state, that they have reason to believe, and do believe, that, at said Providence, on the third day of September, 1852, with force and arms, spirituous or intoxicating liquors are kept or deposited, and then and there intended for sale, by a person, to the complainants unknown, who is not authorized to sell the same in said Providence, under the provisions of the act entitled "An act for the suppression of drinking-houses and tippling-shops," in the building number 81 Broad street, and the buildings in the rear thereof, and connected therewith, running back to Middle street; also the building connected therewith on Orange street, (being the building between the buildings occupied by Henry A. Howland and Solomon Pareira,) together with the cellars and yards belonging to said buildings, against the statute, and the peace and dignity of the state. Wherefore they pray advice, and that process may issue, and that the said premises may be searched, and that the owner or keeper of said liquors may be summoned to answer to this complaint, and be further dealt with relative to the same, according to law. Dated at Providence, this 3d day of September, A. D. 1852. D. K. Chaffee. Geo. W. Wightman. Warren G. Slack.

Providence, sc. In Providence, this 3d day of September, A. D. 1852, personally came D. K. Chaffee, Geo. W. Wightman, and Warren G. Slack, subscribers to the above complaint, and made oath to the truth of the same. Before me, Samuel W. Peckham, Justice of the Court of Magistrates.

(B.)

State of Rhode Island, and Providence Plantations.

Providence, sc.

To the Sheriff, his Deputy, or to either of the Town Sergeants, or Constables in the County of Providence: Greeting.

(L. S.) Complaint having been made to me, on oath, as above written, you are therefore hereby required, in the name of said state, forthwith to proceed to search the premises above described, to wit: the building number 81 Broad street, and the buildings in the rear thereof, and connected therewith, running back to Middle street; also the building connected therewith on Orange street, (being the building between the buildings occupied by Henry A. Howland and Solomon Pareira,) and the cellars and yards belonging to said buildings, in the city of Providence; and if any such liquors are found therein, to seize the same, and convey them to some proper place of security, and there keep them until final action is had thereon; and to summon the owner or keeper of said liquors (if he shall be known to you) to appear at the next regular session of the court of magistrates, on the 4th day of September, 1852, at 8 o'clock, a. m., to show cause, if any he have, why said liquors should not be adjudged forfeited, and be destroyed, and he be adjudged to pay a fine of twenty dollars, to the use of the state, and all costs that shall accrue hereon. And for so doing, this shall be your warrant. Hereof fail not. Given under my hand and seal, at Providence, in said county, this 3d day of September, in the year 1852. Samuel W. Peckham, Justice of the Court of Magistrates.

(C.)

Providence, sc. Sept. 3d, 1852.

I have taken aid and diligently searched the within described premises, and have found and seized the following described liquors, viz: to wit, in the buildings number 81 Broad street, and the buildings in the rear thereof, and connected therewith, running back to Middle street, the following described liquors, namely: Here follows description of liquors. Also, the liquors, here-

after described, in the building connected therewith on Orange street, (being the building between the buildings occupied by Henry A. Howland and Solomon Pareira,) as follows, namely: Here follows description of liquors. And have summoned Moses K. Holbrook, as the owner or keeper of said liquors, to appear before the magistrates' court, on the 4th day of September, 1852, at 8 o'clock, a. m. Nathan M. Briggs, Police Constable.

On the 7th of September, (by paper referred to in plea marked D.) Moses K. Holbrook, of Providence, summoned by the officer who made service of the warrant, averred, before the court of magistrates, that he held the liquors seized in the building on Broad street, as the agent of William H. Greene, of New York, on storage; that no sale had been made, nor was any sale intended to be made, since the 19th of July last; and that he made no appearance as the owner, keeper, or possessor of the other liquors. On the same day William H. Greene, of New York, filed his claim, in writing, (marked E,) in said court, to said liquors, averring that they were deposited in said buildings on storage, before the 19th of July, 1852; and that they were not kept or deposited for sale in the city of Providence, contrary to the provisions of the act under which they were seized, and demanded that they be returned to him. On the same day, A. A. Hall, of East Greenwich, filed his claim, in writing, (marked F,) in said court, claiming one cask of native wine, making the same averment as that made by Greene, and demanded that said cask be returned to him. On the 27th day of September, the court of magistrates entered the following decree:

(H.)

Be it remembered, that, on the 3d day of September, 1852, the following spirituous and intoxicating liquors, to wit: (here follows a description of the liquors,) were seized, upon a search-warrant, issued by Samuel W. Peckham, one of the justices of the court of magistrates, in the city of Providence, in said county, and one of the justices of the peace for said county, on the complaint of D. K. Chaffee, George W. Wightman, and Warren G. Slack, voters in said city, in writing, in the name and behalf of the state, setting forth that, with force and arms, at said Providence, on the 3d day of September, 1852, &c., &c., (following the language of the warrant.) And Moses K. Holbrook, the person summoned by the officer as the owner or keeper of said liquors, personally appeared before said court of magistrates, as the keeper of the liquors seized in store No. 81 Broad street, but not as the keeper of the other liquors seized on said warrant. And now, on this 27th day of September, 1852, upon a trial of said complaint and warrant, and after a full hearing of the evidence adduced, and arguments of counsel for the complainants, and for said Holbrook, it is adjudged by said court, that the said Moses K. Holbrook is the keeper of all said liquors; and that it not having been shown to the court, by "satisfactory proof, that said liquors are of foreign production; that they have been imported under the laws of the United States, and in accordance therewith; that they are contained in the original packages in which they were imported, and in quantities not less than the laws of the United States prescribe;" and it being the opinion of the court, that said liquors have been "kept and deposited for the purposes of sale, contrary to the provisions of said act," said liquors are adjudged forfeited, and are ordered to be destroyed, in the presence of William H. Hudson, who is appointed to witness the destruction thereof; but the said Moses K. Holbrook, having withdrawn himself from this court, and the said act not providing any way for the court to keep or bring him before them, the court cannot impose upon him the fine provided therein.

On the same day, the court of magistrates issued the following order to destroy:

(I.)

Providence, sc.

(L. S.) To the Sheriff, his Deputy, or to either of the Town Sergeants or Constables in the County of Providence: Greeting.

Whereas, the following described spirituous or intoxicating liquors, to wit, (here follows a description of the liquors,) have been seized, on a warrant of search issued by Samuel W. Peckham, one of the justices of the court of magistrates, in the city of Providence, on the complaint of Daniel K. Chaffee, George W. Wightman, and Warren G. Slack, voters in said city of Providence, according to the provisions of the eleventh section of an act entitled "An act for the suppression of drinking-houses and tippling-shops," in the building No. 81 Broad street, and the buildings in the rear thereof, and connected therewith, running back to Middle street; also, the building connected therewith on Orange street, (being the building between the buildings occupied by Henry A. Howland and Solomon Pareira,) together with the cellars and yards belonging to said buildings, in said city of Providence. And whereas, Moses K. Holbrook, the owner or keeper of said liquors, seized as aforesaid, having been duly summoned to appear before said court, has appeared before said court, and has failed to show, by satisfactory proof, to said court, that said liquors are of foreign production; that they have been imported under the laws of the United States, and in accordance therewith; that they are contained in the original packages in which they were imported, and in quantities not less than the laws of the United States prescribe; and whereas, in the opinion of said court, said liquors have been kept and deposited for the purpose of

sale, contrary to the provisions of said act, said liquors have been, by said court, adjudged forfeited, and ordered to be destroyed, in pursuance of the provisions of said act. You are, therefore, hereby ordered to destroy said liquors, in the presence of William H. Hudson; and for so doing, this shall be your authority. Witness, Francis E. Hoppin, at said Providence, this 27th day of September, A. D. 1852. Charles Hart, Clerk.

The plaintiff demurred to this plea, as insufficient in law to authorize the taking of said goods and chattels by said defendants, in the manner set forth in their plea; and the defendants joined in demurrer.

Jenckes, Ames and Carpenter, for plaintiff.
James M. Clarke, Esq., for defendants.

CURTIS, Circuit Justice. This is an action of replevin for a quantity of wine and spirits, alleged to have been unlawfully taken and detained by the defendants, who justify the taking and detention by virtue of certain proceedings set forth in their avowry. These proceedings depend, for their validity, upon an act of the general assembly of the state of Rhode Island, passed at its May session in the year 1852, and entitled "An act for the suppression of drinking-houses and tippling-shops" [Laws R. I. 1851-53, p. 915]. The plaintiff, having demurred to the avowry, insists that some of the provisions of this act, necessary to maintain the validity of these proceedings, are in conflict with the constitution of the state, and therefore, void; and so the taking and detention complained of are not justified. The plaintiff is a citizen of the state of New York. Under the constitution and laws of the United States, he is entitled to come into this court, and find here a remedy for any legal wrong done to him by citizens of Rhode Island. An adjudication upon his rights may, and in this case does, involve important questions, arising under the constitution and laws of the state; but in such a case, it is our duty to determine them; a duty, which we should neither seek nor avoid, but perform.

The constitution of Rhode Island (article 1, § 15), declares—"The right to the trial by jury shall remain inviolate." The 10th section of the same article is as follows:—"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining them in his favor, to have the assistance of counsel in his defence, and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land." Taking these two sections together, it may be said of them in general, that while the 15th section recognizes the existence of the right of trial by jury, and makes effectual provision for its preservation, as it existed when the constitution was formed, the 10th section declares, not only that this right is to exist in all criminal cases, but is to be accompanied by certain incidents and modes of proceeding, which are therein prescribed and defined. In other terms, in civil causes, a trial by jury is to be had in those classes of cases in which it had been practised, down to the time when the constitution was formed; and such trial is to be substantially in accordance with such modes of proceeding as had then existed, or might thereafter be devised by the legislature, without impairing the right itself. But in all criminal cases, the right to a trial by jury, accompanied by the other privileges enumerated and defined, is absolutely to exist.

In order to decide whether those parts of this act, necessary to sustain the avowry, are in conflict with these fundamental laws, we must have a clear view of what the act contains; and, as it provides for modes of proceeding quite anomalous, and some of its clauses need construction, I shall begin by stating what these parts of the act, in my judgment, authorize and require: and I shall then consider, whether the proceedings, thus authorized and required, are in harmony with the constitution of the state. Under this act, three voters, in the town or city where the complaint is made, may make a complaint, in writing, under oath, to some justice of the peace, setting forth that they have reason to believe, and do believe, that spirituous or intoxicating liquors are kept or deposited and intended for sale in that town or city, by some person not authorized to sell the same under the provisions of the act. It is not required that any particular person should be named in the complaint, as the person intending to sell such liquors contrary to law, nor was any person in fact named in the complaint which was the foundation of the proceedings in question. Upon the filing of such a complaint, the justice of the peace is to issue a warrant of search, directed to the sheriff, his deputy, the town sergeants, or constables in the county, one of whom is to proceed to search the premises described in the warrant; and if any spirituous or intoxicating liquors are there found, he is to seize, secure, and keep them, until final action shall be had thereon. The officer is further required to summon the owner, or keeper of the liquors seized, if known to him; but there is no other provision for giving notice to the owner or possessor, prior to an adjudication of forfeiture. There is a provision, that in case the owner is unknown to the officer, the liquors shall not be destroyed, until they shall have been advertised for two weeks, to enable the agent of any town, duly authorized to sell such liquors, to appear and claim them; and upon making due proof of title, the liquors are to be delivered to him, and not destroyed. But this has no application to any other owner,

and the law expressly requires the justice to adjudge a forfeiture, if the owner fail to appear. Upon the return of the warrant, if the owner or keeper do appear, and the justice is of opinion that the liquors have been kept or deposited for sale, contrary to the provisions of the act, he is to adjudge a forfeiture, cause them to be destroyed, and inflict a fine of twenty dollars; or, if this fine be not paid, imprisonment for thirty days, upon such owner or keeper. An exception is made in favor of imported liquors, contained in their original packages; but the burden of proof is put upon the party appearing, to make out this defence. If the person claiming the liquors shall appeal to the court of common pleas, he is required to enter into a recognizance, in a sum not less than two hundred dollars, with good and sufficient sureties, conditioned, among other things, that he will pay all fines and costs that may be awarded against him; and if the final decision shall be against the appellant, that such liquors were intended by him for sale, contrary to the provisions of the act, and the quantity seized exceed five gallons, he is to be adjudged "a common seller of intoxicating liquors," and punished as such, by a fine of one hundred dollars; or, in default of its payment, by imprisonment for sixty days; and he is also subjected to increased penalties on a second conviction.

On reviewing these proceedings, it will be seen that, in order to obtain a trial by jury, the party must give security, in a sum not less than two hundred dollars, with two sufficient sureties, to pay all fines and costs which may be adjudged against him; and must subject himself to the hazard of having the fine, inflicted by the justice of the peace, increased fivefold, if the quantity of liquor seized should exceed, as in this case it did exceed, five gallons. To require security for the payment of the penalty and costs, as a condition for having a trial, so far as I am informed, is a novelty in criminal jurisprudence; and, in my opinion, it is not only essentially unjust, but in conflict with that clause of the constitution which secures the accused from being deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land. Natural right requires that no man should be punished for an offence, until he has had a trial, and been proved to be guilty; and a law which should provide for the infliction of punishment, upon a mere accusation, without any trial, if the accused should fail to furnish two sureties to pay the penalty which might, after the trial, be adjudged against him, would be viewed, by all just minds, as tyrannical; for it would treat the innocent, who are unable to furnish the required security, as if they were guilty, and would punish them, while still presumed innocent, for their poverty, or want of friends. And it is equally clear, that such a law would not be "the law of the land," within the settled meaning of that important clause in the constitution. Certainly this does not mean any act which the assembly may choose to pass. If it did, the legislative will could inflict a forfeiture of life, liberty, or property, without a trial. The exposition of these words, as they stand in Magna Charta, as well as in the American constitutions, has been, that they require "due process of law;" and in this is necessarily implied and included the right to answer to and contest the charge, and the consequent right to be discharged from it, unless it is proved. Lord Coke, giving the interpretation of these words in Magna Charta (2 Inst. 50, 51), says, they mean due process of law, in which is included presentment or indictment, and being brought in to answer thereto. And the jurists of our country have not relaxed this interpretation. Hoke v. Henderson, 4 Dev. 15; Taylor v. Porter, 4 Hill, 146, 147; 3 Story, Const. 661; 2 Kent, Comm. 13, note.

It follows, that a law, which should preclude the accused from answering to and contesting the charge, unless he should first give security, in the sum of two hundred dollars, with two sufficient sureties, to pay all fines and costs, and which should condemn him to fine and forfeiture, unheard, if he failed to comply with this requisition, would deprive him of his liberty or property, not by the law of the land, but by an arbitrary and unconstitutional exertion of the legislative power. And if this would be the character of a law, which made the right to any trial dependent on such a condition, can it be maintained, that to prescribe such a condition, does not impair the right to a trial by jury. In such a case, the appeal has annulled the sentence of the justice of the peace. The accused is presumed to be innocent. He has had no such trial as he has a right to have. He now claims this particular kind of trial, as the prescribed constitutional means of determining whether he is to be punished. A condition, which would impair his right to any trial, if prescribed as the condition of his having any, impairs his right to this trial, if prescribed as a condition for his having it.

The 14th section of the 1st article of this constitution declares:—"Every man being presumed innocent, until he is pronounced guilty by the law, no act of severity, which is not necessary to secure an accused person, shall be permitted." Undoubtedly, this clause has reference chiefly to acts of severity against the person of the accused. But it not only contains the great principle of the presumption of innocence, until the accusation is proved, but points out the security of the person, that he may be tried, as the only just or admissible reason for exercising any control over one still presumed to be innocent. And in my judgment, any law which disregards these principles, and introduces a new object, namely, the security of the payment of the fine and costs, and denies a

trial by jury, unless the security is given, does not allow the right to such a trial to remain unimpaired. If this were not so, there would be no limit to legislative control over this right; for if one onerous condition may be imposed, so may any number, until the right becomes so difficult of attainment, that it ceases to be a common right, and can be enjoyed only by a few. I find it equally difficult to reconcile the increase of penalties, upon a conviction after an appeal, with the unimpaired enjoyment of the right of trial by jury. The act inflicts a fine of twenty dollars, if a conviction takes place before a justice of the peace. It must be that the legislature considered this the appropriate penalty for the offence. Certainly it cannot be said that the offence is aggravated, by the accused having claimed a trial by jury. For what, then, is the additional penalty of eighty dollars, or the additional imprisonment for thirty days, inflicted? If the offence remains the same, and the offender has done nothing but claim an appeal, in order to have his case tried by a jury, must not these additional penalties be founded on the exercise of that right? Here, also, it is manifest that this right is not secured by the constitution; but is wholly under the control of the legislative power, if it can annex penalties to the exercise of the right.

These proceedings are clearly criminal in their nature. Their object is to inflict upon the person fine or imprisonment, and at the same time to adjudicate a forfeiture of the liquors. The process, and the judicial action under it, are directed both against the offender and his property. It is true the warrant does not require the officer to arrest any one, but only to seize and hold the property, and summon the owner or keeper, if known to him. But the arrest of property, to compel an appearance, is a known and effectual mode of proceeding against the owner of that property. Indeed, all mesne process, both civil and criminal, which results in giving bail for an appearance, is only a mode of binding a certain amount of property to a forfeiture on non-appearance. And when this law provides that the property is to be seized and detained, and adjudged forfeited, if the owner or keeper fail to appear, and if he do appear, that he shall be fined or imprisoned, if found guilty, it has brought into action a criminal process both against the owner and his property. That spirituous or intoxicating liquors are still property, notwithstanding this act, is certain. The act nowhere declares the contrary; and it recognizes them as property, by providing for the appointment of public agents, to buy and sell them, by expressly declaring that they may lawfully be held by chemists and others, and by not interfering with the title to them, under any circumstances, unless they are held, in some town in the state, for sale within that town. Indeed, the very terms employed to describe the judgment to be entered by the justice of the peace, "they shall be adjudged forfeited," "and the owner shall pay a fine," &c., are applicable only to property, and clearly imply that there is deemed to be some title to be devested, something for such a judgment to operate upon, and something which, until forfeiture, had an owner. This being a criminal prosecution, directed against person and property, having for its end both fine or imprisonment and forfeiture, it becomes necessary to compare the law, authorizing this prosecution, with another requirement of the 10th section of the 1st article of the constitution of the state, already quoted. The accused is "to be informed of the nature and cause of the accusation." This act does not require that any particular person should be charged; and in the case at bar, the complaint charges no one. It merely sets forth that the complainants have reason to believe, and do believe, that spirituous or intoxicating liquors are kept or deposited in several buildings which are mentioned, or in the yards or cellars thereto belonging, and are intended for sale in the city of Providence, by a person not authorized to sell the same. Whether these particular liquors, or others seized at the same time, and claimed by different persons, were referred to; whether the plaintiff, who owned these liquors, or some other person, in whose care they were left, had this unlawful intent, is not stated or shown by the complaint. There being no accusation whatever against the plaintiff, how can he be said to be informed of its nature and cause. When the constitution requires that the accused should be informed of the nature and cause of the accusation, it clearly implies that there is to be an accusation against him. An accusation against another, or against no one in particular, is not such an accusation as will satisfy this clause of the constitution. It stands in the same article which demands a conformity to "the law of the land," that is, due process of law, and should be interpreted as requiring that certainty which the common law has deemed essential to the protection of the accused. Certainty, in respect to the person charged, is not the least essential particular to which the constitutional requisition extends. Sanford v. Nichols, 13 Mass. 286; Reed v. Rice, 2 J. J. Marsh. 45; Com. v. Davis, 11 Pick. 432; Com. v. Phillips, 16 Pick. 211. If the complaint had charged the owner of particular liquors, so described as to be capable of being distinguished from all others, with an unlawful attempt to sell them, perhaps this might be sufficient; though, when it is borne in mind that this is a proceeding in personam, as well as in rem, such a mode of presentment would be novel, especially as applied to a case in which the unlawful intent of a particular person is the substance of the offence. But here it does not appear the owner was intended to be charged. The complaint alleges only that some person has

this unlawful intent; but whether the owner, or some person to whom he had confided the possession, or a mere wrongdoer, who had possession, does not appear. Nor is there any description of the property, capable of distinguishing it from all other of like kind, and, consequently, of identifying the owner, if he should appear, as the person intended to be charged. The only description given is, that the property is liquors, spirituous or intoxicating; and that they are in one or all of three storehouses mentioned in the complaint, or in the cellars or yards belonging thereto. If it should turn out, as it did in this case, that more than one person had, or claimed to have, such liquors, in one of those places, how is the accusation to be treated, and which claimant is to be selected as the one to be tried, and who is to make the selection; or, under a complaint charging a person, to the complainants unknown, with a criminal intent, is a trial to be had of all claimants who may appear, however numerous they may be? The complainants having sworn that some one person is believed by them to be guilty, is the justice to go on and try all comers, till he finds some one guilty, and there stop, and discharge the rest, or proceed and convict two or three, or any other number, if he find evidence enough, under a complaint against one only?

But this is by no means the only difficulty. The accused has an absolute right to a trial by jury. He has, also, a right to be so charged, that when that trial takes place, the jury shall pass upon the whole charge, so far as it involves matter of fact, and under the direction of the court, shall apply the law to all mixed questions of law and fact. Now, if the owner of liquors seized, reach a jury trial by an appeal, and the quantity of liquors seized exceed five gallons, the court is required to adjudge him "a common seller of intoxicating liquors," and he is to be punished accordingly. But the complaint does not charge him with being such a common seller, nor with having and intending to sell, over five gallons; and no such fact is required to be, or can be put to the jury, to be tried. Yet, upon this fact, the judgment that he is guilty of a distinct offence, and the higher punishment appropriate to that offence, are rested. So that he is to be convicted of this higher offence without being charged with it, and without a trial by jury, of one of the facts essential to constitute it. It is urged, however, that nevertheless, this may be a valid proceeding against the property, although the court could not thus convict the person. If this were simply a proceeding to forfeit property, it would nevertheless, be a criminal prosecution within the meaning of this clause in the constitution; and the owner would be entitled to a trial by jury, and to have the accusation, relied upon to work the forfeiture, set forth substantially, in accordance with the rules of the common law, so that he could discern its nature and cause. And I should more than doubt, whether a complaint stating only, that some liquors were in one or all of several buildings mentioned, and were intended by some person to be sold, would be sufficient. Suppose it is all admitted, non constat, that the liquors seized are those referred to, or that their owner, or any person to whom he had intrusted the possession, had any unlawful intent. It may be so, but it also may not be so; and a criminal charge, not only according to the rules of common law, but from the nature of the thing, should at least contain enough to show, that if true, the appropriate punishment should be inflicted. Yet here, all that the complaint avers may be true, and yet the property of the plaintiff never held for sale in Providence, by him or his agent. It is to be borne in mind that this complaint is not merely the ground for issuing a warrant of search, and for the arrest and detention of the property, but it is the sole basis for judicial action afterwards. It is the only presentment of the offence; and, therefore, if the proceeding was to result only in a forfeiture of property, I should still consider the complaint as so deficient in the requisite certainty, as to be bad for that cause. But it is not possible thus to separate the proceedings, under this act, against the property, from the proceedings against the person, on appeal. The court is to order the property to be destroyed, only in the event, "if the final decision shall be against the appellant." If there is no accusation, upon which the appellant can lawfully be tried, there can be no final decision against him, and the property cannot be destroyed.

When this writ of replevin was served, this property was held under an order of forfeiture, which was invalid, for two reasons: First, because there was no sufficient complaint; and secondly, because the plaintiff was deprived of his property by a criminal prosecution, in which he neither had, nor could have, a trial by jury, without submitting to conditions, which the legislature had no constitutional power to impose. In general, a judicial act is not void, but voidable only; and, therefore, it is necessary to consider whether this order comes within that class of acts which are only voidable by some appropriate legal proceeding in the same case, or was absolutely void. An order made by a justice of the peace, concerning a matter not within his jurisdiction, is void; and he, and all ministerial officers who execute that order, are trespassers. Wise v. Withers, 3 Cranch [7 U. S.] 331; Cowp. 140; 7 Barn. & C. 536; 5 Maule & S. 314; 11 Conn. 95; 7 Wend. 200. Such an order confers no authority to detain property, and is not a defence to an action of replevin by its owner. The inquiry, therefore, is, whether the magistrate had jurisdiction to make this order; and I am of opinion that he had not.

It has already been stated that this is a criminal prosecution. So far as this law at-

tempts to confer jurisdiction upon justices of the peace to inflict fine and forfeiture, a trial by jury being at the same time denied, unless the accused should comply with conditions to which he is not bound to submit, it is in conflict with the constitution, and is wholly inoperative. The legislature may confer on justices of the peace power to punish offences; but it must be so done as to preserve, unimpaired, the right of trial by jury; otherwise, the whole proceeding is void, ab initio. The constitution declares, that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury." The act, now under consideration, provides that the right shall not be enjoyed in all criminal prosecutions; but, under this act, only in those cases in which security shall be given to pay all fines and costs. It is not practicable to consider the grant of jurisdiction to the justice valid, and the condition imposed on the exercise of the right of appeal void; because an appeal, in a criminal case, can exist only by force of a statute; and if the statute has given it only on certain conditions, the magistrate must execute his judgment, and cannot allow the appeal; and the appellate court cannot entertain it, unless those conditions are complied with. In substance, it is a grant of final jurisdiction to a justice of the peace, in all cases in which such security is not given; and this is such a criminal jurisdiction as cannot be created under the constitution of Rhode Island.

I am of opinion, also, that the complaint in this case was so defective, as to render all proceedings under it void. Here, also, the rule is, that if the process, though erroneous, is voidable only, it must be avoided by some proper legal proceedings; and while it stands, they who act under it are not trespassers. But this is not an authorized legal proceeding, in which an error has occurred. The complaint is in the form required by the act. The difficulty is, that the act has authorized a criminal prosecution, founded on a complaint which is not "due process of law." This act, so far as it authorizes such a prosecution, being in conflict with the constitution, is inoperative, and it seems to be a necessary conclusion, that it confers no jurisdiction to receive and proceed upon such a complaint. This may be illustrated, by supposing a law authorizing a criminal prosecution without any complaint. In such case, there could be no doubt that the whole proceeding would be absolutely void. I think it would be difficult to make a sound distinction between no complaint, and one which does not satisfy this requisition of the constitution, which, therefore, is no legal complaint, and is not "due process of law," within the definition by Lord Coke, of the words "law of the land," in Magna Charta. It has long been settled (Martin v. Marshal, Hob. 63) that the magistrate must not only have a jurisdiction of the subject-matter, but of the process. And if the law, conferring jurisdiction, is fatally defective, as respects the process, which is the foundation of the jurisdiction, the jurisdiction does not exist. Grumon v. Raymond, 1 Conn. 40.

For both these reasons, I am of opinion that the proceedings before the court of magistrates were inoperative to divest the owner of this property of his legal rights; and, consequently, neither the taking nor detention are justified by the avowry.

Several other questions have been argued at the bar in this case; but I do not find it necessary to consider them. They involve important rights under the constitution and laws of the state. If any case should come here for judgment, requiring their decision, I shall pass upon them. This case is determined without doing so. My opinion is, that there should be a judgment for the plaintiff, upon the demurrer; and if he claims damages for the taking and detention, their amount must be assessed by a jury.

PITMAN, District Judge, said he fully concurred in the opinion of Mr. Justice CURTIS, and added: The law in question was, no doubt, intended by many good men to promote the welfare of the community; but if this good cannot be accomplished, except by the sacrifice of those principles which are so essential to secure our rights and liberties, we cannot hope for security, because we are under a popular government. The despotism of numbers is quite as much to be dreaded as the despotism of one. It is not lawful to do evil, that good may come; and (if I may be here allowed to say so) it is not expedient. If good men disregard the vital principles of the constitution, how can they expect that bad men are to be controlled by law.

There are other features of this law, which struck me, at the hearing, as a violation of the constitutional rights of the citizen. The right of trial by jury, affected as it is by the conditions and obstructions which are annexed to the claim of this right by other sections, by the 9th section is rendered of less value to the accused, not only by declaring that no person engaged in the traffic of selling liquors, contrary to this act, "shall be competent to sit upon any jury in any case arising under this act," but by the mode of ascertaining the fact. The constitution provides, that "no man, in a court of common law, shall be compelled to give evidence criminating himself." Article 1, § 13.

This law authorizes the court to inquire of the juror who may be challenged, on this account: it is true, the law says "he may decline to answer," but what then? Is the fact to be proved by other evidence? No; his silence is considered as sufficient proof, and he is excluded accordingly. He is, therefore, compelled to answer, if he does not wish to be excluded, as unworthy to sit as a juror, or does not wish to be considered as concerned in a traffic which may be considered as infamous. The maxim of the common

law, recognized by the constitution, is, that every man is to be presumed innocent, until he is proved to be guilty.

The whole spirit of this law appears to me, to be at variance with the rights of property, as well as person. The legislature has no right, by an act, to confiscate the property of the citizen; it may be forfeited for a violation of law, but this must be done, without affecting the rights of the owner thereof to a jury trial. But the object of this law does not appear to be so much "for the suppression of drinking-houses and tippling-shops," as its title would seem to import, as for the destruction of intoxicating liquors—because they may be injuries to the community. But those who drafted the law, no doubt knew, that this could not be done, without making compensation to the owner thereof, as the constitution of Rhode Island, and most of the other state constitutions provide, that private property cannot be taken for public use, without just compensation. To evade this provision, it is made criminal to have this kind of property, not merely in "drinking-houses and tippling-shops," but "in any store, shop, warehouse, or other building," &c., (section 11,) with intent to sell the same; and by what manner of process, and how it is to be destroyed, we have seen,—evidently, with a view to evade the trial by jury. Such an evasion is as illegal as a denial of this right; and if such a law is to be justified, it can only be by adding another provision, by which the owner shall be compensated for the destruction of his property.

Lord Coke, in his commentary upon the 29th chapter of Magna Charta, says (2 Inst. 48), "5, No man destroyed,"&c. "Every oppression against law, by color of any usurped authority, is a kind of destruction, for, 'quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud;' and it is the worst oppression that is done by color of justice." In page 51, he says: "Against this ancient and fundamental law, (referring to Magna Charta,) and in the face thereof, I find an act of parliament made, (11 Hen. VII. c. 3,) that as well justices of assize as justices of peace, (without any finding or presentment by the verdict of twelve men,) upon a bare information for the king, before them made, should have full power and authority, by their discretions, to hear and determine all offences and contempts committed, or done, by any person or persons, against the form, ordinance, and effect of any statute made, and not repealed, &c. By color of which act shaking this fundamental law, it is not credible what horrible oppressions, and exactions, to the undoing of infinite numbers of people, were committed by Sir Richard Empson, Knight, and Edm. Dudley, being justices of peace throughout England; and upon this unjust and injurious act, (as commonly in like cases it falleth out,) a new office was erected, and they made masters of the king's forfeitures." "But at the parliament holden in the first year of Henry VIII., this act of 11 Henry VII., is recited and made void and repealed, and the reason thereof is yielded, for that by force of the said act it was manifestly known, that many sinister, and crafty, feigned, and forged informations, had been pursued against divers of the king's subjects, to their great damage and wrongful vexation; and the ill-success hereof, and the fearful ends of these two oppressors should deter others from committing the like, and should admonish parliaments, that instead of this ordinary and precious trial per legem terrae, they bring not in absolute and partial trials by discretion."

Judgment was then entered for the plaintiff, by order of court, with one dollar damages, by agreement of parties.

[For another case involving the constitutionality of a similar act of the legislature, see Greene v. James, Case No. 5,766.]

Case No. 5,765.

GREENE v. DARLING et al.

[5 Mason, 201.] [1]

Circuit Court, D. Rhode Island. , Nov. Term, 1828.

SET-OFF—DISCONNECTED DEBTS.

1. Courts of equity, independently of any statute of set-off, do not exercise jurisdiction to set off mutual disconnected debts, unless where the dealings of the parties imply it as matter of agreement, or mutual credit.

[Cited in Gordon v. Lewis, Case No. 5,613; Howe v. Sheppard, Id. 6,773; Gordon v. Lewis, Id. 5,614; Drexel v. Berney, 122 U. S. 253, 7 Sup. Ct. 1205; Farmers' Loan & Trust Co. v. Northern Pac. Co., 58 Fed. 266.]

[Cited in Second Nat. Bank v. Hemingray, 34 Ohio St. 390; Leavitt v. Peabody, 62 N. H. 189; Barnes v. McMullins, 78 Mo. 271; Pond v. Harwood, 139 N. Y. 119, 34 N. E. 768.]

2. Quaere, whether in Rhode Island, judgments can be set off against each other, where the debt due to the plaintiff has been assigned before suit brought.

3. An award, upon a submission of a question whether the parties had a right of set-off, is conclusive.

4. Quaere, whether a decision by a court of law, of concurrent jurisdiction on the same point, would not be conclusive.

5. How far notice of a set-off is necessary to defeat the rights of an assignee.

6. Quaere, whether a party, who has procured an assignment of a debt of the plaintiff, can set it off against his own debt due to the plaintiff, which was previously assigned.

[Cited in Wood v. Carr, Case No. 17,940; Aldrich v. Equitable Safety Ins. Co., Id. 155; Whetmore v. Murdock, Id. 17,509.]

[Cited in Buffum v. Deane, 4 Gray, 392; McGraw v. Pettibone, 10 Mich. 537; Spaulding v. Bachus, 122 Mass. 555, 556; Backus v. Spaulding, 129 Mass. 238.]

7. Where a set-off or defence to a debt was available at law, and the party omitted by laches

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

to take advantage of it, it seems a court of equity will not relieve him.

[Cited in Howe v. Sheppard, Case No. 6,773; Hendrickson v. Hinckley, 17 How. (58 U. S.) 447.]

[This was a bill in equity by Job Greene against Daniel Darling and Charles B. Jenks.]

Bowen & Whipple, for plaintiff.
Randall & Searle, for defendants.

STORY, Circuit Justice. The present is a bill for an injunction and relief by way of set-off, against a judgment obtained in this court, at November term, 1826, for $695.48. That judgment was rendered in a suit, brought in the name of Daniel Darling, trustee to James Wheaton 3d, against the plaintiff, on a bond given for the liberty of the prison limits by John Pond, as principal, and by the plaintiff and one Stephen Buffum, as sureties, and binding them jointly and severally, in the form prescribed by the statute of Rhode Island. The verdict and judgment were founded upon an escape proved at the trial. Pond was committed to the gaol in Providence on the 20th of March, 1824, on an execution founded on a judgment against him in favour of Daniel Darling, trustee to James Wheaton 3d, for $529.79, and upon that occasion this prison bond (as it is called) was given. This last judgment was founded on a promissory note, dated on the 27th of April, 1821, whereby Pond promised to pay Darling $426.58 on demand, with interest. The note was not negotiable, and therefore, to whomsoever it might be assigned, it could be sued only in the name of the original payee. In point of fact, it passed by assignment to several intermediate persons, and finally, before the commencement of the original suit was assigned to Wheaton, fraudulently, as the bill suggests for whose benefit the suit was instituted. Afterwards, on the 21st of January, 1825, Wheaton assigned the original judgment and bond to the defendant, Jenks, Darling joining in the assignment; and this assignment, also, is suggested in the bill to be fraudulent. The suit on the prison bond was returnable to the June term, 1826, of the circuit court.

The case of set-off stated in the bill is, that the plaintiff is now in possession, as his own property, of certain notes of hand, given by Darling to Pond, on the 20th of May, 1825, to the amount of $1138, which he claims to have set off against the judgment, on the prison bond. The history of the consideration of these notes is stated as follows. Darling, on the 24th of June, 1820, gave his note for $1332.88 payable to Pond or order on demand, with interest. A suit was brought against Darling upon this note by Pond, and a judgment obtained thereupon at September term of the supreme court of Rhode Island, 1823, the very same term, in which the original judgment was rendered in the same court in favour of Darling, as trustee to Wheaton, against Pond. At that time an attempt was made to set off the judgments against each other; and the attornies of the parties, without the knowledge of Pond, (as he asserts,) submitted the question of the set-off to Wheeler Martin Esq., one of the justices of the same court, who decided against the set-off, and executions issued accordingly upon both judgments, and Darling and Pond were both committed to gaol on execution, for the judgments against them respectively. Pond remained in gaol until he was discharged under the insolvent act of the state, on the 17th of April, 1826. Darling remained in gaol until the 20th of May, 1825, when an arrangement was made between him and Pond without the knowledge or assent of Wheaton, Darling undertaking to discharge the judgment against Pond, and Pond, deducting the amount of that judgment from his own against Darling, and taking from the latter the notes already mentioned for $1138, as the balance due him on his own judgment. It is farther stated in the bill, that Darling was insolvent at the time of the execution of the first note to Pond, in June, 1820, and hath ever since remained so. It is suggested in the bill, that Wheaton is now deceased; and no attempt is made to bring his personal representative before the court; and no reason is assigned for the omission. Such is the posture of the case, as it stands upon the plaintiff's bill; and passing, for the present, the consideration, how far it stands supported in point of fact as to the very material allegations, that the assignments to Wheaton and Jenks were wholly without any consideration and fraudulent, (which are explicitly denied by the answer of Jenks,) let us examine, whether in a court of equity the plaintiff is entitled to the relief prayer for, supposing the whole ground work of his bill to be established.

The first question presented upon a general survey of the case is, as to the jurisdiction of courts of equity to compel a set-off, where there is no legal provision to enforce it. In the state of Rhode Island, the right of set-off is by statute extended only to cases of judgments and executions. The statutes of 1798 [Laws R. I. 1798, p. 140] and 1822 [Laws R. I. 1822, p. 107] (the latter being only a revision of the former,) provide, "that whenever the supreme judicial court, or courts of common pleas shall, at the same term, render final judgment in two or more causes, in which the parties shall be reversed, and shall sue and be sued in the same right and capacity, such court shall offset the same judgments, and issue execution for the balance in favour of the party, to whom it shall be due;" and, "that if any officer shall at any time have two or more executions in personal actions directed to him to serve, in which the parties shall be reversed, and shall sue and be sued in the same right and capacity, he shall offset the same, and levy and collect the balance only from the party, from whom it is

due." To bring any case within the reach of the statute, the parties must be reversed, and sue and be sued in the same right and capacity. Now the bill itself admits, that the very question, whether the two original judgments rendered at September term, 1823, were under the statute liable to be set off, was submitted to a judge of the court, and that he decided, that they could not be set off at law, because the parties were not reversed in the same right and capacity. It is said, that this was an extrajudicial act, and not the act of the court, and therefore, it does not bind as a judgment of the court. Be it so; but if the parties have submitted it to the decision of a judge, they are bound by that decision, as an award; and unless some other equity intervene, it ought to conclude them. Then it is said, that the submission was without the knowledge of Pond by his attorney; but that, in point of fact, is not established by any evidence. And if it were, it remains to be shown, that it is beyond the scope of an attorney's general authority in cases of this nature. Cases rather more questionable have been held within his authority. Com. Dig. "Attorney," B 9, 10; Inhabitants of Buckland v. Inhabitants of Conway, 16 Mass. 396. And if he exceeds it, the remedy for his client is to be sought in his own personal responsibility. But it may not be wholly immaterial to consider, whether there has been any such error in the award or decision, as the argument supposes. The statute of Rhode Island applies solely to suits brought in the same right and capacity. Now, in a strict sense, a suit brought by Darling, as trustee of Wheaton, was not a suit in the same right and capacity, as the suit against him, which was in his own right. Supposing the assignment to be bonâ fide, it is by no means clear, that the statute of Rhode Island meant to reach such a case as the present. Here, the note to Pond was negotiable, and non constat, that the parties at the time of the assignment to Wheaton knew, that it had not been negotiated. There may be an equity in allowing unconnected demands to be set off against each other, where they are both subsisting at the same time, and one has been assigned. But it is by no means so clear an equity, as necessarily to justify an enlarged construction of a statute. For aught that this court can judicially know, it may have been the policy of the legislature of Rhode Island to exclude its own courts from exercising any jurisdiction of set-off, in cases where there had been bonâ fide assignments. See Alsop v. Caines, 10 Johns. 396; Makepeace v. Coates, 8 Mass. 451. Where the assignment is without consideration and a fraudulent evasion of the statute, it might justly be held a mere nullity, and the case within the relief intended by the statute. There is a great distinction between the case of an equity attaching to the very demand assigned, and an equity personally existing in the debtor to set off an unconnected debt. The cases, which are found in the Reports in other states, for the most part turn either upon their own statutes, or upon principles of the common law, where there are no statutes to govern them. They do not necessarily involve principles, which ought to control the construction of a statute differently framed. See Goodenow v. Buttrick, 7 Mass. 140; Hatch v. Greene, 12 Mass. 195; King v. Fowler, 16 Mass. 397; Stewart v. Anderson, 6 Cranch [10 U. S.] 203; Murray v. Williamson, 3 Bin. 135; Robinson v. Beall, 3 Yeates, 267; Simson v. Hart, 14 Johns. 63; Mitchell v. Oldfield, 4 Term R. 123; Glaister v. Hewer, 8 Term R. 69; Doe v. Darnton, 3 East, 149; Crosse v. Smith, 1 Maule & S. 545; Tucker v. Oxley, 5 Cranch [9 U. S.] 34; James v. Kynnier, 5 Ves. 108; 2 Madd. Ch. Pr. 512. I do not mean to say, that the statute ought to receive the construction, which the judge is supposed to have given it, acting upon the ground of its being a case of a bonâ fide assignment, (as he must be presumed to have done); that is not necessary to be decided, in my view of the case. But if it be doubtful, it is very far from being certain, that upon the reference of a doubtful point to him his decision, even if founded on what may now be deemed a mistake in law, is to be overturned. The point of view in which his decision is now considered, is not as a judicial decision, but as an award. If it had been a judicial decision, it would have required grave consideration, how far it could be re-examined in a court of equity, since there are conflicting doctrines on that point. In Ex parte Flint, 1 Swanst. 30, Lord Eldon seems to have thought, that if he would grant relief in a case already distinctly decided at law, it ought to be clearly made out, that there was such a mistake. The case of Billon v. Hyde, 1 Ves. Sr. 327, also seems to justify relief in case of a clear mistake of the law, though that case was compromised. Belt, Supp. Ves. 159. See Dinwiddie v. Bailey, 6 Ves. 136. On the other hand, the late learned chancellor of New York, in Simson v. Hart, 1 Johns. Ch. 91, after a very full examination of the authorities, came to the result, that such relief ought not to be granted after a decision of the very point by a court of concurrent jurisdiction. His opinion was, indeed, overturned by the court of errors, but under circumstances of such diversity of judgment among very able judges, that one may well pause, until the point shall be the very hinge on which the cause shall turn.

Assuming, however, that the award in the present case ought not to be conclusive, what are the grounds, upon which a court of equity ought to interpose; or in other words, what is the jurisdiction, which it is accustomed to exercise in respect to set-offs? I do not speak here of cases, where distinct equities arise from other sources; but upon the naked equity of distinct and unconnected debts, and independently of any statuteable regula-

tions. It is not very easy to ascertain the exact nature and limits of this jurisdiction from the English authorities. Down to the publication of Mr. Montague's book on Set-Off, there does not seem to be any very clear doctrine laid down; for his treatise on this head is singularly brief and unsatisfactory, and consists but of three sentences. Mr. Maddock (1 Madd. Ch. Pr. 70; 2 Madd. Ch. 512, 513) has done little more to enlighten us on the subject, and has merely collected the authorities, principally in bankruptcy.

It has been said, that before the statutes of set-off at law, and the statutes of mutual debts and credits in bankruptcy, courts of equity were in possession of the doctrine of set-off, and acted upon it, as grounded upon principles of natural equity; and that now, when the court does not find a natural equity going beyond the statutes, the construction is the same in equity as at law. But that the bankrupt act, enabling the party to prove the balance of the account upon mutual credit, has gone much farther than the party could have gone either in law or equity before, as to set-off. Ex parte Stephens, 11 Ves. 26; Ex parte Blagden, 19 Ves. 464. This is not a very instructive account of what the jurisdiction in equity actually is. Lord Mansfield, in Green v. Farmer, 4 Burrows, 2214, 2220, said, that "natural equity says, that cross demands should compensate each other, by deducting the less sum from the greater; and that the difference is the only sum, which can be justly due. But positive law for the sake of the forms of proceeding and convenience of trial, has said, that each must sue, and recover separately in separate actions. Where the nature of the employment, transaction, or dealing, necessarily constitutes an account consisting of receipts and payments, debts and credits, it is certain, that only the balance can be the debt; and by the proper forms of proceeding in courts of law or equity the balance only can be recovered. Where there were mutual debts unconnected, the law said they should not be set off; but each must sue. And courts of equity followed the same rule, because it was the law; for had they done otherwise, they would have stopped the course of the law, in all cases where there was a mutual demand." If his lordship be correct in this account of the matter, courts of equity did not antecedently to the statutes exercise any jurisdiction as to set-off, unless some equity intervened, independently of the fact of mutual, unconnected debts. Lanesborough v. Jones, 1 P. Wms. 325, has been thought to establish an equitable right of set-off under other circumstances. Mont. Set-Off, bk. 2, p. 60. But it is questionable upon the report of that case, whether the act of parliament, under which an assignment was made of Cogg's estate, did not subject him to the general operation of the provisions of the bankrupt acts; for the act of 4 Anne, c. 17, § 11, as to mutual credits, formed the ground-work of the reasoning of the court. If, however, the case turned upon a more general ground, it was, that the mutual credit and the additional fact of Coggs's insolvency, created a new equity. See Simson v. Hart, 14 Johns. 63. The case, there put, of a set-off of a separate debt against a partnership debt, where there is a surplus belonging to the debtor partner, was not decided. Ex parte Edwards, 1 Atk. 100, looks more towards the establishment of that point; but that case was not brought to a decision. In Ex parte Quinten, 3 Ves. 248, the point was decided. But that case has been shaken by later decisions, and particularly by Ex parte Twogood, 11 Ves. 517, and Addis v. Knight, 2 Mer. 117. And, at all events, the fact of bankruptcy also intervened. It is also material to observe, that in all these cases the neat point did not arise, as to the mere set-off of mutual debts, but of joint debts against separate debts, or è converso. Now the general rule in equity is like that at law, that there can be no set-off of joint debts against separate debts, unless some new equity justify it. See cases cited in Jackson v. Robinson [Case No. 7,144]; Ex parte Twogood, 11 Ves. 517; Vulliamy v. Noble, 3 Mer. 593, 618. Such an equity may arise under circumstances of fraud; or where the party seeking relief is only a surety for a debt really separate; or where there are a series of transactions, in which joint credit is given with reference to the separate debt. Ex parte Stephens, 11 Ves. 24; Ex parte Blagden, 19 Ves. 465; Ex parte Hanson, 12 Ves. 346, 18 Ves. 232; Vulliamy v. Noble, 3 Mer. 593, 618, 619, 621.

The strong impression left upon my mind by other authorities is, that Lord Mansfield's doctrine, as to the jurisdiction of set-off in equity, is not in its general latitude, and without some qualifications, maintainable. It seems irreconcileable with what fell from Lord Cowper, in Lanesborough v. Jones, 1 P. Wms. 326, who said, that "it was natural justice and equity, that in all cases of mutual credit only the balance should be paid;" and that if Coggs had not been bankrupt, and had brought a bill to foreclose his mortgage, he could have recovered only the balance, after deducting the notes due to the other party. Lord Cowper here relies on the fact of mutual credit, (by which I understand him to intend, a credit founded on a knowledge of, and trust to, the existing debts,) as itself, in a case of insolvency, furnishing an equity. And other cases well warrant that distinction. It was acted upon by the lord keeper in Curson v. African Co., 1 Vern. 121. In Downam v. Matthews, Finch, Prec. 580, where there were mutual dealings on each side, and independent debts, the lord chancellor held, that a set-off ought to be allowed, because the mode of dealing furnished a strong presumption of an agreement to this purpose, and that without such liberty of retaining against each other, the parties would not have continued on their dealings. In the

case of Hawkins v. Freeman, 2 Eq. Cas. Abr. 10 pl. 10, 8 Vin. Abr. 560, pl. 26, the decision was precisely to the same effect. See, also, Lord Hale's decision, cited in Chapman v. Derby, 2 Vern. 117. Peters v. Soame, 2 Vern. 428, probably turned on the same point. The like presumption of mutual credit, and right of stoppage flowing therefrom in equity, was acted upon in Jeffs v. Wood, 2 P. Wms. 128, where the master of the rolls seems, indeed, to intimate his own opinion, that a broader doctrine might be maintainable; and that very slight circumstances ought to be taken hold of to justify the presumption. In Whitaker v. Rush, 1 Amb. 407, Sir Thomas Clarke, the master of the rolls, gave a history of the doctrine, and laid great stress on the distinction, whether there was mutual credit, or not. He said, that "it was a rule of justice to set off one debt against another in the Roman law. That rule did not prevail in England for many years. The dealings between bankrupts and other persons first gave occasion to its being introduced into England by statute of 5 Geo. II." It had been introduced before by a temporary statute (4 Anne, c. 17, § 11). "Equity took it up, but with limitations and restrictions, and required, that there should be a connexion between the demands. In Downam v. Matthews, Lord Macclesfield said, that the mutual dealing raised a presumption, that the one should be set off against the other." And he founded his decree, in part, upon the fact, that there was no connexion in the demands in that case. The same principle runs through later cases, such as James v. Kynnier, 5 Ves. 108, and Vulliamy v. Noble, 3 Mer. 593, 618; and Ex parte Flint, 1 Swanst. 30. The phrase "natural equity" occurs frequently in the Reports in cases on this subject; and it is difficult to give it any rational interpretation in the places, where it occurs, unless it means, that there is a natural equity to have mutual and disconnected debts set off, which courts of chancery will, in certain cases, enforce. Ex parte Stephens, 11 Ves. 24, 27; Ex parte Flint, 1 Swanst. 30. See, also, what is said by Lord Mansfield in Collins v. Collins, 2 Burrows, 820, 826. This is the ground, upon which courts of law have vindicated their right to set off judgments against each other. The doctrine is strongly hinted at on various occasions; and, indeed, I know not how, upon any other principle than this, many of the modern decisions in equity can be supported. In James v. Kynnier, 5 Ves. 108, the lord chancellor said, "Is there any doubt, that where there are mutual credits between the parties, though they cannot set off at law, yet it is the common ground for a bill? If J. had brought an action against M. upon the note, supposing no bankruptcy had taken place, I should have stopped the action while he was debtor on the bond." In Lechmere v. Hawkins, 2 Esp. 626, Lord Kenyon recognized the authority of courts of equity to enforce a set-off, when refused at law, even where the party had come under an honorary obligation not to insist on it; and this doctrine was affirmed in Taylor v. Okey, 13 Ves. 180. Ex parte Hanson, 12 Ves. 346, assumes, that some jurisdiction existed before the statutes, as does Ex parte Blagden, 19 Ves. 465.

The conclusion, which seems deducible from the general current of the English decisions,—Mitchell v. Oldfield, 4 Term R. 123; Barker v. Braham, 2 W. Bl. 869, 3 Wils. 396; Glaister v. Hewer, 8 Term R. 69; Simson v. Hart, 14 Johns. 63, 1 Johns. Ch. 93; Waln's Assignee v. Bank of North America, 8 Serg. & R. 73,—(though most of them have arisen in bankruptcy,) is, that courts of equity will set off distinct debts, where there has been a mutual credit, upon the principles of natural justice, to avoid circuity of suits, following the doctrine of compensation of the civil law to a limited extent. 1 Poth. Obl. (by Evans) p. 365; 2 Poth. Obl. (by Evans) Append. 13, p. 98. That law went farther than ours, deeming the debts, suo jure, set-off or extinguished pro tanto; whereas, our law gives the party an election to set off, if he chooses to exercise it; but if he does not, the debt is left in full force, to be recovered in an adversary suit. 1 Poth. Obl. (by Evans) p. 365; 2 Poth. Obl. (by Evans) Append. 13, p. 98. Since the statutes of set-off of mutual debts and credits, courts of equity have generally followed the course adopted in the construction of the statutes by courts of law; and have applied the doctrine to equitable debts (see Taylor v. Okey, 13 Ves. 180); they have rarely, if ever, broken in upon the decisions at law, unless some other equity intervened, which justified them in granting relief beyond the rules of law, such as has been already alluded to. And, on the other hand, courts of law sometimes set off equitable against legal debts, as in Bottomley v. Brooke, cited 1 Term R. 619. See Crosse v. Smith, 1 Maule & S. 545. The American courts have generally adopted the same principles, as far as the statutes of set-off of the respective states have enabled them to act. See Caines v. Brisban, 13 Johns. 9, 10 Johns. 396; Gordon v. Bowne, 2 Johns. 150; Ford v. Stuart, 19 Johns. 342; Carpenter v. Butterfield, 3 Johns. Cas. 145; Duncan v. Lyon, 3 Johns. Ch. 351; Goodwin v. Cunningham, 12 Mass. 193; Greene v. Hatch, 12 Mass. 195; Jones v. Witter, 13 Mass. 304; Johnson v. Bridge, 6 Cow. 693; McDonald v. Neilson, 2 Cow. 139; Murray v. Williamson, 3 Bin. 135; Primer v. Kuhn, 1 Dall. [1 U.S.] 452. As, then, in the most favourable light, in which the jurisdiction of courts of equity can be viewed, the mere existence of distinct debts without mutual credit did not give a right of set-off in equity (see 2 Evans, Poth. Obl. p. 98), it will be difficult to establish, that in a state not recognizing any set-offs by its own statutes, except of judgments and executions, a court of equity sitting here ought to assume a broader jurisdiction. I agree, that this

court has a general equity jurisdiction; but it cannot go beyond the principles, which belong to that jurisdiction.

Let us consider, then, the circumstances, upon which the interposition of the court is asked in the present case. In the first place it is said, that here there were mutual debts existing between Darling and Pond, and that an equity existed to have them set off against each other, which attached to the debts themselves, and travelled with them into whosesoever hands they might come; and therefore it ought now to be asserted in favour of the assignee of Darling's debt against the assignee of Pond's debt, assuming both assignments to be bonâ fide. That the balance only after such deduction could be recovered by Pond; and nothing could be recovered by Darling. This is a very comprehensive proposition; and it is very desirable to have had some authorities cited, which bear it out in its full extent. None, however, have been cited at the bar; and the court is left to grapple with it without such assistance. My own researches have not enabled me to find a single case, in which, to such an extent, it is decided, or even intimated; and unless the preceding view of the English decisions on this subject is erroneous, none can be presumed to exist in England. For if a court of equity there would not set off debts, unless there was some mutual credit relative to them, arising from the course of dealing of the parties, it cannot be that any equity of set-off attaches to the debt itself. Where a chose in action is assigned, it may be admitted, that the assignee takes it subject to all the equities existing between the original parties, as to that very chose in action, so assigned. But that is very different from admitting, that he takes subject to all equities subsisting between the parties as to other debts or transactions. There is a wide distinction between the cases. An assignment of a chose in action conveys merely the rights, which the assignor then possesses to that thing. But such an assignment does not necessarily draw after it all other equities of an independent nature. Then, again, what is the right of set-off? By our law it is not a compensation, balancing debts pro tanto, as in the civil law; but mere matter of defence. See 2 Evans, Poth. Obl. No. 13, p. 98. The party is not bound to make use of it. He has his election; and if he does not assert it, his debt is not extinguished. It is a personal privilege, and not an incident or accompaniment of the debt. If a person assign a debt, he does not thereby assign any equity he may have to set it off against the debtor. Set-offs can only be between the parties to the record, or those for whose benefit the suit is brought. An assignee of a debt may set it off against a debt due by himself to the plaintiff; but certainly not against a debt due from the assignor to the plaintiff; nor could the assignor himself, after such assignment, set it off against the plaintiff. The right of set-off, in short, does not depend upon the mutuality of debts in their origin, as an inherent quality attaching itself to such debts, but upon the situation and rights of the parties, between whom it is sought to be enforced; and whether the suit be at law or in equity, there must be personal debts existing between them, and not merely between either of them, and third persons. As has been very properly remarked at the bar, it is a privilege or right attaching to the remedy only; which in some states may be allowed by their laws, and in others, denied. But it touches not any obligation of contract or vested right. But it is said, that the right of set-off is an equity, which at all events the original debtor may assert against the assignor, and also against his assignee of the debt, whether he has, or has not notice of its existence. If by an equity is meant a mere dictate of natural justice in a general sense, it is not worth while to discuss it, because this court is not called upon to administer a system of mere universal principles. If by an equity is meant a right, which a court of equity ought to enforce, it remains to be proved, that such an equity exists in the jurisprudence, which this court is called upon to administer. The English court of chancery has as yet laid down no such general rule. Where there are mutual debts subsisting, and there is either an implied or express agreement of stoppage pro tanto, or mutual credit, doubtless a court of equity would enforce it against the party himself, and against his assignee with notice; that it would enforce it against his assignee without notice is not so clear; and to say the least of it, would trench upon some of its known doctrines, for the protection of bonâ fide purchasers.

There are some American cases, in which a doctrine approaching to this extent has been entertained by courts of law; but, upon examination, they will be found to rest either upon the construction of local statutes, or upon local jurisprudence. Stewart v. Anderson, 6 Cranch [10 U. S.] 203, belongs to the former class. Robinson v. Beall, 3 Yeates, 267, possibly belongs to the latter. No reasons are given for it; and it may have turned upon the more general doctrine, or upon the settled construction of the statute of set-off of Pennsylvania. In Greene v. Hatch, 12 Mass. 195, it was held, that judgments might be set off against each other notwithstanding an assignment, where the demands, on which the judgments were founded, were coeval, and the assignee had notice. But in Makepeace v. Coates, 8 Mass. 451, the same court refused to set-off judgments, where there was an assignment, made by an insolvent debtor, and the party, who sought to set off his judgment, had purchased the demand after the insolvency, but before the assignment. And King v. Fowler, 16 Mass. 397, shows the extreme caution of the court in interfering in

such cases. In Alsop v. Caines, 10 Johns. 396, the court thought, that cases of complicated trusts, where the debt sued for was assigned, and the nominal plaintiffs were alleged to be trustees of a debtor of the defendant, were not fit subjects of set-off at law, upon grounds, which it seems extremely difficult to answer. That case was re-examined in 13 Johns. 9, and confirmed on a writ of error perhaps for different reasons. One of the judges in the court of errors stated, that the assignee took the debt subject to all the equities between the original parties, of which the right of set-off was one; but this point was not relied on by the only other member of the court, who delivered an opinion. In O'Callaghan v. Sawyer, 5 Johns. 118, it was decided, that the holder of a note assigned, after it became due, took it subject to all equities, which existed against it between the original parties, not only as to the note itself, but as to set-offs. And this decision has been followed in the bank of Niagara v. McCracken, 18 Johns. 493, and Ford v. Stuart, 19 Johns. 342, and may be considered as the settled law of that state, not only as to set-offs of debts, but of judgments against each other. See, also, Gould v. Chase, 16 Johns. 226; Henry v. Brown, 19 Johns. 49. In the latter case the principle applies as well, where the judgments have been assigned, as where they remain in the original parties (Chamberlain v. Day, 3 Cow. 353); but in neither case can a set-off be allowed of a debt due from the assignee, and not from the plaintiff on record (Wheeler v. Raymond, 5 Cow. 231; Johnson v. Bredge, 6 Cow. 693).

These are the most material of the American cases, which have fallen under my observation; and they are open to some remarks. In the first place, most of them purport to be founded upon local statutes, where the right of set-off in common law suits before judgment is provided for by statute, and the question was under what circumstances that right should be allowed, or defeated at law. In Rhode Island, no like statute of set-off exists; and what might be very fit in order to carry into effect the legislative intention once expressed, may not be equally fit to be assumed, as mere matter of equity, independently of any such intention. In the next place, those cases, which are set-offs of judgments, proceed upon the general authority of courts of law in their discretion to set-off judgments, upon what such courts may deem an equity, (a jurisdiction, full of delicacy and danger in cases of complicated trusts and assignments, as the cases sufficiently instruct us), where there is no statute to regulate it. In Rhode Island, there is a statute, which limits such set-offs to cases, where the parties are reversed, and sue in the same right and capacity. There is no pretence to say, that in Rhode Island an assigned judgment of a third person against the plaintiff could be set off in favour of the defendant, who had purchased it, against the plaintiff's own judgment. The parties in such case would not be reversed. There being then no statute of set-off of mutual demands generally in Rhode Island, no right of set-off can arise at law between the parties themselves, as to such demands, which ought to be protected by courts of equity, and upheld against subsequent assignments. If such right exists in equity, it is because courts of equity have created it, independently of law. I have endeavoured to show, that such a right has not yet been recognized in equity from the mere existence of mutual debts, even in regard to the parties themselves. But if it were otherwise, it would present quite a different consideration, where a debt had been assigned bonâ fide before suit. In such a case, if the assignee had no notice of any existing counter demand, where is the equity of giving it effect against him? It would in Rhode Island be quite a different thing, where the debt was assigned after both the judgments were rendered; for then the rule of the American cases might bear upon the question with far more force, I do not say with how conclusive a force. It would then be a case, where a court of equity would be called upon to enforce a legal right of set-off against an assignment, which would interrupt it.

In this view of the matter it is, in my judgment, most material to disprove, that the assignment to Wheaton was bona fide. And, indeed, if an assignment was bona fide made to any other of the assignees, through whom he claims, he seems entitled to the full protection of their title. The presumption of bona fides is certainly strong, from the award of Judge Martin. It is asserted in Jenks's answer, and he also maintains, that the assignment to himself was bona fide, and for a valuable consideration. Upon both of these points, much testimony has been introduced by the parties, some of which is quite loose and unsatisfactory, and of doubtful character. It is questionable, whether Darling's testimony is competent; but it is unnecessary to decide that, as it is completely demolished by the opposing evidence, so far as it constitutes a ground of reliance for the plaintiff. I do not say, that there are no circumstances of suspicion attached by the evidence to the title of Wheaton and Jenks; but taking the clear denial of the answer with the corroborative proofs, the weight of the evidence is strong in favour of the bona fides of the title, and purchase of both. It is so strong, that a court of equity would not be at liberty upon its own principles to decree otherwise; or at least, sitting in equity, I should feel it my duty to abstain from such a decree. It must be taken, therefore, that the title and purchase of Wheaton and Jenks stand both unimpeached, and unimpeachable.

But if this difficulty were not absolutely insuperable, there are some others, which lie in

the way of the relief sought, of no inconsiderable magnitude. In the first place, it is by no means clear, that the plaintiff has made out any title by assignment from Pond of the very debt, which he seeks to set off. That debt is not the judgment of Pond, for that has been discharged; and, as a matter of set-off under the Rhode Island statute by way of judgment, it is gone. The notes now set up as a set-off grew out of that judgment, but they cannot be now set off, as a remaining part of that judgment. They are to be set off, if at all, as debts in pais by simple contract. The plaintiff's title and property in the notes are expressly put in issue by the answer, and it is denied, that they constitute a good subsisting debt even against Darling. Now, there is some cloud thrown over the original validity of the debt, on which the judgment against Darling was founded, which ought to have been removed, since it goes to the very gist of the argument, on which the plaintiff rests his claim for relief; I mean, the existence of mutual debts between Pond and Darling. And then, again, there is no proof, that these notes have been transferred by Pond to the plaintiff bona fide, and for a valuable consideration. If he holds them merely in trust for Pond, he is not entitled to maintain them as a set-off to his own debt. See Gilman v. Van Slych, 7 Cow. 469; Satterlee v. Ten Eyck, 7 Cow. 408. For assuming, that where there is a separate debt, secured by a joint bond as security, upon equitable considerations a creditor, who has such joint security, cannot resort to it without allowing a separate debt, which the debtor has against him to be deducted, where there has been mutual credit (Ex parte Hanson, 18 Ves. 232), still that is to be done upon application by the debtor, and not by the surety without his assent, or at least without his being made a party. If this difficulty were overcome, still there is the fact that the debt was assigned by Pond to the plaintiff, after the judgment and bond were assigned to Jenks, and with full notice of all the facts. The bill does not pretend to assert the contrary; and the assignment to Wheaton is apparent both upon the face of the judgment and bond. Now, if the assignments to Wheaton and Jenks were bona fide, it would be hard to say, that their equity to satisfaction should be defeated by a subsequent purchase by the plaintiff of a debt of Darling's, with full notice of such equity, under circumstances like the present. I have said, that difficulties would exist, even if the assignments to Wheaton and Jenks were not bona fide, and the reason is, that they may protect themselves against the set-off by establishing any bona fide assignment in those, under whom they claim. They claim through Henry Thayer and John Thayer. There is no pretence to say, that Henry Thayer is not a bona fide assignee; and if John Thayer be not, upon the evidence in the case, it would seem to be a matter wholly between him and Henry Thayer, with which Darling had nothing to do. If there be any infirmity in the title of John Thayer, it is an infirmity, which does not make the whole transaction void; but only voidable, if the proper parties contest it. Be this as it may, the bill is not adapted to reach such a case. It does not make either of the Thayers parties; and the answer, setting up their title and the mesne conveyances to Wheaton, asserts it to be bona fide. It is not established in evidence to be otherwise. And under a bill, framed like the present, it is impossible to set aside their title. They would be indispensable parties, as having rights, which might be vitally affected.

There is another difficulty, which has been suggested by one of the counsel for the plaintiff, and which is entitled to great weight. If the assignments were all fraudulent or void, then Darling continued the real owner of the debt up to the time, when he discharged it in May, 1825, and consequently, if the judgment was discharged, it constituted a good defence at law to a suit on the prison bond, which was for the security of it. The defence should then have been made at law; and the bill assigns no reason, why it was not made. If a party, by his own gross laches, omits to make a defence at law, which he was competent to make, courts of equity are not in the habit of relieving him from the judgment obtained against him by his own negligence. Upon the whole, my judgment is, that the bill ought to be dismissed, and the injunction dissolved. Judgment accordingly.

Case No. 5,766.

GREENE v. JAMES.

[2 Curt. 187.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1854.

CONSTITUTIONAL LAW—INTOXICATING LIQUORS—SEIZURE.

The act of the legislature of Rhode Island, passed at the January session, 1853, entitled "An act for the more effectual suppression of drinking-houses and tippling shops" [Laws R. I. 1851–53, p. 948], so far as it authorizes a seizure of property, is in conflict with the constitution of the state, because it does not provide for notice to the owner, by due legal means, of the nature and cause of the accusation, nor for a trial of the question, whether the liquors seized were held for sale in violation of law.

[Cited in Mitchell v. Lippincott, Case No. 9,665.]

[Cited in Dunn v. Burleigh, 62 Me. 30.]

[See note at end of case.]

At law.

Mr. Ames, for plaintiff.

Jenckes & Payne, contra.

Before CURTIS, Circuit Justice, and PITMAN, District Judge.

CURTIS, Circuit Justice. This is an action of replevin, brought by [William H.

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

Greene] a citizen of the state of New York, against [Samuel James] a citizen of the state of Rhode Island, for a quantity of wine and spirits, alleged to be the property of the plaintiff, of the value of seven hundred and fifty dollars, and to have been unlawfully taken and detained by the defendant. The defendant does not traverse the allegation of property in the plaintiff, but avows the taking by Daniel Wightman, a deputy sheriff of the county of Providence, under whom the defendant makes cognizance as bailiff; and this taking and detention are alleged to have been under and by virtue of certain warrants, which, together with the proceedings whereon the warrants rested, are set out in the plea. These proceedings were had and warrants issued under an act passed at the session of the legislature of Rhode Island, held in January, 1853, entitled "An act for the more effectual suppression of drinking-houses and tippling shops." The plaintiff demurred to this avowry, and the demurrer being joined, it is insisted that so much of this act as touches the proceedings in question, is in conflict with the constitution of Rhode Island, and is therefore inoperative.

It appears by the avowry that a complaint on oath was made by the marshal of the city of Providence, on the 21st day of June, 1854, to the court of magistrates of that city, alleging that one John Reefe did keep or suffer to be kept on his premises, or possession, or under his charge, in certain described rooms, in the city of Providence, for sale within that city, strong or malt liquors, in violation of the act above mentioned. Upon this complaint a warrant issued against Reefe, personally, he was arrested, tried, convicted, and fined, and appealed to the court of common pleas.

On the 22d day of June, three legal voters of the city of Providence made another complaint before the same court of magistrates, in which they allege, that they have reason to believe, and do believe, that in certain described premises, which appear from the description to be the same which were described in the complaint against Reefe, strong or malt liquors, in packages, the description and marks of which are given, are held for sale by John Reefe, contrary to the act above mentioned, and that a warrant has already issued against him.

Another similar complaint appears to have been made on the same day, but it is not necessary in this case to distinguish between them. Warrants were issued upon these complaints, and the taking and detention on these warrants, are the taking and detention alleged in the writ. The question is, if they were lawful or unlawful; and this depends on the other question, whether those provisions of the act of January, 1853, which authorize proceedings to arrest and forfeit such property, are, or are not in conflict with the constitution of the state.

I am spared the necessity of going at large into reasoning on this question, by the decision heretofore made by the supreme court of Rhode Island. They have decided that inasmuch as this act does not provide for any trial of the question whether the liquors seized were held for sale in violation of law, and the owner of the property is not informed in due course of law, of the nature and cause of the accusation, by reason of which a forfeiture is sought, the proceeding against the property is unlawful. Under the 34th section of the judiciary act (1 Stat. 92), this case is to be decided according to the law of the state of Rhode Island. It belongs to the highest judicial tribunal of the state to interpret its constitution, and declare how far, and in what respects, any act of the legislature is in conflict therewith, and therefore inoperative. Webster v. Cooper, 14 How. [55 U. S.] 488.

Being satisfied, that in this instance, the highest court of Rhode Island has placed a construction upon the constitution and this act, so far as it respects proceedings against the property, which is in accordance with the law of the state, and I ought to add, fully concurring therein, and in the reasons on which it is rested by them, I am of opinion the plaintiff is entitled to judgment on the demurrer.

[NOTE. In Greene v. Briggs, Case No. 5,764, a similar act was held unconstitutional, because the law authorized a complaint against no person in particular, and did not require a recital of the substantive facts necessary to constitute the offense. Such a proceeding the court said was not "due process of law."]

Case No. 5,767.

GREENE v. KLINGLER.

[10 Cent. Law J. 47.] [1]

Circuit Court, W. D. Texas. Oct. 13, 1879.

REMOVAL OF CAUSES.

1. Under the statutes of Texas, when the tenants call in the landlord or real owner, and he makes himself a party, being thus the real defendant, he has the right, under the act of congress of March 3, 1875 [18 Stat. 470], if he be a citizen of a state other than that of the plaintiff, to remove the cause to the proper United States court on complying with the law, the controversy being regarded as one wholly between him and the plaintiff.

[See note at end of case.]

2. And such application is in time if made on the day after he becomes a defendant, though this be not the first term to which the suit was brought, provided the cause had not been previously at issue or ready for trial.

3. The application of the landlord to be made a party defendant, and his subsequent application to remove the cause to the United States circuit court, being both made in open court in the state court, and both being resisted and passed upon by the state court, and made the subject of bills of exceptions by the plaintiff, the matters raised by such application and passed upon by the state court and reserved by the plaintiff cannot be inquired into in the federal court

[1] [Reprinted by permission.]

upon a mere motion to remand the cause, based alone upon the matters contained in the transcript sent from the state court.

Motion to remand.

John Ireland, for the motion.
Hancock, West & North, contra.

DUVAL, District Judge. The above entitled and numbered causes were removed from the district court of Comal county, state of Texas, and filed in this court on the 16th day of June, 1878. They are ordinary actions of trespass to try title commenced on the 21st day of June, 1878. On the 18th of September, 1878, they were continued as upon the affidavits of defendants. On the 19th of September the defendants answered, setting up a general demurrer, the plea of not guilty, the statute of limitations of three and five years, and adverse possession in good faith for more than one year, with valuable improvements, etc. On the 21st of January, 1879, the defendants filed their motion to require M. C. Hamilton to defend the case as their landlord, and on the same day M. C. Hamilton himself moved for leave to appear in said cause, as landlord of defendants, and defend the same. This was resisted by the plaintiff, but after hearing the argument the court on the 22d day of January, 1879, allowed M. C. Hamilton to become a party defendant as landlord, and he thereupon entered his appearance as landlord of defendants, pleading the general issue and adopting as his own the pleading of said defendants. On the same day M. C. Hamilton filed his petition alleging himself to be a citizen of the state of New York, and praying to remove the cause into the circuit court of the United States for the Western district of Texas, holden at the city of Austin, at the same time offering the necessary bond, etc. This motion to remove was also resisted by the plaintiff, but it was allowed by the court, and an order to that effect made on the 23d of January, 1879. To the action of the state court allowing Hamilton to become a party as landlord, and to remove the case into this court, the plaintiff duly filed bills of exceptions, etc. These are the material facts as shown by the transcripts of the record filed in this court.

The plaintiff now moves this court to remand these cases to the district court of Comal county on two grounds: (1) Because, as he alleges, there is no act of congress of the United States, giving to this court jurisdiction over said causes; and (2) because the motion to remove to this court came too late. I presume that this application for removal was made on the part of Hamilton under the second section of the act of congress of March 3d, 1875, entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes." This section provides, among other things, that "any suit of a civil nature at law or in equity," involving over $500 in which there shall be a controversy between citizens of different states, may be removed from a state court to the proper circuit court of the United States by either party. As respecting the time in which the removal must be applied for, the provision is that the petition therefor must be filed in the state court, "before or at the term at which the cause could be first tried, and before the trial thereof." It seems to me that under the Texas statute providing a mode of trying title to land, there can be no doubt that Hamilton, as the landlord of the tenant had the right to come in and defend the suit. The fifth section of the statute referred to provides that, "when a tenant is sued for the lands of which he is in possession, the real owner, or his agent or attorney, may enter himself on the proceedings as the defendant in the suit, and shall be entitled to make such defense as if he had been the original defendant in the action." Under this provision Hamilton had the absolute right as landlord of the tenant sued, to make himself the defendant, and having done so, he became virtually the sole defendant, and entitled to make any defense that he could have done had he been the original defendant. The controversy then became one wholly between himself and the plaintiff. The tenants who had been sued were thereafter merely nominal parties; they became, in fact, dormant parties, whose appearance or existence was no longer necessary in the further progress of the litigation. Under these circumstances, it seems to me that the mere fact of their being citizens of the state of Texas ought not to defeat the right of Hamilton to a removal. Whether Hamilton was, in fact, the landlord of the defendants originally sued, is not shown by the transcript of the record, and cannot be inquired into or determined upon this motion to remand. And the action of the district court of Comal county on this subject can not be revised by this court. It is not denied that Hamilton is a citizen of the state of New York, and such, at present, must be regarded as his status. It is well established by repeated decisions of the supreme court of the United States that in controversies respecting real property in a state, the laws of such state and decisions of her highest court are rules of decision for this court. Construing, therefore, the Texas statute which gives to landlords the absolute and unqualified right to make themselves parties defendant in actions of trespass to try title, in connection with the act of congress of March 3d, 1875, my conclusion is that these cases have been properly removed, and this court has jurisdiction over them as being a controversy between citizens of different states, provided it was removed in proper time. The transcript of the record shows that at the first term of the Comal district

court, after the institution of the suit, viz., on the 18th of September, 1878, it was continued on an affidavit of defendants, and on the same day, during the same term, the defendants filed their answer. The case was, therefore, not at issue until after the continuance was entered, and under the laws and practice of the state of Texas was not subject to be tried upon its merits until the next succeeding term thereafter, that was the term at which Hamilton moved for the removal, and I think he was in time, even so far as the case could be first tried as between the plaintiffs and original defendants. Be this as it may, when Hamilton entered his appearance as landlord, and moved for the removal of the case, it was certainly the first term at which the cause could be tried as to him. He made the motion for removal on the next day after he was made the party defendant, and it was allowed by the state court. This was the earliest moment at which he could have made the application, and the law cannot be properly construed to require any greater diligence on his part. In my opinion the court has jurisdiction over these cases, so far as appears upon this motion and the transcript of the record. The motion to remove is therefore overruled.

[NOTE. This case was then heard at October term, 1880, by Woods, Circuit Judge, who also denied the motion to remand, but afterwards suggested a reargument, which took place at February term, 1882, before Pardee, Circuit Judge, who also denied the motion in a case reported in 10 Fed. 689. He followed the case of Barney v. Latham, 103 U. S. 205, which had been decided since the argument before Judge Woods, and where it was held that, where there is a controversy wholly between citizens of different states which can be fully determined as between them, such a removal is proper, upon one or more of the plaintiffs or defendants complying with the requirements of the statute.]

GREENE (MOORE v.). See Case No. 9,763.

Case No. 5,768.

GREENE v. SISSON et al.

[2 Curt. 171.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1854.

ASSIGNMENT FOR BENEFIT OF CREDITORS—PROCEDURE.

Where the amount of a trust fund for creditors is not fixed, and it is necessary to take an account to fix it, all the cestuis que trust must be made parties, either as plaintiffs or defendants; and the act of congress of February 28, 1839 (5 Stat. 321), does not enable the court to proceed without them, to make a decree distributing parts of the fund to those who are entitled to them in severalty.

[Cited in Florence Sewing Mach. Co. v. Singer Manuf'g Co., Case No. 4,884; Cookingham v. Ferguson, Id. 3,182.]

[Cited in Cassidy v. Shimmin, 122 Mass. 410.]

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

This was a suit in equity [by Richard Greene, trustee, against David Sisson and others]. The bill stated that a mortgage was made by Benjamin Cozzens to Earl P. Mason to secure the payment by the former to the latter, of the sum of forty thousand dollars, and also to indemnify Mason against certain liabilities, the nature of which appear by the following contract which was made part of the bill: "It is agreed by and between Benjamin Cozzens of Providence, James Read and Christopher C. Chadwick, composing the firm of Read & Chadwick, of Boston, Henry W. Hubbell, John C. Thatcher, and William Brenton Greene, composing the firm of Hubbell, Thatcher and Greene, of New York, Henry Marchant, of Providence, and Earl P. Mason, of said Providence, as follows: The said Read & Chadwick agree to deliver to the said Cozzens, printing cloths to be by him printed, the property in which cloths is not to vest in said Cozzens till they are finished, but the quantity of cloths which the said Read & Chadwick are to deliver to said Cozzens as aforesaid, and the prices thereof and mode of payment for the same, are to be as the said Cozzens and the said Read & Chadwick may hereafter agree. And the said Hubbell, Thatcher & Greene agree to deliver to said Cozzens printing cloths to be by him printed, the property in which cloths is not to vest in said Cozzens till they are finished, but the quantity of cloths the said Hubbell, Thatcher & Greene are to deliver to the said Cozzens as aforesaid, and the prices and modes of payment for the same are to be as the said Cozzens and the said Hubbell, Thatcher & Greene may hereafter agree. And the said Henry Marchant agrees to deliver to said Cozzens, printing cloths to be by him printed, the property in which cloths is not to vest in said Cozzens, till they are finished, but the quantity of cloths which the said Marchant is to deliver to said Cozzens as aforesaid, and the prices and modes of payment for the same are to be as the said Cozzens and the said Marchant may hereafter agree. And the said Cozzens agrees with the said Read & Chadwick, with the said Hubbell, Thatcher and Greene, and with the said Henry Marchant, respectively to pay them for the cloths which they shall respectively deliver to him as aforesaid, to be printed at the prices, and at the times, and in the mode to be hereafter agreed upon between the said Cozzens, and the said Read & Chadwick, Hubbell, Thatcher & Greene, and Henry Marchant respectively. And the said Earl P. Mason guarantees to the said Read & Chadwick, Hubbell, Thatcher & Greene, and Henry Marchant, the payment to them respectively of all debts to become due to them from said Cozzens, on account of said cloths, and the performance by said Cozzens of all his agreements with them respectively in relation to said cloths, subject to the limitations, re-

strictions, and conditions, hereinafter contained. And whereas the said Cozzens has by deed of mortgage bearing date the 26th day of January, A. D. 1846, conveyed to the said Mason the 'Cozzens Mill,' so called, situated in East Greenwich, in the county of Kent, conditioned for the payment by the said Cozzens to the said Mason of four promissory notes for ten thousand dollars each, the first payable two years after the date thereof, the second payable three years after the date thereof, the third payable four years after the date thereof, and the fourth payable five years after the date thereof, all four of said notes bearing date on the said 26th day of January, A. D. 1846, and bearing interest payable quarterly from the date thereof; and one note for five hundred dollars payable two years after the date thereof, which is on the said 26th day of January, A. D. 1846; and also conditioned that the said Cozzens shall well and truly indemnify and save harmless the said Mason from all future liabilities as guarantor for said Cozzens, now it is hereby agreed by and between all the parties hereto, that all the property conveyed by the said deed of mortgage to the said Mason, and the proceeds thereof, should the said Mason sell the same, shall be by him held and applied; First, to the payment of the several promissory notes, principal and interest, mentioned in the conditions of said mortgage, and the expenses of sale and all other expenses incurred and to be incurred; secondly, to indemnify and save harmless himself, the said Mason, from all liability to which he may be subjected by reason of his guaranty for said Cozzens under this indenture, and from no other liability for said Cozzens. And the said Read & Chadwick, the said Hubbell, Thatcher & Greene, and the said Henry Marchant, respectively agree to and with the said Mason, that in case the surplus of said property conveyed to him by the said Cozzens by the deed of mortgage aforesaid, or the proceeds thereof actually received by him over and above the amount of said promissory notes in the condition of said mortgage mentioned, principal and interest, and the expenses of sale and all other expenses incurred, and to be incurred by the said Mason, should be insufficient to indemnify him against his liabilities, as guarantor for the said Cozzens under this indenture, the said Read & Chadwick, the said Hubbell, Thatcher & Greene, and the said Henry Marchant, respectively agree to accept from the said Mason, such surplus proceeds actually received and legally held by him in discharge of his liability as guarantor for said Cozzens, hereby meaning to exonerate the said Mason from all personal liability other than as the holder of the surplus aforesaid. And it is the understanding and agreement of all the parties hereto that the guaranty of said Mason under this indenture, shall stand and be performed to the respective firms and parties in whose favor said guaranty is made, in the following proportions of the said surplus property, namely, to the said firm of Hubbell, Thatcher & Greene one half,—to the said firm of Read & Chadwick one fourth,—and to the said Henry Marchant one fourth of said surplus; and if either of the said firms, or the said Marchant shall sell to said Cozzens printing cloths to an amount greater than the proportion of such surplus, to which said firm or said Marchant is entitled as herein before stated, the said firm or the said Marchant who shall so sell to said Cozzens, shall have no claim upon said Mason or upon said surplus for such excess. And it is hereby further covenanted and agreed by the said Earl P. Mason with the said Read & Chadwick, Hubbell, Thatcher & Greene, and Henry Marchant, that he will upon request, at any time after default made by the said Benjamin Cozzens in making payment to them, or either of them, for cloths furnished under his contract with them, assign to them, or either of them, to hold in the proportions in the contract before named, the mortgage so as aforesaid made to him, and all his rights under the same and all his claims against the said Cozzens therein mentioned and secured, provided they shall first pay to him all the sums of money due him from said Cozzens which are secured by said mortgage, including all the costs, charges, or expenses therein secured. In witness whereof all the parties aforesaid have hereunto set their hands and seals this 26th day of January in the year of our Lord one thousand eight hundred and forty-six. (Signed) Benjamin Cozzens. (L. S.) James Read. (L. S.) Chris. C. Chadwick. (L. S.) Henry W. Hubbell. (L. S.) John C. Thatcher. (L. S.) Wm. Brenton Greene. (L. S.) Henry Marchant. (L. S.) Earl P. Mason. (L. S.) The said Earl P. Mason agrees that any cloths which were delivered by either of the within-named parties to the said Cozzens, for printing, before the execution of this contract were intended to be embraced within it, and I hereby guarantee the payment of the same upon the same terms and conditions as hereintofore expressed. Earl P. Mason. (L. S.) And I assent to the same. Benj. Cozzens. (L. S.)" The complainant claims to be the assignee of Hubbell, Thatcher & Greene's rights under this contract, and he avers that the respondents, being Mason's assignees, have gone into possession of the mortgaged premises, and taken the rents and profits; and prays that on payment by him of what may be due of the debt to Mason, after deducting the rents and profits, he may have an assignment of the mortgage interest from the defendants. The bill was demurred to.

Tillinghast & Bradley, for complainant.
Mr. Jenckes, contra.

CURTIS, Circuit Justice. It is certainly a general rule that persons having distinct interests in the same security, either jointly or in succession, must unite in a bill to enforce their rights, or if some refuse, they must be joined as defendants. Story, Eq. Pl. 272. But it is argued that there is an exception to this rule, when the trust fund is fixed, and each cestui que trust is entitled to an aliquot share. This may be, but the exception does not apply to this case, because the bill seeks for an account, and the trust fund is not fixed, but depends on the result of that account. Falk v. Lord Clinton, 12 Ves. 48; Norrish v. Marshall, 5 Madd. 475; Hobart v. Abbot, 2 P. Wms. 643; Wilson v. City Bank [Case No. 17,797]; Lenaghan v. Smith, 2 Phil. Ch. 301; Wyllie v. Ellice, 6 Hare, 510.

It was further argued, that the last clause in this contract gives to either of the cestuis que trust a right to call for this conveyance, in order to hold the property for his own benefit, and also for the benefit of the others, and as their trustee. I do not think this is the meaning of the contract. It was contingent whether Mr. Cozzens would be in default in his payments or not; and he might be in default to one only, or to all. To meet this contingency, the agreement is to convey to them, or either of them; that is, to them if all shall have become interested; to either of them if only one shall be interested. Besides, if the agreement was to be construed as the plaintiff insists, I should hesitate to say that an assignee succeeded to the right of Hubbell & Co., to stand as trustee for the others. This must be deemed to involve a personal confidence which cannot be delegated by them.

It was argued that the act of congress of February 28, 1839 (5 Stat. 321), has enabled the court to proceed without these parties, because they are out of the jurisdiction. But, as was said by the supreme court in Hagan v. Walker, 14 How. [55 U. S.] 36, the court cannot proceed to take an account in the absence of a necessary party, though he is out of the jurisdiction. And Mr. Justice Story acted on this principle in Wilson v. City Bank [supra], and dismissed the bill. There were other objections to the bill in that case, which could have been removed by amendments; and as counsel, I offer to make them; but the court was of opinion that the case could not proceed without making Williams a party. See Shields v. Barrow, 17 How. [58 U. S.] 130. If the complainant can truly aver by way of amendment of the bill, that the other cestuis que trust have no interest, or that their interests have passed to the defendants, as was suggested at the bar, I am of opinion this would remove the objection.

GREENE (UNITED STATES v.). See Case No. 15,258.

Case No. 5,769.

In re GREENEBAUM et al.

[1 Chi. Law J. 599.]

District Court, N. D. Illinois. May 25, 1878.

BANKRUPTCY—COMPOSITION WITH CREDITORS—SCHEDULE OF DEBTS.

[1. In accepting a composition of creditors all the court requires is to be satisfied that the creditors have been fully and honestly advised of the true condition of the debtor's affairs, so that the creditors have acted intelligently and understandingly in full view of the facts, and with a knowledge of their own rights in the premises.]

[2. The whole question of whether the composition should be accepted is relegated under the law to the necessary quorum of creditors, and if it appears that they acted intelligently and without undue influence, the court should confirm their action, unless subsequent disclosures are made, which it may be fairly presumed would, if known, have caused the creditors to act differently.]

[3. It seems that, where the requisite majority of creditors agree to a composition, the mere fact that some of that majority signed in a representative capacity, as assignees in bankruptcy, administrators, etc., is not a valid objection to the composition; for, as the receipts of administrators and assignees are sufficient, and if they sign for indebtedness due their estates without authority they become personally liable, it would seem that, in the absence of evidence, the court would presume them to be personally liable if they signed the composition without sufficient authority.]

[4. A bankrupt is not bound to schedule among his debts a contingent liability as a stockholder in a savings bank which has failed, when it does not appear that the bank will not pay in full, and there has been no judicial determination that the liability exists.]

[5. The fact that a bankrupt has failed to schedule all of his debts is not an insuperable obstacle to the confirmation of a composition, for he will only be discharged from the debts which have been scheduled, remaining personally liable for those which have been omitted.]

[In bankruptcy. On objections to the confirmation of composition proceedings in the matter of Henry Greenebaum, Elias Greenebaum, and David S. Greenebaum, bankrupts.]

Adolph Moses and Rosenthal & Pence, for bankrupts.

Fuller & Smith and E. A. Storrs, for objecting creditors.

BLODGETT, District Judge. I announced that I would dispose of the objections to the confirmation of the composition in re Greenebaum Brothers this morning. I regret that I have not had more time to investigate this case, although so far as I have gone I am satisfied that investigation would only strengthen the conviction and the conclusion to which I have arrived. The case has been made quite voluminous, and to some extent complicated, by the acts of the parties opposing the composition. Very voluminous depositions have been taken, and I have been obliged to read those, as far as possible, in fragments, here and there, getting at the substance of what had been eliminated by the depositions, and think that I pretty fully

understand all the questions of fact that have been made in the case.

In the month of December last, the firm of Henry Greenebaum & Co., consisting of Henry Greenebaum, Elias Greenebaum and David S. Greenebaum, filed their voluntary petition in bankruptcy in this court, and subsequently were duly adjudged bankrupts. In the month of February last, the bankrupts filed their petition, asking that a meeting of their creditors be called to consider propositions for compositions. The meeting was duly called to be held before H. N. Hibbard, Esq., one of the registers of this court, on the 8th day of March, 1878. This meeting was quite largely attended, the bankrupts being present. As, however, the affairs of the bankrupts were complicated, and the creditors numerous, many residing in Europe, the meeting appointed a committee of creditors to examine the books and affairs of the bankrupts, and adjourned to the 28th day of March last, at which time it was expected the committee would report. In the interval between the first and the adjourned meetings the bankrupts Henry and Elias were examined at great length, under oath, by attorneys representing creditors, and a very careful examination of their books and papers made by an expert accountant employed in behalf of creditors. At the adjourned meeting the committee reported the result of their examination, so far as the same had gone, and asked for a further adjournment, but the meeting, by a large vote, refused to adjourn for further examination, and proceeded to act on the propositions for composition. The bankrupts, however, offered themselves for examination, and in accordance with such offer, Mr. H. G. was examined in reference to his conveyances just prior to the failure. It appeared that the bankrupts had been, for quite a number of years past, engaged in business in the city of Chicago, as bankers and brokers and dealers in foreign and domestic exchange, under the firm name of Henry Greenebaum & Co., and had also conducted a similar business in New York City, under the firm name of Greenebaum Brothers & Co. They had also been largely interested in the German National Bank of this city, and the German Savings Bank, as managers and stockholders of said corporations. The whole number of their creditors, so far as at present disclosed, by their schedules and otherwise, is seven hundred and fifty-four, of whom three hundred and eighty-six are creditors for over $50 each; and the total amount of debts and liabilities scheduled amounted as shown to $442,137.53. The number of creditors present or represented at the meeting was one hundred and twenty-eight, representing debts to the amount of $218,000. The creditors assembled and represented at the adjourned meeting then proceeded to consider the proposition for composition, made by the bankrupts, which was an offer to pay 25 per cent. on the dollar of the amount due from them to their respective creditors,—5 cents to be paid in cash within sixty days after the ratification of the composition, 10 cents in one year, and 10 cents in two years from the date of the ratification of the composition; the deferred payment to be evidenced by the joint and several notes of the bankrupts, and secured by a bond, to be approved by a committee of creditors, in the penal sum of $100,000,—and adopted a resolution to accept said composition, one hundred and fourteen of the creditors at the meeting voting in favor of accepting the composition, and only fourteen voting against it, the fourteen so voting in the negative representing about $34,000 of indebtedness. On the 2d of May inst. the proceedings of the creditors' meeting, duly certified by the register, were filed with the court, together with a confirmation of the composition, signed by two hundred and seventy creditors, representing about $322,000 indebtedness. A rule was entered requiring all persons interested to show cause on the 9th instant why the composition should not be ratified and confirmed by the court, and on the return day of the rule, Moses Bloom, Leopold Bloom, Simon Zacaries, Christoph Remelsburger and Peter Mars filed objections to the ratification of the composition.

These objections are substantially: (1) That the resolution was not legally adopted by the creditors' meeting. (2) That Elias Greenebaum has failed to schedule a large amount of his property, the proceeds of an undivided half of the assets of the late firm of Greenebaum & Foreman. (3) Because Elias Greenebaum, in fraud of his creditors, has heretofore attempted to transfer and assign to his wife all his interests in the assets of Greenebaum & Foreman. (4) Because both Elias and Henry had made preferences which were fraudulent under the bankrupt law. (5) That the bankrupts have failed to show by their schedules the names of all their creditors. I have not attempted to recite in detail the objections and specifications filed, but the substance of those urged upon the court or referred to in the proofs are grouped under the foregoing heads.

The main controversy in the case centers about two transactions.

1. It was disclosed that in 1874 Elias Greenebaum became a partner in the firms of Henry Greenebaum & Co. and Greenebaum Brothers & Co., contributing at that time a cash capital of about $250,000, besides $50,000 which those firms owed him previously: that Elias at, or just before he became a member of the firms, pretended to transfer to his wife, Rosina Greenebaum, the balance of his estate, amounting to about $250,000 to $300,000 more, and that said Rosina now claims to hold and control the assets so transferred to her, as against the present creditors of the bankrupts. The undisputed facts in regard to this seem to be these: Elias and one Gerhard Foreman had

been partners, doing business as loan brokers for several years prior to the spring of 1874 under the firm name of Greenebaum & Foreman. This firm had recently dissolved, for the purpose, it would seem, of enabling Elias to unite in business with his brothers. On the 16th of May he gave to his wife an agreement in writing, in the following language:

"Whereas, the copartnership heretofore existing under the firm name and style of Greenebaum and Foreman has been dissolved, and I, the undersigned, having been a member of said firm, and am about to enter into the firms of Greenebaum & Co., of Chicago, and Greenebaum Brothers & Co., of New York; and whereas I have promised my wife, Rosina Greenebaum, that prior to my entering into the aforesaid business relations I shall assign, transfer and set over unto her all my personal property and estate save and except the sum of $50,000, which sum I have agreed to contribute into the business firms which I am about to enter, and save and except the sum of $50,000 due me from Henry and David S. Greenebaum, which indebtedness is represented by two demand certificates, signed Greenebaum Brothers & Co., and bearing date April 7, 1873, and payable respectively January 1, 1876 and 1877, with annual interest at 7 per cent per annum: Now, therefore, in consideration of $1 to me in hand paid, I, Elias Greenebaum, of the city of Chicago, do hereby make, assign, and set over to my wife, Rosina Greenebaum, all my right, title and interest in and to the undivided assets of the late firm of Greenebaum & Foreman, which will be kept by said Foreman, at his office, in a separate safe, for collection and conversion, with my assistance and concurrence.

"P. S.—It is understood and agreed that should at any time any of the assets, by exchange, foreclosure, or settlement, be converted into real estate, and thereby the title of the interest of said Rosina Greenebaum be vested into Elias Greenebaum, then said Elias Greenebaum is either to transfer and convey the same to said Rosina Greenebaum, or pay therefor the amount of the original indebtedness." After making this paper, Elias has continued to collect and reinvest the funds referred to, and has received about $193,000 of his share of the assets of Greenebaum & Foreman, which he has kept in a separate account with Elias Greenebaum as trustee; but most of the time the securities have been under the control of his wife, and she, as between themselves, has been recognized as the owner, although Mr. Foreman knew nothing of it, and for some time it was not known to Henry Greenebaum. This gift, or transfer, it is claimed, was and is fraudulent and void as against the creditors of the bankrupt firms, and upon the facts surrounding this transaction is based the charge of fraud and concealment of assets by Elias. So far as Henry Greenebaum is concerned, the main allegations are as to the unlawful preferences made by him just before filing the petition in bankruptcy. These charges are in substance that Henry conveyed a large amount of real estate, owned by him individually, to various firm creditors, and for the benefit of the German National Bank, in which he was interested, thereby defrauding his individual creditors, and also the creditors of the firm who would have shared in any surplus of his individual estate.

The admitted facts in regard to these transactions are, briefly, that in the early part of November the New York house became embarrassed, and after a visit to New York, Henry Greenebaum attempted, with the aid of his personal friends here, to raise funds to relieve the New York house. In order to do so, he obtained from eight prominent merchants of this city their notes for $10,000 each, and upon these he raised the money, about $50,000 of which went to the relief of the New York firm, and the balance was used about the affairs of the firm here and for the payment of his individual debts. A few days after, Henry executed to Herman Shaffner five trust deeds upon real estate, the title to which stood in his name; three to secure $10,000 each, payable in one year; two to secure $50,000, payable in two and three years; one to secure $25,000, payable in one year. It does not appear that it was expressly agreed that these conveyances were agreed upon or promised at the time these friends lent their credit to protect the bankrupt firms, but Henry Greenebaum testified that a portion of these securities were made to so secure those who had generously, as he says, come forward to help sustain the credit of his firm. Of these securities $80,000 were so appropriated, $25,000 was pledged at the Corn Exchange Bank to raise funds for the firm, and the other $50,000 note and security is turned over to the assignee. A day or two before the petition in bankruptcy was filed, Henry Greenebaum also executed an instrument declaring that he held title to certain real estate in trust for the German National Bank, and a similar instrument in favor of the German Savings Bank. An assignment was also made for nominal consideration of the interest of Henry Greenebaum in the leasehold interest and building on the corner of Lake and La Salle streets, subject to payment of ground rent and taxes, and a deed made to Nelson Morris of certain real estate in exchange for stock in the German National Bank. It is claimed that the transfer by Elias Greenebaum to his wife of one-half of the assets of Greenebaum & Foreman was fraudulent and void as against creditors, either existing at the time or subsequent, and that creditors should be allowed to test the validity of this transfer by proceedings in the name of an assignee in bankruptcy; that the conveyances by Henry Greenebaum to Shaffner were void as fraudulent preferences under the bankrupt act [of 1867 (14 Stat. 517)],

and creditors should be allowed to set them aside in the name of the assignee. With regard to the transactions between Elias and wife, it can hardly be claimed that these are void under any provision of the bankrupt law. At most, it can only be attacked by creditors as a partly executed or inchoate gift, the proof tending to show that since the alleged gift or assignment, Elias has exercised the general control over his interests in the old assets of Greenebaum & Foreman. But Mrs. Greenebaum has control and possession now of these assets, at least all that seem to have any present value, and they could only be reached at the end of a probably tedious and expensive litigation. The conveyances made by Henry Greenebaum upon the eve of the developed insolvency of his firms are perhaps of more questionable validity under the bankrupt law, and it is possible that some of them might be set aside as preferential. But it is obvious such a result could only be reached at the end of a series of lawsuits with the parties now interested in those conveyances.

All these facts were before the meeting of creditors. Most of them were to some extent developed at the first meeting, and they were thoroughly investigated by the committee between the first and the adjourned meetings. The committee consisted of able lawyers and astute, sagacious business men. They laid the results of their investigation before the adjourned meeting in an elaborate report, and the proofs now before me show that the report of the committee was elaborately and fully discussed. There is no charge that there has been any concealment or withholding of any fact necessary to be known by the creditors in order to enable them to act intelligently upon the proposition. An expert accountant was employed, who made a thorough examination of the books of both firms and laid the results of those investigations before the creditors at their last meeting, in tabulated form, easy to be understood by any business man. The amount of the assets and liabilities of the bankrupts, and the reasons for their losses were all explained as fully as any such transactions can probably ever be explained under such circumstances. All the facts in regard to the alleged preferences and the main and essential facts in regard to the gift assignment from Elias to his wife were fully discussed and understood by the creditors at the meeting, and the evidence taken by the committee has been accessible to all creditors ever since that meeting. The single question is, ought the court, for the reasons assigned, to refuse to gratify this composition? The creditors who have confirmed the composition by their signatures would seem to be largely of a class who are intelligent and capable on questions touching their own interests, a large proportion being bankers or business firms engaged in business in various parts of the country.

There is no pretext or evidence that any undue or improper influence has been brought to bear on creditors to secure their votes at the creditors' meeting, or signatures in confirmation. Since the amendments of 1874 [18 Stat. 178] to the bankrupt law, the right of a certain majority of the creditors of a bankrupt or insolvent debtor to control the bankruptcy proceedings has been one of the leading features of the law, and the constitutionality of such action has been amply sustained by the courts. It is hardly necessary to refer to the only authority on that subject, and that is the decision of Judge Hunt in Re Reiman [Case No. 11,675]. For illustration: No matter how flagrant or fraudulent acts of bankruptcy a debtor may have committed, it requires the concurrence of one-fourth in number of his creditors, representing at least one-third in amount of his debts, to commence and prosecute bankrupt proceedings against him. If more than three-fourths of a debtor's creditors representing the least fraction more than two-thirds of his debts, see fit to overlook the acts in bankruptcy, the minority is powerless; they cannot invoke the aid of the law in any respect. So, too, when a bankrupt asks for a creditors' meeting to submit proposals for a composition under the amendment of 1874, the creditors can undoubtedly condone acts of bankruptcy or even frauds of which their debtor has been guilty. This question was decided by Judge Wallace, of the Northern district of New York, in Re Allen [Case No. 210]. While I confess I should be loath to confirm a composition originating in fraud, as the learned judge stated to have been the fact in that case, I think there can be no doubt of the rule deducible from all the adjudications in the composition cases, that all the court requires is to be satisfied that the creditors have been fully and honestly advised of the true condition of the debtor's affairs, so that the creditors have acted intelligently and understandingly in full view of the facts, and with a knowledge of their own rights in the premises.

The whole question of whether the composition should be accepted is relegated under the law to the necessary quorum of the creditors, and if it appears that they acted intelligently and without undue influence, it seems to me the court should confirm their action, unless subsequent disclosures are made which it may be fairly presumed would, if known, have caused the creditors to act differently. The creditors of these bankrupts meet. They become aware that Elias Greenebaum, who was reputed the wealthiest of this firm of brothers in 1874, made a gift of half his substance to his wife, and that this fact has been kept concealed, at least not communicated, from the body of the creditors of these firms up to the eve of their bankruptcy. They also learn that the donee of the large amount of assets has them now, or the valuable portion of them, in her possession, and that she can only be made to

disgorge them at the end of a lawsuit, and are not even sure of that result. They learn that Henry Greenebaum, on the eve of his bankruptcy, gave certain securities which they are advised were preferential and void under the bankrupt law; but they also learn that those alleged preferences may be deemed the struggles of an over-sanguine business man, made in good faith under the belief that he could thereby tide his business affairs over a crisis, and thus save his credit and pay all his debts in full. Knowing, therefore, that if these alleged preferences are set aside, it will be after tedious and expensive proceedings in the courts, where the assets at present available may be consumed, or at least much diminished, without absolute assurance of success, they, the creditors, in view of all the surrounding facts, vote to accept the offer made by the bankrupts, condone the alleged frauds as a proper majority undoubtedly have the right to do, say they will take what is offered without further delay or expense, and forego the balance of the debt. This is what the creditors of the bankrupts have done by a very large majority under the circumstances. As I have already said, the total amount of debts is $442,137, in the hands of seven hundred and fifty-four creditors, of whom three hundred and eighty-six are creditors for $50 and over. Of these three hundred and eighty-six creditors two hundred and seventy had confirmed the composition, representing $322,000 of the debts. The law requires that the composition shall be confirmed by the signatures of two-thirds in number and one-half in value. Here is a majority of eleven over the required number, and over $100,000 in amount more than what is required. The majority at the creditors' meeting was very large. The number present at the meeting and voting was one hundred and twenty-eight; those voting for the composition, one hundred and fourteen, those voting against it, fourteen, and since the composition meeting four of the creditors who voted in the minority at that meeting have signed the confirmation of the composition. Those who have signed represent over $17,000, over half of the amount of the indebtedness, which was represented in the composition at the time of the meeting. But it is also claimed that the individual composition of Henry Greenebaum was not properly carried and confirmed, because at the meeting seven creditors voted, six of whom voted aye and one voted no. The whole amount in value of his individual debts represented was $63,199, but the debtor voting no, represented $11,000, leaving $52,000 voting in the affirmative. But it is claimed that this amount should be reduced by deducting the amount represented by the German National Bank, and that that vote should have therefore been excluded. I do not see the force of this objection. There is no question raised but what Henry Greenebaum owed the German National Bank the amount of the indebtedness that was represented and voted for. Nor is there any charge made that any undue influence was brought to bear by Henry Greenebaum as the representive of the corporation to secure this vote. On the contrary, the proof shows that at the time this meeting was held, and at the time the vote was cast the German National Bank was in process of liquidation, winding up its affairs under the control of other parties than Henry Greenebaum, and that he had no special influence with the management of the bank at that time.

It is also objected that some of these creditors who have confirmed this composition by their signatures have acted as administrators or assignees in bankruptcy, and that therefore enough creditors have not confirmed it. A sufficient answer to this objection is that a careful inspection of the confirmation shows that only five, I think, of the creditors who have confirmed the composition have signed in any representative capacity, so that those claims may be all thrown out, and yet the requisite number of creditors, both in number and amount will be shown. But it may be further questioned whether the court would not presume, in the absence of evidence, these parties to be personally liable. The receipt of an assignee is sufficient, and the receipt of an administrator is sufficient, and if they sign for indebtedness due the estates which they represent without sufficient authority, they simply make themselves personally liable. So that upon two grounds this objection would be overruled.

It is further objected that the bankrupts have failed to schedule all their creditors. This is based upon the fact that the evidence shows that they were stockholders in the German Savings Bank and in the German National Bank, and that a contingent liability exists from them as such stockholders to the creditors of these corporate institutions. A sufficient answer to that criticism is that it is not definitely ascertained or known, certainly not judicially determined, that any such liability will ever be attempted to be enforced, or will arise; it does not appear but what both these institutions may pay in full, nor does it appear from any evidence that there is any personal liability on the part of the stockholders in the German Savings Institution. But even if it were so, the debtors in a composition proceeding are only discharged from those debts which they schedule, and if they fail to schedule this indebtedness or this contingent liability which rests upon them as stockholders in these corporations, they will not be released from personal liability. They will only be released from their liability to creditors who are named in their schedule.

For these reasons which I have thus carefully gone over, I am satisfied that no sufficient reason has been assigned why this composition should not be confirmed. The una-

nimity of the creditors' meeting, the large number of creditors, considering the scattered condition of the creditors of this firm throughout this country and Europe, the large number of creditors who have confirmed the composition by their signatures, all tend to convince me that the business men who looked at the affairs of this concern, who have investigated its assets and liabilities, are satisfied that as a business proposition it is better for them to accept the offer that is made. The offer is a peculiar one, but at the same time is such an one as is for the creditors themselves to say whether it is satisfactory or not. And the minority, while they may be satisfied that fraud has been perpetrated, that preferences have been given, that Elias Greenebaum has in this transaction, as between himself and his wife, saved a large proportion of his estate, which he will hereafter enjoy with his wife, yet those facts were all before the creditors; they knew what they were, knew what the objections were, and considered them. The court must believe that with the aid of the able lawyers who have contested this composition from the outset, who have met and argued questions of law and submitted proofs to the creditors—that this question must have been fully considered in all its aspects by the creditors, and that they acted intelligently and understandingly. The objections to the composition will therefore be dismissed and the composition confirmed. Composition confirmed.

GREENE COUNTY COURT (UNITED STATES v.). See Case No. 15,259.

Case No. 5,770.

The GREENE COUNTY TANNER.

The J. W. WOODRUFF.

[8 Ben. 396.] [1]

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

COLLISION IN HUDSON RIVER—SAILING VESSELS—PRIVILEGED TACK—LOOKOUT—PLEADING.

1. Two schooners, the T. and the W., were beating up the Hudson river, the wind blowing down the river. Both vessels had been standing on their starboard tack towards the Jersey shore. The T. was ahead and stood out her tack and went about near the Jersey shore and came on her port tack. The W. continued on her starboard tack and the vessels collided, the stem of the W. failing to clear the stern of the T. by only a few feet. The master of the T. claimed that, before going about, he looked to see where the W. was and saw her about a third of the way across the river from the Jersey shore, heading nearly across the river but a little up, and being a little further up the river than the T. was; that, after the T. had gone about and he had ordered her jib to be drawn away, he saw that the W. was about 100 or 150 feet off, pointing for his starboard quarter, whereupon he put his wheel to starboard, and, just as his sails began to shake, the collision occurred. Cross libels were filed by the owners of each schooner against the other: *Held*, that on the libel of the Tanner, filed four days after the occurrence, which did not claim that the W. was so near the Jersey shore as not to leave room for the T. to go about with safety, and on the evidence, the T. got headway on her port tack, before she did anything in discharge of her duty to keep out of the way of the W., which was on the privileged tack.

2. The master of the T. either came about without carefully observing the W., or, if he observed her, persisted in coming on his port tack and trying to cross the bows of the W. instead of porting and going under her stern.

3. The W. had the right to keep her course and was not in fault in that she did not try, by starboarding, to go under the stern of the T.

4. As the W. did not fail in her duty, her keeping or not keeping a lookout was not an element in the case.

5. The T. was responsible for the damages.

In admiralty.

Benedict, Taft & Benedict, for the Tanner.

Scudder & Carter, for the Woodruff.

BLATCHFORD, District Judge. These are cross libels growing out of a collision which occurred in the Hudson river, off Jersey City, on the 14th day of November, 1874, in the day time, between the schooner Greene County Tanner and the schooner J. W. Woodruff. The wind was blowing down the river and both vessels were beating up. Prior to the collision both vessels had been standing on the starboard tack, heading towards the New Jersey shore, from the city of New York. The Tanner was ahead, and stood out her tack, and went about near the New Jersey shore and came upon her port tack. The Woodruff continued on her starboard tack, and the two vessels collided. The claim on the part of the Woodruff is, that, as both vessels were close hauled, it was the duty of the Tanner, having the wind on her port side, to keep out of the way of the Woodruff, which had the wind on her starboard side; that it was equally the duty of the Woodruff to keep her course; that the Woodruff did keep her course; and that the Tanner was in fault in not avoiding the Woodruff. The rule of navigation in such a case is very clear, that the vessel on the port tack must avoid the other vessel, and that the latter must keep her course. If she does keep her course and a collision ensues, the burden of proof is on the other vessel to show some satisfactory reason why she did not keep out of the way.

The libel on the part of the Tanner avers that the Tanner, on her starboard tack, stood in as close to the shore as it was proper to stand; that, at that time, the Woodruff was still on her starboard tack, but much farther from the New Jersey shore; that the Tanner then properly came about on her port tack, heading towards the New York shore, close-hauled; that thereupon it became the duty of the Woodruff to go about in time to prevent a collision, or to keep away and go

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

under the stern of the Tanner, as she could easily have done, there being nothing in the way to prevent either of such manoeuvres on her part; that the Tanner had barely got filled away on her port tack, when those in charge of her perceived that the Woodruff was keeping on, without going about or going under the stern of the Tanner; that thereupon an effort was made by the Tanner to go about again in order to avoid the Woodruff, but before the heading of the Tanner was changed more than a point or two, or her headway checked, the vessels collided; and that the collision was the result of the reckless and unskilful navigation of those navigating the Woodruff, in that they failed to go about as they should have done, and failed to keep away and go under the stern of the Tanner, as they could easily have done, and failed to keep a lookout. It is to be observed that the purport of these allegations in the libel of the Tanner is, that the reason and the excuse set up for the Tanner's not keeping out of the way of the Woodruff is, that the Woodruff did not do something to keep out of the way of the Tanner and did not allow the Tanner to keep her course. The libel of the Tanner does not allege that the Tanner could not have avoided the collision, or that the Woodruff crowded her and did not give her room to tack; and the substance of it is, that the Tanner was on the privileged tack.

On the evidence, it is contended, for the Tanner, that her master, who was at her wheel, looked around to see where the Woodruff was before he hove his wheel down to go about, and saw her about one-third of the way over from the New Jersey shore, heading nearly across the river, but a little up, and a little farther up the river than the Tanner was; that the Tanner then went about, and her master, after he had ordered his jib to be drawn away, looked to see where the Woodruff was, and saw her pointing for the starboard quarter of the Tanner and 100 or 150 yards off; that he then put his helm at once to starboard, and, just as his sails began to shake, the collision occurred, the bow of the Woodruff failing by only a few feet to clear the stern of the Tanner on the starboard side of the Tanner. On these facts, it is contended that the Woodruff should either have gone about or have starboarded and allowed the Tanner to cross her bows. But the libel on the part of the Tanner, filed four days after the occurrence, says, very distinctly, that, when the Tanner went about, the Woodruff was much farther from the New Jersey shore than the Tanner was, and does not intimate that the Woodruff was not so far from the New Jersey shore as to make it safe for the Tanner to go about, even if the Woodruff kept on her course. The libel on the part of the Tanner also says, very distinctly, that the Tanner got filled away on her port tack, and got headway on, on such tack, before she did anything in discharge of her duty to keep out of the way of the Woodruff. It is very apparent, from the libel of the Tanner and the evidence, that the master of the Tanner either saw clearly all the time where the Woodruff was, and persisted in coming on his port tack and trying to get across the bows of the Woodruff, in disregard of his obligation either to refrain from filling away on his port tack or to port, when on that tack, sufficiently to go under the stern of the Woodruff; or else he was negligent, and did not carefully observe the Woodruff, and suddenly found himself in presence of a vessel which he was bound to avoid. The Woodruff had a right to keep her course, and had a right to suppose that the Tanner would understand that, and to suppose that the Tanner would see in time that she could not cross the bows of the Woodruff and would port and go under the stern of the Woodruff. In this view, if the Woodruff had starboarded and the Tanner had at the same time ported, a collision would certainly have occurred, for which the Woodruff alone would have been in fault.

It is urged for the Tanner, that the evidence shows that the Tanner could not, by porting, have cleared the Woodruff. That may be, but that does not exonerate the Tanner, or make it a fault in the Woodruff that she did not starboard. It was the fault of the Tanner that she allowed herself to get into a position where she could not, by either porting or starboarding, keep clear of the Woodruff, and the Woodruff had a right to suppose, that, as the Tanner ventured to fill away on her port tack and to get headway on, on that tack, she could and would, if not able to cross the bows of the Woodruff, go under the stern of the Woodruff, by porting.

I see no fault on the part of the Woodruff, in respect to keeping a lookout. As she failed in no duty, her keeping or not keeping a lookout is not an element in the case. The libel of the Tanner must be dismissed, with costs, and in the suit by the Woodruff there must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages.

Case No. 5,771.

Ex parte GREENFIELD.

[See Case No. 5,772.]

Case No. 5,772.

In re GREENFIELD.

[5 Ben. 552;[1] 42 How. Pr. 469.]

District Court, S. D. New York. March 2, 1872.

BANKRUPTCY—JURISDICTION—SUPPLEMENTAL PROCEEDINGS.

The firm of F. & Co., composed of F., L., and G., did business in New Orleans, La., and

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

expired by limitation in September, 1862. In August, 1867, G., then residing in the city of New York, filed his petition to be declared a bankrupt. He was declared a bankrupt, and an assignee was appointed. G. afterwards obtained his discharge. In February, 1868, F. and L., then residing in New Orleans, filed their petition there, praying that all the members of the firm of F. & Co. might be declared bankrupts. An assignee was elected in those proceedings, and he afterwards sold a piece of land in Texas to one B. B., not being satisfied with his title, applied to this court in order to have the assignee appointed in these proceedings join in the conveyance: *Held*, that the proceedings in Louisiana were void for want of jurisdiction; that it was the duty of the assignee in these proceedings to have F. and L. adjudged bankrupt by supplemental proceedings in this court; and that in neither of the proceedings as they now stood, could the title of the members of F. & Co. to the real estate in question be conveyed.

By I. T. WILLIAMS, Register:

[2] [I, the undersigned, register in charge of the above-entitled matter, and to whom it was referred by a special order of this court, founded upon the petition of Albert Smith, Esq., the assignee therein, to take proofs of the matters alleged in the said petition, and report the same with his conclusion thereon, and further to report whether the proceedings in bankruptcy either in this court or in the district court for Louisiana are of any avail to convey the interest of the members of the firm of Fellows & Co., in the land in question, to any assignee in bankruptcy appointed in either court, and as to what is the situation and value of such land, and as to whether this court has not the first jurisdiction as to such lands, and as to what ought to be done to assert such jurisdiction and make it operative if the lands are valuable, do hereby certify that I have been attended by the said assignee, and that I have taken proofs touching the matter so reported to me, which said proofs are hereto annexed.

[That I find the facts as follows: The bankrupt, Thompson Greenfield, then residing in the city of New York, filed his petition in this court to be declared a bankrupt on the 24th day of August, 1867. That such proceedings were had in this court, that he was on the —— day of ——, 1867, duly declared a bankrupt, and that Albert Smith, Esq., was afterward duly elected assignee of said bankrupt's estate. That said assignee proceeded to administer upon said estate, and that the said Greenfield has been duly discharged in bankruptcy in this court. That prior to September, 1862, said bankrupt had been a partner of the firm of Fellows & Co., residing and carrying on business in New Orleans, in the state of Louisiana, which firm consisted of Cornelius Fellows, Daniel P. Logan, and the bankrupt, and had expired by limitation in September aforesaid. The aforesaid partners, Fellows and Logan, residing in that city, filed their petition in the bankruptcy court, for the district of Louisiana, on the 30th day of February, 1868, praying that all members of said firm, to wit, said Fellows, Logan and Greenfield, be declared bankrupts, and such proceedings were thereupon had in said court, that an assignee of the partnership property was duly elected, who took possession of the property of said firm, and, under an order of said court, sold a piece of real estate situate in the state of Texas, to one William Brennen,[3] and afterwards conveyed the same to him in due form of law. The said Brennen,[3] not being satisfied with his title, now asks of the referee appointed in the proceedings of this court to join in the said conveyance. And I certify and report that I am of opinion, that the proceedings in the bankruptcy court of Louisiana are void for want of jurisdiction, and that it is the duty of the assignee appointed by this court to proceed by petition, alleging as an act of bankruptcy the filing of the petition in the district of Louisiana aforesaid, and obtain from this court an order to show cause why the said Cornelius Fellows and Daniel P. Logan should not be declared bankrupts, which order should be served on the said Cornelius Fellows and Daniel P. Logan by publication, and by mail. On the return of said order, this court will listen to any evidence, and to any arguments upon the facts and law, and will then dismiss the petition or adjudge them bankrupts, and if they shall be declared bankrupts the assignee should proceed to take and obtain possession of all of the partnership property of the said firm, and administer upon the same in this court in due form of law.

[The grounds upon which the foregoing opinion is placed are as follows: It is true, that the 36th section speaks of partnerships in the present tense, and literally refers to partnerships existing at the time of the filing of the petition. But such literal construction would take any case out of the purview of the section if there had been a dissolution an hour before the petition was filed. Clearly such could not have been the intent of the act. It is very clear, that from the standpoint at which the act contemplates a partnership, all the partnerships must be regarded as existing partnerships where there are joint assets and joint liabilities; any other construction would tend to inextricable confusion. It would be a mockery of justice if an individual, who, with others, owned partnership property and owed partnership debts, could proceed in a bankruptcy court for the purpose of being discharged of either his individual or his partnership debts, without bringing into court, with himself, all of his copartners. In no other way could the court get jurisdiction of the partnership property so as to administer upon it. If the partnership property was not so brought into court, the individual

[2] [From 42 How. Pr. 469.]

[3] [5 Ben. 552, gives Bumm.]

creditors might well object that it did not appear, that all the property rights and interests of their debtors, the bankrupts, were administered upon by this court and divided among them; that it did not appear, and could not be made to appear, unless the other partners were brought in, that upon a full administration of all the property and interests of the bankrupt, there was not property out of which their claims could be paid in full or in part; for if the partnership property would more than pay the partnership debts, such excess would go to the individual creditors.

[Again, if the bankrupt desire to be discharged from his personal liability for the partnership debts, clearly he must have the partnership property administered upon in bankruptcy, which cannot be done without bringing in the other partners. If, indeed, the other partners are solvent and have committed no act of bankruptcy, it is clear that they cannot be brought in, for they cannot be adjudged bankrupts. But the very fact that they are solvent and cannot be brought in is a full reason why they need not be brought in, for in such case the partnership creditors are at no hazard of losing their claims and cannot be heard to complain. The assignee in that case becomes a tenant in common of the solvent partners, and after the partnership creditors are paid from the partnership property or their claims otherwise disposed of, the assignee of the bankrupt partner, may have an accounting with the other members of the copartnership, and obtain from them and bring into the bankruptcy court for distribution among the individual creditors, whatever interest the bankrupt may have remaining in the copartnership property. At the time Greenfield filed his petition in this court he resided in this district, the other parties resided in another district. Each partner had an equal right to proceed in bankruptcy in the district where he resided. The court of the district in which a petition was first filed would acquire jurisdiction of the whole case and could not be ousted of jurisdiction of the case or a part of it by the subsequent filing of a petition in the court of another district. It will be observed that Greenfield does not ask in his petition that his partners be adjudged bankrupts, but the creditors by their assignee may ask it, and would have a right to such an adjudication. The court here therefore could not be ousted, or in any wise affected in its jurisdiction over the whole case by any such omission on the part of the bankrupt. The act is clear, "if such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case." Section 36. If the petition was first filed in this court, and this court thereby acquired exclusive jurisdiction, it is certain that the court in the district of Louisiana obtained no jurisdiction, and that all the proceedings there upon the petition of the other partners are utterly void. The adjudicated cases so far as they bear upon the point now under consideration clearly look to the conclusion above expressed. In Re Gureer Flour Co., 1 Fla. e. L. R. 45, the recusant partners were brought in and adjudged bankrupts on the motion of the assignee. The same is true in the Case of Grady [Case No. 5,654]. Should the court approve of the views above expressed, the assignee will without delay take the proceedings here recommended. And I further certify that in my opinion as the case now stands, and without recourse to the proceedings above recommended, neither the proceedings in this court nor the proceedings in the bankruptcy court for the district of Louisiana are of any avail to convey the interest of the members of the firm of Fellows & Co. in the lands in question to any assignee in bankruptcy in either court. And I further certify that the lands in said petition referred to, judging from the account and description thereof, and from the anxiety to obtain the same manifested by said Brennen and his counsel, at New Orleans, are of very considerable value, but what precise value I am unable to ascertain. That the value of the real estate of said copartnership, set down in the said schedules of the said bankrupt, amounts in all to the sum of $155,683, being 15 different parcels of land, situate in the states of Texas and Louisiana, but a small part of which was so sold to said Brennen, as aforesaid, and still remain unsold, so far as my knowledge or information concerning the same extends. And I further certify that though the subjoined evidence is not of a positive character, or in all respects admissible upon the trial of an issue, yet it is the best that the assignee could obtain without incurring considerable expense, and having no funds in his hands he did not feel it his duty to make advances for that purpose. But I submit that it is sufficient to justify the action herein recommended in case the court should think the views herein expressed are tenable.] [4]

BLATCHFORD, District Judge. I concur in the conclusions of the register, that the proceedings in the bankruptcy court in Louisiana are void for want of jurisdiction; that it is the duty of the assignee appointed by this court to proceed to have Fellows and Logan adjudged bankrupts in this court, and that neither the proceedings in this court nor those in the district court for Louisiana, as they now stand, are of avail to convey the interest of the members of the firm of Fellows & Co., in the lands in question, to any assignee in bankruptcy in either court. The proceedings above referred to, to be taken by the assignee, in this court, must be proceedings by way of supplement in the proceedings pending in this court.

[4] [From 42 How. Pr. 469.]

Case No. 5,773.

In re GREENFIELD.

[6 Blatchf. 287.] [1]

Circuit Court, S. D. New York. Dec. 24, 1868.[2]

BANKRUPTCY—APPLICATION FOR DISCHARGE.

The 29th section of the bankruptcy act of March 2, 1867 (14 Stat. 531), requires a bankrupt to apply for a discharge from his debts within one year from the adjudication of bankruptcy, only in cases where, by reason of no debts having been proved against him, or of no assets having come to the hands of his assignee, he can apply for a discharge within less than six months from such adjudication.

[Cited in Re Gallison, Case No. 5,203; Re Sloan, Id. 12,945.]

This was a petition for a review of an order of the district court, refusing a discharge to [Thompson Greenfield], a bankrupt.

[The opinion of the district court, which is reported in full in 6 Blatchf. 287, is here published as Case No. 5,774.]

Sullivan & Bracken, for bankrupt.

NELSON, Circuit Justice. I have examined the 29th section of the bankruptcy act, discussed by Judge Blatchford, in this case [Case No. 5,774], and his opinion upon it; and, after the best consideration I have been able to give, concur in that opinion. I think the fair grammatical construction excludes the limitation of the one year from the first clause in the section, and that there is reason for the distinction between the case where there are creditors and assets, involving delay in the proceedings, and in the settlement of the estate before the court, and the case where there are either no creditors, or no assets, or, rather, no debts proved, or no assets to be assigned. The objection is very technical, and a contrary view leads to no useful result. The order of the district court is reversed, and a discharge is directed to be given.

[See Case No. 5,775.]

Case No. 5,774.

In re GREENFIELD.

[2 N. B. R. 298 (Quarto, 98); [3] 1 Chi. Leg. News, 123.]

District Court, S. D. New York. Dec. 14, 1868.[4]

BANKRUPTCY—APPLICATION FOR DISCHARGE.

Where a bankrupt had failed to apply for a discharge until the expiration of a year from the adjudication in bankruptcy, a discharge must be refused.

[Cited in Re Sloan, Case No. 12,945; Re Martin, Id. 9,153; Re Watson, Id. 17,273; Watson v. Reynolds, Id. 17,275.]

[In bankruptcy. In the matter of Thompson Greenfield.]

Sullivan & Bracken, for bankrupt.

BLATCHFORD, District Judge. The adjudication of bankruptcy was made on a voluntary petition on the 28th of August, 1867. On the 22d of October, 1868, the bankrupt petitioned for his discharge. The petition is in the form of form No. 51, and does not state that either no debts have been proved against the bankrupt, or that no assets have come to the hands of the assignee. The question arises whether a discharge must be withheld for the reason that the bankrupt failed to apply to the court for a discharge from his debts within one year from the adjudication of bankruptcy? It has been decided by the district court, for the Northern district of New York, in Re Willmot [Case No. 17,778], that section twenty-ninth of the act [of 1867 (14 Stat. 531)], requires that in all cases a discharge must be applied for within one year from the adjudication of bankruptcy, and if it be not applied for within that time, it cannot be granted. Such is also the view of the authors of two elementary works on the statute. Avery & H. Bankr. Law, p. 210; James, Bankr. Law, p. 133. My attention has not been called to any other authority on the subject. I have serious doubt whether this is the proper construction of the twenty-ninth section. The language of that section is, "that at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts." It is contended that the provision consists of two parts, and is to be read as if it were worded thus: (1.) At any time after the expiration of six months from the adjudication of bankruptcy, and within one year from the adjudication of bankruptcy, the bankrupt may apply, &c. (2.) If no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, the bankrupt may, at any time after the expiration of sixty days from the adjudication of bankruptcy, and within one year from the adjudication of bankruptcy, apply, &c. There is no doubt that the privilege granted by the act must be enjoyed, if at all, subject to the conditions and limitations as to the time of applying for the discharge, which are imposed by the act. The only question is as to what are the limitations?

In order to maintain the construction which would withhold a discharge in this case, the words: "and within one year from the adjudication of bankruptcy," must be held to apply equally to, and to be connected equally with, and to qualify equally, each

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

[2] [Reversing Case No. 5,774.]

[3] [Reprinted from 2 N. B. R. 298 (Quarto, 98), by permission.]

[4] [Reversed in Case No. 5,773.]

one of the two branches of the same sentence which precedes them therein; the one branch consisting of the words: "at any time after the expiration of six months from the adjudication of bankruptcy," and the other branch consisting of the words: "if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days." Now the first of such branches contains a complete idea in itself—"at any time after the expiration of six months from the adjudication of bankruptcy," without any aid from anything contained in the subsequent words: "and within one year from the adjudication of bankruptcy." But the second of such branches does not contain a complete idea in itself. It merely says that in the case of no debts proved, or in the case of no assets, then at any time after the expiration of sixty days; but it does not state where the computation of sixty days is to commence. The idea would have been complete if it had said, "after the expiration of sixty days from the adjudication of bankruptcy." The words: "from the adjudication of bankruptcy," must be supplied in the second of such branches from some source, otherwise it has no meaning. Those words are found in the first of such branches, and if they had been transplanted from their position in the first of such branches and placed in the second of such branches after the words, "sixty days," there would have been no doubt whatever that the words, "and within one year from the adjudication of bankruptcy," were intended and must have been held to qualify and apply to both of such branches. But in judicial construction such transplanting would be a forced process. In the use of written language qualifying words generally relate back to something that precedes, and do not reach forward to something that follows. The words, "from the adjudication of bankruptcy," which are needed to make sense of the second of such branches, are found immediately following it in the words, "and within one year from the adjudication of bankruptcy," and naturally relate back to, and apply to, and qualify, the second of such branches, so as to make it read: "at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy." Now, if the clause, "and within one year from the adjudication of bankruptcy," be thus necessarily adjunct and auxiliary to the second of such branches, in order that it shall have any sensible meaning, such clause thereby becomes an integral part of the second of such branches, and the sentence thus resolves itself into two members which provide severally, (1) That at any time after the expiration of six months from the adjudication of bankruptcy, but not sooner, the bankrupt may apply, &c.; (2) That if no debts have been proved or there are no assets, he may apply at any time after the expiration of sixty days from the adjudication of bankruptcy, and not sooner, provided he applies within one year after such adjudication. In this view, if debts have been proved and there are assets, he is obliged to wait for six months, but after that he is not restricted in time. If he is in a position to apply after waiting only sixty days, he must do so within a year. It may have been thought that when there are debts proved as well as assets in the hands of the assignee, there should be no requirement that the application for a discharge be made within a year after the adjudication, but that when there are either no debts proved or no assets, there ought to be such a requirement. It is difficult, indeed, to see a reason for such a distinction, but not more difficult than it is to see why there should be such a requirement in any case. The provision in section twenty-one against unreasonable delay will not work more in the interest of creditors, by reason of such requirement, because by virtue of such requirement a delay of a year, which might otherwise be unreasonable, is made reasonable.

Still, in view of the decision before referred to, and of the fact that there would be greater mischief in granting a discharge in this case on a mistaken view of the statute than in erroneously withholding one, I shall refuse a discharge, with a view to afford an opportunity for a review of the question involved by the circuit court on a proper proceeding to be instituted under section 2 of the act.

[See Cases Nos. 5,773 and 5,775 for other stages of this same proceeding.]

Case No. 5,775.

In re GREENFIELD.

[2 N. B. R. 311 (Quarto, 100);[1] 1 Chi. Leg. News, 139.]

District Court, S. D. New York. Dec. 24, 1868.

BANKRUPTCY—APPLICATION FOR DISCHARGE.

Under section 29 [Act 1867; 14 Stat. 531], it is only in cases where the bankrupt can apply for his discharge within less than six months from his adjudication, that he must do so within a year therefrom, in order to obtain a discharge.

[Cited in Re Watson, Cases Nos. 17,273, 17,275; Re Martin, Id. 9,153; Re Holmes, Id. 6,634.]

[In bankruptcy. In the matter of Thompson Greenfield.]

Sullivan & Baker, for bankrupt.

BLATCHFORD, District Judge. In this case, on the 14th instant, I denied the petition of the bankrupt for a final discharge, on the ground that he did not file his petition for final discharge within one year from his adjudication of bankruptcy. [Case No. 5,774.] His petition did not state either that no debts had been proved against him, or

[1] [Reprinted from 2 N. B. R. 311 (Quarto, 100), by permission.]

that no assets had come to the hands of his assignee. In my decision in the case I stated that I had serious doubts whether the twenty-ninth section of the act required that in all cases a discharge must be applied for within one year from the adjudication of bankruptcy, and I gave at some length reasons for the conclusion, that the proper construction of the section was, that in case that the bankrupt was in a position, either by reason of no debts having been proved against him, or of no assets having come to the hands of his assignee, to apply for his discharge after the expiration of only sixty days from his adjudication of bankruptcy, he must so apply within a year from such adjudication; but that, in case he was obliged, by reason of debts having been proved against him, and of assets having come to the hands of his assignee, to wait until after the expiration of six months from such adjudication before he could apply for his discharge, he was not restricted to apply within one year from such adjudication, but might apply at any time after the expiration of such six months, even though at a longer distance of time than one year from such adjudication. In view, however, of the fact, that a decision had been made by the district court for the Northern district of New York,—In re Wilmott [Case No. 17,778],—to the effect that section 29 of the act required that in all cases a discharge must be applied for within one year from the adjudication of bankruptcy, and that if it was not applied for within that time, it could not be granted; and of the further fact that there would be greater mischief in granting a discharge in this case, on a mistaken view of the statute, than in erroneously withholding one, I refused a discharge, with a view to afford an opportunity for a review of the question involved by the circuit court, on a proper proceeding, to be instituted under section two of the act.

It now appears, by an order of the circuit court, of which a certified copy has, by the direction of that court, been transmitted to this court, that the bankrupt presented a petition to that court, setting forth that he was aggrieved by the order and decision made by this court, denying his petition for a final discharge, and praying that said decision and order might be reviewed and reversed, and that a final discharge might be granted to him; that the application for the exercise of the jurisdiction to hear and determine the case made by the said petition to the circuit court was made to Mr. Justice Nelson, and that he, on a consideration of said petition, and by his written decision and order thereupon, filed in the circuit court, decided and ordered that the said decision and order of this court be reversed, and that a final discharge in bankruptcy be decreed to the bankrupt. [Case No. 5,773.] In his decision, Mr. Justice Nelson says: "I have examined the twenty-ninth section of the bankrupt act, within discussed by Judge Blatchford, and his opinion upon it, and, after the best consideration I have been able to give, concur in that opinion. I think the fair grammatical construction excludes the limitation of the year, from the first clause in the section, and that there is reason for the distinction between the case where there are creditors and assets, involving delay in the proceedings and settlement of the estate before the court, and the case where there are either no creditors or no assets, or rather, no debts proved, or no assets to be assigned. The objection is very technical, and a contrary view leads to no useful result."

In accordance with these views of Mr. Justice Nelson, it must be regarded as the proper construction of the twenty-ninth section, as respects cases pending in this court, until such views are overruled by superior authority, that it is only in cases where the bankrupt can apply for his discharge within less than six months from his adjudication, that he must do so within one year from his adjudication. An order will be entered in this case, reciting the proceedings that have taken place since the former order of this court on the 14th instant, and directing that a discharge be granted to the bankrupt.

GREENFIELD (BELL v.). See Case No. 1,231.

GREENING v. The GREY EAGLE. See Cases Nos. 5,734 and 5,735.

Case No. 5,776.

GREENISH v. STANDARD SUGAR REFINERY.

[2 Lowell, 553.] [1]

District Court, D. Massachusetts. March, 1877.

GARNISHMENT—DISSOLUTION OF ATTACHMENT—PAYMENT OF INTEREST.

Where the respondents owed freight to the libellants, and were summoned as their garnishees in the state court, and, after some time, gave bond to the plaintiffs in the action in which they were summoned as garnishees, and thus dissolved the attachment, and afterwards the case in this court for the recovery of the freight was decided,—*held*, that the respondents, not having tendered the freight, were bound to pay interest on the amount found due, at the market rate of three per cent. while the money was under attachment, and at the statute rate of six per cent. after the attachment was dissolved.

[Cited in Albion Lead Works v. Citizens' Ins. Co., 3 Fed. 197.]

LOWELL, District Judge. A somewhat nice question is raised in this case: whether the defendants should be decreed to pay interest on the freight found due from them. They were summoned in the superior court of the state as trustees or garnishees of the owners, before the cargo was fully delivered

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

in May, 1876, and that attachment was discharged by bond with sureties in October, 1876, of which fact they were notified. It seems to be clear, that, from the time the attachment was discharged, they could be excused from the payment of interest only by a tender of the amount which they admitted to be due, and which I have found to be the true amount.

The question is, whether, for the time that the funds were under arrest, they are chargeable. Upon this point there is great diversity of practice. In some states it is held that a garnishee is excused from paying interest, unless it is proved that he has made it; in others, that he is liable for it, unless he proves that he did not make it; and, in still others, he must pay the money into court, if he would be relieved of this charge. In Massachusetts, the rule appears to be, that, if the garnishee owes a debt which by its terms bears interest, he will be bound to pay it, as an incident to the principal, though his power of paying was suspended by the misfortune of an attachment. Adams v. Cordis, 8 Pick. 260. And, on the other hand, that he will not be bound to pay it while an attachment was pending, if it is no part of the contract, but is merely assessable as damages for non-payment. Oriental Bank v. Tremont Ins. Co., 4 Metc. [Mass.] 1; Rennell v. Kimball, 5 Allen, 356. The distinction is rather nice, unless by contract is meant an express contract, because in debts due ex contractu it is difficult to draw the line between an implied promise to pay interest, after demand, or after the debt is due, and a liability to pay the same interest, ex debito justiciae, as damages. Rent, for example, is held in many of the states, and, I suppose, in Massachusetts, to bear interest without a demand, and I suppose freight does; but whether as damages or as impliedly contracted for, I confess I do not know; but an express contract may perhaps be held to overrule all considerations of a general character.

In some cases stress is laid upon the money not having been paid into court or set apart. I know of no right that a garnishee has to set money apart, or invest it, with or without interest. He is simply a debtor; and if his debt bears interest, for any reason, or in any mode of assessment, I hardly see why the interest should stop until the principal is paid. Interest is not assessed as a penalty for default, so much as being, on the whole the fairest mode of making the plaintiff good; and it is often assessable when the defendant has been unable to pay or tender the amount due, through some misadventure or other beyond his control.

However, I do not think the admiralty is bound to any hard and fast rule on the subject, unless where some statute or positive contract regulates the matter. The defendants had the use of the money, and money was worth, it seems, three per cent. a year on call, while they had it; and they are traders. I think the true settlement for this case is to allow interest at the rate of three per cent. for the time the attachment was pending; and I consider six per cent. to be due, as matter of law, after that obstruction was removed. Decree accordingly.

GREENLEAF (BANKS v.). See Case No. 959.

Case No. 5,777.

GREENLEAF v. CROSS.

[1 Cranch, C. C. 400.] [3]

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

BAIL.

Affidavit to hold to bail.

Affidavit that defendant was justly indebted to the plaintiff for one thousand weight of crop tobacco, for rent.

THE COURT thought it sufficient to hold to bail.

FITZHUGH, Circuit Judge, absent.

Case No. 5,778.

GREENLEAF et al. v. GOODRICH.

[1 Hask. 586; [1] 21 Int. Rev. Rec. 324.]

Circuit Court, D. Massachusetts. Sept., 1875.[2]

CUSTOMS DUTIES—ACTIONS TO RECOVER PAYMENTS—SIMILAR DESCRIPTION—EXPERT TESTIMONY.

1. In a suit to recover back duties paid upon certain goods as of "similar description" levied under the act of 1862 [12 Stat. 553], laying the duty upon all delaines and goods of "similar description," it is for the jury to say as a fact whether the goods upon which the duty was laid were of similar description as delaines.

[See note at end of case.]

2. The words "similar description" are to be understood in their popular and generally received meaning; goods similar in product and adapted to similar uses, and not necessarily produced by similar processes or methods of manufacture.

[See note at end of case.]

3. An expert called to testify as to the process of manufacture, quality and similarity of certain fabrics from inspection of them, may be shown other samples of like fabrics by the adverse party, and asked his opinion as to the kind of goods they are, and how they were manufactured, and his opinion may be contradicted by such party to impair his testimony as an expert.

Contract, to recover money paid to the collector of the port of Boston under protest, as duties laid upon certain dress goods under the act of 1862, as being goods "of similar description" to delaines. The cause was tried upon the general issue; the verdict was

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

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

[2] [Affirmed in 101 U. S. 278.]

for the defendant [John Z. Goodrich], and the plaintiffs [Richard C. Greenleaf and others] moved for a new trial for misdirection, and because the verdict was against evidence.

Charles L. Woodbury, Francis W. Heard, and J. P. Tucker, for plaintiffs.

Geo. P. Sanger, Dist. Atty., and P. Cummings, Asst. Dist. Atty., for defendant.

Before SHEPLEY, Circuit Judge, and FOX, District Judge.

FOX, District Judge. The plaintiffs, importers of dry goods, doing business in this city under the style of Hovey & Co., brought their action against the defendant, formerly the collector of customs at this port, to recover back an amount alleged to have been illegally exacted of them by him, as duties on sundry importations of cloths, in the year 1862-3, commonly known as Saxony dress goods. It was not questioned by either party, that under the acts of 1861, the plaintiffs' goods would have been subject to a duty of thirty per cent. ad valorem; but the question arising in the present cause is, whether under the act of 1862, providing for additional duties, these goods were subject to an additional duty of two cents per square yard, they not exceeding forty cents per square yard in value, or whether they came within another clause of the act of 1862 (12 Stat. 553), which subjected the class of goods therein mentioned as subject to an additional charge of five per cent. ad valorem.

The clause found in the act of 1862, under which the two cents per square yard was claimed, is as follows; "on all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, wool, mohair, or goat's hair, and on all goods of similar description, not exceeding in value forty cents per square yard, two cents per square yard." By another clause in the same act, all other manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for, are subject to an additional duty of five per cent. ad valorem. The plaintiffs' goods were of cotton warp and a worsted filling, which was dyed or colored before weaving, and it was claimed that they were not of a similar description to the delaine fabrics, which were always woven without color, or in the grey, as it is generally termed, and so they were not liable to the higher rate of two cents per square yard.

The principal ground taken by the counsel for the plaintiff in their learned argument for a new trial is, that under the instructions given to the jury, the construction of the statute was left to the jury; that it was the duty of the court to have defined the language of the act, and that the jury should have been directed to apply the definitions so given to the facts as they might find them established by the evidence. The instructions which were given to the jury are found set forth in the report of the charge as taken by the shorthand reporter, and an examination of the charge does not satisfy us, that it is fairly subject to this objection.

The charge states "that as the court understands the testimony, there were in 1862 two descriptions of delaines; one made entirely from wool or worsted, and it was not claimed, that the goods of the plaintiff were of that description; the other was of cotton warp and worsted filling, known in commerce by various names, some of which as cashmere, barege, &c., are found in the statute. These goods were invariably woven of undyed yarn, or in the grey; were for the most part dyed or printed, and sold as dress goods for ladies' wear. It would seem from the evidence that they varied somewhat in texture, in coarseness or fineness of the worsted, and sometimes, as some of the witnesses state, were twilled or woven in figures; sometimes the warp had more or less heavy threads or cords running through it for making reps, but the filling, it is said, was never in color when woven. Here is found, if I am correct in my view of the evidence of which the jury will judge, a class of dress goods of cotton warp and worsted filling, without color of any kind when woven, but the color was subsequently applied, and these were the delaines referred to in the act as the court understands it." This portion of the charge certainly must have conveyed to the jury, what in the opinion of the court were the fabrics referred to in the act as delaines, and of a similar description to which must be any other goods, upon which the additional duty of two cents per square yard could be exacted.

The jury were also instructed, that the words "of a similar description" were to be taken and understood, in their popular and received import, as generally understood in the community at large, at the time of the passage of the act. These words are manifestly not words of art; they are not novel or obscure, and there is nothing peculiar or exclusive in their signification, so that it would be proper to explain or elucidate them by reference to the business of manufacturing or vending of delaines; the language is plain and familiar to every one, and requires no evidence to explain its import, and as stated by Mr. Justice Daniel, in Maillard v. Lawrence, 16 How. [57 U. S.] 261, "The popular or received import of words furnishes the general law for the interpretation of public laws, as well as of private and social transactions; and whenever the legislature adopts such language in order to define and promulge their action or their will, the just conclusion from such a course must be, that they not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it

was designed to constitute a rule of conduct, namely, the community at large." The objection, therefore, that the jury were instructed to take these words in their popular import, without evidence as to what the import might be, is not maintainable, as evidence was not necessary or properly admissible upon a matter so clearly within the general knowledge and understanding of the jury.

The jury were also instructed that the similarity referred to in the statute by the expression, "goods of similar description," is a similarity in respect to the product and its adaptation to uses, and to its uses and not to the process by which it was produced. The plaintiff requested that the jury should be instructed, "that if they believe that the plaintiffs' goods were not woven in the grey or natural color of the worsted and cotton, but were woven with colored warps or filling, then their verdict must be for the plaintiff." This instruction was refused, and as we think properly, as the effect would have been to restrict the consideration of the jury to the process of manufacture, and to have withdrawn from their consideration the true question, which was similarity of fabric. In our opinion, this was the real question for the jury to determine, and the judge at nisi prius would not have been justified in withholding from the consideration of the jury all the other evidence in the case bearing on the similarity, or difference between the delaines called for by the act, and the goods upon which the duties were exacted of the plaintiff. The instruction that the similarity required by the act must be found in the resultant fabric, and not solely in the process of its manufacture, was a correct exposition of the meaning and effect of the words, "goods of a similar description," and all that the court could be well called upon to present for the consideration of the jury. The very words of the act are the clearest and most manifest evidence of the meaning and intent of congress. It no where declares that the similarity shall be in the method by which the goods are woven or dyed, but it does require that in the goods themselves, the similarity shall exist.

The charge of the judge presented to the jury with some detail, the various points of similarity and difference as developed in the testimony, and concluded by instructing them, that it was for the jury to determine whether or not the goods upon which the duties were exacted were goods of a similar description with the delaines enumerated in the act, and that all of the testimony that had any bearing upon that question, the goods themselves, the manner in which they were woven and dyed, the result of the dyeing, and every other fact and circumstance, were to be taken into consideration and allowed their proper effect, in coming to a conclusion in regard to the similarity or dissimilarity of the two fabrics. These instructions submitted to the jury the real issue in the case, which had become almost entirely a matter of fact, which the jury was the proper tribunal to pass upon; any other direction would have encroached on the province of the jury, and would therefore have been objectionable.

These instructions are sustained by the opinion of the supreme court of the United States in Barney v. Schmeider, 9 Wall. [76 U. S.] 252, which was an action similar to the present, to recover back the excess of duties imposed by the collector of New York, under this statute of 1862, on goods similar to plaintiffs'. In that case the learned judge says, "The point in dispute was whether the goods of plaintiff, on which the two cents per yard had been assessed, were goods of a similar description to those above mentioned, within the meaning of the act. Now it is clear that this question alone is one of mixed law and fact, because until we are informed by testimony as to the nature and character of plaintiffs' goods, no construction or view of the law can be applied to them. The court can only know by evidence what kind of goods were assessed by the collector, and this at once dispels the idea that the case could in any sense present an abstract question of law." From the report and record of that cause it would seem that the judge at the trial, because the goods of the plaintiff were woven in colors, ruled as a matter of law that such goods were not similar to the delaine fabrics, and the plaintiff obtained a verdict which was not sustained by the supreme court. In the present case an entirely different course was adopted, and the jury were instructed as to what the evidence showed the delaine fabrics mentioned in the act to be, and further in what respect the similarity must exist in, that the fabric itself and the uses for which it could be employed must be similar to the goods previously described in the act. The court thus gave a legal construction and signification to the language of the statute, leaving it to the jury to make the application of the facts and determine whether by the facts it appeared that the goods of the plaintiff were fabrics, so far similar to the delaine fabrics as to subject them to the same rate of duty.

Exception is also taken to the admission of the testimony of Webster respecting certain samples of goods. Mr. Dalton was called by the plaintiff as an expert, to state as to the process of manufacture of delaines and other fabrics, and whether certain samples presented to him were delaines or similar goods. For the purpose of testing his skill and knowledge as an expert, the defendant exhibited to him certain other samples, and he was inquired of in relation to them, what kind of goods they were, &c. Having given his opinion in respect to them, Mr. Webster was called and allowed to contradict the opinions of Mr. Dalton, and to state the facts as to these samples shown to Dalton by de-

fendant's counsel, what they in truth were, and of what material, &c. This evidence was clearly admissible, as bearing upon the qualifications of Mr. Dalton as an expert, and this was the sole reason and purpose for which it was received at the trial.

There being a great mass of evidence before the jury bearing upon the question of whether or not the plaintiffs' goods were similar to delaines, all of which was very ably and fully presented to the jury by the respective counsel, the court does not feel justified in setting the verdict aside as contrary to the weight of the evidence; it was a matter more clearly within the province of the jury, with much evidence on each side, and the plaintiffs must abide the result. Motion overruled. Judgment on the verdict.

[NOTE. The plaintiffs then appealed to the supreme court, where the judgment was affirmed in an opinion by Mr. Justice Strong, who said that the court's instruction with reference to the act of 1862 was proper, and that the phrase, "of similar description," is not a commercial term; the tariff acts do not contemplate that goods classed under it shall be in all respects the same. 101 U. S. 278.]

GREENLEAF (KELLEY v.). See Case No. 7,657.

GREENLEAF (KNOX v.). See Cases Nos. 7,908 and 7,909.

Case No. 5,779.

GREENLEAF v. MAHER et al.

[2 Wash. C. C. 44.] [1]

Circuit Court, D. Pennsylvania. April Term, 1807.

INJUNCTION—STAY PROCEEDINGS AT LAW — JUDGMENT.

1. An injunction was obtained to stay proceedings on a judgment rendered under the following circumstances. G. drew two bills of exchange in favour of M. on S., who accepted them for the accommodation of G., who afterwards became bankrupt, and obtained his certificate. S. made an assignment of certain effects to M. to secure his acceptances, and after the date of the certificate of S., arrested him in New-Jersey, and took from him the note upon which the judgment was obtained, which judgment was for the use of M.

2. The court refused to dissolve the injunction, as no money had been paid by S., but deemed the whole a contrivance to get rid of G.'s discharge under the bankrupt law.

[Cited in Parks v. Ingram, 22 N. H. 292.]

3. By a special action on the case, S. might recover from G. what he had actually paid to M.

In equity. The case, as it appears from the bill and answer, is shortly as follows. The plaintiff drew two bills of exchange on Smith for 8000 dollars each, payable at four and six months; which Smith accepted for the accommodation of the plaintiff. These bills were drawn in favour of Maher, who endorsed one of them to A. Harper. Smith assigned to a trustee, a claim he had against Sir W. Pulteney and W. Hornby, to satisfy two judgments obtained against him on these bills, in 1801, and in 1805. Maher delivered up the acceptance which he had for 8000 dollars, and gave a receipt in full of the judgment, which thereby became satisfied; and satisfaction was accordingly entered on the record thereof. Still further to secure the said Maher, Smith, in 1805, assigned to Nathaniel Pendleton, all debts due to him from the plaintiff, on account of money paid by Smith for the plaintiff, as his surety, in consequence of his acceptance of his bills, and on any other account; and also a claim he has against the government of France; subject, nevertheless, to the claims of Grayham, Rogers & Pitcairn; and also any contingent right of Smith in certain property previously conveyed to Mr. Troup, in trust for paying a large sum due to different persons: after that trust was executed, all the property so assigned, was in trust, to pay first his debt to Maher, and then the one due to Harper. This deed recites the assignment of the claims against Pulteney & Hornby, which it declared to be yet subsisting.

A suit was brought in the circuit court of Pennsylvania, by Smith, against Greenleaf, to recover the amount of the acceptance to Maher, on which no bail was taken. The defendants consider this suit as brought for the benefit of Smith, inasmuch as the money to be recovered therein, is with other effects, assigned as collateral security for the debt due to Maher; and if that debt should be paid out of the other trust property, the money recovered from Greenleaf, would go solely to Smith. They admit, however, that so far as the money, when recovered, will go to Maher to satisfy his claim against Smith, he has an interest in the suit. Suits are now depending against Pulteney & Hornby for the same purpose. Sometime in 1806, the plaintiff being in New-Jersey, was arrested at the suit of Smith, and held to bail for 35,000 dollars, the suit being to recover the amount of the two acceptances before mentioned; the suit in Pennsylvania still depending. The plaintiff was unable to give bail, whereupon a compromise took place between Mr. Lawrence, the agent and attorney at law of the plaintiff, and the attorney for the defendant, Smith; whereby the latter agreed to accept the note of Greenleaf for 2000 dollars, endorsed by Lawrence, to be applied in all events towards the discharge of the acceptance for 8000 dollars, for which the suit in Pennsylvania was brought; and on receiving this note, Greenleaf was discharged from the custody of the sheriff, and the suit in New-Jersey dismissed. On the 11th of January 1803, a commission of bankruptcy issued against the complainant, and his certificate was signed on the 29th of April

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

in the same year. The plaintiff having obtained an injunction to prevent the transfer of the note for 2000 dollars, a motion was now made to dissolve it.

WASHINGTON, Circuit Justice. If it appeared that the bill had been fairly paid by Smith, by means of property sold to the holder, or conveyed in trust for payment to his satisfaction, and the bill was given up, we should think that it was nothing to Greenleaf how it was paid. But it appears that the whole business has been conducted with a view to save Smith; and it does not appear to the court, nor is it even averred by the answer, that the trust property, exclusive of the claim against Greenleaf, is worth a cent —much less enough to pay the acceptances. If so, then the case stands as if Maher, whose claim against Greenleaf, was defeated by the certificate, had merely appointed Smith, who was ultimately liable to him, to sue Greenleaf in his name, but for the use of Maher; and to enable him to do so, he acknowledged satisfaction received upon the bill. Smith in fact pays nothing, but receives the debt, and pays over the money to Maher. But this cannot be done. He can only recover, in a special action on the case, so much as he has paid. It would, therefore, be premature to dissolve the injunction, until we can ascertain the value of the other property assigned to pay Maher. The motion to dissolve the injunction refused.

[See Case No. 5,780.]

Case No. 5,780.

GREENLEAF v. MAHER et al.

[2 Wash. C. C. 393.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

INJUNCTION — STAY PROCEEDINGS AT LAW—JUDGMENT.

A perpetual injunction was granted, in order to stay proceedings on a judgment at law, obtained in a suit instituted in the name of a person not interested, whose name was used only for the purpose of preventing a defence, which the defendant had against the real plaintiff in interest.

This cause now came on to be heard, upon the bill, answers of all the defendants [Maher, Smith and Pendleton], replication, and the deposition of a Mr. Jackson, an agent of Maher; who deposed, that in 1808, he (having been authorized by Maher to take land), received a conveyance from one Justice Smith, in part payment of Smith's acceptance of the bill held by Maher, at the price of about twenty-four hundred dollars, at which it was valued by three disinterested persons, for which sum he had passed his receipt to Mr. Smith. The judgment at law, by Smith against Greenleaf, was rendered in November, 1806; afterwards this injunction was granted, subject to the decision of the court in this cause, whether the said Smith was entitled to recover in that action.

Tilghman and Ingersoll, for the complainant, contended, that until actual payment, or real satisfaction made by Smith to Maher, no action could be maintained by Smith against Greenleaf. Even if Smith had given his bond to Maher, and he had accepted it as payment, it would not have been sufficient. 3 East, 169; 2 Term R. 371, 372; 3 Bl. Comm. 163, note 5. As to the note given by Greenleaf to Smith, in New-Jersey, it was given under such circumstances of oppression, that it cannot be supported. Greenleaf was, at that time, sued by Maher in this court. The suit in New-Jersey was for the amount of Maher's bill, and the one assigned to ——, although it is not pretended that any part of this last bill had been satisfied or secured, and bail was marked for thirty-five thousand dollars. The payment in 1808 was objected to as unsatisfactory, in respect to the bona fide nature of it.

Dallas and Rawle, for the defendants, argued that it was of no consequence to the complainant how Maher was satisfied. A note given and received as payment by a surety, is sufficient to entitle him to recover. If his body be taken in execution, it is a payment. There is no distinction between this case and one where a bond of indemnity is given. In this case, the complainant promised to provide funds to enable Smith to pay, and a principal may be bound to indemnify, without giving a bond. The surety may sue in equity, to compel his principal to indemnify: also to compel the creditor to bring his suit against the principal. Cases cited, 1 Vent. 261; 5 Coke, 24; 3 Mod. 87; 2 Esp. 571; 1 Vern. 189; 18 Vin. Abr. 141; Anstr. 544; 3 Wils. 13, 266, 346; 1 Term R. 559, 715; 4 Burrows, 2482; 2 Com. Dig. 327.

WASHINGTON, Circuit Justice, delivered the opinion of the court. If we had any doubt in this case, we should take time to consider it; but we have none. We cannot but perceive that the suit at law was brought by Maher, in the name of Smith. The deeds of trust, the acknowledgment of the defendants in their answers, the arrangement in New-Jersey upon the arrest of the complainant, and every circumstance in the cause, prove this beyond all controversy. The case, then, is no more than this. Maher, the payee of this bill, whose claim against the complainant, as drawer, was forever barred by the certificate of the complainant, by an arrangement with Smith, acknowledging himself satisfied in respect to him, receives an assignment from Smith to certain trustees of his, Smith's claim upon the complainant, and now uses Smith's name to recover the money. But had Smith any

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

cause of action against the complainant, which he could assign? Merely as acceptor or surety, he had none. But if he had paid Maher, after the certificate of bankruptcy of Greenleaf, a cause of action would then, and not before, have accrued; and this, being subsequent to the certificate, would not have been barred by it. This seems to be so obvious, that it can only be necessary to notice the objections to it.

It is said that Smith has given satisfactory security to Maher, which is equivalent to a payment. What is this security? As to his claims upon Poulteney & Hornsby, and upon the French government, it does not appear, nor is it pretended, that they have produced, or are likely to produce, one shilling; and if they never should, Smith can be in no worse condition than if he had not given the deed. If the first deed was equivalent to satisfaction and payment, then this took place before the certificate, which would be fatal to the claim. The other security is this very debt, in which, as before observed, Smith had no interest, until he had first paid Maher. If Maher had gratuitously released Smith, could the latter have recovered against Greenleaf, as for money paid to his use? Certainly not. It is said, that Greenleaf is bound to indemnify Smith. This is not the fact; but if it were, the action of Smith must have been for a breach of that contract, and not for money paid for his use, which was never paid. It is said, that Greenleaf, being complainant in equity, must do equity; and this equity consists in paying or indemnifying Smith. But this is begging the whole cause. It is the very thing which Greenleaf says, and very justly too, he is not bound to do; and it is to be relieved against such a claim, that he comes into this court. As to the payment, said by Jackson, the witness, to have been made in 1808, it was after this cause was for hearing, and it comes in too questionable a shape to be accredited now. It is obvious, that the whole object is to vest in Maher a right to recover against Greenleaf, where alone he has a chance to get any thing. He would therefore care very little about giving a receipt for ten times the amount of the property transferred; and it is to be observed, that this alleged payment is about nine months before the answer of Maher is sworn to, and yet he does not notice it. Besides, although we have the testimony of the witness, we have not that of the defendants, in order to ascertain the reality of this payment. If, however, this payment has been bona fide made, and is a real transaction, and still further, if the trust property should turn out productive, or Smith should be enabled to pay Maher, it would be inequitable to bar the right of Smith to proceed at law upon his judgment, by an absolute decree; and therefore we shall decree a perpetual injunction as to the judgment at law, and as to a transfer of the note given in New-Jersey, under circumstances which require us to prevent it from operating against the persons who gave it. But this decree will be without prejudice to the defendant Smith, in case he should hereafter make payment or other equitable satisfaction to Maher; or in case he should be able to establish the payment made in 1808, to the satisfaction of the court; and leave will be reserved to him, at any future time, to open this decree for these purposes. We shall not decree the New-Jersey note to be delivered to the plaintiffs, or to be cancelled, but to be delivered to the clerk of this court; and reserve for future consideration, in case this decree should be opened, whether Smith should be entitled to the benefit of that security. The costs of this, and the suit at law, to be paid by Smith and Maher.

[See Case No. 5,779.]

Case No. 5,781.

GREENLEAF v. SCHELL.

[Nowhere reported; opinion not now accessible.]

Case No. 5,782.

GREENLEAF et al. v. SCHELL.

[6 Blatchf. 225.] [1]

Circuit Court, S. D. New York. Oct. 19, 1868.

CUSTOMS DUTIES—ACTION TO RECOVER PAYMENTS—PROOF OF PROTEST—VERDICT BY CONSENT.

1. In a suit brought against a collector of customs, to recover back duties paid under protest, it is, under the act of February 26, 1845 (5 Stat. 727), an indispensable item of proof, to be made by the plaintiff, on the trial of the suit, that such a protest as that act requires was made.

2. Where the verdict in such a suit is, that, by consent of counsel, the jury find for the plaintiff, "for the amount, with interest, of the excess of duties paid under protest, on more than two per cent. commission on all importations specified in the bill of particulars in this cause, from the continent of Europe, except Paris, the amount to be adjusted by the clerk of this court or his deputy," and the clerk reports that, according to his adjustment the plaintiffs are entitled to judgment for a sum named, the report cannot be excepted to on the ground that the duties are shown to have been paid by a certain firm, and that the plaintiffs did not prove before the referee that they composed that firm when the duties were paid, or that they alone paid the duties.

[Cited in Simpson v. Schell, 14 Fed. 287.]

3. Even if such objection be not one which ought to have been taken by plea in abatement, as being an objection that some party who ought to have been joined as a plaintiff in the suit, was not joined, the verdict cures any defect in that regard.

4. Such verdict must be considered as being also an order of reference made by the court and entered in its minutes, and confines the action and duty of the referee to an arithmetical adjustment and computation of amounts, on the basis of computation prescribed in the verdict.

5. Under such verdict, the plaintiff is not required to prove before the referee that the duties were paid under protest.

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

This was an action [by Richard C. Greenleaf and others] against [Augustus Schell] the collector of the port of New York, to recover back an excess of duties alleged to have been paid to him under protest.

Almon W. Griswold, for plaintiffs.
Simon Towle, for defendant.

BLATCHFORD, District Judge. The foundation of any claim by the plaintiff in such an action as this, is, that the alleged illegal duties exacted by the collector must have been paid under a proper protest. The act of February 26, 1845 (5 Stat. 727), provides, that no action shall be maintained against any collector, to recover the amount of duties paid under protest, "unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." In such a suit, therefore, it is an indispensable item of proof to be made by the plaintiff, on the trial of the suit, that such a protest as the statute requires was made. Such proof may be made by producing the protest, and showing when it was made, or by proving its contents and when it was made, if it be lost, or by the admission and consent of the defendant in proper form, in open court or otherwise, that such a protest was made. In the present case, the issue, which was raised by the plea of the general issue to the declaration, was tried before this court and a jury, on the 26th of February, 1864. The verdict of the jury was in these words: "By consent of counsel, the jury find a verdict for the plaintiffs in the above-entitled cause, for the amount, with interest, of the excess of duties paid under protest, on more than two per cent. commission on all importations specified in the bill of particulars in this cause, from the continent of Europe, except Paris, and on more than one and a half per cent. commission on importations from Great Britain, and a like verdict for the excess of duty paid under protest, on the importations specified in the bill of particulars in this cause, upon charges, above those set forth in the reports of Isaac Phillips, appraiser, dated October 13th, 1856, and of the several subsequent dates, as modified by treasury instructions dated May 21st, 1863, the amount to be adjusted by the clerk of this court or his deputy." The adjustment under this verdict has proceeded before the clerk, and he, by his report, filed October 3d, 1868, reports, that, according to his adjustment, the plaintiffs are entitled to judgment on the verdict, for $338.85 principal, and $270.23 interest—in all, $609.08. The defendant has excepted to the report on two grounds, and the exceptions have been argued on the report, and on the record of the testimony and proceedings on the reference.

1. The first exception is, that the duties are shown to have been paid by the firm of C. F. Hovey & Co., and that the plaintiffs did not prove before the referee that they composed that firm when the duties were paid, or that they alone paid the duties. It is too late to take this objection. The point of the objection is, that some party who ought to have been joined as a plaintiff in the action, was not joined. Even if this objection be not one which ought to have been taken by plea in abatement, the verdict cured any defect in this regard. Independently of this, I regard the verdict, which must be considered to be also an order of reference made by the court and entered in its minutes, as confining the action and duty of the referee solely to an arithmetical adjustment and computation of amounts, on the basis of computation prescribed in the verdict, and as affirming that the plaintiffs are entitled to the judgment which will follow the verdict, for the excess, to be so computed, of duties paid on the importations specified in the bill of particulars. If some parties other than the plaintiffs paid such duties, so as to be really entitled to the return of them, it was for the defendant to show that fact on the trial before the jury. At all events, the referee had nothing to do with that question, under the terms of the reference to him.

2. The second exception is, that the plaintiffs did not prove before the referee that the duties in question were paid under protest. In regard to this exception, the defendant insists that the terms of the verdict require that the plaintiffs shall make proof before the referee that the duties were paid under protest. I do not so understand the verdict. I understand it to affirm, that the excesses of duties paid, if any such excesses shall be found, by the computation and adjustment of the referee, to have been paid, on the importations specified in the bill of particulars, were paid under protest. Unless they were paid under protest, there could be no verdict for the plaintiffs, because, by the express provision of the act of 1845, before referred to, no action for them would lie. Proof of such payment under protest laid at the threshold of the plaintiffs' case at the trial, and, unless such proof was made, it was the duty of the court to instruct the jury that the plaintiffs could not recover. Such proof could be made as well by the admission and consent of the attorney for the defendant as in any other way. In the present case, it appears by the verdict to have been made by such admission and consent. The verdict must be held, in the absence of any reservations in it, to cover every thing which the plaintiffs would have been obliged to prove, on the issue joined, to entitle themselves to a verdict. The verdict here covers every thing but the amounts of the excesses. As to those, the referee is to compute them, on the specific basis set forth in the verdict. But he has no other duty to perform.

It frequently happens, that, in a verdict in a suit to recover back duties paid under

protest, the verdict is expressly made, on its face, subject to the opinion of the court as to the sufficiency of the protest, or that the verdict provides, that, if it shall appear, on the adjustment by the referee or otherwise, that the question of the timeliness of the protest, or the question of a prospective protest, is involved, the verdict shall be opened. But there is no such reservation in the verdict now in question. That being so, the parties cannot, on the hearing before the referee, or by exception to his report, go back of the verdict, or go at all into any questions in regard to the protest.

This question has been heretofore settled by this court. In the case of Lottimer v. Redfield [Case No. 8,522], decided by Mr. Justice Nelson, in December, 1863, the verdict of the jury, which was given on the 2d of May, 1861, was in form precisely like the verdict in the present case, and was a verdict by consent, and the court held that the verdict was conclusive upon the referee as to the protest. The exceptions to the report are overruled.

GREENLEAF (STUART v.). See Case No. 13,555.

Case No. 5,783.

GREENLEAF v. YALE LOCK MANUF'G CO.

[17 Blatchf. 253; 4 Ban. & A. 583; 17 O. G. 625.] [1]

Circuit Court, S. D. New York. Oct. 29, 1879.

PATENTS—INFRINGEMENT—DAMAGES.

In this case, the report of the master as to the amount of damages sustained by the plaintiff, by the infringement of his patent, was set aside, on the ground that what he had reported as an established license fee was not shown to have been such.

[Cited in Matthews v. Spangenberg, 14 Fed. 351; Westcott v. Rude, 19 Fed. 833.]

[This was a suit in equity by Halbert S. Greenleaf against the Yale Lock Manufacturing Company.]

Edmund Wetmore and George T. Curtis, for plaintiff.

Frederic H. Betts, for defendant.

BLATCHFORD, Circuit Judge. The accounting in this case relates to the infringement of the first claim of the plaintiff's patent, in making and selling safe locks, and of the fourth claim, in making and selling bank locks. The master says: "The complainant has successfully prosecuted infringers of these claims, and, in one case, for infringement of the fourth claim, in the manufacture and sale of bank locks, a settlement was arrived at, and the infringer, one George Damon, of Boston, was licensed at $20 per lock. Several suits against infringers of the first or 'key-changing tumbler' claim of this patent were also successfully prosecuted by complainant and settlement obtained. One of such infringers, Timothy J. Sullivan, of Albany, after settlement for past infringement, was granted a license under this patent and the patent granted to Lyman F. Munger, known as the Munger patent wheel, owned, or owned in part, by complainant, at a license fee of $500 per year for the privilege of making 75 locks per year, that is, $6 66 per lock, and, if he manufactured more than 75 locks in a year, he was to pay $10 per lock. Of the licenses granted by complainant under this and the Munger patent, two-thirds of the royalty received was allowed to the Munger patent and one-third to the Rosner patent, on which this suit is brought. Under this division of royalty, the license fee on bank locks, for the use of the Rosner patent, would be $6 66 per lock; and on the fire-proof safe locks, taking the smaller license fee of $500 a year, for 75 locks, $2 22 per lock. These licenses form, in my opinion, under the decision of the supreme court in Burdell v. Denig, 2 Otto [92 U. S.] 716, 719, the measure of damages which the complainant is entitled to recover from the defendant for its infringement of this patent. I, therefore, find that the complainant should recover from the defendant the sum of $6 66 per lock on 536 bank locks, $3,569 76, and $2 22 on 2,999 fire proof safe locks, $6,657 78—in all, $10,227 54."

The defendant excepts to the finding that the settlements arrived at with Damon and Sullivan, or either of them, were any measure of the damages which the plaintiff should recover from the defendant, whereas the master should have reported that no established license fee was shown to have existed for the use of the plaintiff's invention, and that the damages could not be ascertained by reference to any license fee or settlement. The defendant also excepts to the report because the master reports the sum assessed as damages, notwithstanding the fact that the master has not found or reported that the plaintiff had any established license fee or fees for the use of the patented invention, and notwithstanding the fact that it was conceded that the settlements upon which his finding was based were exceptional cases, unlike, and inapplicable to, the case, or the situation and condition, of the defendant, and notwithstanding the fact that the plaintiff himself testified that he had no established license fee and never intended to establish one, and notwithstanding the fact that the alleged settlements on which the said finding is based were manifestly inapplicable to the case of the defendant, or any rule of damage. It further excepts to the report for that the rule and amount of damage derived from following the exceptional settlements upon which it is based, give to the plaintiff more than his actual damage; and for that the prices and amounts imposed upon the defendant, by fol-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 583, and here republished by permission.]

lowing said exceptional settlements, are plainly extravagant and ruinous, and more than the actual damage of the plaintiff, and impossible to have been realized or received by the plaintiff as license fees from such a business as the defendant's, and impossible to have been paid in the course of business by the defendant; and for that the master erred in reporting that the sum of $10,227 54, or any other sum, should be recovered by the plaintiff from the defendant; and for that the master erred in not reporting that no profits and no damages were shown.

I think that the defendant's exceptions must be allowed and the report set aside, and the case be referred back to the master, for further consideration and report, either with or without additional evidence, as he may determine. The evidence does not show that any established license fee was proved in respect to either of the devices. The report is not on the basis of profits. It is on the basis of damages. The amount awarded seems to me to exceed the actual damage, on any fair view of the case. The views set forth in Black v. Munson [Case No. 1,463] show, that, on the evidence in this case, no fixed and established license fee can be held to have been proved by the plaintiff, or any fee which can be properly taken as a measure of the actual damage sustained by the plaintiff.

[NOTE. There was a decree overruling both plaintiff's and defendant's exceptions to the master's report, and the cause sent back for further consideration. Upon the master's second report, judgment was given for complainant for $2,968.16, with interest from February 15, 1879, and $184 costs. From this decree an appeal was taken to the supreme court, where it was reversed (Mr. Justice Wood delivering the opinion) upon the ground that the first claim of the complainant was anticipated by the application and specification of one D. S. Rickards, of Boston, and by the locks manufactured by Evans & Watson, of Philadelphia, and that it is therefore void. 117 U. S. 554, 6 Sup. Ct. 846.]

GREENOLDS (JONES v.). See Case No. 7,464.

Case No. 5,784.

GREENOUGH v. CLARK.

[1 MacA. Pat. Cas. 173.]

Circuit Court, District of Columbia. March, 1853.

PATENTS—DECISION OF COMMISSIONER—TIME FOR APPEAL—MOTION FOR REHEARING.

[1. The reasons of appeal must be filed within the time fixed by the commissioner, otherwise the right of appeal is lost; and the time is not enlarged merely by the pendency of a motion for a rehearing, without any order extending such time.]

[2. The filing of the reasons of appeal is essentially the appeal itself. The judge can judicially know nothing of the case until the aggrieved party presents to him his petition for revision on appeal, and this the latter is not authorized to do until after an adverse decision, after he has notified the commissioner of his appeal, and after his reasons of appeal are filed.]

Appeal from decision of commissioner of patents in interference.

[Appeal of John J. Greenough from a decision in interference by the commissioner in favor of Terence Clark.]

MORSELL, Circuit Judge. On the day and place appointed for the trial of this case, the parties appeared by their respective counsel, and Mr. Baldwin, an examiner at the patent office, with the models and drawings, the evidence, and all the papers relating to said case, with the decision of the commissioner, the reasons of appeal, and the commissioner's report. Previously to entering upon the investigation of the merits of the matter in controversy, the counsel for the appellee objected to the jurisdiction of the judge, and moved to dismiss the appeal, upon the ground that the appeal was not taken and the reasons of appeal filed within the time limited by the commissioner. With respect to which the facts were: On the 19th of January, 1850, notice was given to the appellant by the commissioner that an interference was supposed to exist between his application and a caveat theretofore filed in the secret archives at the instance of the appellee, Terence Clark. On the 18th of April, 1850, the caveator filed his application for a patent. On the 27th of April, 1850, an interference was declared between the two applications, and notice of a day of hearing was given to the parties. The hearing was postponed from time to time until the first Monday in November, 1850. On the 14th of November, 1850, the commissioner decided the question between the parties. He says: "Upon examination of the testimony adduced in this case, it is hereby decided that Terence Clark is the first inventor, and as such entitled to a patent." Notice of this decision was given to the parties, together with notice that if no appeal was taken on or before the third Monday in December then next a patent would issue to Clark. On the 11th of December, 1850, and within the time fixed for issuing of the patent to Clark, Greenough made application to the commissioner in the nature of a petition for a rehearing. This application was pending and undecided until the 26th day of December, 1850. No new limit appears to have been expressly assigned, but the request was refused by letter of the 26th, same day as above stated. On the 15th of September, 1851, before the patent had issued, Greenough filed with the commission his appeal to the chief judge of the circuit court of the District of Columbia. On the 8th of June, 1852, letters-patent were issued to Clark, at which time no reasons of appeal were filed. In addition to the oral remarks that were made at the time when the motion was made in this case by the counsel for the respective parties they have since furnished me with their written arguments, embracing all that was before urged, giving fuller and more comprehensive views on the subject. The order is—first, by

the counsel in support of the jurisdiction; and secondly, by the answer of the opposing counsel. I will briefly state the substance of each: It is said that it is a proceeding which concerns nobody but Greenough, and cannot affect the validity of any existing patent. Judge Cranch's decision in the case of Pomeroy v. Connison [Case No. 11,259]. The decision of the same judge is referred to in the case of In re Janney [Id. 7,209], on the point of limitation of time to appeal and the practice of the office.

The reply is an argument upon the construction of those parts of the acts of July 4, 1836 [5 Stat. 117] and 1839 [5 Stat. 353], which give the right of appeal from the decision of the commissioner, and contends that there are three classes of cases intended to be provided for—the first, under the seventh section of the act of 1836, where the applicant persists in his claim for a patent, and it is again rejected; second, where the application interferes with any other patent for which an application may be pending, or with any unexpired patent which shall have been granted; this is under the eighth section of the act of July 4th, 1836; third, in cases where a caveat has been filed and application is made within a year by some other person, which appears to interfere with the caveator's invention. Although, it is contended, there be no express limit of time within which the appeal is to be made under the act of 1836, it is implied that it must be made within a reasonable time. The act of the 3d of March, 1839, section 11, remedies this defect by expressly providing a limit. Further, the limitation of time which the commissioner is authorized to make is not confined solely to the filing of the reasons of appeal, because, first, that would not accomplish the object to be obtained by the law; second, the appeal might go on at any time, without any reason being filed at all, for aught that appears in the acts of congress. The eleventh section of the act of 1839 first introduces the terms "reasons of appeal," and this in the case of interfering applications. The correct grammatical construction of this section requires the interpretation that the limit is to the appeal as well as to the time the reasons are to be filed. The copulative conjunction "and" connects both clauses. If Clark is no party, then there is no appeal. The acts of congress in no case of interference contemplate an appeal without expressly providing for it. The continuance of the motion for a rehearing is no excuse for not filing reasons in time. It is not analogous to a motion for a new trial in a court of common law. The commissioner had no authority to grant a rehearing after having once decided the case. Clark had no notice of it. The appeal, with the reasons, was not filed until after another expiration of forty days. The decision in the case of Pomeroy v. Connison [supra] is argued to be inapplicable, because the party appealing, against whom the commissioner had decided, was a patentee, in which case the judge had no jurisdiction, and of whom the judge says a remedy may be had in another forum. As to Janney's Case [supra], the judge refused to entertain jurisdiction. It was not a case of interference. The question is, whether the right to appeal was not lost by the failure of John J. Greenough to notify the commissioner of his appeal in this case, and to file his reasons of appeal on or before the 26th day of December, 1850, the time limited by the commissioner.

All the conditions mentioned in the act of the 3d of March (section 11), in the cases of interference, must be complied with as prerequisites before the judge can take jurisdiction by way of appeal from the decision of the commissioner refusing to grant a patent to the applicant. The jurisdiction which he can take is a very special, limited jurisdiction, and all the previous circumstances must exist under which it is given before it can attach; and no other power or authority can be exercised except that which is either expressly given or which can be fairly inferred. The words of the statute are "that in all cases where an appeal is now allowed by law from the decision of the commissioner of patents to the board of examiners provided for in the seventh section of the act to which this is additional, the party, instead thereof, shall have a right to appeal to the chief justice of the district court of the United States for the District of Columbia, by giving notice thereof to the commissioner, and filing in the office of patents, within such time as the commissioner shall appoint, his reasons of appeal, specifically set forth in writing, and also paying into the patent office, to the credit of the patent fund, the sum of twenty-five dollars; and it shall be the duty of said chief justice, on petition, to hear and determine all such appeals, and to revise such decisions in a summary way, on the evidence produced before the commissioner, at such early and convenient time as he may appoint, first notifying the commissioner of the time and place of hearing, whose duty it shall be to give notice thereof to all parties who appear to be interested therein, in such manner as said judge shall prescribe. The commissioner shall also lay before the said judge all the original papers and evidence in the case, together with the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal, to which the revision shall be confined." From a careful examination of the provisions of this statute, I am satisfied that the filing the reasons of appeal must be considered as essentially the appeal itself; that the judge can judicially know nothing of the case until the party aggrieved presents to him his petition for a revision on appeal. This the law does not authorize the party to do until after the decision of the case by the commissioner against him, after he has notified the commissioner of his appeal and

after his reasons of appeal are filed. On receiving notice from the party of his intention to appeal, it becomes the duty of the commissioner to fix a reasonable time for filing the reasons, and to him that duty is exclusively intrusted; within this time all further action of the commissioner as to granting a patent is to be suspended, and within this time also the reasons must be filed, unless, for good cause shown to him, he directs the time to be enlarged. I think the power to enlarge the time and rehear the case remains with the commissioner until not only the patent issues, but until it is actually delivered; after which his power over the case is exhausted. I think, therefore, he had a right to entertain the motion in this case, and might have granted an enlargement of the time and a rehearing; but having refused so to do, and no reasons having been filed within the time limited, and a patent having issued, the right of appeal was lost. Believing, therefore, that I have no jurisdiction in this case, the appeal must be, and is hereby, dismissed. All the papers and models are herewith returned.

GREENOUGH (EMORY v.). See Case No. 4,471.

Case No. 5,785.

GREENOUGH v. LANGTREE.

[1 Hayw. & H. 72.] [1]

Circuit Court, District of Columbia. April 15, 1842.

JUSTICE OF THE PEACE — JURISDICTION — REDUCTION OF CLAIM.

A plaintiff cannot withdraw a part of his account so as to bring the balance within the jurisdiction of a justice of the peace and recover in an action for the part withdrawn unless with the consent of the defendant.

At law. Action on an account [by Frederick W. Greenough against Samuel D. Langtree].

Jos. H. Bradley, for plaintiff.

Clement Cox, for defendant.

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

This is a suit brought on an account for goods sold to the defendant, as appeared by the following exhibit: "Samuel D. Langtree, to Frederick W. Greenough. To 13 numbers of the Indian Biography, $6 per number. Delivered by Daniel Rice. $78. Washington, D. C., Jan. 20, 1841." The following agreement was copied from the book of subscriptions and admitted as evidence: "Terms. This work will be comprised in twenty numbers at six dollars per number, each number will contain six portraits. Subscribers: S. D. Langtree, Georgetown, D. C.," &c. Plea, non assumpsit.

The following prayers were asked to be given by the counsel for the defendant, and given as prayed: The plaintiff is not entitled to recover, unless the jury shall be satisfied from the evidence that the goods in question were sold and delivered by plaintiff to defendant by request of the latter. If the jury should believe from the evidence that the defendant agreed to accept the goods in question if delivered by the plaintiff, the plaintiff is not entitled to recover, unless the jury shall be satisfied from the evidence that the plaintiff delivered or offered to deliver the same in a reasonable time to the defendant. If the jury shall believe from the evidence that the plaintiff delivered the goods in question and afterwards voluntarily withdrew a portion of them to reduce his demand within the jurisdiction of a justice of the peace, and sued the defendant for the residue before the justice of the peace, then the plaintiff is not entitled to recover for the portion so withdrawn, although the jury shall believe from the evidence that the object of the plaintiff in so withdrawing them was to reduce his claim within the jurisdiction of a justice of the peace, unless at the trial before the said justice the defendant refused to agree to such withdrawal of the said five books for the purpose aforesaid, and the said justice thereupon nonsuited said plaintiff, and the plaintiff offered to return them to the defendant.

Judgment for plaintiff on the verdict of the jury for the amount claimed.

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

Case No. 5,786.

In re GREEN POND R. CO.

[13 N. B. R. (1876) 118.] [1]

District Court, D. New Jersey.

BANKRUPTCY — PRIOR APPOINTMENT OF RECEIVER BY A STATE COURT — CONFLICT OF JURISDICTION.

1. The fact that a state court had, prior to the filing of the petition, acquired jurisdiction over a corporation in a suit commenced therein for the purpose of distributing its estate as an insolvent corporation, and a receiver appointed therein, is no ground for dismissing a petition for an adjudication of bankruptcy filed against it.

[Cited in Re Broich, Case No. 1,921; Re Gorham, Id. 5,624.]

2. Secured creditors are not to be reckoned in computing the number of creditors who must join in an involuntary petition.

[Cited in Re Scrafford, Case No. 12,557.]

[Petition by certain creditors of the Green Pond Railroad Company to have it adjudged a bankrupt.]

Henderson & Fennell, for creditors.

B. Williamson, for bankrupt.

NIXON, District Judge. This is a petition filed by certain creditors of the Green Pond Railroad Company, praying that the said

[1] [Reprinted by permission.]

corporation may be adjudged a bankrupt. The court is asked to dismiss the petition on two grounds: First. Because the court of chancery of New Jersey, prior to the filing of the said petition, had acquired jurisdiction over the debtor in a suit commenced therein, for the purpose of distributing its estate as an insolvent corporation, in which suit a receiver had been appointed, who is now in the possession of the said estate. Second. Because the petitioning creditors do not constitute one-fourth of the creditors of the alleged bankrupt, and the aggregate of their debts do not amount to one-third of all the debts provable under the bankrupt act [of 1867 (14 Stat. 517)].

The counsel for the bankrupt undertakes to sustain the first ground by invoking the long-established principle or rule, that where two courts, having concurrent jurisdiction, entertain separate suits, which involve the custody or sale of property, whether by execution, attachment, or receivership, that court which first obtains actual possession of the property is entitled to administer it, and will not yield its authority to the other tribunal, nor will the other tribunal attempt to interfere. All this is conceded, but it is suggested that the principle is not applicable to the case before me. It is shown that a bill was filed in the court of chancery of New Jersey on the 13th of February, 1875, by certain creditors, against the alleged bankrupt, as an insolvent corporation, praying for the appointment of a receiver, and for a writ of injunction; that such steps were taken therein, that a receiver was appointed February 22d, and a writ of injunction issued February 23d, 1875, and that when the petition in bankruptcy was filed in this court, the receiver, under the state law, had an absolute control over all the property of the debtor. This proceeding in the state court was under the act entitled "An act to prevent frauds by incorporated companies" (Nix. Dig. 402), which was passed as early as the 16th of February, 1829, and which has always been held to partake of the character of a bankrupt law. A cursory examination of its provisions shows, that it embodies all the elements of a bankruptcy act, insolvency, surrender of property—its administration by receivers or trustees—and the distribution of the assets among creditors. President, etc., of State Bank v. Receivers of Bank of New Brunswick, 3 N. J. Eq. 266; Receivers, etc., of People's Bank v. Paterson Gas Light Co., 23 N. J. Law, 283; Receivers, etc., of People's Bank v. Paterson Savings Bank, 10 N. J. Eq. 13.

"The act to prevent frauds by incorporated companies," says Chief Justice Green in the case of Receivers, etc., of People's Bank v. Paterson Gas Light Co., supra, "so far as it relates to the estate of an insolvent corporation is, in all its essential elements, a bankrupt law. It leaves the creditor, indeed, the naked remedy of proceeding to judgment against a corporation, stripped at once of its property and the right of exercising its franchises; and thus avoids the constitutional objection, of interfering with the obligation of contracts. But, like a bankrupt law, it vests the whole property of the corporation, by operation of law, in the hands of assignees, to be distributed among the creditors upon principles of justice and equity." Although the national constitution vests in congress the authority to establish uniform laws on the subject of bankruptcies throughout the United States, it is conceded that the several states may legislate in regard to bankruptcy and insolvency, as long as congress fails to exercise its power. But when congress does act in the matter, the expression of its will is the supreme law of the land, and everything in the legislation of the states inconsistent with it must yield to its superior authority. The bankrupt act of 1867 makes provisions for winding up the affairs of insolvent corporations, different in many respects from the state law now under consideration. Indeed, its plain object and intent are to place their administration under the exclusive jurisdiction of the federal courts of bankruptcy, and hence it has been held, that the appointment of a receiver under the state laws, by a state court, to take possession of the assets of an individual or a corporation, to be applied to the payment of the debts, is, itself, an act of bankruptcy within the meaning of the eighth clause of the 39th section of the act, and subjects the individual or corporation, permitting or suffering such appointment, to an adjudication of bankruptcy. Such a proceeding is analogous in its character and effects, to an assignment under the insolvent laws of a state, which is always treated as an act of bankruptcy. The case then, being one of bankruptcy, over which the jurisdiction of the federal courts is exclusive as long as the bankruptcy act remains in force, no question respecting the concurrent jurisdiction of the state and federal courts can arise. In re Merchants' Ins. Co. [Case No. 9,441].

The second ground for dismissal is also untenable. The amendment of June 22, 1874 [18 Stat. 178], to the 39th section of the bankrupt act, requires that the creditors joining in the petition, shall constitute one-fourth thereof at least in number, and the aggregate of whose debts provable under the act shall amount to at least one-third of the debts so provable.

The answer of the defendant clearly shows that the debts of the alleged bankrupt due to the petitioning creditors largely exceed in amount the one-third of the unsecured claims against the company, and that more than one-fourth of the creditors have joined in the petition. It has been held in Re Frost [Case No. 5,134], and I think properly, that congress, in using the expression "debts provable under this act," meant to include only the unsecured creditors. The secured

creditors, in truth, have no interest in the proceedings, and hence should not be allowed to control the action of those who have an interest. As the answer admits the third act of bankruptcy alleged in the petition, and the insolvency of the debtor, an adjudication must be ordered. In re Independent Ins. Co. [Cases Nos. 7,017, 7,018].

Case No. 5,787.

In re GREENVILLE & C. R. CO.

Ex parte SCANNELL et al.

[5 Chi. Leg. News, 124; 6 Alb. Law J. 422.] [1]

District Court, D. South Carolina. Nov. 12, 1872.

PETITION FOR INVOLUNTARY BANKRUPTCY—WHEN THE STATE A CREDITOR — RAILROAD CORPORATION SUBJECT TO ACT—FAILURE TO PAY INTEREST COUPONS — WHETHER ACT OF BANKRUPTCY.

1. That whatever interest the state may have in or upon the property of the company if it is a bankrupt, the jurisdiction of the bankrupt court is not ousted because the state is a creditor.

2. That a railroad corporation, under the act and decisions upon the act, is a corporation subject to the bankrupt act.

3. That the interest coupons severed from the bonds are commercial paper, and if the railroad company were "a banker, broker, merchant, trader, manufacturer or miner," the non-payment of its coupons for fourteen days would be an act of bankruptcy; but as it does not fall within any one of these, the penalty for such stoppage does not attach.

4. The court fails to find the company insolvent.

[Petition by Daniel E. Scannell and others to have the Greenville & Columbia Railroad Company declared a bankrupt.]

This case was ably argued in July last, and taken under advisement.

BRYAN, District Judge. The issues made by the pleadings in this case are as follows: First. Whether this court has jurisdiction, the state of South Carolina having instituted proceedings as guarantor upon the bonds of the respondent, and in the state court, under which all the property of the company has been taken possession of. Second. Whether the Greenville & Columbia Railroad Company is a corporation, subject to the provisions of the bankrupt act? Third. Whether the interest coupons, severed from the bonds, are commercial paper, and the non-payment thereof for fourteen days is an act of bankruptcy? Fourthly. Whether the Greenville & Columbia Railroad Company was bankrupt and insolvent at the time it suffered judgment to be taken against it by default? Fifthly. Whether being bankrupt and insolvent, the respondent suffered judgment to be taken against it, with intent thereby to give a preference to those creditors, or to defeat or delay the operation of the bankrupt act? Sixthly. Whether the respondent has suffered its property to be taken on legal process, with intent thereby to defeat and delay the operations of the bankrupt act [of 1867 (14 Stat. 517)] in the case of the State ex relatione the Attorney General against the Greenville & Columbia Railroad Company [case unreported]?

As to the first question, I hold that whatever the interest or lien the state may have in or upon the property of the Greenville & Columbia Railroad Company, if said company be bankrupt, the jurisdiction of the bankrupt court is not ousted because the state is a creditor.

As to the second question, I hold that the Greenville & Columbia Railroad, under the act and decisions upon the act, is a corporation subject to the provisions of the bankrupt act.

As to the third question, I hold that the terest coupons severed from the bonds, are commercial paper, and if the Greenville Railroad were "a banker, broker, merchant, trader, manufacturer or miner," the non-payment of its coupons for fourteen days would be an act of bankruptcy; but as it does not (in my opinion) fall within any one of these classes, the penalty for such stoppage does not attach.

As to the fourth question, (acting instead of a jury,) I have not been able to find the insolvency of the company, or decide that it is insolvent.

As to the fifth and sixth questions, not having found the Greenville & Columbia Railroad insolvent, it is not necessary that I should decide them.

I have simply stated my conclusions upon the issues presented, without arguing them, and without reference to the authority upon which they rest for support. Time has not permitted more. Let the decree be entered accordingly.

GREENVILLE & C. R. CO (PARSONS v.). See Case No. 10,776.

GREENWALD (JENKINS v.). See Case No. 7,270.

Case No. 5,788.

GREENWAY v. GAITHER.

[Taney, 227.] [1]

Circuit Court, D. Maryland. Nov. Term, 1853.

CONTRACTS — REPUDIATION — WHEN SUIT CAN BE COMMENCED—BILL OF EXCEPTIONS.

1. Where defendant contracted for the purchase of a house, and agreed to pay the purchase-money in instalments, at specified periods, but afterwards repudiated the contract, in a suit brought by the vendor for the breach; *held*, that no action could be maintained on the contract, unless there was a breach of some one of its stipulations, by the defendant, before the suit was instituted.

2. A notification by the defendant, that he would not fulfil his contract, did not authorize

[1] [6 Alb. Law J. 422, contains only a partial report.]

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

an immediate suit on it, because none of the payments to be made by the defendant were then due; and the plaintiff, at the time of bringing the suit, had no legal demand, under the contract, for which a suit at law could be immediately brought.

3. The court will not seal a bill of exceptions presented two years after the trial; unless satisfied that there was error in the instructions given to the jury.

[Cited in Marine City Stave Co. v. Herreshoff Manuf'g Co., 32 Fed. 825.]

This action was instituted, on the 10th March 1849, on the following contract for the purchase of a house and lot in the city of Baltimore: "I hereby agree to purchase the house and lot, No. 52 Mount Vernon place, 37 by 160 feet, for the sum of twenty-four thousand dollars, payable in 18, 24, 30 and 36 months, interest on the whole to be paid semi-annually, the right reserved by the owner of the adjoining lot to build against the walls of said house and lot, although it may close the windows and openings on the said lot. I, Edward M. Greenway, agree to sell the said premises on the above terms. Geo. R. Gaither. Edward M. Greenway. Baltimore, 9th October 1848." The purchaser having repudiated the contract, for reasons which it is unnecessary to state, as they were not passed upon by the court, the plaintiff [William W. T. Greenway] resold the house for a much lower sum than that agreed to be paid by the defendant [George R. Gaither], and instituted this action to recover damages for a breach of the contract. The action was brought before the time had arrived for the payment of the first instalment of the purchase-money, under the agreement, and the cause was tried at November term, 1851.

R. Johnson and Brown & Brune, for plaintiff.

J. Nelson, J. V. L. McMahon, and J. Lloyd, for defendant.

TANEY, Circuit Justice. 1. This action is brought for a breach of the contract set forth in the plaintiff's declaration, and the plaintiff is not entitled to recover, because, at the time the suit was brought, no one of the stipulations on the part of the defendant, contained in the contract, had been broken; and no action can be maintained on the contract, unless there was a breach of some one of its stipulations, by the defendant, before this suit was instituted.

2. The letters of the defendant, and those written by his authority, notifying the other party that he would not fulfil his contract, did not authorize an immediate suit upon it, because none of the payments to be made by the defendant were then due; and the plaintiff, at the time of bringing the suit, had no legal demand, under the contract, for which an action at law could be immediately brought. The court was also of opinion that, as this instruction disposed of the whole case, it was unnecessary to express an opinion on the other points raised by the plaintiff, and the instructions asked for by him were, therefore, refused. Verdict for the defendant.

The plaintiff excepted to the ruling of the court, and prepared a bill of exceptions, which was not acted on at the time; two years afterwards, he applied to the court to seal this bill of exceptions, but the application was refused, for the reasons stated in the opinion given below. The refusal was based upon the following rule of court: "November Term, 1846. Ordered, that whenever either party shall except to any opinion given by the court, the exception shall be stated to the court, before the bailiff to the jury is sworn, and the bill of exceptions afterwards drawn out in writing and presented to the court, during the term at which it is reserved, otherwise it shall not be sealed by the court. November 25th, 1846."

TANEY, Circuit Justice. An application has been made to me, on the part of the plaintiff in this action, to seal a bill of exceptions, in order to carry before the supreme court, by writ of error, the instructions given to the jury by the circuit court. The cause was tried in November 1851, more than two years ago. At the trial, an exception was reserved by the plaintiff, and among the papers now laid before me, I find one which purports to have been drawn as an exception, and upon which I see some notes of my own, which show that this paper was before me. From the lapse of time, I have forgotten the circumstances connected with the preparation of this paper, and its presentation to me; it is now found among the papers in the cause, in the clerk's office, without the signatures or seals of the judges. I cannot now say whether the refusal of the court to sign it arose from any imperfection in the statement, or from the blotched and interlined condition in which it was presented, which made it difficult to understand it; the face of the paper, as it now stands, shows that the last reason would, of itself, have been sufficient. It was, I presume, handed by me to the clerk, with directions to inform the counsel why the paper was not signed and sealed, and what was necessary to be done by them; it is my usual custom in such cases. I have heard nothing of this exception since the term at which the case was tried.

The exception, it appears, was reserved on the 12th November 1851, and on the 29th of the December following, the counsel for the plaintiff filed a written order to the clerk, to "dismiss the appeal or writ of error." And as no exception was presented to me, after the paper I have spoken of was returned, I presume from that circumstance, and this entry on the docket, that the design to bring the question before the supreme court was abandoned. Judge Heath who sat with me on the trial died more than twelve months ago. Under such circumstances, it is very clear

that, under the rule and practice of the circuit court, the plaintiff has no right to call on me to sign and seal the paper above referred to, as an exception taken at the trial. The rule of the circuit court, in relation to this subject, was before the supreme court at the last term, and fully sanctioned by it.

If, however, I had any doubt as to the correctness of the instruction which was given to the jury, I should deem it my duty to seal the exception, provided it could be done without injustice to the defendant, because it is too late now to correct an error here; and if I thought one had been committed, I should send the case to the tribunal which has the power to correct it. This is the ground upon which the plaintiff bases his application; and I have been referred to an opinion, delivered in the queen's bench, in the case of Hochster v. De Latour, 20 Eng. Law & Eq. 157.

The decision of the queen's bench is, of course, entitled to no more weight than what it derives from the force of its reasoning and the learning which it displays in support of its opinion; and in that view of the subject, I see nothing to shake my confidence in the instructions given to the jury by the circuit court. The principle upon which that case was decided is loosely stated by Lord Campbell in the opinion delivered. In the first portion of it, the decision would seem to be placed upon the character of the contract, and the necessity the plaintiff was under of preparing himself for the service, before the day when he was to enter upon its actual performance. In another part of the opinion, it would seem to be placed on the ground that, for aught that appeared on the motion in arrest of judgment, it might have been proved at the trial, that the defendant had put himself in a condition to make it impossible for him to perform his part of the engagement.

Neither of these grounds has any application to the case before me. But in the latter part of the opinion, Lord Campbell says, that a man who wrongfully renounces a contract, when he is to do an act at a future day, may be sued immediately for a breach of it, without waiting for the time stipulated for its performance. His language, in this part of his opinion, is general enough to apply to all cases where an act is to be done by the party on a future day, whether that act be to render service, or deliver goods, or pay money; and it is upon this part of the opinion that the plaintiff in this case relies to support his present application.

The language of Lord Campbell, in this part of his opinion, is perhaps broad enough to bear the construction which the plaintiff has put upon it. It is, however, but justice to him to restrict it to contracts of the character of which he was speaking; and so, I suppose, he intended it. For if he meant to say that a contract like this, by which the defendant engaged to pay a certain sum of money on certain days, would be broken, and might be sued on immediately, if the party gave notice that he would not comply with it, and intended to dispute it; if such was the doctrine he meant to announce in that opinion, it cannot be maintained either upon principle or the authority of adjudged cases. It has never been supposed that notice to the holder of a bond, or a promissory note, or bill of exchange, that the party would not (from any cause) comply with the contract, would give to the holder an immediate cause of action, upon which he might sue before the time of payment arrived. If, therefore, the case in the queen's bench had been decided previously to the trial in the circuit court, it would not have influenced the decision, and furnishes no sufficient ground for this application.

Indeed, if I entertained, upon reconsideration, some doubt as to the correctness of the decision of the circuit court, I should feel much difficulty in altering the record, by making an exception a part of it, after such a lapse of time, and when the defendant had every reason to suppose the controversy was finally closed. The counsel who tried the case for him, I understand, do not now consider themselves as authorized to appear in his behalf, and, therefore, decline interfering; and in a case where it appears that a good deal of testimony was offered, parol, as well as written, I should hardly be justified in certifying to the supreme court, a statement of the evidence, of which I have no distinct recollection, and in which I might do injustice to the defendant. The application is, therefore, refused.

Case No. 5,789.

GREENWAY et al., v. The GRIFFIN.

[N. Y. Times, Oct. 26, 1855.] [1]

District Court, S. D. New York. Oct. 25, 1855.

SHIPPING—NONDELIVERY OF CARGO—MEASURE OF DAMAGES.

[The measure of damages for nondelivery of cargo is the value of the articles at the port of delivery.]

[See note at end of case.]

In admiralty. This case came up on exceptions to the report of the commissioner. The suit was brought to recover damages for the non-delivery of freight shipped for Rio Janeiro, and the libelants [John Greenway and George C. Dickson] having obtained a decree in their favor, the commissioner reported the damages, taking the value of the freight at Rio as the rule of damages, to which the claimants excepted.

Weeks & De Forrest, for libelants.

Howland & Chase, for claimants.

HELD BY THE COURT (INGERSOLL, District Judge): That the contract was to de-

[1] [Affirmed in Case No. 5,814, and by supreme court in 22 How. (63 U. S.) 491.]

liver the freight at Rio, and the value of the articles at the port of delivery is the proper rule of damages. Exception overruled.

[NOTE. The claimants then appealed to the circuit court where the decree was affirmed in an opinion by Mr. Justice Nelson. Case No. 5,814. A further appeal to the supreme court was then taken by the claimants, and the decree of the circuit court affirmed in an opinion by Mr. Justice Campbell, who held that the measure of damages adopted was correct. 22 How. (63 U. S.) 491.]

Case No. 5,790.

GREENWAY v. ROBERTS et al.

[2 Cranch, C. C. 246.] [1]

Circuit Court, District of Columbia, May Term, 1821.

EXECUTORS AND ADMINISTRATORS — REAL ESTATE —DUTY OF PURCHASER TO SEE TO APPLICATION OF PURCHASE MONEY.

A purchaser under a power given by will to the executor to sell real estate for payment of debts, is not bound to see that the purchase-money is properly distributed among the creditors of the testator.

Bill in equity. William Bushby, by his will devised as follows: "It is my desire that, for the discharge of whatever debts I may owe, that my wife shall sell any part or parts of my real estate to pay and satisfy the same, or to make use of for any purposes which she may judge to be profitable to herself and children." The defendant, [Jonathan] Roberts, purchased a part of the real estate under this power to the executrix; and the plaintiff [Greenway's administrator], contended that the defendant, Roberts, was bound to see that the purchase-money was properly distributed among the creditors, especially as to debts due by judgment.

But THE COURT (THRUSTON, Circuit Judge, absent) decided that he was not so bound. Bill dismissed as to the defendant, Roberts.

Case No. 5,791.

GREENWELL v. BOTELOR.

[3 Cranch, C. C. 7.] [1]

Circuit Court, District of Columbia. Dec. Term, 1826.

REPLEVIN.

In replevin, the court will, on motion, order a return of the property to the defendant, a constable, who has taken it in execution upon a judgment against a third person, unless it shall appear to the court that the possession was obtained by the defendant forcibly or fraudulently, or that the possession first being in the plaintiff, was obtained by the defendant without proper authority or right derived from the plaintiff.

[This was an action at law by John Greenwell against Charles W. Botelor.]

Motion for a return of the property to the defendant, who was a constable, and had taken the goods as the property of one Joseph W. Greenwell, under a fieri facias, upon a judgment against him.

THE COURT (MORSELL, Circuit Judge, contra) ordered the property to be returned to the defendant, being satisfied by evidence that the property, at the time of the defendant's taking it, belonged to the said Joseph W. Greenwell, and not to the plaintiff, and that the possession was not first in the plaintiff, and was not obtained by the defendant forcibly or fraudulently. See Act Md. 1785, c. 80, § 14.

MORSELL, Circuit Judge, thought that the act of assembly of Maryland was intended only to aid the real owner of the goods, and not an officer serving an execution.

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

GREENWICH, The (SCOTT v.). See Case No. 12,531.

GREENWOOD (ALLEN v.). See Case No. 222.

GREENWOOD (HOTCHKISS v.). See Case No. 6,718.

Case No. 5,792.

GREENWOOD et al. v. RECTOR.

[Hempst. 708.] [1]

Circuit Court, D. Arkansas. April, 1855.

FEDERAL AND STATE COURTS—JURISDICTION FIRST ATTACHING.

1. After the institution of a suit in this court against a defendant, a garnishment subsequently sued out against him in a state court cannot affect it, nor be plead as a defence to the action.

[Cited in Bates v. Days, 11 Fed. 532.]

2. If jurisdiction has once attached, it cannot be divested or impaired by matter occurring subsequently.

[See note at end of case.]

Assumpsit on a bill of exchange. The defendant [Henry M. Rector] plead that since the institution of this suit, a writ of garnishment had been sued out of the Pulaski circuit court of the state of Arkansas and served on him, in respect to the same debt mentioned in the declaration, which was still pending, and prayed to be discharged from this suit; to which plea the plaintiffs [Moses Greenwood and Thomas E. Adams] demurred, on the ground that this suit having been just commenced in this court could not be defeated by any subsequent proceeding in a state court.

S. H. Hempstead, for plaintiffs.

Henry M. Rector, in proper person.

Before DANIEL, Circuit Justice, and RINGO, District Judge.

DANIEL, Circuit Justice. It would certainly be an extraordinary procedure if an action in this court could be defeated by a subsequent proceeding in a state court. Such

[1] [Reported by Samuel H. Hempstead, Esq.]

a pretension cannot be tolerated. The jurisdiction of this court, and the right of the plaintiffs to prosecute their suit therein, having attached, that right certainly cannot be arrested or taken away by any proceedings in another court; for the effect of such a practice would be to produce collision in the jurisdiction of courts, that would embarrass the administration of justice. State courts can no more interfere in our business and proceedings than we can in theirs. The plea cannot be allowed and the demurrer to it must be sustained. Judgment for plaintiffs.

NOTE. Where the suit in one court is commenced prior to the institution of proceedings under attachment in another, such proceedings cannot arrest the suit. Wallace v. McConnell, 13 Pet. [38 U. S.] 151. The commencement of another suit for the same cause of action in the court of another state, since the last continuance, cannot be pleaded in abatement of the original suit. A subsequent suit may be abated by the allegation of the pendency of a prior one; but the converse of the proposition, in personal actions, is never true. Resever v. Marshall, 1 Wheat. [14 U. S.] 215; Embree v. Hanna, 5 Johns. 101; Haight v. Holley, 3 Wend. 262. A suit having been commenced in the circuit court of the United States is not abated by a subsequent suit in the state court by attachment against the defendant in the first suit who is summoned as garnishee. Jurisdiction having vested in the circuit court it cannot be divested by any subsequent proceeding in a state court. Campbell v. Emerson [Case No. 2,357].

GREENWOOD (UNITED STATES v.). See Case No. 15,260.

GREENWOOD CEMETERY (BLAKE v.). See Case No. 1,497.

GREENWOOD, The GRACE. See Case No. 5,652.

Case No. 5,793.

GREER v. NOURSE.

[4 Cranch, C. C. 527.] [1]

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

PLEADING—NO RENT ARREAR.

The plea of no rent arrear admits the demise as laid in the avowry.

At law. Avowry for rent arrear [by William Greer against John R. Nourse]. Plea, no rent arrear, and issue.

R. S. Coxe, for plaintiff, contended at the trial, that the defendant must prove his title and the demise laid in the avowry.

Mr. Bradley, for defendant, cited 4 Starkie, Ev. 1297.

THE COURT (nem. con.) decided, that the plea of no rent arrear admits the demise as laid in the avowry.

GREER (UNITED STATES v.). See Case No. 15,261.

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

Case No. 5,794.

In re GREFE.

[2 N. B. R. 329 (Quarto, 106).] [1]

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

BANKRUPTCY — FILING SPECIFICATIONS NUNC PRO TUNC.

In a proper case, where the omission to file specifications in opposition to the discharge, within ten days after the return day to show cause, was inadvertent, creditors may file same with permission, nunc pro tunc.

By the Register:

I, Isaiah T. Williams, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following questions arose pertinent to the said proceedings, and were stated and agreed to by the counsel for the opposing parties, to wit: W. H. Neuschafer, who appeared for the bankrupt, and Messrs. Nelson Smith and John Sessions, who appeared for Briggs & Lawton, Miller & Williams, and Anderson & Staudinger, creditors of the said bankrupt. In this case the bankrupt filed his petition for discharge on the 26th day of September, 1868. The case was referred back to the register by the usual order. Upon the return of the order to show cause, there being no assets, Nelson Smith, Esq., solicitor for Briggs & Lawton and Miller & Williams, also John Sessions, solicitor for Anderson & Staudinger, filed, respectively, notices of opposition. Ten days elapsed, and both sets of creditors failed to file their specifications of objections to the discharge of the bankrupt. Thereupon, and on the 10th day of November, 1868, both of said attorneys applied to the register upon affidavits, excusing the default, for leave to file their objections nunc pro tunc. There being no appearance on the part of the bankrupt, the order was made accordingly. Subsequently the parties again came before the register, and it appeared by affidavits then read that no notice of the said application on the part of the creditors had reached the said bankrupt or his attorney. Whereupon the said order, as before granted, was vacated, and the attorneys for the said creditors moved upon notice for an order giving them leave to file their specifications as of a time within ten days after the return of said order to show cause. This motion being opposed by the attorney for the bankrupt, I do hereby certify, at the request of the parties, the case to the court for decision. The register has no suggestions to submit to the court save to say that he sees no good reason why the court should not grant the relief sought by the solicitors for the creditors, as the omission was mere inadvertence.

BLATCHFORD, District Judge. The creditors are allowed to file their specifications as of a time within ten days after the return day of the order to show cause.

[1] [Reprinted by permission.]

Case No. 5,795.

GREGERSON v. IMLAY.

[4 Blatchf. 503.] [1]

Circuit Court, S. D. New York. June 14, 1861.

PATENTS—DAMAGES FOR INFRINGEMENT — AGREEMENT TO COLLECT—CONTINGENT FEE—CHAMPERTY AND MAINTENANCE.

1. Where I., the patentee of a patent which had expired, having claims for damages for its infringement, made a written agreement with G., giving to G. the exclusive right to control the claims, and collect or compromise them, G. to bear all expenses, except that I. was to bear the taxable costs of any suit in which a recovery for costs should be had against him, and G. to have, as compensation for his time and all expenses, except such taxable costs, one half of the gross amount he might collect, the rights under the agreement to survive to and against the personal representatives of each party, and the contract not to be revoked except by the consent of both parties in writing, and the agreement was accompanied by an irrevocable power of attorney from I. to G., authorizing G. to sue in the name of I. and conduct the whole business of collecting the damages in all the states of the Union except four: *Held*, that the contract was tainted with champerty and maintenance, and that a court of equity would not uphold it.

[Cited in Goldsmith v. American Paper Collar Co., 2 Fed. 241.]

2. The case of Prosser v. Edmonds, 1 Younge & C. Ex. 481, cited and approved.

3. The absence of an agreement to indemnify against taxable costs does not make such a contract valid.

4. The fact that the contract was made in New York, and that the common law doctrines concerning champerty and maintenance no longer exist in New York, cannot uphold the contract, as it is to operate in many states where it is clearly void.

5. Even though such a contract might be barely valid at law, a court of equity will lend no countenance to it.

In equity. This was a motion for a provisional injunction, to restrain the defendant [Richard Imlay] from violating a written agreement made between the parties. The defendant was the owner and patentee of letters patent for an improvement in trucks for railroad cars. The patent had expired, but, during its continuance, while the exclusive right to it was in the defendant, a large number of persons, and especially railroad corporations, infringed the rights of the defendant, by building and using cars to which this improvement was attached, without any license from the defendant. The invention was a valuable one, and the defendant was entitled to recover from the infringers divers sums, as damages for the violations of his rights. While these claims, or many of them, were outstanding and wholly unadjusted, the defendant entered into a written agreement with the plaintiff [William H. Gregerson], by the terms of which he conferred upon the plaintiff the exclusive right to control these claims and collect the same by suit or compromise, the latter to bear all the expenses of such collection out of his own pocket, except that, in case he failed to recover in any suit, the defendant was alone to be liable to pay the taxable costs that might accrue against him in such suit. As a compensation to the plaintiff in full for his time, and for all expenses of the collection and litigation of these claims, including counsel fees and all other fees, except only the taxable costs above referred to, the plaintiff was to receive and retain fifty per cent. of the gross amount he might collect. The rights which the agreement purported to vest in the plaintiff were to descend to his executors and administrators, in the event of his death before the completion of the business of collection, and in the event of the death of the defendant before that time, they were to be confirmed against his heirs, executors and administrators. The agreement was not to be revoked or changed, except by the mutual consent of both parties, expressed in writing. For the purpose of carrying out the agreement and enabling the plaintiff to collect the claims, which existed against persons in nearly all the states of the Union, the defendant made his power of attorney, authorizing the plaintiff to bring suit in the defendant's name, and countersign discharges, and conduct the whole business of collecting the damages, in all the states except four. The power referred to the agreement, and was, in terms, irrevocable. The plaintiff proceeded, in good faith, to execute his part of the agreement, but the defendant becoming, for some cause that did not clearly appear, dissatisfied, attempted to revoke the power and annul the contract, and assume the entire control of the business which he had, in terms, committed to the exclusive control of the plaintiff. The defendant claimed the right to resume the control of the claims, and denied the right of the plaintiff to interfere therewith. The bill was brought to perpetually enjoin the defendant from annulling the contract or power, and from in any way interfering with the business of collecting or adjusting the claims. Upon the bill, and affidavits in support thereof, the plaintiff now moved for a provisional injunction, to restrain the defendant in the premises.

Benjamin Cozzens, for plaintiff.
Samuel Blatchford, for defendant.

SHIPMAN, District Judge. A variety of points, both in support of and in opposition to this motion, have been raised and ingeniously argued by the counsel, some of which are of an interesting character, but, in the view I take of the case, it is unnecessary to pass upon them. This is certainly an extraordinary contract, and one which a court of equity should hesitate long before it sanctions. It is clearly void at common law, for champerty and maintenance, and, although it is quite true that the doctrines of the common law touching the effect of these features

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

upon the validity of contracts have been greatly modified in modern times, yet I think it doubtful if any court of law, much less any court of equity, has ever sustained a contract of this description. This is not the case of an assignment of an interest in an individual claim, or a sale of property in esse which is involved in a legal controversy, but it is an attempted transfer of an interest in indefinite litigious rights, and in claims for unliquidated damages, arising out of torts, indefinite in number and amount, and limited only by territorial boundaries, covering nearly the entire country. Passing by other grave questions that suggest doubts as to the validity of such a contract, it is sufficient to say, that it is one that no court of equity should countenance, inasmuch as it is tainted with champerty and maintenance. This view of the duty of courts of equity is fully supported by the chief baron of the exchequer, in the case of Prosser v. Edmonds, 1 Younge & C. Ex. 481, where he remarks, that such courts should lend no countenance to agreements which partake in any manner of champerty, although they might be barely valid at law. Without impugning the good intentions of either party to the contract before me, and even assuming that the unmolested execution of this agreement by the plaintiff would be highly beneficial to the defendant, still it is easy to see that such contracts are liable to great abuse. To arm one individual with exclusive and unlimited power over the claims of another for unliquidated damages arising out of numerous torts, with power to sue and press the claims to judgment in all courts, in the name of the injured party, not for a fixed or a reasonable compensation to be determined by the amount of labor performed and the expense incurred, but for what might prove an enormous bounty proportioned to the amount that might be recovered, while at the same time the other party is stripped of all power to adjust, settle or discharge those claims, of the justice of which he ought to be the better judge, would be detrimental to the peace of society and the safety of individuals, and against public policy.

It may be claimed, that this contract is not champertous, inasmuch as the plaintiff does not agree to indemnify the defendant against taxable costs. This distinction has sometimes been taken; and some of the elementary treatises seem to regard it as valid. But the doctrine was pretty effectually exploded in the case of Lathrop v. Amherst Bank, 9 Metc. [Mass.] 489. Indeed, where the power over the prosecution of the claims is, as claimed in the present case, exclusive and irrevocable, the exemption of the prosecutor from liability for costs, aggravates rather than relieves the mischievous character of the contract.

The case of Call v. Calef, 13 Metc. [Mass.] 362, was one in which a contract was involved, resembling in many features the one now before me. The facts were these: Leeds & Co. claimed to own the exclusive right to use a patent planing machine in the town of Manchester, New Hampshire, in which town Baldwin & Stevens were infringing upon their rights by the use of another machine. Call, the plaintiff, had an interest in the same patent in Lowell, and Leeds & Co. executed a power of attorney to him, authorizing him, by suit or otherwise, to restrain Baldwin & Stevens from using the machine in Manchester, and promised him one-half of what he might recover or collect for his compensation. It was claimed, on a subsequent trial, in which this agreement was drawn in question, that it was void for champerty and maintenance. The court held it valid, upon the sole ground, however, that, as the unauthorized use of the machine in Manchester would diminish the profits and value of the patent in the adjoining town of Lowell, where Call owned the right, the latter had a direct interest in preventing the infringement in Manchester, and that this interest supported the validity of the contract. It is needless to remark that, in the present case, the plaintiff had no interest whatever in the claims committed to his control by the plaintiff, except what arose out of the contract itself.

I am aware that, in Sedgwick v. Stanton, 4 Kern [14 N. Y.] 289, Selden, J., in an able opinion, maintains that the doctrines of the common law touching champerty and maintenance are pretty effectually swept away in New York, by state legislation. But, although the contract under consideration was made in New York, still the lex loci cannot control the determination of the present case. The contract was, by its terms, to be executed in all the states of the Union except four, and the effect of the injunction asked for would be to support the contract in many states where it is clearly void. But, as already intimated, if the contract were barely valid at law, still, by applying the salutary doctrines of the English court of exchequer, in Prosser v. Edmonds, in which I fully concur, I should feel compelled to deny this motion.

Case No. 5,796.

In re GREGG.

[1 Hask. 173;[1] 3 N. B. R. 529 (Quarto, 131); 1 Am. Law T. Rep. Bankr. 298.]

District Court, D. Maine. Dec., 1868.

BANKRUPTCY — ASSIGNMENT OF A PERMIT TO CUT TIMBER—ADVANCES MADE TO BANKRUPT.

1. The assignment of a permit to cut timber and a conveyance of the timber by a bankrupt before he filed his petition in bankruptcy, to secure any amount due the assignee of the permit on settlement, create a valid lien upon the timber cut to secure all advances made to the bankrupt by such assignee before the petition in bankruptcy was filed: and such assignee is entitled to recover from the proceeds of the sale thereof such advances, together with all sums paid to extin-

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

guish prior statute liens thereon, and the cost of driving the timber to market.

2. Advances made to the bankrupt by such assignee, on the faith of such assignment and conveyance, after the bankrupt has filed his petition in bankruptcy, but of which the assignee was ignorant, are not secured upon the timber, and do not create a lien thereon.

3. If such assignee of the permit agrees to assign his security to another, who thereupon before the assignment is made, advances funds to drive the logs to market, the latter is entitled in equity to be subrogated to the rights of the former, and in addition thereto, has a lien upon the logs for the advances so made by him, upon the ground that equity considers done that which is agreed to be done.

[Cited in Brown v. Brabb, 67 Mich. 28, 34 N. W. 408.]

4. The purchaser of land by deed will take a fee as against the assignee of a bankrupt, who held before his bankruptcy a bond for a deed of the same from the purchaser's grantor, the conditions of which the bankrupt had violated, unless the owner of the land, who gave the bond, had so conducted and dealt with the bankrupt as to have waived the breach of the bond.

5. A bankrupt, holding a bond for a deed of land, the condition of which he had broken, acquired no title to timber he had cut thereon without the consent of the owner of the land, and none passed to his assignee in bankruptcy.

[Cited in Re Lake, Case No. 7,992; Taylor v. Irwin, 20 Fed. 617.]

In bankruptcy. Petition by Hayford and Pearson to charge funds, received by the assignee from the sale by him of certain logs as the property of the bankrupt [Thomas B. Gregg], with a lien that attached to them before their sale. The cause was heard upon the report of Mr. Register Hamlin, to whom the same had been referred.

John A. Peters and Franklin A. Wilson, for Hayford.

James S. Rowe and John F. Appleton, for Pearson.

W. C. Crosby, assignee, pro se.

FOX, District Judge. In this case, the assignee has disposed of a large quantity of logs, cut by the bankrupt in the winter of 1867–68, under permits from the owners of the tracts of timber land, and questions have arisen as to the amount of certain liens alleged to exist thereon; the whole matter has been referred to Mr. Register Hamlin, and the questions are now presented for decision on his report and the depositions accompanying it. The bankrupt filed in this court his petition to be adjudged a bankrupt on Feb. 29, 1868, and the decree of bankruptcy was entered on the 30th of March last.

On the 5th day of February, 1868, the bankrupt assigned the permits for lumbering to one Hayford, as "security for the payment of any and all sums he might owe him on settlement;" and on the same day Hayford advanced to the bankrupt his two notes of $2,100 each, on five and six months without interest, payable to Gregg, charging them to him on account, together with a commission amounting to $210; the assignment of the permits and the lumber cut under them, was given as security for these advances; a lien on the timber was created thereby for their payment, and these sums should be paid by the assignee from the proceeds realized by him from the sales of this timber. Hayford is not however, at present, the owner of this claim, having on the fourth day of July, in consideration of $8,402 paid to him by one Pearson, assigned to him all his account against Gregg, together with the two permits, a written agreement to make and accept such an assignment having been entered into between Hayford and Pearson on the 10th day of April.

Under this assignment, Pearson claims to be subrogated, in place of Hayford, to all of Hayford's claims and securities against the bankrupt. It appears, that on the 21st of March Hayford made to the bankrupt a second advance of his notes, three in number, each for $2,075, charging them to him on account, and also a commission of $311.25. These notes were discounted for the bankrupt at the rate of 9¼ per cent. including brokerage. Hayford at the same time advanced to the bankrupt in cash $667.38. After the notes were discounted, the bankrupt paid back from their proceeds to Hayford on the 21st day of March $2,966.73, and this amount was passed by him to the credit of the bankrupt with interest at the rate of eight per cent. for the time the notes had to run, and commissions $148.50. The purpose of this arrangement is not very apparent; there is something inexplicable in this way of lending a party money, furnishing him with the lender's notes to a larger amount than the borrower needed, and his getting them discounted at 9¼ per cent. paying over to the lender the surplus beyond his necessities, which amount is credited to him with interest at eight per cent. only; but the parties testify such was the transaction, and in the view I take of their rights it is not very material to determine upon the propriety of such an arrangement. The report finds that the bankrupt filed his petition in bankruptcy in this court on the 29th of February. Hayford advanced him his notes on the 21st of March subsequently, not knowing of the filing of such petition, and his assignee Pearson claims that Hayford is to be considered in the light of a bona fide purchaser without notice, making the advances in good faith, ignorant of any proceedings in bankruptcy, and relying on the security which he held through the permits which had been assigned to him Feb. 5, and which were to be "held by him as security for the payment of any and all sums Gregg might owe him on settlement."

The 14th section of the bankrupt act [of 1867 (14 Stat. 522)] provides, "that as soon as the assignee is appointed, etc., the judge, etc., * * * or the register, shall by an instrument under his hand assign and convey to the assignee, all the estate, real and personal of the bankrupt, with all his deeds

books and papers relating thereto, and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee." The 38th section of the same act provides, "that the filing of a petition for adjudication in bankruptcy, shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act." Form No. 18, as prepared by the justices of the supreme court for the assignment of the bankrupt's effects, in terms conveys and assigns to the assignee all the estate, real and personal, of the bankrupt, including all the property of whatever kind, of which he was possessed, or in which he was interested on the day of the filing of the petition.

Under the present act, I hold, that from the moment the petition in bankruptcy was filed, the bankrupt had lost all power of disposal of any portion of his property, and any subsequent conveyance or transfer by him was a nullity, and absolutely void as against the assignee. The assignment was subsequently executed by the register, but its effect must depend entirely on the language of the act, and it is expressly enacted that the assignment when made, shall relate back to the commencement of the proceeding, which is declared to be the filing of the petition. The register, "by such assignment, merely executes a power devolved by law upon him; he conveyed no interest of his own; the property which passes by it is transferred by force of the statute; and therefore the legal effect of such transfer depends little upon the terms of the assignment, either as to the property transferred, or the time at which it shall take effect; but the legal effect and operation of the assignment in these respects, must depend upon the provisions of the statute. It is purely a statute title, under which an assignee claims the goods or choses in action of the insolvent, and to the statute he must look for the nature and extent of that title." Clarke v. Minot, 4 Metc. [Mass.] 348.

An entirely different time for the devesting of the property of the bankrupt is found in the former bankrupt act; by the 3d section of Act 1841, it was provided that from the time of the decree of bankruptcy, the property shall be deemed to be devested out of such bankrupt, without any act or conveyance whatever. Under the English bankrupt act, it has been frequently decided that when an assignment is made under a good commission of bankruptcy, it relates back to the act of bankruptcy, and avoids all mesne conveyances, excepting when made bona fide, more than two months before the date and issuing of the commission. The law on this point is clearly stated by Bosanquet, J., in his opinion in Balme v. Hutton, 9 Bing. 471. He says, "It is not to be disputed, with respect to persons in general, that after an assignment by the commissioners, all property of the bankrupt is liable to be treated and dealt with, not merely as actually being, but as having been, from the time of the act of bankruptcy, the property of the assignees; and that persons who possess themselves of such property, or dispose of such property to others, are liable to be sued for a tortious conversion in actions of trover. This liability to answer in an action of tort to the assignees does not depend upon any actual or presumed knowledge on the part of the defendant of the existence of an act of bankruptcy. The act of bankruptcy subjects the property of a trader to the right of his assignees in the event of a commission, and when the assignment has been executed, the title of the assignees is completed by relation from the date of the act of bankruptcy. The effect of this relation may sometimes produce hardships to individuals, who may have purchased or disposed of property with perfect honesty and good faith. But the necessity of adopting a retrospective measure for the prevention of fraud has been thought sufficiently to counterbalance the evil of such occasional hardship. Even those persons who purchase goods, sold by the sheriff under an execution against a trader, are liable to be sued in trover for the value of the goods, by assignees claiming under a commission subsequently issued, if an act of bankruptcy appears to have been committed by the trader before the sale. A limit, however, has been set to this retrospective effect of the bankrupt law by provisions introduced into the latter statutes, by which parties who act bona fide and without notice of an act of bankruptcy are protected, unless a commission shall have issued within a certain time." This principle has even been applied to a transfer of negotiable paper by a bankrupt, and the title of an innocent holder of a bill of exchange by transfer from a bankrupt has been made to yield to that of the assignee. Willis v. Freeman, 12 East, 656.

In Kynaston v. Crouch, 14 Mees. & W. 266, a man committed a secret act of bankruptcy by leaving his house, but before he left, desired the defendant, his foreman, who had been accustomed to manage his business, to carry it on in his absence; the defendant accordingly did so, and received several sums of money for debts due the bankrupt, and for goods sold after the act of bankruptcy. He also made several bona fide payments, some to creditors of the bankrupt for expenses of housekeeping, and retained some for wages due himself; the moneys were used and the payments made without notice of any act of bankruptcy. An act for money had and received was brought by the assignees, and defendant pleaded never indebted and set off. It was decided that the defendant was liable to the assignees for all the money received by him after the act of bankruptcy, and that he was

not entitled to set off any of the payments made by him.

The case of Copland v. Stein, 8 Durn. & E. [8 Term R.] 199, is not unlike the present case. In that case, a trader, after a secret act of bankruptcy, assigned goods to a factor, who agreed to advance money thereon, and accordingly accepted and paid bills drawn on him by the trader. A commission of bankruptcy afterwards issued against the trader on such prior act of bankruptcy, after which the factor sold the goods and received the money, and it was held that he was answerable to the assignees for the value of the goods. Ld. Kenyon said: "A decision in favor of the defendants would be contrary to all the bankrupt laws, and to the cases that have been determined upon them, on the ground of relation back to the act of bankruptcy. * * * The doctrine of relation obtains universally through all the bankrupt laws, except in the cases that are particularly excepted, and this case does not come within either of those exceptions. The argument of the defendant goes the length of asserting, that if a bankrupt, after a secret act of bankruptcy, sell or mortgage his estate, such sale or mortgage will be valid. It is true that if no commission be taken out for five years after the act of bankruptcy committed, such sale would be good; but in no other case can such a sale be protected. In the present case the goods were delivered in Oct., 1796, but now it appears that the bankrupt, by having committed a secret act of bankruptcy two months before, was incapacitated from disposing of these goods to the prejudice of his creditors at large. This is a hard case on the part of the defendants, but we are compelled to decide against them by positive law, and can only say ita lex scripta est."

The case under the English bankrupt act is certainly much harder for a party dealing with the bankrupt than under the act of congress. By the English law, the acts of bankruptcy may be secret, of such a nature as it would be impossible for the party to be advised of. No means exist by which the utmost diligence could protect a party, and give him knowledge of such act on the part of the bankrupt; whilst by our bankrupt act, the records of the court in bankruptcy are always open for inspection, and it is not until the petition is filed in court, that the statute declares "that the property shall be devested;" the fact is therefore within the means of knowledge of any one dealing with another, if he will take the trouble to consult the records of the court, the 38th section declaring, that the docket shall be open to public inspection. It is a record of the same public nature as the registry of deeds. The record of a deed is legal notice of the conveyance to all parties interested, and in the same manner congress has enacted that the filing of the petition in court shall be conclusive upon the rights of all parties, and from that time the bankrupt shall have no control or disposition of the property formerly belonging to him. As remarked by Ch. J. Shaw in Clarke v. Minot, 4 Metc. [Mass.] 349: "It seems to have been the obvious policy of the statute, to fix some precise point of time, at which the whole property and effects of the debtor shall be deemed to have passed from him, and vested in the assignees."

I am of opinion therefore, that Hayford did not acquire any legal right to hold the permits and timber cut by either of them, as security for the cash and notes advanced by him to the bankrupt on the 21st of March, as the petition in bankruptcy was filed Feb. 29th, and Hayford must be deemed in law to have had constructive notice of its filing, and of its effect under the operation of the bankrupt law. It is claimed that if Hayford acquired no legal right to hold the permits and timber as security for his advances of March 21st, still he has a right in equity to look to them as security for such advances, on the ground that the assignee takes only the property of the bankrupt, subject to like equities with the bankrupt. It is true that such is the title of the assignee. Mr. Justice Story, in Mitchell v. Winslow [Case No. 9,673], has examined this matter with his usual care and learning, and most clearly vindicates and enforces the doctrine that assignees, except in cases of fraud, are affected with all the equities which would affect the bankrupt if he were asserting his rights and interests in the property.

But that principle can only operate on the title as it stood when the property passed from the bankrupt to the assignee, and not to any rights attempted to be obtained subsequently. By the laws of Maine, a lien is given for personal services in cutting, hauling, or driving logs or lumber, which shall take precedence of all other claims, except liens reserved to the states of Maine and Massachusetts. Such liens would override the rights acquired by Hayford by force of the assignment of the permits, so far as such liens existed in full force at the time of filing the petition. I am of opinion that Hayford, by virtue of the interest he held in the lumber under the permits, had a right to advance money for the discharge of such liens, and that the amount, actually paid and applied in discharge of them, he may claim out of the proceeds of the lumber as against the assignee. The case is similar to a second mortgageor, who should pay off a prior mortgage, or discharge a tax which was a lien on the mortgaged estate. As against an assignee in bankruptcy, the amount so paid in protection of his title to an estate would be an equitable claim on the estate, and it would pass to the assignee burdened with such equities.

It is claimed, that a portion of the amount advanced by Hayford was applied to getting the logs to market, and that thereby their value has been increased to that extent;

that at the commencement of the proceedings in bankruptcy, the logs were in the streams, or on the banks where cut, and that it was necessary that they should be driven to market; that a large portion of the advances were applied to this purpose, and that it is inequitable and unjust for the assignee to take possession of the logs at the boom, where they were worth a much larger sum than they were when on the banks and in the streams, this increase in value being occasioned by the expenditure of the money so furnished by Hayford. Considering Hayford's relation to the property by the transfer of the permits, and the peculiar character of the property itself, its necessary diminution in value by being allowed to remain where it was, and that some expenditures were actually necessary for preserving the lumber, and that without doubt the estate of the bankrupt has derived a substantial benefit from the expenditure, I feel justified in deciding, that Hayford is entitled to an equitable lien on the timber for such sum as was actually, fairly and judiciously expended in the care and driving of the timber to the boom after Feb. 5th. Pearson, having on the 10th of April agreed with Hayford that he would pay his demands against Gregg on or before July 5th, and that the permits should be assigned to him, on the 11th of April advanced to Gregg by his note $1,565, and on the 13th of May $1,500 more.

These advances were made by Pearson to Gregg, that he might pay his men, and for driving the logs. At this time, Pearson had no legal interest in the timber, the permits not having been assigned to him, but as he had agreed previously to take the permits and pay Hayford his claim, and Hayford had agreed to assign him the permits, adopting the rule that what is agreed to be done may in equity be considered as done, he, Pearson, may be considered as holding the permits, and his advances will stand on the same grounds, and in like condition with those made by Hayford. Sixty-three dollars were paid by Pearson to Blake for boots purchased by Gregg. From the evidence reported, I do not consider this to have been a lien claim; it should not be allowed.

[The case, as presented in the report, does not state with sufficient exactness the amount of lien claims discharged from the sums advanced by Hayford and Pearson; nor the amount actually paid, from the sums advanced by them, for driving the logs to market, and must be recommitted to the register for a more full and detailed report on these points; the burden being on Pearson to establish such payment to the satisfaction of the register].[2]

In addition to the timber cut under the permits, the bankrupt, the same winter, cut a quantity of logs from land in the town of Amity. The legal title to this land was in James White, who in Oct., 1863, made a contract with the bankrupt and one Brown to sell them 1,800 acres of the land, they giving him four notes of $675 each, payable in one, two, three, and four years, with interest annually. Oct. 23, 1864, the first note was paid, and $362.15 was paid on the second note. At the time the notes were given, White gave the signers a bond to convey the land to them on payment of these notes according to their terms. In the winter of 1867-68, Gregg having acquired all of Brown's interest, went onto the land and cut a quantity of logs, which were afterwards claimed by White as his property, and he had them scaled and marked. June 18th White met Gregg and told him he wished the money due on the notes, and Gregg replied, he had nothing to pay with; the same evening Hayford came to White and inquired about his claim on the logs, and he told him he considered them his, as they had been cut without his permission. Hayford informed him he had been furnishing supplies to Gregg, and that he wanted to secure himself. After some conversation, White proposed to give Hayford a deed of the land, and relinquish his claim on the logs for the sum of $2,300, which was about $50 more than the amount due on Gregg and Brown's notes, and the next day the proposition was accepted by Hayford, and the papers executed, and Hayford subsequently sold the logs for $3,109.

The assignee claims that this amount, after deducting the $2,300 paid by Hayford to White, should be applied in reduction of his claim against Gregg, and that before Pearson as Hayford's assignee can insist on payment of the balance of Hayford's claim, he must procure from Hayford a conveyance of the interest he acquired in the Amity lands by virtue of White's deeds.

Whether this claim of the assignee is valid or not, I think, depends on the question, whether as between White and Gregg the latter had any right to the Amity lands which he could enforce against White. The terms of the bond had not been complied with by Gregg and Brown; there was a large amount of the purchase money which was due and unpaid, and had so remained for years. It should appear that White had so conducted and dealt with Gregg, that he had waived the breach, or else Gregg had no interest in the tract or timber that he had cut therefrom.

[2][The testimony on this point is not as full as could be desired, or as can probably be obtained. White's deposition does not meet this question of waiver, although he does say he called for payment of the notes in June, 1868. I shall allow either party to take further testimony on this point, and will reserve my opinion until the matter is again presented].

[2] [From 3 N. B. R. 529 (Quarto, 131).]

[2] [From 3 N. B. R. 529 (Quarto, 131).]

[Ordered: That the report of the Register in this cause be recommitted to him, with directions to ascertain and report: 1st. The lien claims on the timber cut under the permits, which were discharged by the sums advanced to Gregg by Pearson, or by the notes and cash advanced by Hayford, March 21, 1868, stating each of said claims, its nature, amount, and when paid and to whom. 2d. The amount paid from such advances after February 5th, 1868, for getting the logs to market, and to whom paid, and when; and whether such payments were judiciously made, and the value of the logs thereby increased to the amount so expended. 3d. The Register will take such further testimony as either party may request, touching the Amity lands, and Gregg's interest therein, and especially touching any waiver by White of the breach by Gregg and Brown of the condition of the bond given by White for the conveyance of said lands.][2]

Case No. 5,797.

In re GREGG.

[4 N. B. R. 456 (Quarto, 150).][1]

District Court, D. California. Nov. 26, 1870.

BANKRUPTCY—PREFERENCE — KNOWLEDGE OF INSOLVENT CONDITION BY DEBTOR.

1. Where an insolvent debtor executed a bill of sale to a creditor who had obtained the levy of an attachment after notice of the debtor's insolvency, the same was a violation of the bankrupt act [of 1867 (14 Stat. 517)].

2. Its inevitable effect was to give a preference. Although insolvency exists, yet, if the debtor honestly believes he shall be able to go on in his business, and with such a belief pays a just debt without a design to give a preference, such payment is not fraudulent, although bankruptcy should subsequently ensue.

3. If the debtor is cognizant of his own insolvent condition, and expects to stop payment, and makes a payment, or gives security to a creditor for a just debt, with a view to give a preference, such payment, or giving of security, is fraudulent as against creditors, and property thus transferred may be recovered by the assignee in bankruptcy, and the debtor's discharge will be denied.

In bankruptcy.

HOFFMAN, District Judge. This is a proceeding brought by the assignee to recover certain property alleged to have been transferred by the bankrupt in fraud of the act. On the 2d September, Knox, to whom the bankrupt was indebted for a balance due on two promissory notes, levied an attachment on all the property of the latter, consisting of a piece of land, and a house in which the bankrupt resided, and a saloon, stock of liquors, fixtures, etc. On the same day, Knox and the bankrupt entered into an agreement by which the former was to execute a bill of sale to Knox for the saloon, stock in trade, etc., in payment of the notes, and the latter was to discontinue his suit, and release the house and land from the attachment. This was, accordingly, done, and the possession of the saloon, etc., delivered to Knox, who surrendered to the bankrupt his notes. Very soon afterwards the bankrupt declared the real property a homestead under the laws of the state. At the time of these transactions the bankrupt was largely insolvent, and of this the creditor was informed a few days before the attachment was levied. There can be no doubt that this payment by the bankrupt was a violation of the act. Its inevitable effect was to give a preference to one creditor at the expense of all the rest, and to appropriate to the satisfaction of his debt a great part of the property of a person who knew himself to be hopelessly insolvent. "The policy and aim of the bankrupt laws," says the supreme court, "are to compel an equal distribution of the assets of the bankrupt among all his creditors. Hence, when a merchant or trader, by any of these tests of insolvency, has shown his inability to meet his engagements, one creditor cannot, by collusion with him, or by a race of diligence, obtain a preference to the injury of others. Such conduct is considered a fraud on the act, whose aim it is to divide the assets equally, and therefore equitably." Shawham v. Wherritt, 7 How. [48 U. S.] 744. It is urged that to constitute an act of bankruptcy of the kind under consideration, it is necessary that the intent to give a preference should exist, and that this intent cannot be inferred from the mere fact of actual insolvency. The law on this point is well laid down in Jones v. Howland, 8 Metc. [Mass.] 377. "The result of these cases," says the court, "is the drawing of a distinction between the actual insolvency and a contemplated bankruptcy, between the payment of a just debt, in the course of business, though insolvency exists, and is known to the insolvent, and the design to give a preference in view of stopping payment. And, in view of all the authorities, we hold the law to be this—that, although insolvency in fact exists, yet, if the debtor honestly believes he shall be able to go on in his business, and with such a belief pays a just debt, without a design to give a preference, such payment is not fraudulent, though bankruptcy should afterwards ensue. And, on the other hand, if the debtor, being insolvent, and knowing his situation, and expecting to stop payment, shall then make a payment, or give security to a creditor for a just debt, with a view to give him a preference over the general creditors, such payment, or giving security, is fraudulent as against the creditors, and property that is transferred in making such payment, or giving the security, may be recovered by his assignee, and the debtor will not be entitled to a discharge under the statute.

[2] [From 3 N. B. R. 529 (Quarto, 131).]

[1] [Reprinted by permission.]

It rests upon the intent with which the act was done, and the intent is to be proved as a fact, either by direct evidence, or as the necessary and certain consequence of other facts clearly proved." These observations are cited with approval in Morgan, Root & Co. v. Mastick [Case No. 9,803], and in Doan v. Compton [Id. 3,940], and the same principles are substantially laid down in numerous cases. Farrin v. Crawford [Id. 4,686]; Wadsworth v. Treadwell [Id. 17,032]; Langley v. Perry [Id. 8,067.] It will be perceived that, in the case at bar, all the circumstances exist, which in the above extract are supposed to furnish clear evidence of a fraudulent intent. The debtor was insolvent, and perfectly aware of his situation. His transfer to the creditor included his whole stock in trade. It at once deprived him of the means of conducting his business, and involved the necessity of an immediate stoppage. As his entire property had been seized, the effect of the payment in full to the attaching creditor, was to liberate his house and land from the attachment, and to put it in his power, unless prevented by a proceeding in bankruptcy, to declare it a homestead, and withdraw it from the reach of his creditors. This he attempted to do, and, whether successful or not, the attempt shows an intention to satisfy one creditor's demand by applying to its payment all the property of the debtor, which he intended to be appropriated to the payment of his debts. The 35th section of the act provides that if the transfer is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud. The burden of proof is thus thrown upon the bankrupt to repel the presumption of fraud raised by the law. The circumstances of the case, so far from repelling, strengthen the presumption, to the exclusion of any other hypothesis. It being clear, then, that the bankrupt intended to give the preference which was the necessary consequence of the transfer, it remains to inquire whether the person receiving it had reasonable cause to believe that a fraud on the act was intended. He knew that the debtor was insolvent. He knew that he himself had attached all his property, and that the debtor had committed an act of bankruptcy by the non-payment of his commercial paper for more than fourteen days. He knew that the inevitable consequence of the transfer was to break up the business of the debtor, and that it was made in view of stopping payment. Under these circumstances he not only had reasonable cause to believe, but he must have known that the payment to him was a preference by an insolvent debtor, and was necessarily intended to be such. It was, therefore, a fraud on the bankrupt act. I am, therefore, of opinion that the payment and transfer were void, and the property transferred or its value can be recovered by the assignee for the benefit of the estate, as provided in the bankrupt act.

Case No. 5,798.

GREGG v. BONTZ.

[2 Cranch, C. C. 115.] [1]

Circuit Court, District of Columbia. Nov. Term, 1815.

LIMITATION OF ACTIONS—PLEADING STATUTE.

In Alexandria, D. C., the statute of limitations may be pleaded on setting aside the office judgment at the first term. Act Va. Dec. 12, 1798, § 28.

E. J. Lee, for defendant.

THRUSTON, Circuit Judge, absent.

Case No. 5,799.

GREGG et al. v. GIER.

[4 McLean, 208.] [2]

Circuit Court, D. Illinois. June Term, 1847.

MOTION TO AMEND PLEADINGS.

Motion by plaintiffs' counsel to increase the damages laid in the declaration. Mat. p. i. 153.

[This was a suit by Gregg and Wald against Gier.]

OPINION OF THE COURT. Under the act of congress, as well as in pursuance of the state practice, this court has always exercised a liberal discretion in giving leave to amend the pleadings. This power of the court is not limited, as by the common law, to permit amendments only where there was something in the proceedings to amend by. The motion is granted.

GREGG (GIER v.). See Case No. 5,406.

Case No. 5,800.

GREGG v. WESTON et al.

[7 Biss. 360; [3] 9 Chi. Leg. News, 175.]

Circuit Court, D. Indiana. Feb. 14, 1877.

PROMISSORY NOTE—JURISDICTION OF UNITED STATES COURT.

1. The statutes of Indiana make all promissory notes negotiable so far as to vest the property in each indorsee successively; but unless a note is made payable to order or bearer at a particular bank, whatever equity the maker was entitled to against the payee he may assert against any indorsee. Under such a statute the United States courts have no jurisdiction of an action by an assignee of a note not made payable at a bank, as such a note is not a "promissory note negotiable by the law merchant."

[Cited in Porter v. Janesville, 3 Fed. 619; Bank of Sherman v. Apperson, 4 Fed. 31; Hardin v. Olson, 14 Fed. 705.]

2. The statutes of a state enter into and become part of a note made in that state.

[This was a suit by Noah S. Gregg against John Weston and M. G. Schultz.]

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

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

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

Harrison, Hines & Miller, for plaintiff.
Jacobs & Terrell, for defendant.

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

GRESHAM, District Judge. Gregg, a citizen of Ohio, sues Weston and Schultz, both citizens of Indiana, on a note executed by Weston to Schultz, and by the latter assigned to the plaintiff. The note, a copy of which is made part of the complaint, was given at Kendallville, Indiana, August 4th, 1870, payable to the order of M. G. Schultz. The defendants demur to the complaint on the ground that this court has no jurisdiction.

Under the judiciary act of 1789 [1 Stat. 73], the circuit courts of the United States have no cognizance of any suit on a promissory note in favor of an assignee, unless a suit might have been prosecuted in such court on such note if no assignment had been made. It is admitted that under this statute this action could not have been maintained. But it is urged by the plaintiff that this court has jurisdiction of the action under the first section of the act to determine the jurisdiction of the circuit and district courts of the United States, approved March 13th, 1875 (18 Stat. 470). That part of section 1 which is relied on by the plaintiff as conferring jurisdiction on this court reads as follows, viz: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange."

In Indiana only notes payable to bearer or order at a bank in this state are negotiable as inland bills of exchange. 1 Davis' St. Ind. p. 636, § 6. The question is, what is meant by the words "promissory notes negotiable by the law merchant" in the act of congress? The plaintiff insists that congress contemplated all promissory notes negotiable at common law or by the statute of Anne. I think congress meant by this language, notes having the qualities of promissory notes negotiable by the law merchant, namely, notes which, in the hands of a bona fide purchaser for value before maturity, were subject to no equities in favor of the maker. The note sued on was given in Indiana and payable in Indiana, but not at a bank in this state, so that, by the law of Indiana, whatever equities the maker was entitled to as against the payee he may assert against any indorsee. That was the law of the contract. The statute of the state entered into and became a part of the note. Holloway v. Porter, 46 Ind. 62; Dundas v. Bowler [Case No. 4,141]; Brabston v. Gibson, 9 How. [50 U. S.] 263.

The statute already cited makes all promissory notes negotiable so far as to vest the property in each indorsee successively, but unless a note is made payable to order or bearer at a particular bank in this state, it cannot be said to possess all the privileges or immunities of a note negotiable according to the law merchant. The statute of Anne has generally been adopted in this country, but has never been adopted in this state.

This opinion has been submitted to my Brother DRUMMOND, and he concurs therein. The defendant's demurrer is sustained.

See Seckel v. Backhaus [Case No. 12,599].

GREGORY (BURR v.). See Case No. 2,191.

GREGORY (FARRINGTON v.). See Case No. 4,688.

Case No. 5,801.

GREGORY v. HEWSON et al.

[1 Bond, 277.] [1]

Circuit Court, S. D. Ohio. June Term, 1859.

EXECUTION—ORDER FOR EXAMINATION—LIS PENDENS—CHATTEL MORTGAGE.

1. The circuit court of the United States, within the Southern district of Ohio, has adopted, as a rule of practice, the proceeding in aid of execution provided for by the Code of Ohio.

2. Where an order was issued by the court, requiring a defendant to appear for an examination touching his property, and after the issuing of the same, but prior to his appearance, he executes a chattel mortgage to certain creditors upon a large amount of stocks and bonds, such order of examination was not so far lis pendens as to render the mortgage a nullity.

3. The principle that where, at the instance of a judgment creditor, a third person has been cited to answer as to property and effects held by him belonging to the judgment debtor, such notice operates as lis pendens, and that the party, from the time of the service of the notice, can make no disposition of the property or effects in his hands, does not apply to the case of a judgment debtor, as to whom there has been a mere order for his examination, without an order restraining him from disposing of his property.

[This suit was brought by James B. Gregory against Hewson & Holmes and others.]

Thompson & Nesmith, for plaintiffs.

OPINION OF THE COURT. This is a proceeding under the Code of Ohio in aid of execution, which has been adopted by this court as a rule of practice. The facts necessary to notice are, that on the 20th of September last, the plaintiff obtained a judgment in this court against the defendants for $9,258.84, on which execution has issued, and which has been returned, no property to be found on which to levy. On the 27th of September, the plaintiff, on application to a judge of this court, procured an order for the examination of the defendants, touching his property, as authorized by the Code. In this order there was a clause restraining the de-

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

fendants from transferring or disposing of their property until the further order of the court. On the 28th of September, the defendants, by their counsel, made a motion for the rescission of the restraining clause in said order, on the ground that the plaintiff had made no showing authorizing such order. The judge thereupon suspended the operation of the restrictive clause till further cause was shown. On the 4th of October, a further affidavit having been filed, an order was made restraining the defendants from disposing of their property. On the same day, an examination of one of the defendants was had before a referee, which disclosed the fact that, on the 28th of September, defendants had executed a chattel mortgage to certain creditors, excluding the plaintiff Gregory, of a large amount of stocks, bonds, etc., being all in their possession or under their control at that time. The receiver appointed to take charge of the property and effects of defendants has reported that defendants were the owners of certain stocks, bonds, etc., amounting nominally to a large sum, of which he had demanded possession of defendants, but which they had refused to deliver, alleging that they had before mortgaged them to their creditors. The present motion is for an order on the mortgagee to deliver this property to the receiver. This motion involves the question of the validity of the chattel mortgage. The plaintiff insists that it is void, having been made after the institution of these proceedings, and therefore within the principle of a transfer lis pendens. From the foregoing statement of the facts, it appears that the chattel mortgage was executed on the 28th of September, the day after the order was made, suspending the operation of the restraining clause of the original order. There was, therefore, at the date of the mortgage, no operative order except that for the examination of the defendants by the referee. Was this order so far lis pendens as to render the mortgage a nullity? I am of the opinion that it can not be so regarded. There is no decision of the Ohio courts which gives this effect to a mere order for the examination of the judgment debtor. The supreme court of Ohio, in the case of Union Bank of Rochester v. Union Bank of Sandusky, 6 Ohio St. 256, hold that where, at the instance of a judgment creditor, a third person had been cited to answer as to property and effects held by him belonging to the judgment debtor, the notice operated as lis pendens, and that the party, from the time of the service of the notice, could make no disposition of the property or effects in his hands. But clearly this principle does not apply to the case of a judgment debtor, as to whom there has been a mere order for his examination, without an order restraining him from disposing of his property. The rights of creditors, claiming under the mortgage, are directly involved in this question, and it would be clearly improper to make the order now requested, which would be decisive of the title of the mortgagees to the property embraced in the mortgage. It is too grave a question to be disposed of, in this summary way, without notice to the mortgagee, or giving him an opportunity to be heard in support of his title. There is obviously no necessity that the question should be thus disposed of. The plaintiff Gregory has a full opportunity, by a bill in chancery, in which all the persons interested must be made parties defendants, to assert his title to the property in question, while the creditors claiming under the mortgage will have their day in court, and the opportunity of sustaining the validity of the mortgage under which they claim. The motion is therefore overruled.

Case No. 5,802.

GREGORY v. MARKS.

[8 Biss. 44; 4 Law & Eq. Rep. 283; 9 Chi. Leg. News, 394; 23 Int. Rev. Rec. 281.] [1]

Circuit Court, N. D. Illinois. Aug., 1877.

DECLARING NOTE DUE UNDER CLAUSE IN TRUST DEED.

Where a clause in a trust deed provided that the indebtedness secured thereby was to become wholly due and payable in case of default in the payment of interest, the note and trust deed, being contemporaneous instruments, must be construed together, and if default is made in payment of interest, the whole indebtedness becomes due, and the holder of the note may pursue the maker of the note by a personal judgment after exhausting the securities.

[See Atlantic Ins. Co. v. Conard, Case No. 627.]

This case was submitted to the court upon an agreed statement of facts, which are, that on May 1, 1874, the defendant, Enoch Marks, borrowed of Ann Y. Boardman the sum of $12,500, for the term of five years, with interest at ten per cent. per annum, payable semi-annually; that the said defendant, Enoch Marks, executed his promissory note for said debt, a copy of which is given in the stipulation, and certain interest coupons; that accompanying said principal note were ten interest coupons for the sum of $625, each payable, etc.; that the said defendant, Enoch Marks, and Margaret A. Marks, his wife, at the same time, and contemporaneously with the execution of said note, executed and delivered their trust deed, dated May 1, 1874, to Willis G. Jackson, trustee, conveying certain property as security for the payment of said debt; and in said deed of trust it was provided that in case of default in any of the said payments of principal or interest, according to the tenor and effect of the said promissory notes, or either of them, or any part thereof, or of a breach of any of the covenants or agreements therein by the party of the first part, his executors, administrators

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 4 Law & Eq. Rep. 283, contains only a partial report.]

or assigns, then in that case the whole of said principal sum thereby secured, and the interest thereon to the day of sale, might, at the option of the legal holder thereof, become due and payable, and the said premises be sold with the same effect as if said notes had matured. It is further stipulated, that the said Ann Y. Boardman, for value received, assigned the said principal and interest notes to the plaintiff [Sarah W. Gregory]; that subsequently said defendant made default in the payment of interest due on May 1, 1876, and the premises were sold by the trustee, and there was a balance left unpaid, for which this suit is brought.

Lyman & Jackson, for plaintiff.
H. S. & F. S. Osborn, for defendant.

BLODGETT, District Judge. The only question in the case is whether the party can maintain a suit at law for this balance upon this note.

The note, on its face, is not yet due; but by the terms of the trust deed, the indebtedness secured by the note was to become wholly due and payable in case of default in the payment of interest. This stipulation is found in the trust deed, which was contemporaneous with the note, and must be deemed a part of the same contract with the note.

Something like a year ago I had a kindred question to this before me, and having in my mind a Missouri case which I had read a few months before that, upon the same question, I refused to render judgment at first, although subsequently, as there was no defense made, I allowed the plaintiff to take judgment; [but at the time plaintiff called the case up at first, I told him I did not think he could take it. The same attorney is now defending this case and cites—what is always very troublesome to the court—the former decision, as authority. He will bear in mind, with reference to my former decision, that he subsequently came in, and inasmuch as the defendant had made a default and put in no defense, I allowed him to take judgment, although he only showed a note which had not matured by its terms, but had only matured by virtue of the clause in the trust deed.] [2]

On looking up the Missouri case, which was in my mind, I find, however, that so much of the case as appeared to bear on this case is really obiter. The case there was this—A. made a mortgage upon certain real estate, or rather gave his note, and to secure the payment of the note, gave a mortgage upon certain real estate, and in the mortgage covenanted that in case of default in the payment of interest, the whole debt should become due and payable. A. sold and conveyed the mortgaged premises to B. Default was made in payment of the indebtedness, and B. being in possession of the mortgaged premises, the mortgagee filed a bill against A., the original mortgagor, and B., the grantee of the mortgagor, making them both parties to the foreclosure proceeding, and the court rendered a judgment of foreclosure, and ordered the premises to be sold, and on the coming in of the report of the commissioner making the sale, there being a deficiency, rendered a personal judgment against the purchaser of the equity of redemption as well as against the original mortgagor and the promissor in the note which was given.

On error to the supreme court, taken in behalf of the purchaser B., this opinion was given, to which I have referred; and in the course of its discussion of the question, the supreme court say: "The clause in the trust deed is only put there for the purpose of marshaling the security, and not for the purpose of maturing the note for any other purpose than that of applying the securities."

It was not necessary that the court of Missouri should decide that point, for the purpose of disposing of the case before it, because the only question there was whether they had the right to take a personal judgment against the purchaser.

The law is well settled in this state, that where two contracts, relating to the same subject matter, are made at the same time, they form but one contract, and are to be construed together; and I know of no reason why any exception to the rule should be applied to the case before me.

The question is, does this note and trust deed, when taken together, make the note become due at an earlier day, in the happening of certain contingencies, than the note alone upon its face requires, or would allow; and I am opinion that it does; that the two contracts are to be construed together, and that when construed together, if default is made in the payment of interest, the whole indebtedness becomes due, and that the holder of the note may pursue the maker of the note by a personal judgment, after exhausting the securities. I shall therefore render judgment in favor of the plaintiff.

GREGORY (NORTHROP v.). See Case No. 10,327.

GREGORY (SEYMOUR v.). See Case No. 12,686.

GREGORY (STRANAHAN v.). See Case No. 13,522.

Case No. 5,803.

GREGORY v. UNITED STATES.

[17 Blatchf. 325; [1] 26 Int. Rev. Rec. 27.]

Circuit Court, S. D. New York. Nov. 28, 1879.

FORFEITURE OF PERSONAL PROPERTY — USE OF PREMISES FOR ILLICIT DISTILLERY.

Under that part of section 3281 of the Revised Statutes which forfeits personal property owned

[2] [From 9 Chi. Leg. News, 394.]

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

by a person who has permitted or suffered his premises to be used for purposes of ingress or egress to or from an illicit distillery, it is necessary, in order to such forfeiture, that such person should have known that the ingress or egress over his premises was to or from a distillery.

[In error to the district court of the United States for the Southern district of New York.]

[This was a proceeding by the United States against George C. Gregory for the unlawful use of his premises in permitting them to be used for purposes of ingress and egress to and from an illicit distillery. A decree of condemnation was entered in the district court, and the claimant brings error.]

Louis F. Post, for plaintiff in error.

Edward B. Hill, Asst. Dist. Atty., for defendants in error.

BLATCHFORD, Circuit Judge. The plaintiff in error (the claimant below) was the owner of the lot of land and buildings No. 419 East 48th street, in the city of New York. On that lot, in front and adjoining No. 421, was a dwelling house. On the west part of the lot 419 was a covered drive-way leading from a rear building to the street in front. The rear building covered the rear part of the lot 419 and extended eastward over the rear part of lot 421, which latter lot belonged to a savings bank. In this rear building there was no partition, the ground floor being one large room. An illicit still, in use as part of a distillery, was found and seized in the rear building in the part of it which was on the lot 419, and mash tubs were found and seized in the rear building on the continuation of the partition line between the front buildings on the lots 419 and 421. Between the front building on the lot 421 and the rear building was an open yard. Between the front part of the covered drive-way on the lot 419 and the rear building was a covered one story shed. Between the rear of the dwelling house on the lot 419 and the rear building were stalls. In these stalls were found and seized a horse, a truck and a lot of harness, belonging to the claimant. He used the covered drive-way for ingress and egress between the stalls and the street. His business was that of a builder. An agent for the bank had, at its request, found a tenant for the rear building, at the rent of $40 a month. The claimant, in consideration of his receiving one-half of such rent, consented to the tenancy, and that the tenant should use such covered drive-way for ingress and egress between the street or front and such rear building. The claimant was informed that the rear building was to be used as a vinegar factory. The tenant set up the illicit distillery in the rear building, and used such covered drive-way for ingress and egress thereafter, between the street in front and such illicit distillery. The question tried in the court below was as to the forfeiture of the horse, truck and harness. The claimant was called as a witness on his own behalf, and, in the course of his direct examination, he was asked this question: "Did you know that this building was being used as a still?" This question was objected to by the counsel for the United States, as immaterial under sections 3281 and 3242 of the Revised Statutes of the United States. The objection was sustained by the court, and the counsel for the claimant excepted to the ruling. At the close of the evidence the counsel for the United States moved that a verdict be directed for the United States. Thereupon the counsel for the claimant asked leave to go to the jury on the case generally, and as to whether the claimant permitted the drive-way to be used for the purpose of ingress or egress to or from a distillery. The court denied such request, and the counsel for the claimant excepted to such refusal. The court thereupon granted the motion of the counsel for the United States, under section 3281 of the Revised Statutes, and the counsel for the claimant excepted to such decision. Thereupon, the court directed a verdict for the United States, condemning said horse, truck and harness, and the counsel for the claimant excepted. The jury found such verdict and a decree of condemnation was entered thereon.

Section 3281 of the Revised Statutes is in these words: "Every person who carries on the business of a distillery without having given bond as required by law, or who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, shall, for every such offence, be fined not less than one thousand dollars nor more than five thousand dollars and imprisoned not less than six months nor more than two years. And all distilled spirits or wines, and all stills or other apparatus fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title and interest of such person in the lot or tract of land on which such distillery is situated, and all the right, title and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard or inclosure, or any part thereof, to be used for the purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard or inclosure, and all the right, title and interest of every person in any premises used for ingress and egress to or from such distillery, who has knowingly suffered or permitted

such premises to be used for such ingress or egress, shall be forfeited to the United States."

The claimant has brought a writ of error. It is contended for the claimant, that, as soon as the distillery was established, his license was at an end; that his knowledge as to the use to which the building was put was material; that he granted a right of way to a vinegar factory and not to a distillery; and that he never permitted or suffered the drive way to be used for purposes of ingress or egress to or from the distillery.

For the United States it is contended, that the provisions of section 3281, with regard to forfeiture of personalty and realty, are carefully distinguished; that the word "knowingly" is inserted wherever realty is referred to, and omitted wherever personalty is referred to; that the words used relative to personalty found on premises used for ingress and egress, and those used relative to realty used for ingress and egress, are the same, except as to the word "knowingly;" that such difference was intentional, and must, if possible, be made effective; that it cannot be made effective except by the ruling made in the court below; that it is not contended for the United States that the words "permit" and "suffer" do not imply knowledge, but it is contended that it is sufficient knowledge if the claimant knew that the illicit distiller was obtaining ingress and egress to and from the building where his illicit work was carried on, and allowed him to do so; that, under such circumstances, he permitted such distiller to use the inclosure for ingress and egress to and from the distillery, even though he had no knowledge that there was a distillery there; that the position of the claimant is, that the words "suffer" and "permit" necessarily and of themselves import knowledge, and that the word "knowingly" cannot add to such meaning, nor can its absence take away from such meaning; that such position makes the peculiarity of the use of the word "knowingly" unmeaning and ineffectual; that it is enough that the claimant permitted ingress and egress to and from the building in the rear, and that there was in that building an illicit still; that the purpose of the permission is not material, where personalty is concerned; and that such purpose becomes material only when a question arises as to the forfeiture of realty.

Section 3281 contains various provisions for forfeiture. It forfeits (1) spirits and distilling apparatus owned by the illicit distiller, wherever found; (2) all spirits and personal property found on the premises of the illicit distillery; (3) the interest of the illicit distiller in the distillery premises; (4) the interest in the distillery premises of every person who knowingly has suffered or permitted the business of a distiller to be there carried on or has connived at the same; (5) all personal property found in any building, yard or inclosure, owned or possessed by any person who has permitted or suffered such building, yard or inclosure to be used for purposes of ingress or egress to or from the illicit distillery; (6) the interest in any premises used for ingress or egress to or from the illicit distillery, of every person who has knowingly suffered or permitted such premises to be used for such ingress or egress. Knowledge of the use of the place as a distillery, at least, whether in an unlawful manner or not, seems to be clearly predicated in all these cases except the fifth. The illicit distiller knows of his own fraud, it is presumed, and so his spirits and apparatus are forfeited, wherever found. The owner of all spirits and personal property found on the premises of the illicit distillery, is held to forfeit it, on the view, that, being on the premises, it is presumed to be used in the illicit business or to be its product, and that its owner is bound to know that it is in a distillery. The interest of the illicit distiller in the distillery premises is forfeited, because he is presumed to know of the fraud. The interest in such premises of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same, is forfeited, because, knowing that the place was used for a distillery and permitting it to so used, he is made responsible for its use in a fraudulent manner. The interest in any premises held for ingress or egress to or from the illicit distillery, of every person who has knowingly suffered or permitted such premises to be used for such ingress or egress, is forfeited, because, knowing that the place was used for a distillery and permitting his premises to be used for ingress and egress to and from such distillery, he is made responsible for its use in a fraudulent manner. In every one of these five cases there is to be knowledge that there is a distillery. Yet it is claimed by the United States, that, under the fifth clause of the section, it is not necessary that the owner of the personal property should know that the ingress and egress over his premises is to and from a distillery. This difference is predicated on the absence of the word "knowingly," in the fifth clause, when it is found in the fourth and sixth clauses; and it is claimed to be enough that the owner of the personal property knows of the abstract ingress and egress and allows it, even though he does not know that it is ingress and egress to and from a distillery. Under this view the same duty would have been cast on the claimant if he had not owned the rear building. In either case it is claimed that, having given a right of way to a building which he was told was to be used as a vinegar factory, he was bound to see that it was not used as an illicit distillery.

In the ordinary use of language, when it is said that a person permits or suffers premises to be used for egress and ingress to and from a distillery, the meaning is, that he knows that the ingress and egress are to and from a distillery, that there is a distillery, and, that, knowing there is a distillery, he

permits the ingress and egress, and intends that the ingress and egress shall be to and from the distillery. The permission, sufferance, allowance, authority and license are predicated quite as much on knowledge that there is a distillery as on knowledge that there are ingress and egress. The distinction in this case is sought to be founded on the absence of the word "knowingly." But, it would be more in harmony with the purview of the whole section, and with the natural meaning of the words "suffer" and "permit," to hold that the word "knowingly," where it occurs, can have no reasonable meaning as adding to the force of the words "suffer" and "permit," and should be rejected there as surplusage. The word "knowingly," where it is used, is used to qualify the word "suffered" and the word "permitted." The words are "knowingly has suffered or permitted" and "has knowingly suffered or permitted." The word "permit" is defined thus: "To grant permission, liberty or leave; to allow; to suffer; to tolerate; to empower; to license; to authorize." The word "suffer" is defined thus: "To allow; to admit; to permit." The word "admit" is defined thus: "To permit; to suffer; to tolerate." The word "allow" is defined thus: "To suffer; to tolerate." The word "tolerate" is defined thus: "To allow so as not to hinder; to permit as something not wholly approved; to suffer; to endure; to admit." Every definition of "suffer" and "permit" includes knowledge of what is to be done under the sufferance and permission, and intention that what is done is what is to be done. When it is said that a person suffers or permits a yard to be used for purposes of ingress and egress to and from a distillery, his sufferance or permission must be applied to the whole subject-matter, and he does not suffer or permit the ingress and egress to and from the distillery, unless he is conscious that there is a distillery as well as ingress and egress. It is not said that he does any more, when it is said that he knowingly suffers or permits a yard to be used for purposes of ingress and egress to and from a distillery.

There is nothing in the decision in the case of U. S. v. Distillery at Spring Valley [Case No. 14,963], which is inconsistent with the foregoing views. The decision there, so far as it was on the 44th section of the act of July 20, 1868 (15 Stat. 142), now section 3281 of the Revised Statutes, was, that that section, in providing for the forfeiture of the interest in the land on which a distillery is situated, of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or who has connived at the same, does not require that he should have knowingly suffered or permitted it to be fraudulently carried on or that he should have connived at such fraud. Indeed, the court, when citing the provisions of said section 44 which form clauses five and six thereof, as above set forth, couples them together and remarks that they provide for "the knowing permission or sufferance of the use for, or in aid of, the business of distilling."

On the whole, I am of opinion that the question asked of the claimant and excluded was improperly excluded; that it was a question for the jury whether the claimant knowingly or consciously suffered or permitted the drive-way to be used for the purpose of ingress or egress to or from a distillery, knowing or being conscious that there was a distillery in the rear building; and that it was error to direct a verdict for the United States. The judgment below is reversed, with a direction to the court below to enter an order granting a new trial.

GREGORY, The D. S. See Cases Nos. 4,099–4,103.

GREGORY, The DUDLEY S. See Cases Nos. 4,099–4,103.

Case No. 5,804.

GREIGG v. READE.

[Crabbe, 64.] [1]

District Court, E. D. Pennsylvania. Nov. Term, 1836.

APPEAL TO CIRCUIT COURT—DAMAGES—TIME FOR PREPARATION ON ARGUMENT—SURPRISE.

1. Where a libel claims three hundred dollars damages, and a decree is given for the libellant for forty dollars, in which he acquiesces, the respondent cannot appeal to the circuit court.

2. Where a legal point arose, the counsel of one of the parties asked time for preparation to argue it, but, it appearing that such counsel had previous notice that the point would then arise, the court refused the application.

3. In an action for assault and battery, the respondent's counsel having addressed the court, the case was submitted by the other side without reply, on the understanding that it should be immediately decided, and a decree was at once entered for the libellant. On the respondent's counsel moving for a new trial under these circumstances, on the ground of surprise, the court refused the motion.

This was a libel for assault and battery. The case came on to be heard, before HOPKINSON, District Judge, on the 30th December, 1836. One witness was examined on the part of the libellant [David Greigg], and one deposition read on behalf of the respondent [John H. Reade]. No question of law was made by either party, nor was there any in the case. Mr. H. Hubbell, counsel for the respondent, addressed the court on the case as long as he thought proper. When the counsel for the libellant were about to proceed in reply, the judge said that a very important case, appointed for that day, was waiting to be heard, and several counsel and parties attending for it: if, therefore, the

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

counsel for the libellant in this case desired to be heard, they should have a full opportunity, but that the argument must be postponed until the next week. If, however, they would submit the case as it stood, it should be decided at once. The libellant's counsel, Messrs. Grinnell and McIlvaine, consulted, and agreed to submit the case as it stood. No objection was made to this proposition; and the judge then pronounced a decree giving the libellant forty dollars damages,—the amount claimed in the libel being three hundred dollars. The parties and their respective counsel then left the court without further remark. On Monday, the 2d January, 1837, Mr. Hubbell wrote to the judge that he desired to enter an appeal, but was informed by the clerk that he could not do so without an order of the court. The judge replied that he would be in court on the Wednesday following, when the application for an appeal might be made, and referred to Mr. Hubbell's consideration the acts of congress limiting the amount for which an appeal might be entertained. Act 24th September, 1789, §§ 20, 21; 1 Story's Laws, 60 [1 Stat. 83]; Act 3d March, 1803, § 2; 2 Story's Laws, 915 [2 Stat. 244]. On the 4th January, 1837, Mr. Hubbell appeared for the respondent, and Mr. Grinnell for the libellant. The respondent's counsel moved to enter an appeal, and the court refused to allow it, on the ground that the decree was for a sum under fifty dollars, that the libellant acquiesced in it, and the application for an appeal was made by the respondent. It was, therefore, clear, in the opinion of the court, that the matter then in dispute did not amount to fifty dollars, although the libel claimed damages to the amount of three hundred dollars. The respondent's counsel asked time to prepare to argue this question. It was objected that, having had previous notice of the point, the counsel should have come prepared to argue it; and it was shown that notice had been given, both by the judge's note, before mentioned, and by the libellant's counsel. The judge referred the counsel of the respondent to the law as expressly declared by the supreme court in Cooke v. Woodrow, 5 Cranch [9 U. S.] 14. A postponement was refused, and the clerk ordered to enter on the record that the appeal was not allowed. The respondent's counsel then moved for a new trial, on the ground of surprise at the time of the decree, it not having been supposed that the court was about to decide the case immediately. The judge said that the intention to make an immediate decision had been distinctly announced; that the libellant's counsel had acted upon it; and that the respondent's counsel had no reason to complain, as a full hearing had been given him. The motion for a new trial was overruled.

GREINER (UNITED STATES v.). See Case No. 15,262.

Case No. 5,805.

GRESHAM v. MONTGOMERY.

[2 Ky. Law Rep. 397.]

Circuit Court, D. Kentucky. April, 1881.

TAX-TITLE—IMPROPER ASSESSMENT.

1. A sale of land under several levies is void if one of the levies is illegal.

2. The county court of Grayson had no right to levy, as part of the general levy of taxes, the five and ten cents upon $100 worth of property to cover the expense of collecting railroad tax.

Mary D. Gresham, then and now of Jeffersonville, Indiana, became, in 1869, the owner of 720 acres of land in Grayson county. That county took stock in the E. & P. Railroad, and levied a tax for the years 1872 and 1873 to pay the interest. Neither this nor the ordinary state tax was paid on Mrs. Gresham's land, and it was sold January 27, 1874, for both the sum total for state tax and county revenue, with interest and costs, being $21.07 for the two years, and the total for the railroad taxes, $33.28. One Grayson bought the whole tract under both taxes, taking separate certificates. He sold and conveyed the land to one Adams, who sold to the defendant [George W. Montgomery], who is in possession. The plaintiff in her petition simply claims the land as her own. The answer, as amended, contains in the main three paragraphs, the first of which sets out the facts as to the assessment; the second justifies under the state tax sale, but shows that the county levy included with the state taxes in the bills was authorized only under the railroad charter, being for cost of collection and disbursement of the railroad tax, and shows also that the sale was in fact for $54.35, the amount of all the taxes for the two years in one bid. The third paragraph, which is really the second, justifies separately under the railroad tax bills and certificate of sale under the same. The petition and answer both show that the plaintiff was all along a non-resident, but for greater caution there was a reply setting up this matter distinctly, with a view to the law as it stood before 1873, when the sheriff had no power to sell the lands of non-residents for non-payment of taxes. The case was submitted on demurrers to the answer and reply, and the opinion given disposes fully of the case against the purchaser under the tax sale.

L. N. Dembitz, for plaintiff.

W. O. & J. L. Dodd and G. W. Stone, for defendant.

BARR, District Judge. This case is submitted on plaintiff's demurrer to first, second, and third paragraphs of defendant's answer, and defendant's demurrer to second paragraph of plaintiff's reply. The first paragraph of the amended answer is not in itself a good defense to plaintiff's recovery if the statements thereof are true. The paragraphing is evidently a mistake, and I presume paragraphs Nos. 1 and 2 should be con-

sidered as one paragraph. This paragraph sets up an assessment of taxes for state revenue, and also to pay expenses of collecting railroad tax, a levy of the land assessed, and a sale by the sheriff and a purchase thereunder by defendant's grantor. These taxes were levied for the years 1872 and 1873. It is quite clear that the sheriff has no authority to sell this land for the taxes levied for the year 1872. It is equally clear that the county court of Grayson had no right to levy as part of the general levy of taxes the five cents and ten cents upon $100 worth of property to cover the expense of collecting the railroad tax. This defect is fatal to both of these levies and to the sale made by the sheriff. The assessment is the basis of all subsequent proceedings. This is true whether the tax be against the owner with a lien on the property taxed, or be against the property itself. Under the Kentucky law the tax is against the owner with a lien on the property taxed, and the right to levy on and sell other property of the owner to pay the tax. This makes it necessary to have the owner correctly described; and I am, therefore, inclined to the opinion that these assessments are fatally defective in being against 'Henry Haines as agent of Mary Gresham,' instead of being against Mary D. Gresham. I will not decide the point, as it is unnecessary.

The third paragraph, which we are considering as the second paragraph of the amended answer, sets out the assessment as above stated, and a levy of railroad tax for the years 1872 and 1873, and a sale to pay those taxes. I am inclined to the opinion that the charter, as amended in 1868, of the E. & P. R. R. Co. gave the right to levy on and sell real estate to pay these taxes. See section 12, amended charter, approved February 24, 1868. It is quite clear from the allegations of the amended answer, taken together, that the sheriff united all the taxes (state, county, and railroad) and made one sale, and that Grayson became at that one sale the purchaser of the entire tract. It is true the defendant has pleaded his purchases in separate paragraphs, as if there were two sales, one for the railroad tax, the other for the state and county taxes, but the facts alleged show there was really only one sale. If we apply the same rule to this sale, as if the sale had been made under fi. fas., it would be void, and certainly a tax sale should not be less strict.

The demurrer to the first, second, and third paragraphs of defendant's answer is sustained, and defendant's demurrer to second paragraph of plaintiff's reply is overruled.

GREVE (GOLDSMITH v.). See Case No. 5,521.

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